



SUMMARY OF FINDINGS AND RECOMMENDATIONS IN THE MATTER OF IVAN MOTLOGELOA // FIRST GARMENT RENTAL (PTY) LTD

CASE NUMBER: 15/11/2018

Summary: *Complainant alleged fronting and misrepresentation of B-BBEE status said to have occurred through a joint venture in that the respondent used the complainant's B-BBEE credentials to secure a tender and that the respondent proceeded to implement the tender without the complainant after it was awarded - Findings - No evidence of a joint venture, misrepresentation of B-BBEE status or fronting practice was found, further the matter relates to a dispute between the parties that the B-BBEE Commission has no mandate over - Recommendations – no remedial recommendations were made, however the B-BBEE Commission may refer the report to the Department of Small Business Development to consider whether it is feasible to create a cost effective dispute resolution structure or platform where small businesses and entrepreneurs can have their matters resolved as they raised concerns about legal costs to deal with disputes with large corporates*

1. Introduction

- 1.1 The Broad-Based Black Economic Empowerment Commission ("B-BBEE Commission") is established in terms of section 13B of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 ("the B-BBEE Act").
- 1.2 The B-BBEE Commission is empowered to conduct investigations on any matter arising from the application of the B-BBEE Act, including any B-BBEE initiative or a category of B-BBEE initiatives, in terms of section 13F (1) (d) and section 13J (1) of B-BBEE Act, read with regulation 15 of the Regulations Regulating the Administration and Implementation of the B-BBEE Act and the Functions of the B-BBEE Commission, 2016 ("B-BBEE Regulations").

- 1.3 Without limiting the powers of the B-BBEE Commission, in terms of section 13J (3) of the B-BBEE Act, read with regulation 15 (4) (g) of the B-BBEE Regulations, the B-BBEE Commission may make a finding on whether any B-BBEE initiative involves a fronting practice.
- 1.4 In terms of regulation 15 (13) of the B-BBEE Regulations, before making its final findings, the B-BBEE Commission must notify the respondent in writing of the details of the adverse finding(s) and afford them an opportunity to respond to each or any finding within 30 (thirty) days, which on merit can be extended by a maximum period of 10 (ten) days.
- 1.5 In terms section 13J (7) (a) of the B-BBEE Act read with regulation 15 (12) (a)-(c) of the B-BBEE Regulations, the finding(s) or recommendation(s) made by the B-BBEE Commission must be in writing, communicated to the complainant and published in a manner it may deem fit or appropriate, subject to section 13J (7) (b) of the B-BBEE Act.
- 1.6 This publication is therefore issued in line with these provisions of the B-BBEE Act and in the interest of the public.

2. *Brief description of the complaint*

- 2.1 On the 6th of June 2016, the Minister issued the B-BBEE Regulations which prescribed the process for handling complaints in terms of the B-BBEE Act. Mr Ivan Motlogeloa for MMK Laundry (Pty) Ltd, (hereinafter also referred to as the complainant), filed a complaint on the 19th of November 2018 with the B-BBEE Commission against First Garment Rental (Pty) Ltd, a private company registered in terms of the company laws of the Republic of South Africa with registration number: 2015/279859/07 alleging practices that are contrary to the objectives of the B-BBEE Act, using the B-BBEE 7 Form as prescribed.
- 2.2 The allegations in this complaint are summarised for the purposes of this publication as follows:
 - 2.2.1 that on or about March 2017, MMK Laundry (Pty) Ltd entered into a Joint Venture partnership with First Garment Rental (Pty) Ltd t/a Montana Laundries (a Bidvest subsidiary) to jointly bid for the provision of laundry services contract for three (3) years at the Nelson Mandela Children's Hospital in Parktown, Johannesburg;

- 2.2.2 that subsequent to MMK Laundry (Pty) Ltd and First Garment Rental (Pty) Ltd t/a Montana Laundries being jointly awarded the said contract, the latter performed without the knowledge and/or consensus and involvement with MMK Laundry (Pty) Ltd;
- 2.2.3 that following various attempts to be involved in the said awarded contract, MMK Laundry (Pty) Ltd has unfortunately been unsuccessful;
- 2.2.4 that First Garment Rental (Pty) Ltd t/a Montana Laundries used MMK Laundry (Pty) Ltd as an opportunistic intermediary to secure the said contract with the Nelson Mandela Children's Hospital to the financial detriment/exclusion of MMK Laundry (Pty) Ltd; and
- 2.2.5 that MMK Laundry (Pty) Ltd has not financially benefited from the said contract in the manner proposed and envisaged in the bidding documents submitted on or about March 2017.
- 2.3 In the B-BBEE7 filed, Mr Ivan Motlogeloa emphasised that the arrangement between the two parties were a joint bid, that First Garment Rental (Pty) Ltd t/a Montana Laundries used MMK Laundry (Pty) Ltd's BEE profile and SME status to win the contract, and further that upon winning failed to involve MMK Laundry (Pty) Ltd as envisaged in the original proposal submitted for the bid. First Garment Rental (Pty) Ltd t/a Montana Laundries was therefore accused of fronting, misrepresentation and fraud.
- 2.4 Further, in the sworn statement dated 17 November 2018, MMK Laundry (Pty) Ltd requests the B-BBEE Commission to investigate First Garment Rental (Pty) Ltd t/a Montana Laundries for fronting practice on the basis that it used MMK Laundry (Pty) Ltd as an opportunistic intermediary to secure a contract and yet MMK Laundry (Pty) Ltd has not benefited in accordance with the proposal submitted in March 2017.
- 2.5 For the purpose of this report First Garment Rental (Pty) Ltd t/a Montana Laundries will also be referred to as First Garment Rental (Pty) Ltd or the Respondent.

3. Findings of the B-BBEE Commission

- 3.1 Having investigated this matter in terms of the provisions of section 13F (1) (d) and section 13J (1) of the B-BBEE Act, read with regulation 15 of the B-BBEE Regulations, after considering the response from First Garment Rental (Pty) Ltd and Nelson Mandela Children's Hospital dated 13 February 2020 and 19 February

2020 respectively, the B-BBEE Commission has found no evidence of a joint venture between First Garment Rental (Pty) Ltd and MMK Laundry (Pty) Ltd, misrepresentation of B-BBEE status or fronting practice and the reasons are set out below based on the evidence at hand:

- 3.1.1 The assessment of the allegations and the information gathered make it clear that the matter does not relate to the ownership element of the B-BBEE Act and the Codes of Good Practice, and thus the ownership credentials of First Garment Rental (Pty) Ltd are not being questioned. Further, the validity of the B-BBEE certificates or status of First Garment Rental (Pty) Ltd is also not being questioned. Therefore, the ownership credentials of First Garment Rental (Pty) Ltd are not the subject of this investigation.
- 3.1.2 The copies of the share certificates of First Garment Rental (Pty) Ltd that are at the disposal of the B-BBEE Commission support Werksmans Attorney's version of shareholding in First Garment Rental (Pty) Ltd. It is also confirmed that the allegations relate to the Enterprise and Supplier Development element and therefore the management control, skills development and the socio economic development elements credentials of First Garment Rental (Pty) Ltd are also not a subject of this investigation.
- 3.1.3 The copy of the B-BBEE verification certificate number **A04334** of First Garment Rental (Pty) Ltd issued for the period between the 23rd of November 2016 and the 22nd of November 2017 reflects that the respondent is 51% black owned with 62.89% for the scores of black ownership voting rights and a 53.57% black ownership economic interest and therefore making First Garment Rental (Pty) Ltd a Level Two B-BBEE Contributor. First Garment Rental (Pty) Ltd has, also claimed a score of 35.14% for Enterprise and Supplier Development, however the claims do not include MMK Laundry (Pty) Ltd as the Enterprise Development Beneficiary based on the information submitted by the verification agency during the investigation.
- 3.1.4 The copy of the B-BBEE verification certificate number **A05564** of the respondent issued between the 11th of October 2017 and the 10th of October 2018 reflects that the respondent is 51% black owned and therefore making the respondent a Level Two Contributor. The respondent has also claimed a score of 33.92% for Enterprise and Supplier Development, however the claims do not include MMK Laundry (Pty) Ltd as the Enterprise Development Beneficiary based on the information submitted by the verification agency during the investigation.

- 3.1.5 The B-BBEE verification certificate number **A06763** of the respondent issued between the 26th of November 2018 and the 25th of November 2019 reflects an ownership score of 40.72% and a 35.47% black women ownership score and 18.23% black women ownership voting rights and therefore making the respondent a Level Two Contributor. The Respondent has claimed a 37.66% score for Enterprises Supplier Development, however the claims do not include MMK Laundry (Pty) Ltd as the Enterprise and Development Beneficiary based on the information submitted by the verification agency during the investigation.
- 3.1.6 The information gathered indicate that indeed First Garment Rental (Pty) Ltd participated in a tender process (RFP) issued by the Nelson Mandela Children's Hospital. The RFP had as part of B-BBEE requirement stated that the bidders are to be evaluated and selected on the basis of their current B-BBEE status and their willingness to work with black empowered Small, Medium and Micro Enterprises (SMMEs) as a joint venture and that bidders must ensure that this minimum requirement is met. It further stated that B-BBEE plans are to be specific with tangible targets and penalties for non-compliance. The requirement set by Nelson Mandela Children's Hospital was evidently progressive and aimed at advancing Enterprise Development in line with the objectives of the B-BBEE Act.
- 3.1.7 During February 2017, after the bid had been submitted, First Garment Rental (Pty) Ltd was invited to the Nelson Mandela Children's Hospital's preferred bidder briefing where it was communicated that most bidders had not achieved the required threshold for Enterprise Development. At this briefing meeting with the preferred bidders, Nelson Mandela Children's Hospital made it clear that the tender specifically required/mandated bidders to do as follows:
- 3.1.7.1 identify an existing Enterprise Development service provider to partner with on the tender/project;
 - 3.1.7.2 identify the project structure and service responsibility of the Enterprise Development partners, and
 - 3.1.7.3 set out the future objectives of the relationship with the Enterprise Development service provider and also specify what the distinct outputs of the relationship will be, so as to monitor same.
- 3.1.8 It was stated at the briefing that the Enterprise Development objectives were not a B-BBEE verification certificate concern or issue, that is the B-BBEE status of the bidder, however, it was about how the

project can develop the identified Enterprise Development entity to have specific healthcare experience within a period of 3 (three) years and further sustain themselves as required in line with the B-BBEE Act. The Nelson Mandela Children's Hospital subsequently requested the bidders to make a specific proposal regarding Enterprise Development.

- 3.1.9 On or about March 2017, First Garment Rental (Pty) Ltd engaged MMK Laundry (Pty) Ltd and proposed that it be its proposed Enterprise Development partner for purposes of complying with the requirements of the tender process and the parties prepared the Enterprise Development plan which was presented to Nelson Mandela Children's Hospital on or about the 16th of March 2017.
- 3.1.10 Afterward, Nelson Mandela Children's Hospital requested further information and/or documentation i.e. a copy of the signed Enterprise Development agreement between the parties, a clear split of responsibilities between the parties identified through a workflow diagram, a record of the turnover split between the parties and a set of brief objectives that the parties wish to achieve yearly, inclusive of a description what a successful outcome of the relationship may be.
- 3.1.11 According to the documents considered, the proposal included that the revenue would be split between the parties in equal shares during the first year, during the second year MMK Laundry (Pty) Ltd would receive 83% of the total turnover whereas First Garment Rental (Pty) Ltd would receive 17% and 95% to MMK Laundry Service (Pty) Ltd in the third year whilst First Garment Rental (Pty) Ltd would receive 5%, based on specified projections.
- 3.1.12 For the purpose of submitting the bid to Nelson Mandela Children's Hospital, the above plan was submitted, however, it is common cause now that First Garment Rental (Pty) Ltd and MMK Laundry (Pty) Ltd did not conclude the Enterprise Development agreement upon the award of the contract to First Garment Rental (Pty) Ltd. It is this aspect that has given rise to the complaint by MMK Laundry (Pty) Ltd.
- 3.1.13 First Garment Rental (Pty) Ltd through Werksmans Attorneys conceded that MMK Laundry (Pty) Ltd was approached to participate in the Enterprise Development proposal for the purposes of meeting the Enterprise Development requirement of the tender.
- 3.1.14 Pursuant to the RFP process referred to above, which included the proposal for Enterprise Development, First Garment Rental (Pty) Ltd was awarded the tender and commenced working on the project on or about June 2017 without the involvement of MMK Laundry (Pty) Ltd as the presented

Enterprise Development partner to the Nelson Mandela Children's Hospital in respect of the terms of the Enterprise Development requirement set by the Nelson Mandela Children's Hospital.

3.1.15 It is confirmed by both First Garment Rental (Pty) Ltd and MMK Laundry (Pty) Ltd that they had agreed that the proposal for Enterprise Development be submitted for purposes of the bid to Nelson Mandela Children's Hospital with MMK Laundry (Pty) Ltd as the proposed Enterprise Development beneficiary. MMK Laundry (Pty) Ltd in its email of 27 March 2018 through Mr Ivan Motlogeloa to Jayson Gopiechand of Nelson Mandela Children's Hospital states as follows:

"I truly feel that our company worked very hard (together with Montana) to prepare the attached pitch presentation which more than (at least in our opinion) adequately spells out the nature of what we hoped our partnership would look like and achieve".

3.1.16 Further, in the email from the legal representatives of MMK Laundry (Pty) Ltd to the legal representatives of Nelson Mandela Children's Hospital dated 18 December 2018, Mr Kgosi Nkaiseng on behalf of MMK Laundry (Pty) Ltd and Mr Ivan Motlogeloa conceded that no written commercial agreement existed between the parties and that such was to be executed upon finalisation of the tender process, and further that MMK Laundry (Pty) Ltd was left in the dark.

3.1.17 The statement by Mr Ivan Motlogeloa and MMK Laundry (Pty) Ltd above confirms that they agreed to submit the proposal for the purpose of the bid, however, did not subsequently conclude the Enterprise Development agreement upon the award of the contract by Nelson Mandela Children's Hospital, which would have given rise to the application of Statement 400 of the Codes of Good Practice for assessment of Enterprise Development.

3.1.18 Seemingly, First Garment Rental (Pty) Ltd proceeded with the contract and did not communicate with MMK Laundry (Pty) Ltd after the contract award. This is alleged by MMK Laundry (Pty) Ltd and First Garment Rental (Pty) Ltd has not disputed this allegation. It seems, however, that the communication between the two parties was normal until 1 June 2017 in regard to the status of the bid, it being noted that the contract award notification was received by First Garment Rental (Pty) Ltd on 13 June 2017.

3.1.19 This is evident as in the email correspondence between MMK Laundry (Pty) Ltd and First Garment Rental (Pty) Ltd on 1 June 2017, First Garment Rental (Pty) Ltd through Praneel Matabadal notified MMK Laundry (Pty) Ltd of the delay in awarding the contract by forwarding an email of 30 May 2017

from Patrick Dominy, who seemingly represented Nelson Mandela Children's Hospital, communicating the delay to all the preferred bidders.

- 3.1.20 On 22 June 2017 MMK Laundry (Pty) Ltd through Mr Ivan Motlogeloa followed up and enquired about the status and Praneel Matabadal of First Garment Rental (Pty) Ltd indicated that there has been a delay, and requested to meet with Mr Ivan Motlogeloa. Whereas the notification of the award to First Garment Rental (Pty) Ltd had been received already on 13 June 2017 and the draft service agreement on 19 June 2017, Mr Ivan Motlogeloa was informed that there is still a delay, however the detail of the delay was not expanded on.
- 3.1.21 On 28 June 2017 and 30 June 2017 MMK Laundry (Pty) Ltd through Mr Ivan Motlogeloa decided to write directly to Patrick Dominy of Nelson Mandela Children's Hospital wherein he enquired about the Enterprise Development requirement of the tender and why it appeared as though it had been done away with.
- 3.1.22 Patrick Dominy responded to Mr Ivan Motlogeloa on 30 June 2017 and stated that *"Please note that all bidders were required to submit an ED proposal. We have had a soft opening (seeing circa 4-5 radiology patients per day) so have awarded the interim PO's to the preferred partners in each service category to cover this stage. The volumes are naturally very low and probably require 2 laundry staff per day shift for now. There is no ED requirement for any of the service providers during this interim phase purely because they had literally 3 days to mobilise. Simultaneously we are negotiating with each preferred partner on various aspects of their bid, including their ED proposals. On the effective date of each contract, the ED requirements included in the agreement shall be effective. I have copied Praneel in this email as you must liaise directly with Montana Laundry"*.
- 3.1.23 According to First Garment Rental (Pty) Ltd in the letter dated 30 October 2018, Nelson Mandela Children's Hospital advised that the Enterprise Development proposal (as initially stipulated by the Hospital) would no longer be applicable as the business of the Hospital, in light of the initial volumes of patients.
- 3.1.24 The reasons provided for the Enterprise Development not to be pursued in the manner it was proposed in the proposal submitted in the bid are consistent in the communication of Nelson Mandela Children's Hospital and First Garment Rental (Pty) Ltd, and MMK Laundry (Pty) Ltd through Mr Ivan Motlogeloa confirmed understanding and that they will remain hopeful as articulated in the email to Patrick Dominy on 30 June 2017. Therefore, as early as 30 June 2017, Mr Ivan Motlogeloa was made aware of the

circumstances regarding the Enterprise Development requirement of the tender and that Nelson Mandela Children's Hospital was negotiating the Enterprise Development requirement with the preferred bidders. It is evident that Mr Ivan Motlogeloa and MMK Laundry (Pty) Ltd do not agree that the Enterprise Development be on different terms than those which they hoped for when the Enterprise Development proposal was submitted during the bidding process.

- 3.1.25 It is not disputed that First Garment Rental (Pty) Ltd made an Enterprise Development presentation to Nelson Mandela Children's Hospital which involved the complainant and MMK Laundry (Pty) Ltd as required by Nelson Mandela Children's Hospital under the B-BBEE requirements of the RFP, and the contract was subsequently awarded to First Garment Rental (Pty) Ltd. However, upon this award of the contract, the envisaged Enterprise Development contract was not concluded between First Garment Rental (Pty) Ltd and MMK Laundry (Pty) Ltd in the manner that was expected or hoped for when the bid proposal was submitted.
- 3.1.26 It is also evident that there were reasons advanced for why the Enterprise Development did not materialise in the manner that was expected as submitted in the bid proposal submitted to Nelson Mandela Children's Hospital. However, it is not within the mandate of the B-BBEE Commission to determine the validity or reasonableness of the reasons parties that were intending to enter into a contract advanced for not continuing with the contract, as that remain part of the negotiations between the parties over which the B-BBEE Commission has no mandate.
- 3.1.27 Subsequent to the award, it is confirmed that a draft Enterprise Development agreement was sent to MMK Laundry (Pty) Ltd by First Garment Rental (Pty) Ltd on 10 July 2018, however, MMK Laundry (Pty) Ltd has allegedly refused to sign the agreement although MMK Laundry (Pty) Ltd has invoiced for and accepted the payments on the basis set out in the said Enterprise Development agreement. A copy of the draft Enterprise Development was provided to the B-BBEE Commission.
- 3.1.28 First Garment Rental (Pty) Ltd has indicated that it has at its cost trained one MMK Laundry (Pty) Ltd employee, and has paid MMK Laundry (Pty) Ltd a total aggregate amount known to the Commission, comprising of the salary of the said employee and the administration fee.
- 3.1.29 MMK Laundry (Pty) Ltd and Mr Ivan Motlogeloa had not indicated in the complaint that there were payments that were invoiced for and paid by First Garment Rental (Pty) Ltd, which information the B-BBEE Commission had to verify with MMK Laundry (Pty) Ltd prior to making its conclusion.

3.1.30 On or about the 27th of December 2019, MMK Laundry (Pty) Ltd through Mr Ivan Motlogeloa confirmed the following to the B-BEE Commission pursuant to Ms Moipone Kgaboesele having written an email wherein the complainant was asked whether there were invoices that the MMK Laundry (Pty) Ltd or Mr Ivan Motlogeloa issued to First Garment Rental (Pty) Ltd, if so, what the invoices were for; how much the MMK laundry (Pty) Ltd or Mr Ivan Motlogeloa received from First Garment Rental (Pty) Ltd; whether MMK Laundry (Pty) Ltd was required to sign an Affidavit/Sworn Statement confirming Enterprise Development support by First Garment Rental (Pty) Ltd; and at what point MMK Laundry (Pty) Ltd raised a dispute with First Garment Rental (Pty) Ltd in regard to this matter:

3.1.30.1 that he has invoiced the respondent a total amount known to the Commission from July 2018 to the 27th of December 2019 to cover his employee's salary and to cover for uniform and monthly salary of the employee since she started working at the Nelson Mandela Children Hospital from July 2018 to date, which would be by 27 December 2019;

3.1.30.2 that according to MMK Laundry (Pty) Ltd and First Garment Rental (Pty) Ltd's "Agreement", MMK Laundry (Pty) Ltd was supposed to have handled 83% of the contract in 2018 and 95% in 2019, however, this has not materialised or implemented accordingly;

3.1.30.3 that MMK Laundry (Pty) Ltd has not signed any documents and/or any Sworn Statement/Affidavit with First Garment Rental (Pty) Ltd and MMK Laundry (Pty) Ltd have never asked for any support from the latter; and

3.1.30.4 that he raised the dispute with the respondent and the Nelson Mandela Children's Hospital from about June/July 2017 once MMK Laundry (Pty) Ltd discovered that other successful bidders and/or service providers of various tenders/contracts with the Nelson Mandela Children's Hospital had started working with their Enterprise Development partners.

3.1.31 First Garment Rental (Pty) Ltd had indicated that Nelson Mandela Children's Hospital is fully aware and has accepted its Enterprise Development initiative with MMK Laundry (Pty) Ltd and has on or about the 10th of July 2018 sent MMK Laundry (Pty) Ltd a draft Enterprise Development agreement, which MMK Laundry (Pty) Ltd refused to sign although it has invoiced for and accepted payments by

First Garment Rental (Pty) on the basis set out in the draft Enterprise Development agreement, and all invoices submitted by MMK Laundry (Pty) Ltd relating to the salary of the specified employee and the administration fee are claimed to have been paid by First Garment Rental (Pty) Ltd.

- 3.1.32 There is no doubt that Enterprise Development was a minimum requirement to be fulfilled by the successful bidder in respect of the laundry service tender, and this is confirmed by both MMK Laundry (Pty) Ltd and First Garment Rental (Pty) Ltd as the reason for their engagement to submit the Enterprise Development proposal in question, and a copy of the Acceptance of Bid Conditions and Bidders' Details was provided to support this.
- 3.1.33 First Garment Rental (Pty) Ltd was indeed selected as the Preferred Bidder by Nelson Mandela Children's Hospital as supported by the email dated the 13th of June 2017 by Patrick Dominy representing First Garment Rental (Pty) Ltd. This email also confirms that a meeting invite would subsequently be issued separately inviting Praneel Matabadal of First Garment Rental (Pty) Ltd to attend a meeting to discuss the finalisation of the contract agreement and mobilisation.
- 3.1.34 MMK Laundry (Pty) Ltd is not party to the Service Agreement between Nelson Mandela Children's Hospital and First Garment Rental (Pty) Ltd, however, they are the Enterprise Development partner that First Garment Rental (Pty) Ltd had identified and proposed to the Nelson Mandela Children's Hospital to develop as an Enterprise Development partner. This is confirmed by correspondence between the parties and documents submitted for the bid.
- 3.1.35 The complainant's complaint is therefore based on proposal submitted in respect of the RFP wherein as part of B-BBEE requirements, bidders had to submit the Enterprise Development proposal in addition to submitting their B-BBEE score card for compliance with B-BBEE. The dispute does not arise from an Enterprise Development agreement that was entered into subsequent to the proposal in terms of which the other party failed to follow through. MMK Laundry (Pty) Ltd confirmed that the Enterprise Development agreement that was hoped for had not been concluded, and this is due to the dispute between the parties regarding the terms of the said Enterprise Development agreement.
- 3.1.36 The chain of emails exchanged between Mr Ivan Motlogeloa of MMK Laundry (Pty) Ltd, Patrick Dominy and Praneel Matabadal reflect that First Garment Rental (Pty) Ltd clarified the Enterprise Development aspects to MMK Laundry (Pty), further that the Enterprise Development requirement was not required to be implemented at some stage for reasons provided. As alluded to above, copies of the emails

between the complainant and Patrick Dominy and Praneel Matabadal dating from the 31st of May 2017 to the 30th of June 2017 were provided.

- 3.1.37 Whereas the B-BBEE Commission had a copy of an email from Patrick Dominy of Nelson Mandela Children's Hospital to Mr Ivan Motlogeloa dated 30 June 2017, the B-BBEE Commission also wanted to have on record in this investigation a response from Nelson Mandela Children's Hospital, however, Nelson Mandela Children's Hospital failed to respond to the request for a response and information/documentation in a letter dated 12 April 2019, and further failed to comply with the summons subsequently issued on 12 June 2019 and properly served on 18 June 2019 to Nelson Mandela Children's Hospital, through its Chief Executive Officer, in terms of section 13K, which conduct amounts to an offence under section 13N (3) (a) and (f) of the B-BBEE Act.
- 3.1.38 Statement 400 of the Codes of Good Practice is applied to measure Enterprise and Supplier Development for purposes of B-BBEE compliance. It is important to note that in this case there was no Enterprise Development agreement concluded between First Garment Rental (Pty) Ltd and MMK Laundry (Pty) Ltd, and therefore the provisions of Statement 400 are not applicable.
- 3.1.39 Further, the information gathered from the verification agency of First Garment Rental (Pty) Ltd indicates that MMK Laundry (Pty) Ltd was not submitted as one of the Enterprise Development beneficiaries of First Garment Rental (Pty) Ltd any time after the tender was awarded. Therefore, the B-BBEE Commission could not find misrepresentation of the Enterprise Development using the credentials of MMK Laundry (Pty) Ltd by First Garment Rental (Pty) Ltd.
- 3.1.40 The Codes of Good Practice also provide guidance in regard to the measurement of joint ventures and distinguishes between unincorporated and incorporated joint ventures, it being noted that unincorporated joint ventures are normally used by parties in respect of a specific project or venture being pursued at the time. In light of this practice, the B-BBEE Commission assessed whether there is any evidence that the bid to Nelson Mandela Children's Hospital was a joint venture bid as alleged by Mr Ivan Motlogeloa.
- 3.1.41 The relevance of investigating whether a joint venture was in existence or not is that there are specific requirements for how a joint venture, whether incorporated or not, would be measured in terms of the Codes of Good Practice, and evidence gathered show that First Garment Rental (Pty) Ltd submitted the bid to Nelson Mandela Children's Hospital on its own, and then later submitted a proposal to fulfil

the Enterprise Development requirement, which proposal included MMK Laundry (Pty) Ltd as its proposed Enterprise Development beneficiary.

- 3.1.42 In terms of section 13A of the amended B-BBEE Act, any contract or authorisation awarded on account of false information knowingly furnished by or on behalf of an enterprise in respect of its broad-based black economic empowerment status, may be cancelled by an organ of state or public entity without prejudice to any other remedied that the organ of state or public entity may have.
- 3.1.43 While the evidence in this matter does not point to false or misrepresented information having been submitted to Nelson Mandela Children's Hospital by First Garment Rental (Pty) Ltd, it must be noted that even if it were to be found that such was the case, section 13A of the B-BBEE Act can be invoked by organs of state or public entities, and Nelson Mandela Children's Hospital is not an organ of state or public entity, but a not for profit company. Therefore, the B-BBEE Commission does not have the mandate to enforce such a cancellation of a contract.
- 3.1.44 According to section 13O (1) (a)-(d) of the B-BBEE Act, a person commits an offence if that person misrepresents or attempts to misrepresent the B-BBEE status of an enterprise, if the person provides false information or misrepresents information to a *verification professional* in order to secure a particular B-BBEE status or any benefit associated with compliance to the B-BBEE Act, provides false information or misrepresents information relevant for assessing the B-BBEE status of an enterprise to any *organ of state or public entity*, or engages in *fronting practice*.
- 3.1.45 Based on the evidence at the disposal of the B-BBEE Commission, First Garment Rental (Pty) Ltd does not appear to have misrepresented its B-BBEE status on the basis that it submitted its B-BBEE certificate with a B-BBEE Level 2 status and the verification agency showed that the Enterprise Development scores on the score card of First Garment Rental (Pty) Ltd was not based on the credentials of MMK Laundry (Pty) Ltd.
- 3.1.46 Further, it is conceded by First Garment Rental (Pty) Ltd that the credentials of MMK Laundry (Pty) Ltd were submitted in the Enterprise Development proposal, it being noted that after the award First Garment Rental (Pty) Ltd sought to conclude the Enterprise Development agreement with MMK Laundry (Pty) Ltd on terms different from those that were submitted in the proposal, which was rejected by MMK Laundry (Pty) Ltd. Nelson Mandela Children's Hospital in its email by Patrick Dominy confirmed that the projected volumes did not materialise hence they had to re-negotiate some aspects of the bid, including the Enterprise Development proposal. Therefore, there is a dispute between the

parties about the terms to be included in the Enterprise Development agreement. It therefore cannot be said based on this that there was misrepresentation of the B-BBEE status in accordance with section 13O (1) (a) of the B-BBEE Act.

- 3.1.47 In its bid, First Garment Rental (Pty) Ltd did not use the credentials of MMK Laundry (Pty) Ltd to enhance its own B-BBEE status for purposes of accessing the contract, however, it did submit the Enterprise Development proposal which included MMK Laundry (Pty) Ltd as the proposed Enterprise Development partner. The information provided by the verification company, Empowerdex (Pty) Ltd reflects that First Garment Rental (Pty) Ltd has never claimed MMK Laundry (Pty) Ltd and/or Mr Ivan Motlogeloa's B-BBEE credentials for its various Enterprise Development scores for the period 2016, 2017 and/or 2018.
- 3.1.48 Based on the response from the verification professional, it cannot be said that First Garment Rental (Pty) Ltd provided false information or misrepresented information to the verification professional in accordance with section 13O (1) (b) of the B-BBEE Act. Email correspondence about the bid shows that Nelson Mandela Children's Hospital is aware of MMK Laundry (Pty) Ltd as the proposed Enterprise Development beneficiary of First Garment Rental (Pty) Ltd. Although the bid was presented to Nelson Mandela Children's Hospital, it cannot be said to entail misrepresentation or provision of false information based on available evidence, even if it were, Nelson Mandela Children's Hospital is not a public entity or organ of state, and therefore the offence envisaged by section 13O (1) (c) of the B-BBEE Act cannot arise.
- 3.1.49 Further, this matter relates to a proposal submitted with a view to enter into an Enterprise Development agreement between the parties, however, no Enterprise Development agreement was subsequently concluded for reasons provided, without the B-BBEE Commission confirming the validity or reasonableness of such reasons.
- 3.1.50 As MMK Laundry (Pty) Ltd had alleged a joint venture for the submission of the bid, the merit assessment highlighted that this matter should be investigated to determine if a joint venture was created for the submission of the bid, enhanced by the B-BBEE credentials of MMK Laundry (Pty) Ltd, which First Garment Rental (Pty) Ltd thereafter reneged on after securing the bid with B-BBEE status enhanced by MMK Laundry (Pty) Ltd's credentials. This scenario would point to fronting, however, in this case there is no evidence of a joint venture that was concluded, therefore the allegation of fronting

practice in terms of section 13O (1) (d) of the B-BBEE Act cannot be sustained having regard to the definition of fronting practice in section 1 of the B-BBEE Act.

3.1.51 Having said the above, it is important to just go through the summary of allegations made by MMK Laundry (Pty) Ltd in regard to this matter and provide a brief response informed by the evidence gathered during this investigation:

3.1.51.1 *that on or about March 2017, MMK Laundry (Pty) Ltd entered into a Joint Venture partnership with First Garment Rental (Pty) Ltd t/a Montana Laundries (a Bidvest subsidiary) to jointly bid for the provision of laundry services contract for three (3) years at the Nelson Mandela Children's Hospital in Parktown, Johannesburg;*

3.1.51.2 The investigation did not find evidence of a joint venture between MMK Laundry (Pty) Ltd and First Garment Rental (Pty) Ltd. However, there is evidence that they did agree that First Garment Rental (Pty) Ltd submit an Enterprise Development proposal to the bid for Nelson Mandela Children's Hospital RFP, which proposal includes MMK Laundry (Pty) Ltd as the proposed Enterprise Development beneficiary for First Garment Rental (Pty) Ltd.

3.1.51.3 *that subsequent to MMK Laundry (Pty) Ltd and First Garment Rental (Pty) Ltd t/a Montana Laundries being jointly awarded the said contract, the latter performed without the knowledge and/or consensus and involvement with MMK Laundry (Pty) Ltd;*

3.1.51.4 Evidence gathered show that the contract was awarded to First Garment Rental (Pty) Ltd and the Service Agreement proposed was between First Garment Rental (Pty) Ltd and Nelson Mandela Children's Hospital, and MMK Laundry (Pty) Ltd was not a party to the contract.

3.1.51.5 It is correct that First Garment Rental (Pty) Ltd performed the contract from June 2017 without MMK Laundry (Pty) Ltd as the proposed Enterprise Development beneficiary and the reasons for that were provided and acknowledged by MMK Laundry (Pty) Ltd. First Garment Rental (Pty) Ltd indicated that it could not proceed to enter into an Enterprise Development agreement with MMK Laundry (Pty) Ltd on the basis of the proposals that were submitted for the RFP as the volumes had changed.

- 3.1.51.6 *that following various attempts to be involved in the said awarded contract, MMK Laundry (Pty) Ltd has unfortunately been unsuccessful;*
- 3.1.51.7 First Garment Rental (Pty) Ltd proposed an Enterprise Development agreement with the terms different from what was presented for the bid during the RFP process, however, MMK Laundry (Pty) Ltd has allegedly refused to sign the agreement sent by First Garment Rental (Pty) Ltd.
- 3.1.51.8 However, MMK Laundry (Pty) Ltd has invoiced and accepted payments on the terms of the said Enterprise Development agreement, although it has not signed it. MMK Laundry (Pty) Ltd did benefit from the arrangement, without a signed Enterprise Development agreement, albeit not in accordance with the terms that were submitted during the bidding process, for reasons advanced in the communication between the parties.
- 3.1.51.9 Mr Ivan Motlogeloa confirmed that he raised a dispute in June/July 2017, which is when the contract was awarded, and from June 2018 MMK Laundry (Pty) Ltd accessed the benefit, albeit absent a signed Enterprise Development agreement. Mr Ivan Motlogeloa lodged a complaint to the B-BBEE Commission in November of 2018.
- 3.1.51.10 *that First Garment Rental (Pty) Ltd t/a Montana Laundries used MMK Laundry (Pty) Ltd as an opportunistic intermediary to secure the said contract with the Nelson Mandela Children's Hospital to the financial detriment/exclusion of MMK Laundry (Pty) Ltd; and*
- 3.1.51.11 MMK Laundry (Pty) Ltd was approached by First Garment Rental (Pty) Ltd for purposes of submitting the Enterprise Development proposal to Nelson Mandela Children's Hospital in terms of which MMK Laundry (Pty) Ltd would be the Enterprise Development beneficiary upon award of the tender. MMK Laundry (Pty) Ltd agreed to participate in the Enterprise Development proposal as the proposed Enterprise Development beneficiary of First Garment Rental (Pty) Ltd.
- 3.1.51.12 There is no evidence that MMK Laundry (Pty) Ltd was used as an opportunistic intermediary but rather First Garment Rental (Pty) Ltd proposed that it would enter into an Enterprise Development agreement with MMK Laundry (Pty) Ltd for the purposes of the bid. There were reasons advanced as to why the Enterprise Development agreement

could not be concluded on the terms that had been proposed when the Enterprise Development proposal was submitted to Nelson Mandela Children's Hospital, and these reasons are consistent in the communique' from Nelson Mandela Children's Hospital and First Garment Rental (Pty) Ltd, and were acknowledged by MMK Laundry (Pty) Ltd.

- 3.1.51.13 First Garment Rental (Pty) Ltd did not use the B-BBEE credentials of MMK Laundry (Pty) Ltd to enhance its B-BBEE status or misrepresent its own status in the bid submitted to Nelson Mandela Children's Hospital. However, it did concede to submitting a proposal that MMK Laundry (Pty) Ltd would be its Enterprise Development beneficiary, however, the parties failed to agree on the terms of the agreement and consequently no Enterprise Development agreement could be concluded for Statement 400 to be invoked.
- 3.1.51.14 *that MMK Laundry (Pty) Ltd has not financially benefited from the said contract in the manner proposed and envisaged in the bidding documents submitted on or about March 2017.*
- 3.1.51.15 It is correct that MMK Laundry (Pty) Ltd has not benefited from the contract in the manner that was proposed when the Enterprise Development proposal was submitted to Nelson Mandela Children's Hospital. It is however noted that reasons were advanced why an Enterprise Development agreement based on those terms could not be concluded, and it is the terms of the agreement to be concluded that gave rise to the dispute.
- 3.1.51.16 Evidence show that a draft Enterprise Development agreement was subsequently sent to MMK Laundry (Pty) Ltd for consideration and signing, and although MMK Laundry (Pty) Ltd did not sign it, it claimed the benefits on the basis of those terms, which included invoicing and receiving payments from First Garment Rental (Pty) Ltd.
- 3.1.51.17 Therefore, MMK Laundry (Pty) Ltd impresses that First Garment Rental (Pty) Ltd must stick to the terms that were submitted during the RFP process for the Enterprise Development agreement, albeit both Nelson Mandela Children's Hospital and First Garment Rental (Pty) Ltd had indicated that the circumstances are not as were projected. Due to the dispute relating to the terms that should form part of the Enterprise Development agreement, no agreement was concluded.

- 3.1.52 The B-BBEE Commission has jurisdiction to oversee the implementation of Statement 400, and even if it were to be assumed that there is an Enterprise Development agreement between the parties in question, the B-BBEE Commission would not be in a position to compel a measured entity to perform against the terms that in their view should be varied based on economic factors or business changes that have occurred subsequent to the conclusion of the said Enterprise Development agreement as those are contractual matters.
- 3.1.53 The role of the B-BBEE Commission cannot extend to business arrangements between parties that do not land themselves within the prescripts of the B-BBEE Act. In this case, the matter remains a contractual dispute between the parties and the B-BBEE Commission would not have the mandate to propose remedies required by MMK Laundry (Pty) Ltd on the basis of the following:
- 3.1.53.1 There is no joint venture agreement or joint bid in terms of which First Garment Rental (Pty) Ltd used the credentials of MMK Laundry (Pty) Ltd to secure the contract, which First Garment Rental (Pty) Ltd otherwise would not have secured with its own B-BBEE status. First Garment Rental (Pty) Ltd was according to its B-BBEE certificates for this period compliant with a B-BBEE Level 2 status.
- 3.1.53.2 There is no Enterprise Development agreement concluded between the parties in terms of which Statement 400 must apply and for which B-BBEE points or recognition was claimed by First Garment Rental (Pty) Ltd. According to the information from the verification agency, Empowerdex (Pty) Ltd, MMK Laundry (Pty) Ltd was not used to claim recognition for Enterprise Development of First Garment Rental (Pty) Ltd.
- 3.1.54 The B-BBEE Commission has noted with concern that despite the fact that there is no Enterprise Development agreement concluded between MMK Laundry (Pty) Ltd and First Garment Rental (Pty) Ltd, both parties confirmed the existence of an arrangement in terms of which MMK Laundry (Pty) Ltd invoices for and receives payment from First Garment Rental (Pty) Ltd. Both parties seem to be implementing outside the parameters of Statement 400 of the Codes of Good Practice. The concern about the lack of information/documentation from Nelson Mandela Children's Hospital to assist in determining the monitoring mechanism for the Enterprise Development requirement in the RFP as well as whether Nelson Mandela Children's Hospital recognises the arrangement in its scorecard for

B-BBEE compliance was addressed through the response from Nelson Mandela Children's Hospital on 19 February 2020 confirming that Enterprise Development was not part of the contract awarded.

- 3.1.55 Notwithstanding the above, the B-BBEE Commission concluded that Ms Mandisa Maholwana, the Chief Executive Officer of Nelson Mandela Children's Hospital, and/or Nelson Mandela Children's Hospital failed to cooperate with the B-BBEE Commission and obstructed the investigation by failing to provide information that was requested for this investigation and further failed to comply with the summons that was issued in accordance with section 13K of the B-BBEE Act, which conduct amounts to an offence in terms of section 13N (3) (a) and (f) of the B-BBEE Act.
- 3.1.56 Nelson Mandela Children's Hospital has responded to the findings in their letter of 19 February 2020 and provided the information and the reasons why they had not been able to submit the information that was required in the summons and further confirmed that the bid was awarded to First Garment Rental (Pty) Ltd without the Enterprise Development requirement and that Nelson Mandela Children's Hospital did not claim any B-BBEE points for this aspect. The information submitted by Nelson Mandela Children's Hospital is consistent with the evidence gathered by the B-BBEE Commission leading to its findings.
- 3.2 The B-BBEE Commission can confirm that during this investigation, both the MMK Laundry (Pty) Ltd and First Garment Rental (Pty) Ltd cooperated fully with the investigation as complainant and respondent, it being noted that Mr Ivan Motlogeloa raised several concerns about the delay in finalising the investigation and these were responded to by the B-BBEE Commission. The investigation therefore was conducted in accordance with the procedures of the B-BBEE Commission, without any undue influence or pressure from any of the parties in arriving at the findings.
- 3.3 The B-BBEE Commission also confirms that First Garment Rental (Pty) Ltd and Nelson Mandela Children's Hospital were notified on 03 February 2020 about the findings, and were afforded the opportunity of thirty (30) days in line with regulation 15 (13) of the B-BBEE Regulations to respond, in case there are any adverse findings. They responded on 13 February 2020 and 19 February 2020 respectively.
- 4 The B-BBEE Commission also confirms that MMK Laundry (Pty) Ltd was notified of the outcome of the investigation on 03 February 2020 and afforded a period of thirty (30) days to respond in case the B-BBEE Commission has missed any crucial evidence. MMK Laundry (Pty) Ltd requested an extension and was granted a further 10 days on 2 March 2020, and to date has not submitted any response.

4 Recommendations of the B-BBEE Commission

- 4.1 Based on the outcome of the investigation and the conclusion that the matter relates to a contractual dispute that the B-BBEE Commission does not have a mandate to pronounce on, the B-BBEE Commission does not make any remedial recommendations in respect of the complaint.
- 4.2 The B-BBEE Commission may, however, refer this report to the Department of Small Business Development to consider whether any intervention is feasible to provide a cost effective and independent platform/structure for Small Medium and Micro Enterprises that have disputes arising from private sector procurement processes to refer them for facilitation given the plight raised by Small Medium and Micro Enterprises, like in this matter, that they often do not have the financial resources to pursue the disputes.
- 4.3 In light of the response received from Nelson Mandela Children's Hospital in their letter dated 19 February 2020, no further action will be pursued in respect of Ms Mandisa Maholwana and Nelson Mandela Children's Hospital regarding the failure to cooperate and comply with the summons.
- 4.4 In line with regulation 15 (12) of the B-BBEE Regulations, any findings or recommendations made by the B-BBEE Commission in respect of an investigation must be in writing, communicated to the Complainant, and published in a manner that the B-BBEE Commission deems appropriate, including on its website.
- 4.5 The B-BBEE Commission has resolved to publish the findings in accordance with section 13J (7) (a) of the B-BBEE Act read with regulation 15 (12) (c) of the B-BBEE Regulations in the interest of the public.

5. Status of this publication

- 5.1 This publication is prepared only for the purpose of publishing the findings and recommendations of the B-BBEE Commission on this matter in the interest of the public, but does not constitute an investigation report.

6. Conclusion

- 6.1 The B-BBEE Commission has taken all due care in preparing this publication, and should there be any errors you wish to highlight or should you require any clarity regarding the contents of this publication, please do not hesitate to contact us immediately.

- 6.2 This publication will also be available on the website of the B-BBEE Commission from the date of its release and it will be circulated to the public through channels that the B-BBEE Commission deems fit.
- 6.3 For any queries or further clarity on this publication, kindly feel free to contact us at the following contact details:

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