

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 32643/2021

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
2025-12-09	
DATE	SIGNATURE

In the matter between:

FORENSIC DATA ANALYSTS (PTY) LTD

1st Plaintiff

(Registration number: 1999/023867/07)

INVESTIGATIVE SOFTWARE SOLUTIONS (PTY) LTD

2nd Plaintiff

(Registration number: 2006/002551/07)

SOLVE FORENSICS (PTY) LTD

3rd Plaintiff

(Registration number: 2010/018049/07)

and

**NATIONAL COMMISSIONER OF THE SOUTH AFRICAN
POLICE SERVICE**

1st Defendant

MINISTER OF POLICE

2nd Defendant

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 9 December 2025.

JUDGMENT

POTTERILL J

Introduction

[1] Upon hearing the evidence in this matter the idiom “playing cat and mouse” involuntary comes to mind; the one party repeatedly attaining a certain outcome with the other party repeatedly evading the outcome by cunning, or deception through contrived action. This cat and mouse pursuit was prolonged and in normal circumstances there is no clear winner or resolution, but herein either the cat or the mouse must win.

The pleadings

[2] The pleadings in a civil matter are critically important as it defines the issues in dispute and shapes the entire course of the litigation. The particulars of claim and the plea must clearly outline the specific facts and legal basis upon which each party relies. This is essential for the court and opposing party to understand the scope of the dispute. The pleadings are the foundation upon which a trial is built and dictates the scope of evidence that can be presented. A pleading can significantly impact the outcome of the case, as it sets the stage for how the court will perceive the merits of each party's arguments.

The plaintiffs' particulars of claim

[3] The plaintiffs, Forensic Data Analysts (Pty) (Ltd), Investigative Software Solutions (Pty) (Ltd) and Solve Forensics, to whom I for ease of reference collectively refer to as FDA, are claiming R644 million from the South African Police Services

[SAPS] pursuant to an oral agreement concluded on 31 January 2020 at the Sefako Makgatho Presidential Guesthouse, Pretoria. In terms of the agreement FDA sold the intellectual property in three computer programs, the Firearm Permit System [FPA], the Property Control and Exhibit Management System [PCEM] and the Visual Analysis Anacapa Matrix Intelligence Solution System [the VA-AMIS] to the SAPS for an amount of R460 000.00 inclusive of VAT. Furthermore, FDA would provide maintenance and support to the SAPS for the computer programmes for a period of two years for a price of R120 000 000.00 inclusive of VAT. The parties agreed that the oral contract would be recorded in writing and that payment would be made upon the signature of the last party to the written version.

[4] On 3 February 2020 the oral agreement was orally amended pertaining to the purchase price for the intellectual property in the computer programmes in that the price would be determined by a fair value process that was to be facilitated by the National Treasury. During May 2020 the fair value of the intellectual property in the computer programs was facilitated and determined by the National Treasury in the amount of R560 000.00 inclusive of VAT which equates to R644 000 000.00.

[5] On 30 May 2020 the SAPS requested FDA to furnish Lieutenant General FN Vuma of the SAPS with an invoice for the purchase price of the intellectual property in the computer programmes in the amount of R644 000 000.00 (VAT inclusive) which FDA with the invoice attached to the particulars of claim.

[6] The FDA tendered that their attorneys will draft the written contract and fulfill or assist in the fulfillment of any unfulfilled requirements imposed by law insofar as there may be such requirements. It will deliver the systems and provide maintenance for two years.

[7] FDA thus claims specific performance of the contract alternatively FDA terminates the oral agreement due to the SAPS repudiating or breach of the agreement and claims the amount as damages suffered.

The SAPS' plea and conditional counterclaim

[8] SAPS pleaded that it denied that an oral agreement was concluded as alleged, or at all. The alleged agreement was for the procurement of goods or services and such agreement was unlawful because there was non-compliance with the mandatory procurement process envisaged in the Constitution, the procurement legislation and policy. The failure to comply with the mandatory procurement process and the Constitution offends the principle of legality and is invalid.

[9] Furthermore, it was pleaded that section 217 of the Constitution provided that an organ of state when contracting for goods and services must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective and the process followed herein was not transparent, fair, equitable, competitive and cost effective.

[10] In the plea there is also reliance on S2 of the Preferential Procurement Policy Framework Act 5 of 2000 [the PPPFA]; that a tender process must be followed. Also, the Public Finance Management Act 1 of 1992 [the PFMA] required a tender process and there was no authority given by Treasury to deviate from the tender process. It was an unauthorized transaction contemplated in S68 of the PFMA and the SAPS is therefore not bound by the alleged oral agreement. The Supply Chain Management Policy of the SAPS provides for a procurement process in line with S217 of the Constitution and any deviation therefrom requires National Treasury's approval. No tender process was followed and no Treasury approval was obtained to deviate.

[11] Furthermore, the State Information Technology Agency Act 88 of 1998 [the SITA Act] provides that IT systems must be procured by the State Information Technology Agency SOC limited [SITA] and if procured otherwise, is invalid.

[12] If the Court should find that a valid oral agreement was concluded then the oral agreement was subject to an implied term that the oral agreement must comply with the procurement processes as pleaded above.

[13] The agreement was not recorded in writing, and the SAPS did not sign any agreement.

[14] The SAPS deny that the fair value of the intellectual property in the computer programmes is R644 million VAT inclusive and the process did not comply with the procurement processes.

[15] The SAPS did ask for an invoice, but the invoice did not substitute the legal procurement requirements. It admitted that SAPS refused to sign the agreement presented by FDA as it would have been unlawful to sign the agreement in breaching the procurement processes.

[16] As for the alternative claim of damages it was pleaded that no damages could be claimed on an invalid contract.

[17] The SAPS also filed a conditional counterclaim insofar as the Court might find that there was an oral agreement, the oral agreement is invalid and must be set aside on account of non-compliance with the procurement processes and for not having been procured by SITA in terms of the SITA Act.

The common cause facts set out the factual background

[18] On 29 November 2017 SCOPA raised eyebrows about FDA's contract with SAPS. National Police Commissioner [Sithole] at the time, as the Accounting Officer of the SAPS ordered to stop payment to FDA for the licensing fees and the maintenance and support fees for the systems. FDA was the sole provider of these three computer systems that were of critical importance to SAPS. It is undeniable that these programmes were per se critical to the functioning of the police, national security, the safety of the public and the integrity of the justice system.

[19] Despite the VA-Amis license contract's expiry date of 31 May 2018, the FPS contract expiring on 30 October 2017 and the PCEM contract expiring on 14 June 2018 the systems were still being utilized with no license fees forthcoming.

[20] It was found that none of SCOPA's concerns had any merit and despite FDA on 3 April 2018 seeking urgent intervention from Sithole, no payment was forthcoming with SAPS using the systems 24/7. FDA as a result on 4 April 2018 switched off the systems and the FDA support personnel left the site.

[21] On 5 April 2018 SAPS and SITA instituted an application seeking an order that the systems be switched on. FDA filed a counterapplication. This application was withdrawn on 8 April 2018 with SITA, without permission in an untoward manner, switching the systems back on. SAPS still made no payments to FDA for the use of the systems. FDA persisted with its counter application and De Vos J, despite finding the matter not urgent, found that the copyright of the systems did not vest in the SAPS as they were paying licensing fees.

[22] This matter is then heard in the ordinary course before Swanepoel AJ. SITA/SAPS were interdicted and restrained from infringing the copyright of FDA on the FPA system. Applications for leave to appeal against the judgment to the Supreme Court of Appeal and Constitutional Court were dismissed with costs. Although not in chronological order Thlapi J on 11 February 2020 also handed down an order that the SAPS was interdicted and restrained from infringing the copyright of FDA in PCEM.

[23] On 27 March 2019 the Deputy National Commissioner wrote to FDA pursuant to a meeting held between the parties that SAPS is aware of its liability towards FDA for services rendered for the period November 2017 to March 2018. FDA is asked to provide a detailed breakdown for the purchase price of the systems as set out in FDA's letter dated 14 November 2018. "It must also be noted that SITA has indicated that it will indeed involve FDA, through National Treasury, to assess and negotiate the purchase prices for the IP as well as for the services rendered."

[24] On 26 July 2019 a meeting is again held with Sithole with the minutes reflecting that there is a problem with State Security and National Security and that "only FDA could provide solutions to SAPS." SCOPA had informed SAPS that they can go ahead with FDA but that National Treasury had to be involved. Sithole explained that other suppliers are being explored.

[25] In a further meeting, 16 August 2019, between SAPS and FDA Maj Gen Mavundla expressed that FACCT claimed it owned the IP. Mr Keating informed the meeting that FDA had bought the IP for VA-Amis and FPS from FACCT and FDA rewrote the system. In the contract FDA's transition period report titled "Critical SAPS Applications Sovereignty" a roadmap is set out for SAPS to obtain sovereignty over the systems. It sets out that for all three systems R500 million is payable for the IP,

with further monies for a three-year transition support service. SAPS also provided a document with a counterproposal also with a three-year transitioning period.

[26] On 16 September 2019 FDA in a letter threatened to execute the interdict as no response is forthcoming from SAPS. On 23 September 2019 a meeting followed that SITA attended for the first time, and the date of 3 October 2019 is determined as the date that the 60 days expired in terms of the court order of Swanepoel AJ and SAPS would have no access to the systems. Sithole would meet with FDA every 2 weeks to provide progress on the settlement and way forward. These meetings never took place. The minute notes that SAPS and SITA "already had the instruction from the National Commissioner to settle this matter." He had decided to follow FDA's proposal of R500 million to purchase all the IP and a transitioning period of 24 months. FDA and SAPS were to reduce the proposal to a contractual agreement. This was to be done as a matter of urgency. "Gen Sithole said he made a commitment for the settlement and gave an order that FDA must be paid." He again requested FDA not to switch of the system. He further informed the meeting that National Treasury must ratify the payment and thereafter certain internal processes must be followed. He highlighted that he, Sithole, had made a commitment to affect payment and settlement. The "contractual components of the agreement reached between FDA and SAPS are critical for service delivery" and "If FDA switches off the systems it will cause a national security risk." Maj Gen Nelson said the financial part could be finalized at the latest the following week Friday, but that National Treasury could take up to 30 days to release the money.

[27] On 27 September 2019 Sithole sent a letter to FDA requesting a proposal of outright purchase of intellectual property of critical South African Police Service systems. This proposal referred to all three systems and sought certain information, including that FDA guarantee that they own the IP and there will be no claims in future from third parties for the use of the copyright. On acceptance of the proposal, it was subject to SAPS following the procurement process. FDA sent the proposal as agreed to by SAPS, but if by 14 October 2019 the matter was not settled compliance would be sought with Swanepoel AJ's order.

[28] On 12 November 2019 FDA issued a contempt of court application pertaining to Swanepoel AJ's order and SITA and SAPS are ordered by Fourie J to comply with

the order of Swanepoel J by 26 November 2019 at 14:00. On 6 December 2019 a further contempt of court application is brought by FDA for non-compliance with the orders of Swanepoel and Fourie J. The Court ordered that SAPS and SITA must comply with both orders by 30 January 2020 or pay a fine of R150 000.

[29] Nothing further happened and FDA on 29 January 2020 wrote to SITA to desist from further using the systems by midnight on 30 January 2020. This is so because on 29 January 2020 a revised offer of R88 million for the three systems was received which is rejected by FDA.

[30] SAPS continued to utilize the systems and on 31 January 2020 FDA instructed the Sheriff to commence with the execution of the court orders, i.e to remove the systems from the SITA building. Mr. Keating from FDA testified that the Sheriff could only remove 2 of the 3 systems at Numeris because the other system was spread over the country.

[31] Up to here the cat and mouse games speak for itself; the SAPS is utilizing the systems with SITA violating FDA's source code while attempting to copy the system and promises of purchasing come to nought. Mr.Keating [Keating] the CEO and Mr. Mufamadi [Mufamadi], his business partner of FDA decided to walk away and execute the Court Order and remove the IP. This was not denied. When the Sheriff is at Numeris to execute the order Mufumadi received a call to attend to the offices of the National Commissioner at 7:30 on the 31st for a meeting. Keating testified that he was against any further meetings and now wanted to take his IP and let SAPS be. He agreed to the meeting but advised he will not instruct the Sheriff to halt the removal. This was not denied. Upon their arrival at the office they were by "blue brigade" rushed to the Presidential Quest House where a government Legotla was being held. Warrant Officer Sithole escorted them in, they passed through security and present were between 20 to 50 SAPS and SITA officials. They sat in a room furnished with couches and were told to wait for Sithole. On their way they passed Ministers Cele of Police and Mboweni of Treasury and Cele told Mboweni that these are the people that intended wrecking the SAPS systems. The Minister of SITA was also present.

[32] Mr. Mogajane, a subpoenaed witness, at the time the DG of National Treasury was approached by Minister Cele telephonically to assist in a matter. While attending

the Legothla he was told that a policeman was looking for him. He was taken to a room where Sithole and a sizable number of SITA officials and uniformed policemen were present. The new CEO of SITA was also present, Mr. Keyise [Keyise]. Sithole then explained to him that he had to negotiate a price with the gentlemen outside who represented FDA, for a settlement to be reached for the acquisition of the systems. The price was in excess R700 million and a lower price needed to be negotiated. With Mogajane's background he immediately enquired as to whether SAPS had budgeted for this acquisition. He was informed by Brigadier Nelson, Head of Finance from SAPS that R500 million was budgeted. He was happy because now he had a range. He then started a conversation with Keating and Mufamadi and was worried because they also spoke about monies in arrears for maintenance and further maintenance. He went back to Nelson and Nelson told him that SAPS could cover those amounts. FDA was prepared to accept the R460 million. Everybody shook hands and he thought he had won the day because he had knocked R200 million of the price. All of these facts were common cause.

[33] It was not disputed that Keating said Keyise took the lead and first tried to negotiate to use the license, FDA refused. They then agreed on R400 million [without VAT included] for the IP and R1.2 million for the support and maintenance. Magojane further testified uncontradicted that Mofamadi did not want to shake hands and said many promises were made before. Keating said if the agreement was reduced to writing he would shake hands otherwise they leave and the Sheriff is to execute. Everybody shook hands and there was cheering and clapping in the room. Keating would not leave without this agreement in writing and General Groenewald [Groenewald] from the SAPS legal services typed it on her laptop, but as she struggled to connect to a printer there, she undertook to immediately email it when she returned to the office.

[34] On 31 January 2020 a letter signed by Sithole with the heading: "SETTLEMENT AGREEMENT RE PURCHASE OF INTELLECTUAL PROPERTY AND MAINTENANCE AND SUPPORT" was received by FDA. It recorded as follows:

"It is herewith recorded that it was agreed that the intellectual property on VA-AMIS, FPS and PCEM will be bought by the State/SAPS for an amount of R460 000 000-00(inclusive of VAT) with two(2) years maintenance and support

for all systems for an amount of R120 000 000-00 (inclusive of VAT) (total of R580 000 000-00).

The aforesaid agreement to be recorded by the parties' legal representatives and upon signature of the last party, payment will be effected as recorded in the signed agreement."

[35] Two hours later VDA received a letter from Sithole with the following content:

"The aforementioned matter refers as well as the settlement negotiations held on even date.

Kindly note that the correspondence sent earlier is hereby withdrawn subject to further discussion with the Minister of Police."

[36] Magojane testified that he was later called back to a room where the three Ministers were sitting. Cele asked him why he agreed to the price and then changed it. He asked what Cele meant and was then informed of a value placed on the systems by GTAC. He explained that GTAC is not part of Treasury although many people think so, resultantly he knew nothing of this value of R88 million. He was then told to "fix" this.

[37] On 29 January 2020 FDA in writing rejected the SAPS revised offer as contained in the GTAC report. The letter stated that SAPS was acting with no urgency because they continued to use the systems, but FDA was now going to execute the order.

[38] On 31 January 2020 FDA's attorneys write to Sithole informing him they do not accept the purported withdrawal and the court order will be executed on 3 February 2020 at 8:30. Now again, they are called to a meeting on the Monday where they are informed the GTAC report was a very quick appraisal done in 4 days and it would be reconsidered, but three weeks are required. Payment will be made on 28 February 2020. FDA agreed to a fair value assessment because FDA knew any fair value assessment would determine the value at at least R500 million. On 4 February 2020 Sithole wrote to FDA:

- "1.1 The SAPS shall make a conditional payment to the FDA in an amount of R88 million (eighty eight million rand) which includes pre-payment in respect of maintenance and support for PCEM for a period of twelve (12) months, payment of which shall be effected within 7 (seven) working days of receipt of this letter. It is also recorded that this payment is subject to finalization of a further fair value assessment of intellectual property of Property Control Exhibit Management (PCEM), Firearm Permit System (FPS) and Visual Analyst Anacapa Matrix (VA-AMIS), which shall be finalised by 28 February 2020. The fair value assessment will include a) the best and final fair value assessment; b) a comparative analysis of any systems in the market and c) the impact on service delivery.
- 1.2 The SAPS undertakes to handover a copy of the signed report by Mindworx Consulting that was completed on the 27th of January 2020 and the terms of reference that was given to Mindworx.
- 1.3 The SAPS will notify SITA to stop developing the replacement of any of the systems mentioned in paragraph 1.1 above, until finalisation of the mentioned fair value assessment."

[39] FDA responded to this on 5 February 2020 with the following:

- "1. During our meeting that took place on Monday, 3 February 2020, you requested that we provide further information to assist in the finalization of the Mindworx report. We are willing to assist in this process where it is reasonably required. However, this is not to be construed as an abandonment of our existing agreement, nor a variation, addition and/or amendment to our existing agreement, nor does it constitute a new agreement. Our participation in this exercise is not in any way to be construed as if we are of the view that the consideration agreed upon on Friday, 31 January 2020 is not the correct one. Ultimately, we will seek from you the consideration that has already been agreed upon.
2. The issue of the conditional payment proposal as contained in numbered paragraph 1.1 of your letter is recorded incorrectly. We agreed that a

payment in the amount of R88 million be made by SAPS as a part payment and a demonstration of your commitment. As you will know the PFMA does not allow for the payment of support and maintenance fees in advance, as discussed at our meeting on Friday, 31 January 2020. Therefore the proposed payment cannot be allocated against support and maintenance.

3. We further discussed that this payment be made unconditionally by Friday, 7 February 2020. We are prepared to extend the payment date to close of business on Tuesday 11 February 2020.
4. We require a written and unequivocal undertaking from SAPS and SITA that you will desist from developing substitute systems for FPS, VA-AMIS and PCEM.
5. Payment of our outstanding invoices for the three systems, for the months of November 2019, December 2019 and January 2020, copies of which are attached for ease of reference, is to be paid by 7 February 2020."

[40] Magojane testified that on 25 February 2020 he addressed a letter to Sithole to ascertain how far the fair value process that was agreed to on 3 February 2020 was. He noted the following:

- "1. Settlement of the conditional payment of R88 million to FDA as a sign of government's commitment to continue with the negotiations for the purchasing of the IP for the systems upon finalisation of the fair value assessment by the end of February 2020;
2. Payment of all outstanding invoices to FDA for the period November 2019 to February 2020 in respect of licence fees for the utilisation of the systems;
3. Hand-over of the previous terms of reference and draft report prepared by Mindworx Consulting on the outcome of the fair value assessment conducted with respect to the intellectual property for PCEM, FPS and VAAMIS."

[41] On 5 March 2020 with no further outcomes reached FDA sent a final letter of demand to Sithole copied to SITA and Treasury. The letter confirmed the agreement reached on 31 January 2020 stood. No part payment of R88 000 that was reduced to R57 million was received. The outstanding license fees as agreed to on 3 February were not paid on 7 February. The fair value process was supposed to be finalized by 28 February, but SAPS had not reported on any fair value.

[42] On 11 March 2020 FDA is called to a meeting at Kievitskroon. Keyise of SITA and Sithole of SAPS are present but Magojane of Treasury is not invited to this meeting. FDA is now offered R51.6 million in total for the FPS and PCEM systems. The minutes record that Mufamadi stated that the State is acting mala fides and after two years FDA expected no less, court papers will be served on the State, and FDA walked out of the meeting.

[43] FDA wrote to Magojane on 13 March 2020 setting out that they sought his urgent intervention. FDA confirmed it reached an agreement on 31 January 2020 and will not accept an amendment thereto. The offer now made at Kievitskroon is unacceptable and they will enforce the January agreement and the Court orders obtained.

[44] Magojane testified that he took offence that he was not invited to the Kievitskroon meeting, with his dissatisfaction reflected in the parliamentary committee minutes. He was called to negotiate and now he was left out of the picture. Magojane on 25 March 2020 had a meeting with Sithole and Keyise and in a letter to FDA set out what was agreed. It was agreed that the fair value process was to continue and "the average amount of R250 million [Mindworx report] as recommended in the SAPS fair value report being the minimum amount payable, and the lowest amount of R462 million as proposed by one of FDA service providers being the maximum amount payable." FDA in a letter dated 28 March 2020 made a counterproposal of R310 million as they had ascertained that the highest value in the Mindworx report was R310 million. They also sought payment of the outstanding license fees until March 2020.

[45] At the end of March FDA received the Mindworx report from the SAPS. The value therein is R57 million. But importantly it is further common cause that on 24 February the legal services of SITA inform the legal services of SAPS that:

"Kindly note that the exemption or deviation from the SITA Act can only be done by our Minister and on a due request by the Minister of Police. If the Minister send (sic) a request to our Minister same will be attended to before end of this week."

This is in answer to an email from Groenewald to SITA setting out that the DC of Treasury had indicated that approval to deviate from TR16A 6.4 must be obtained from Treasury before payment can be made.

[46] Groenewald in an email set out that the January 31st agreement was withdrawn, but that FDA was informed by Treasury that the R88 million would be paid to show goodwill and its commitment to rebuild trust and find a resolution. Another assessment process would thus follow. All processes must be finalized by 28 February 2020.

[47] Magojane further testified that he was in a fix to ascertain the price and therefore he called the attorneys ENS and they provided the name of Mr. Don MacRobert as an independent expert assessor who would determine the final price in the fair value process. The National Treasury would facilitate the fair value process. On 1 April 2020 Magojane wrote to FDA confirming the appointment of Don MacRobert and that R250 million will be paid over as a minimum pending the finding of the value by MacRobert. He confirmed that on 9 and 18 March 2020 R8 million was paid over for the arrear licensing fees and that SITA would pay the outstanding amount for VA-AMIS on 3 April 2020. The agreement would be drafted by the State Attorney. This is common cause.

[48] On 2 April 2020 FDA responded and accepted the interim payment offer of R250 million subject to the Heads of Agreement drawn up by FDA to be signed by Sithole. Until Sithole had signed the Heads of Agreement, the agreement reached on 31 January 2020 shall prevail. FDA also addressed the support and maintenance for two years that was not addressed in the letter of 1 April 2020.

[49] On 27 April 2020 Bouwers Incorporated provided a summary of the IP valuation of all three systems. FDA obtained four valuation reports from independent valuers ranging between R462 odd million to R643 million.

[50] On 29 May 2020 National Treasury confirmed to Sithole that Mr. Don MacRobert determined the value of the three systems at R560 million and that in total 7 evaluations had been obtained pertaining to the fair value and that this evaluation is consistent with 4 of the 6 evaluations and National Treasury regarded it as a fair value.

[51] On 3 June 2020 Sithole wrote to Keyise that SAPS has accepted the report of MacRobert and that an offer to purchase in the amount of R560 million will be made to FDA. Furthermore, SITA must urgently revert whether the procurement will be done by SITA or whether a deviation will be provided for SAPS to procure the system. SITA answered it would be appropriate for SAPS to acquire the systems due to SAPS negotiations and assessments, but SAPS must obtain ministerial exemption to do so. "SITA will not object to such exemption and SAPS may use this letter in support of the ministerial exemption application." It must be mentioned already on 24 February 2020 SITA informed SAPS that if Ministerial exemption is sought it would be granted by the end of that week.

[52] On 5 June 2020 FDA responded to a letter from the State Attorney requesting FDA to keep the systems on while the State Attorneys drafted the offer to purchase. FDA placed on record that Sithole had committed to payment of R560 million within 48 hours of the valuation report of Treasury. On Saturday 30 May an invoice was sought from FDA and it was provided the same day. Lt Gen Vuma committed that an agreement would be forwarded on 1 June for signature on 3 June 2020 with payment to FDA on the same date. License fees for all three systems for April and May 2020 were outstanding. There is thus no reason or for CDH to consult with the SAPS technical team as the process was completed.

[53] On 6 June Magojane wrote to FDA that SAPS undertook to finalize the matter as soon as possible and SAPS just needed to tick all the boxes before they pay.

[54] On 11 June 2020 a draft IP agreement was received from the State Attorney. It is an expansive document with an annexure that FDA requested to complete the open spaces marked in yellow. In the draft IP agreement there is a clause that the purchase price for the FPS and PCEM systems is R389 million plus VAT. FDA accepted this amount.

[55] On 13 June 2020 FDA deactivated the systems with Sithole's knowledge.

[56] On 15 June there is still no payment, FDA sent a letter of demand that if payment is not received by 19 June 2020 FDA will charge license fees for FPS and PCEM for June 2020. On the same date FDA received a letter from CDH that a patent existed on the PCEM system and a license was granted to Global Authentication Pty Ltd. FDA responded that the claim is "ludicrous" and this claim was made in May 2018 and was dealt with extensively in pleadings and protracted litigation. Judge Thlapi on 11 February 2020 declared that FDA held the copyright in FPS and PCEM. There is no legal impediment to not conclude the agreement. On 15 June 2020 FDA had given a commitment that FDA will indemnify the SAPS against third party claims. CDH responded that they will appoint Spoor and Fischer to determine whether the PCEM System infringed on any patent. FDA reacted that this is again proof of ulterior motives because the Court order speaks for itself. FDA never received a Spoor and Fischer report despite demand.

[57] On 26 June 2020 FDA sent the signed copyright agreement to SAPS requesting SAPS to sign it by 29 June 2020 and make payment of R389 million by 1 July 2020. FDA alerted CDH that SAPS is trading in direct contravention of a contempt of court order. FDA accepted the fair value of R389 million for the two systems. This agreement is not a new agreement, but a fair value assessment of the price and now, averred budget constraints, excluding VA-AMIS. CDH responded that all risks in concluding the agreement would be addressed and that SAPS had to comply with "all internal and statutory governance and procurement prescripts".

[58] On 30 June 2020 CDH wrote that the price was an issue and the parties agreed that the VA-AMIS system be removed from the agreement to purchase. There is a complaint that FDA had unilaterally made material amendments to the draft copy of the agreement and added a unilateral new Annexure "E". Yet, it is common cause that Annexure E was attached by the State Attorney with FDA instructed to complete the sections highlighted in yellow; that is what they did. FDA is reminded that SAPS had received a report from crime intelligence that one Persues claimed that a patent existed in the PCEM system and that this needed to be resolved.

[59] On 1 July 2020 Sithole wrote to Keyise as follows:

"In the discussion it was indicated that SITA responded to the SAPS that it would be appropriate for SAPS to directly acquire the target systems from FDA owing to the fact that the National Commissioner accepted the last fair value assessment report by Mr McRobert, as commissioned by National Treasury (NT). It was further indicated that the SAPS can use the same letter of SITA's response to obtain ministerial exemption in order to procure the target systems outside the ambit of SITA Act. It is not clear why ministerial exemption is applicable in this instance, as SITA is requested to perform the required procurement of the target systems within the ambit of the SITA Act.

In terms of SITA regulation 8.2.3 it is stated that:

"The Agency must immediately notify the designated official of the designated department or public body in writing if at any time it is unable to comply with the approved procurement schedule and the reasons for such inability.

In terms of Regulation 17.2.1, ministerial exemption only becomes applicable upon failure by SITA to comply with its procurement mandate. The SITA letter has not indicated that the Agency is unable to comply, as required in terms of the regulations."

[60] On 3 July 2025 a Teams Meeting was held with FDA and Spoor and Fischer, CDH and SAPS Legal and TMS. It is agreed that no one will gain access to the PCEM and FPS systems and that FDA can do audits at any time to confirm that no access to their systems was gained.

[61] On 4 August Bouwers Attorneys confirmed PCEM did not infringe on any patent and:

"1.2 It is further our opinion that the South African Patent No. 2003/09721:

1.2.1 Is statutorily deemed abandoned irrevocably, as of 15 December 2004, well prior to its subsequently more than 10 years' delayed acceptance in 2013;

1.2.2 Lapsed in any event 6 months after its ostensible grant in 2013 on 28 February 2014, due to the non-payment of the first 7 annual annuities, and was never restored;

1.2.3 Was invalid from the beginning due to lack of novelty and inventiveness; and

1.2.4 Has never been infringed by the PCEM System, since:

1.2.4.1 The patented inventions were sold in 2005 to FDA, alternatively, licensed perpetually by IFS to FDA for the use of the patented inventions by the SAPS in South Africa;

1.2.4.2 The PCEM System uses duly authorized codes; and

1.2.4.3 The PCEM System *per se* falls well outside the scope of the patent."

[62] On 11 August 2020 pursuant to FDA requesting that SAPS honour the agreement CDH responded with:

- "4. We again remind you that following contempt proceedings by your client, it was agreed that the proceedings be stayed until 30 January 2020 for the parties to reach a commercial agreement. This much is clear from paragraph 6(a) of your letter dated 29 June 2020. The contempt proceedings have subsequently been stayed until 31 July 2020. It is trite law that a party cannot be forced to conclude an agreement/s, in particular, when one deals with taxpayers monies.
5. Our client has now completed its internal risk and governance processes pertaining to the remaining two software systems (being the FPS and PCEM software) (referred to as the "Target Systems"). Our client being bound by the Public Finance Management Act, 1999, the Preferential Procurement Policy Framework Act, 2000, Treasury Regulations and other relevant rules of governance has decided that it no longer wishes to conclude a commercial agreement with your client for the purchasing of the Target Systems.
6. This letter therefore constitutes a formal notification of the termination of the negotiations for a commercial agreement between the parties.
7. As to the orders of 30 January 2019 and 11 February 2020, we confirm that our client will by no later than 11 October 2020, return to your client:

7.1 all documents, diskettes, drawings and any other medium containing the information in respect of the FPS and PCEM systems, as well as copies, notes, adaptations or reproductions thereof;

7.2 shall deliver a certificate by an authorized representative of SAPS, certifying that all copies of the 1.0.074 version of FPS have been removed from the SAPS databases/network; and

7.3 shall deliver a certificate by an authorized representative of SAPS, certifying that all copies of the PCEM system have been removed from SAPS databases/network."

[63] On 18 September 2020 Magojane wrote to the three Ministers that:

"On the 31 January 2020, the National Treasury was requested to join a meeting between SAPS and SITA that was dealing with the long outstanding matter of the purchase of the IP of 3 systems owned by FDA. The FDA joined the meeting later. These initial discussions included consideration of a purchase price and a support and maintenance services plan for the 3 systems. Arising out of extensive deliberations and negotiations by all parties, a tentative or in-principle agreement was reached on the purchase price of R460 million including VAT for the IP of the systems, and a total of R120b million for support and maintenance over a period of 2 years. Notwithstanding this, the meeting undertook that the head of the responsible government institutions would present the proposed agreement to their respective executive authorities for final decision making. Based on the outcome of this consultation, the executive authorities were not in support of the proposed fair value agreed to in the meeting and requested that to find an amicable solution, National Treasury should embark on further consultations with FDA and relevant parties on this matter."

[64] On 26 November 2020 FDA is called to attend a meeting at the Police College despite FDA cancelling the agreement on 11 August 2020. In attendance were inter alia, Minister Cele, Deputy Minister Mathale, Groenewald and Nelson. It is recorded that the matters between FDA and SAPS is unresolved since 2017 and the Ministry and SAPS mandated the Deputy Minister to find a resolution as a matter of urgency.

The Deputy Minister attempted to obtain a month-to-month licensing agreement with FDA. FDA outright rejected a licensing agreement due to non-payment by SAPS and a severe breach of trust. The Minister then offered to procure the PCEM system only. FDA caucused and upon return to the meeting accepted the proposal provided the sale would be concluded by Monday 7 December 2020 on the draft agreement already negotiated. On 7 January 2020 the Minister of Police and FDA have a team's meeting pertaining to the procurement agreed to on 26 November 2020. It is reported by Sithole that they are awaiting a response from SITA on the buying option, not the licensing option. SAPS complained that the systems must be up and running because the DNA and other samples cannot be processed. Sithole confirmed that SITA is not saying SAPS could not implement the agreement, but SAPS must comply with the SITA Act.

[65] On 10 March 2021 before the Portfolio Committee on Police [PCOP] Magojane reported that MacRobert had been appointed and his valuation report was received by Treasury on 18 May 2020. Treasury had met with the parties and emphasized the urgency to finalize the matter. Cele reported that based on S381(b) there were internal issues in the SAPS. Sithole testified that; "In that first meeting which took place both the DG and the CEO [of SITA] recommended that as accounting officer I can then apply my mind to that particular proposal, which I did and that is when I signed the R460 million purchase to FDA." The Ministers intervened pertaining to fair value and Treasury was involved in that process. "I think in there then I made a second decision, again in terms of the cited Section 38 and I instructed the deputy national commissioner who was so assigned to put it in black and white and also inform the minister. But I also then informed the deputy minister that we were ready to effect payment in terms of the fair value outcome." Due to a time delay the R500 million that "was reserved was no longer available due to the end of the financial year." The third ruling of the PCOP is that General Sithole says that there is an agreement, confirming same and he must appear before the PCOP again the following week.

[66] On 17 March 2021 the follow up PCOP meeting is held. All the members express their frustration at SAPS pertaining to the FDA matter and that SAPS is being sued. Sithole also had to apologize to Treasury as their slides were incorrect averring that Treasury had not adequately replied pertaining to the FDA matter. Mogajane testified that:

"SCOPA may also entail legal issues. Treasury's major worry was over the negotiations over a system. He said that not giving FDA a letter of termination may pose problems. On top of this was the service delivery impact caused by manual processes. The negotiations process with FDA had seen parallel processes, in which SAPS was clearly attempting to procure the PCEM system from FDA by seeking a fair value assessment and entering talks, and then simultaneously attempting to replace the system through SITA. There was a lot of communication on this matter between the state and FDA and internally. If this communication was requested, it would prove an intention to pay on behalf of the state. This may cause fruitless and wasteful expenditure and legal costs, and a legal battle for Treasury."

[67] Sithole stated that SAPS would not pay fair value to FDA as it had no contract with it and did not need its IP anymore. Although there were sufficient advice and recommendations from Treasury to procure the systems from FDA there was an IP code issue and they proceeded to use SITA's system.

Was an oral agreement concluded?

[68] There is very little to gainsay that on 31 January 2020 an oral agreement to purchase the three systems from FDA for the price of R460 million [inclusive of VAT] and R120 million[inclusive of VAT] for two years support and maintenance with payment to be affected when the last party had signed the written agreement, was concluded. The evidence to support this finding is overwhelming and the defenses raised against such a finding are mala fide, unsupported by the common cause recorded facts and lacks credibility. I do not lightly make a finding of mala fides, but the reasons herein will bear out this finding.

[69] In evaluating the evidence, there is a risk of repeating the common cause facts, but it is regrettably necessary. Keating testified, all common cause facts, that from the end of 2018 until January 2020 they were not paid for the use of the systems with much litigation ensuing. Findings by Courts were made that the IP belonged to FDA as SAPS were paying license fees and Thlapi J found that FDA was the owner of PCEM. The Courts found that SAPS were infringing the rights of FDA and two Contempt of Court orders were granted against Sithole personally, and SITA, for non-

compliance with the court orders. In that time FDA's source code was breached and SITA was attempting to develop systems to replace FDA's systems. FDA had to lay off 70 employees due to non-payment by SAPS. Negotiations with SAPS in those two years came to naught.

[70] Keating testified that in January 2020 they had enough of the games and informed the SAPS that the Sheriff will on 31 January 2020 remove the systems. But, the cat and mouse games continued because now Sithole called Mufamadi and requested they urgently meet. Keating is not willing to attend, but they reluctantly agree. Keating and Mufamadi is then with ceremony, blue light brigade, escorted to the Presidential Guesthouse where there are many SITA and SAPS members and officials, they see the three Ministers in attendance and are then introduced to Mogajane of Treasury who is now there to broker the price for the three systems. The price is agreed, but Keating and Mufamadi refused to shake on the agreement reached due to the previous two years conduct of the SAPS and insisted on something in writing.

[71] Keating confirmed that the settlement was not made subject to procurement processes. At that stage if procurement processes were a problem they would have walked away. He knew there was emergency procurement in terms of 16 or 16A and this was an emergency for the SAPS as the systems were going to be removed that would, according to the court documents, leave the SAPS to use a pen and paper system. Furthermore, they were the sole supplier. Keating said nothing is to delay the process and no conditions for sale or payment would be accepted. Nothing was said about due diligence because the SAPS had been using the systems for between 7 and 10 years, it would be ridiculous to talk about that and if it had come up, Keating would have walked out and executed. Mogojane testified that a "firm agreement" had been reached and that procurement would not be an issue. This was so because FDA had rendered a service with these systems for a long period.

Groenewald typed the letter, FDA received the letter of agreement signed by Sithole by email within two hours of leaving the Guesthouse. All three systems were purchased and two years support and maintenance totaling R580 million. This evidence of Keating is borne out by the recorded common cause facts.

[72] Magojane confirmed in his evidence that he was tasked to negotiate the price. He ascertained that SAPS had budgeted R500 million and some, including for maintenance and support, and had done a good job in negotiating the price to be within budget for the agreement to be concluded. Keating testified that the Minister was at the Guesthouse when the settlement was reached and had said to Keating, "now it is sorted." But, in any event, a Minister has no input pertaining to price, it is common cause that a Minister has no statutory or constitutional duty pertaining to obtaining services or goods or to determine a price. Sithole as the National Commissioner is the Accounting Officer with this responsibility and he had agreed to the price as settled. National Treasury was asked to intervene and negotiated a price within the amount budgeted for. Magojane reiterated that he was informed that these key systems were critical and must be owned by the State and the price must be negotiated.

[73] But, the games continued. The letter confirming the oral agreement is withdrawn an hour after it was sent because Minister Cele is not happy with the price agreed to because he was informed of a GTAC report valuing the systems at R88 million. Neither FDA or Magojane were aware of this report or that the agreement was subject to Ministerial oversight. Sithole was aware of this report. FDA through its attorneys wrote to SAPS that they do not accept the withdrawal and the Court Order will be executed on 3 February 2020. Now again FDA is called to an urgent meeting. In that meeting they were informed that the GTAC report was hurriedly compiled, necessitating a further three weeks to come to a proper assessment. An undertaking is given that payment will follow on 28 February 2020.

[74] Keating testified that he was happy to have a fair value assessment take place as FDA knew no fair value of less than R500 million would emerge. Furthermore, the price of IP is generally determined by a fair value assessment.

[75] Magojane confirmed Keating's evidence that the oral agreement was in place except that the price would now be determined with a fair value process. FDA has obtained 4 valuation reports with the lowest value R462 million. By 28 February there is no outcome from the fair value process by SAPS, no payment of the outstanding license fees as agreed to that was to be made by 7 February 2020 and the undertaking to part-pay for the purchase of the systems was not made. FDA sent a final letter of demand to the SAPS on 5 March 2020.

[76] Again, FDA is called to a meeting at Kievietskroon, with Magojane not present, and FDA is offered R51.6 million. Keating testified that FDA walked out of the meeting. FDA wrote to Magojane that the price as agreed on 31 January 2020 will be enforced and the R51.6 million offered was rejected. Magojane testified he could not understand why he was not invited to Kievietskroon and he has a meeting with Keyise and Sithole on 25 March 2020. He testified that the meeting had resolved that the Mindworx report obtained by the SAPS of R250 million would be the lowest amount and the R462 million would be the highest amount payable. As there was still no consensus on the fair value he obtained the most prominent expert on the value of IP, MacRobert, to finally solve this issue. As the second show of good faith FDA will be paid R250 million as a minimum pending the final valuation by MacRobert. FDA responded that they accept the R250 million subject thereto that Sithole sign the Agreement as drafted as by FDA. All the above testimony again corroborated by the common cause recorded facts.

[77] On 29 May 2020 Magojane confirmed that MacRobert valued the three systems at R560 million. On 3 June 2020 Sithole wrote to SITA that they accept the price of R560 million.

[78] Despite the Court order finding that FDA owns the IP, the reports obtained by FDA and provided to the SAPS that they own the IP with no patents being infringed, the indemnity that FDA undertook to provide the SAPS pertaining to third parties, the ownership of the IP now caused a risk to the SAPS and prevented payment to be made. The averred Intelligence Report was not before Court as evidence and the content was not divulged. This contrary to Sithole's testimony that by 19 September 2017 he had taken the decision that there was so little risk to the SAPS he was prepared to pay R500 million for the FDA systems. That was because in 2016 the Forensic Services had informed him that all three systems belong to FDA. This is contrary to what Sithole surprisingly confirmed under oath in the urgent application; the IP belonged to the SAPS.

[79] And so, the games continue, now SAPS advised that it could not buy the VA-AMIS system due to budgetary issues and would deal with it in the new financial year. It was common cause there was a budget for all three systems. It was also implied that this system was not mission critical. Yet, Keating testified that this system is

related to DNA testing. The Hawks and 200 users of this system at Crime Intelligence alone, excluding other divisions of SAPS, used this system. Sithole did not ever use one of these systems and he could not testify as to how many members used it, but heard that only 40 licenses were issued. He testified he was informed that the VA-AMIS system was non-compatible and recalled that he was informed that the system was defunct. Sithole's evidence is improbable and rejected in light of the affidavits contradicting his evidence, setting out the critical importance of the systems, his hearsay evidence and the lengthy and sustained usage of this system by SAPS.

[80] Sithole testified that the 31 January agreement was solely to agree the price with no agreement being reached. Then he testified a "tentative agreement" was reached. Then he testified the price was fixed, but no procurement took place. Keyise in his evidence had no light to shine on whether an oral agreement was concluded or not.

[81] The evidence of Keating was reliable, mostly uncontested, credible and supported by the common cause recorded facts as set out above. His evidence that an agreement was concluded on 31 January 2020 is supported by the subpoenaed witness Magojane and the letter from Groenewald of SAPS confirming the oral agreement, received within 2 hours after the agreement was concluded. The mere fact that the letter set out that the agreement was to be recorded in writing does not negate that an oral agreement was concluded; it just had to be reduced to writing. The oral agreement was not subject to a written agreement being signed, payment was to be made upon the last signature appended to the written contract.

[82] In cross-examination it was put to Keating that the agreement had to go to the Minister due to the history of the matter. Later it was put that it had to go to the three Ministers that were present at the Legotla when the agreement was concluded. Keating testified that this was not raised when the agreement was concluded and if it was, they would have walked away and told the Sheriff to proceed with the execution who was waiting at Numeris. It was not pleaded that the agreement was subject to Ministerial approval and in any event is contrary to the common cause fact that the Minister of Police is barred from deciding on accounting issues. Sithole did not testify that the agreement was subject to Ministerial approval. The evidence was that the Minister was upset with the price in view of the GTAC report and could not understand that

Magojane, also from National Treasury, had negotiated a price higher than their own report. Magojane testified that he did not know of the GTAC report as GTAC did not form part of Treasury and in any event Sitole, is the Accounting Officer, not the Minister. This led to the fair value process which had nothing to do with the Minister, no Minister had to approve the process or the amount; the documentary proof supports that the Minister was not involved in the fair value process. This defence is untenable, not pleaded, mala fide and is rejected.

[83] The further defence put to Keating that there was never an agreement concluded, only negotiations, is blatantly untrue. The letter confirming the agreement was signed by Sithole and to plead that no agreement was concluded "at all" or "as alleged" is mala fide.

[84] The offers to make part payment pending the fair value process is common cause and proved that the agreement was concluded. The version put by Mr. Roux that the part payment was made for maintenance and support is legally flawed as Keating testified that maintenance is barred from being paid in advance. This was confirmed by Groenewald, legal officer of SAPS, in her email dated 13 February 2020. The part payment offer for R88 million was accordingly reduced to R57million, now excluding support and maintenance. The offers of part payment are clear proof that an agreement was concluded.

[85] Not a single question was put to Keating about an implied term in the oral agreement that procurement must take place, nor was any argument on implied terms made. The procurement argument was rooted in Statutory Legislation and no implied term or condition as pleaded.

[86] Magojane also made a very good impression on the Court. He was a subpoenaed witness with nothing to gain or lose. His evidence that a "firm agreement" was reached within two to three hours supported Keating's evidence. The evidence supports the particulars of claim that an oral agreement was concluded. The price agreed upon became an issue and a fair value assessment process followed. Treasury finalized the fair value process with SAPS accepting the price as determined by MacRobert. The agreement did not fall away; it was amended in that the price was

now fixed in a fair value process. It was common cause that a fair value assessment was agreed to.

[87] The patent issues raised were definitively disposed of by the reports filed by FDA and speculatively, by Spoor and Fischer, because SAPS had simply never disclosed what that report concluded.

[88] In cross-examination much was made of the fact that in a letter Magojane had used the word "in principle agreement" supporting Sithole's version that no agreement was concluded. Magojane explained that "tentative or in principle" in his English meant that Sithole just had to pay and so finalize, it did not relate to whether an agreement had been reached or not. He reiterated that a firm agreement was concluded and the fair value process resulted in an agreement pertaining to the price as valued by MacRobert. The plea denied that the price of MacRobert at R560 million was agreed to. This is inexplicable as the common cause documentary evidence of SAPS prove exactly the opposite. If this was SAPS's case, then the witness Sithole must be found to be unreliable and untruthful.

[89] Sithole did not make a good impression on the Court. His evidence was vague and illogical. His evidence was contradictory, not only in Court, but also contrary to his testimony before the PCOP and his affidavits in the other litigation. He, in the urgent application under oath, confirmed that the three systems belong to SAPS, while in his testimony before me he acknowledged that he knew prior to the urgent application in 2018 that FDA owned the copyright in the three systems. What was mystifying was his evidence that there was never any urgency in the matter being resolved, yet every time that an application was brought by FDA, or the real threat of the systems being removed by the Sheriff was there, he sprang into action with a meeting to prevent the disaster of not having access to the systems.

[90] This Court can without any fear of contradiction find that the systems were mission critical. The attempt by Sithole to downplay this fact renders him an unreliable witness. The affidavit for SAPS in the urgent application spells out why the systems were mission critical. The alternative to the systems, a pen and paper system was simply futile. He admitted that he knew that SAPS was interdicted from using the systems yet kept on using it. Not only did they access the systems, but he also knew

SITA was attempting to copy the systems. Also disturbing was his oral evidence that he was never worried about the two personal contempt of court orders against him. The fact that the National Commissioner of Police, a big cog in the Justice System, ignored contempt of courts orders and interdicts against SAPS, reflects a total disregard of the Judicial System. It further reflected his lack of commitment and compliance with undertakings and agreements and his *mala fide* approach towards his undertakings and agreements to FDA.

[91] He at the meeting of 31 January 2020 was in possession of the first Mindworx report but he never disclosed this to Magojane or FDA. It is unfathomable that he did not disclose this to Magojane as the "price- negotiator." The Kievietskroon meeting was again an attempt to salvage the use of the systems and to prevent cut-off, yet again, the Mindworx report is not disclosed to FDA and Magojane is not invited to this discussion about price. In his evidence he stated that the price was key, but he never disclosed the amount of R250 million. He could give no plausible reason why Magojane was not invited to the meeting. He conceded that pertaining to the fair value process the SAPS did not act fairly. I would find that SAPS acted *mala fide*.

[92] His evidence about FDA's averred patent infringements and the risk to SAPS was so vague and without factual basis that it is rejected. He could not tell the Court why the Spoor and Fischer report was never disclosed or what its content was. He could not tell the Court why the reports setting out the correct factual positions pertaining to the patents were not accepted. He testified that the Crime Intelligence Report was classified and could not be disclosed but that he had to take heed of the warning therein and therefore did not proceed. Yet this report was discovered in this matter and no evidence was led thereon. He also received a letter from IBM forwarded by SITA that there was a possible patent infringement. Despite this he on 10 June still offered FDA R389 million for two systems. The averred risk to SAPS is rejected as a red herring not to purchase the systems pursuant to SITA obtaining a back up system.

[93] At the PCOP Sithole never testified that the agreement was subject to Ministerial approval, nor that the agreement was cancelled. When confronted with this his answer was that he did not have enough time to tell the committee. This averment is so untenable that it is rejected. It would have been the honest and easiest statement to make if indeed the oral agreement was cancelled. At the first PCOP meeting the

committee members were frustrated with his vague answers and the meeting was postponed to the next week. Sithole had to apologize to Magojane for testifying that Magojane did not promptly respond.

[94] There was an oral agreement concluded on 31 January 2020 but amended to include a fair value process pertaining to price and the price was determined by MacRobert and accepted by both parties.

[95] Not in cross-examination of Keating, in the evidence of Sithole or in argument was a defence raised to the support and maintenance claim and this claim must too be granted.

Is the agreement invalid because a procurement process was not followed?

[96] The plea had a conditional counterclaim that if the Court should find that an oral agreement was concluded it was invalid and must be set aside on account of non-compliance with the procurement processes and for not having been procured by SITA in terms of the SITA Act.

[97] It is common cause that FDA as a supplier had no obligation pertaining to procurement. The procurement process was solely the responsibility of SAPS. I reject any contention that procurement was a condition of the oral agreement.

[98] It was put to Keating that the procurement process would have started in the event the executives approved the agreement, but because of the GTAC report there was no approval and the procurement process did not start. Keating replied that a supplier, FDA, is not responsible for procurement processes, it only had to sign the IP assignment agreement. Keating denied that there was any condition to the oral agreement pertaining to procurement processes at the meeting of 20 January 2020. He recalled that there was reference to a "16A6.4" as the procurement process. He knew this was an emergency procurement and that FDA was a sole provider. I accept Keating's evidence that nothing was said to FDA about procurement on 20 January 2020. Magojane testified that procurement was not going to be a problem because FDA was the sole supplier and the systems had been in use for a decade.

[99] Magojane testified that “procurement was neither here nor there, what would you put on a tender document”, it would be non-sensical. He reiterated that SAPS wanted to buy the systems, on 20 January 2020 the price was agreed, and there was money available. Sithole only had to exercise his discretion as Accounting Officer and he had done so when he sent the letter to SITA. He testified he had held the position of Accounting Officer and knew that a Minister has no role in procurement, Minister Cele had none. If Sithole sought deviation, then the Minister of SITA would have to grant deviation but did not play any further role in the procurement process. He, when conducting the fair value process, did not involve the Ministers because they did not have the authority, only the Accounting Officer had that authority.

[100] It was put to Magojane and Keating that Sithole had options as to how to procure and he exercised his discretion to get exemption from SITA. Sithole testified that he wanted to buy “through the SITA process.” It is common cause that Sithole never sought deviation from SITA despite being assured in writing that deviation would be granted. Keyise in his evidence confirmed that Sithole would be granted deviation within the week it was asked. Keyise testified that the procurement process must “happen via SITA.” Keyise’s evidence did not take the matter any further.

[101] The averments put to the FDA witnesses did not correspond with Sithole in writing on 1 July 2020 not relying on 17.2.1 [seeking deviation] but informing SITA that SITA must procure the system ‘within the ambit of the SITA Act.’

[102] The evidence of Sithole, the plea and counterclaim and the argument on behalf of SAPS pertaining to what procurement process was to be utilized construed a maze with no way out. In the plea reliance was placed on s217 of the Constitution, s2 of the PPPFA and the PFMA requiring a tender process with only Treasury to approve any deviation. This plea is not in line with the evidence led and has one of two results; the plea is a red herring or the evidence of Sithole is not credible. There simply was no evidence that the purchase of the IP must go to tender and the deviation had to be sought from Treasury. As testified by Magojane, previously an Accounting Officer and the DG of Treasury, what would such tender stipulate when SAPS is purchasing from the sole supplier who had been supplying for a decade?

[103] It was pleaded it was an unauthorized transaction contemplated in S68 of the PFMA and the SAPS is therefore not bound by the alleged oral agreement. The Supply

Chain Management Policy of the SAPS provides for a procurement process in line with S217 of the Constitution and any deviation therefrom requires National Treasury's approval. Again, it is pleaded that because no tender process was followed and no Treasury approval was obtained to deviate the oral agreement is invalid. This is rejected for the same reason as above. No evidence was led as to what requirements were not fulfilled in the legislation relied on but more importantly it was never put to Keating that a tender process was to be followed or that a deviation from Treasury was required. The opposite was put; a deviation was sought from SITA. Again, the plea and the evidence are contradictory reflecting on the *bona fides* of the defence.

[104] Furthermore, the plea avers the SITA Act provides that IT systems must be procured by SITA otherwise the procurement is invalid. This plea refers to the SITA Act that seemingly was relied on in evidence. I must remark that during the trial it was evident that the Counsel and witnesses for SAPS were not certain on what statutory act, regulation or policy it was relying for non-compliance with procurement rendering the oral agreement invalid. In cross-examination of Keating, only pursuant to an adjournment sought, counsel for SARS could put to Keating that Sithole would testify that he had options but exercised his discretion to get an exemption from SITA. Sithole when confronted with what procurement process, he was using he referred to the Police Act. Later he referred to the SITA Act and not the SITA Regulations. But, in any event then in writing denied that Regulation 17.2 was applicable. Sithole's evidence pertaining to procurement was inconsistent with the plea and the documentary evidence. He ever so often told the Court he had a team behind him that advised him and from his evidence it was clear that he did not have much personal knowledge of the procurement processes. Nobody from his team was called as witnesses.

[105] On behalf of SAPS it was argued that the procurement process would have been done through SITA or SAPS. If SAPS wanted to procure the systems it needed to be in terms of the regulations including 8,13,14 and 17. No such evidence was led or put to the witnesses. Surprisingly it is then submitted that no procurement process took place on 20 January 2020. It is surprising as FDA did not contend that procurement processes took place on 20 January 2020. An oral agreement was concluded; SAPS had to in terms of that agreement follow its internal processes. When the last party signed the agreement payment would follow.

[106] This Court cannot prescribe how the Accounting Officer must exercise his discretion, but there was no bar to completing the procurement process in terms of SITA Regulation 17.

[107] The common cause surrounding circumstances in this matter; mission critical systems that are interdicted from being used; systems that for operational and security reasons need to be in the hands of the SAPS and the Sheriff standing ready to remove the systems, necessitated an emergency procurement. SAPS was going to be without mission critical systems, with no other provider and SITA with nothing to offer as alternative at that stage. The SAPS would have to resort to a pen and paper system. Sithole defied the Court orders and was found in contempt of court for utilizing the systems, that is how necessary the systems were. The word "urgent" is recorded in nearly every meeting, minute and document and the fact that Sithole attempted to downplay this, is spurious and reflected on his credibility. Regulation 16A6.4 of the PFMA caters for such procurement. This Regulation was not used, but it could have been.

[108] Sithole testified he had SITA in mind when procuring. He could not explain the procurement process because his evidence had this golden thread that he had a team behind him, advising him. At the risk of repetition, none of these team members testified and Keating was not confronted with Regulations 7(3), 8, 13 and 14 as argued by Counsel at the end of the trial. The documentary proof defied this argument. Sithole asked SITA in writing whether SAPS can procure and whether a deviation would be granted. [Regulation 17.6.1]. It was put to Keating that this deviation process would be used by Sithole. Deviation was "pre-approved" in SITA's letter to SAPS, Sithole did not seek deviation. Sithole exercised his discretion but did not complete the internal processes and thereby repudiated the agreement. Sithole in fact set out that he "terminated the deal". It must be noted that when Sithole appeared before the PCOP he did not testify that by then he need not answer any further questions because "negotiations were stopped" or he had terminated the agreement.

[109] The new stance took in the letter of Sithole that SITA must procure the systems, not SAPS, was not covered in the evidence. Section 7(3) of the SITA Act reads as follows:

"Despite any other law to the contrary, every department must, subject to subsection (4), procure all information technology goods or services through the Agency."

It is common cause that for SAPS to procure the systems it must be done through the Agency. Keyise testified that it must be done through SITA. On no interpretation does s7(3) stipulate that SITA must procure the system and become the owner of the IP. Keating testified that SITA did not have a budget to procure the systems, this was never denied. Magojane did not enquire from SITA if they had a budget, but from SAPS. SITA knew that SAPS was buying technological goods or services, had no objection to SAPS procuring the systems and was so done "through" the Agency. In *SAAB Grintek Defence (Pty) Ltd and the South African Police Service and Others*¹ this position is confirmed in the Supreme Court of Appeal as follows: "All this makes it clear that SITA's role is that of an expert agency facilitating the acquisition of technology services by government departments, but it does not decide whether to acquire the technology, nor does it decide not to proceed with a tender process. That is the function of the relevant department."

[110] The fact that the IP agreement was not signed is no bar as in terms of s22(3) of the Copyright Act 98 of 1978 the document needs only be signed by the assignor [FDA], not the assignee [SAPS]. The SAPS did not.

[111] SAPS breached the agreement by not following the simple procurement process and so repudiated the agreement; the agreement was not invalidated. "An organ of State which is empowered by statute to contract is obliged to exercise its contractual rights with due regard to public duties of fairness."² This obligation was not fulfilled by SAPS.

The remedy

[112] FDA sought specific performance, alternatively damages. On behalf of SAPS it was argued that specific performance cannot be granted because specific performance is impossible and ineffective as SAPS did not need the systems and

¹ (316/2015) [2016] ZASCA 104; [2016] 3 All SA 669 (SCA) (5 July 2016)

² *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) par [21]

procurement could not follow. Granting specific performance would be inequitable due to the change in circumstances. The matters of *Rex v Milne and Erleigh*³ and *Santos Professional Football Club (Pty) Ltd v Igesund and Another*⁴ have found that Courts under these circumstances must not grant specific performance.

[113] Besides seeking specific performance there was no argument from FDA's counsel as to why specific performance must be granted and what is required for such remedy to be successful.

[114] When raising impossibility as a defence to specific performance it must be pleaded.⁵ This defence raised for the first time in argument was not pleaded. Furthermore, SAPS has the onus to prove impossibility. In *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) the Supreme Court of Appeal at p552 par [33] found that it is fatal for a defendant seeking to avoid an order for specific performance not to plead impossibility and not present evidence thereon. This is so because it is ordinarily the defendant called on to perform who has peculiar knowledge pertaining to the impossibility.⁶

[115] It was never put to Keating that performance of the oral agreement is impossible. Sithole did not testify what new systems are in place. Sithole did not testify to impossibility at all. This is fatal to SAPS raising impossibility as a defence to specific performance and specific performance must follow.

[116] In *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) the Court found that the general rule pertaining to impossibility will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault.⁷ In this matter the impossibility is self-created due to SAPS' non-adherence to time frames as set by SAPS itself. The impossibility is also due to SAPS' fault in not complying with the procurement process. "Impossibility is furthermore not implicit in a change of financial

³ 1951 (1) SA 791 (A) at 873G

⁴ 2003 (5) SA 73 (C)

⁵ *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SCA 398 (A) at 442E-F

⁶ *Shill v Milner* 1937 AD 101

⁷ Par [28]

strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.”⁸

[117] The Supreme Court of Appeal has for more than a century, laid down that the discretion to grant or refuse an order for specific performance arises when a claim *ad factum praestandum* is made and an alternative of awarding damages is available. In *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) the Court found that a right to specific performance is the cornerstone of our law. “It seems clear, both logically and as a matter of principle, that any curtailment of the Court's discretion inevitably entails an erosion of the plaintiff's right to performance and that there can be no rule, whether it be flexible or inflexible, as to the way in which the discretion is to be exercised, which does not affect the plaintiff's right in some way or another ... Practically speaking it follows that, apart from the rule just referred to [that the discretion be judicially exercised on a consideration of all relevant facts], no rules can be prescribed to regulate the exercise of the court's discretion.” It further found that “adequacy of damages” is not a defence because it “is a complete negation of a plaintiff's right to select his remedy.” It confirmed that impossibility of performance is a defence to specific performance. Also that specific performance may be refused in the exercise of a judicial discretion when to grant it would cause unreasonable and undue hardship to be visited upon the person against whom it is sought to be enforced. Hefer JA also found that another principle is “that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy.”⁹

[118] In *Ethekwini Municipality v Cooperativa Muratori and Cementisti - CMC di Ravenna Societa Cooperativa* (181/2022) [2023] ZASCA 95; 2023 (6) SA 384 (SCA) (12 June 2023) the Court found that the election is rather with the injured party, subject to the discretion of the Court. “Because it is clear that where, owing to the difficulty of assessing damages or otherwise, it is not possible to do justice by an order for the payment of money, and where it is in the power of a defendant to carry out his undertaking, then such a decree is the only appropriate remedy.”¹⁰ The Court warned that exercising a discretion in the interests of justice or to avoid due hardship “gets perilously close to rendering the simplest instances of judicial enforcement dependent

⁸ *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank* 2000 (4) SA 191 (W) at 198D

⁹ *Benson supra* at 783D

¹⁰ Par [26]

on the 'idiosyncratic inferences of a few judicial minds'. The power of a court to refuse judgment for a money claim arising from contract, when to grant it would be contrary to public policy, is a sufficient brake on excesses. The ambit of that relief has been carefully delineated, as has its position under the Constitution." And "Allowing the courts to refuse such a judgment in the exercise of a discretion may disturb the vital balance set in our public policy rules which are designed, *inter alia*, to ensure that the public interest in the values underlying the doctrine of *pacta sunt servanda* are adequately served and protected."¹¹

[119] FDA tendered to perform in terms of the amended agreement. Since there is no defence of impossibility pleaded there is no bar to granting specific performance of the agreement. The circumstances of this matter require imposing the contracting party to perform his or her obligation despite some hardship.

Costs

[120] Counsel for FDA in argument submitted that costs should be granted on an attorney and client scale due to grave misconduct and unworthy and blameworthy conduct. Punitive costs were not claimed in the particulars of claim.

[121] Counsel for SAPS submitted costs should be on a party and party scale, but costs of two counsel were justified on scale C.

[122] Although this is a matter where the conduct of SAPS prior to the court case, the plea raised and defence not raised, and the unreliable evidence could attract attorney and client costs I exercise my discretion not to grant this exceptional costs order. I am satisfied that cost of two counsel on scale C on a party and party scale is fair in the circumstances.

[123] The following order is made:

[123.1] An order is granted directing the SAPS to have its attorneys record the oral contract (as amended) in writing together with the plaintiffs' attorneys, and to forthwith sign the written version.

[123.2] In the event that SAPS should fail to comply with prayer [123.1] within ten days of the date of grant of this order, the plaintiffs'

¹¹ Par [40]

attorneys are authorised to record the oral contract in writing, and the Sheriff is directed to sign the written version in the place of the SAPS.

[123.3] An order is granted directing the SAPS to fulfil:

[123.3.1] any unfulfilled requirements imposed by law for the lawfulness of the procurement, insofar as there may be such requirements; and

[123.3.2] its obligations in terms of the oral contract (as amended) by paying the plaintiffs, upon the signature of the last party to the written version of the oral contract (as amended):

[123.3.2.1] the purchase price for the intellectual property in the computer programs in the amount of R644 000 000.00 (VAT inclusive);

[123.3.2.2] interest of the amount of R644 000 000.00 at the prevailing prescribed *mora* interest rate in terms of the applicable provisions of the Prescribed Rate of Interest Act 55 of 1975, per annum *a tempore morae* to date of final payment;

[123.3.2.3] the price for maintenance and support in the amount of R120 000 000.00 (VAT inclusive); and

[123.3.2.4] interest of the amount of R120 000 000.00 at the prevailing prescribed *mora* interest rate in terms of the applicable provisions of the

Prescribed Rate of Interest Act 55 of 1975, per annum *a tempore morae* to date of final payment.

[123.4] The first and second defendants are directed to pay the plaintiffs' costs of suit, jointly and severally, including the costs of two counsel on scale C.

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S. POTTERILL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

CASE NO: 32643/2021

HEARD ON: 21-25 July 2025, 28 July 2025, 31 July 2025

FOR THE PLAINTIFFS: ADV. R. MICHAU SC

ADV. C. WESLEY SC

INSTRUCTED BY: CR Law Incorporated

FOR THE DEFENDANTS: ADV. B. ROUX SC

ADV. T. PILLAY

INSTRUCTED BY: Cliffe Dekker Hofmeyr Inc.

DATE OF JUDGMENT: 9 December 2025