

**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF
SECTION 2(1) OF
THE SPECIAL INVESTIGATING UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996
(REPUBLIC OF SOUTH AFRICA)**

CASE NO: MP02/2025 & MP03/2025

In the matter between:

SPECIAL INVESTIGATING UNIT

Applicant

and

**MEMBER OF EXECUTIVE COUNCIL
RESPONSIBLE FOR HEALTH IN THE
MPUMALANGA PROVINCIAL
GOVERNMENT**

First respondent

**THE HEAD OF DEPARTMENT:
MPUMALANGA DEPARTMENT OF
HEALTH**

Second respondent

TARK GROUP PTY (LTD)
(Formerly known as Tuwo Rhodesia (Pty) Ltd)
(Registration Number: 2019/4507175/07)

Third Respondent

BONELELA MGUDLWA
(ID No: 83[...])

Fourth Respondent

KATLEHO OHARA MOKONYANE
(ID No: 92[...])

Fifth Respondent

JUDGMENT

MAKHOB A J

[1] The parties agreed that, this Tribunal hear both matters together because the parties are the same and both matters are similar in nature.

CASE NUMBER: MP02/2025

[2] In regard to the above case number: MP02/2025 the Special Investigating Unit (SIU) seeks to review and set aside contract for the procurement of 60 000 surgical masks used during Covid-19 pandemic. Further the SIU seeks to recover public funds wrongfully paid by the state.

[3] The procurement was initiated by the Mpumalanga Department of Health in April 2020. The third Respondent was awarded the contract on the 8th April 2020.

[4] Authorized by the Presidential Proclamation R23 of 2020, the SIU avers that, the procurement flagrantly violated the constitutional and statutory procurement framework designed to ensure fairness, competitiveness, transparency and cost- effectiveness.

[5] Moreover, the Applicant argues that the process unlawfully deviated from mandatory transversal contract, it bypassed internal bid committees and involved a supplier that was neither accredited for medical supplies nor licenced by SAHPRA to distribute medical services.

[6] In addition, it is argued that, the directors of the third respondent (Tark Group Pty Ltd) failed to disclose material conflict of interest.

CASE NUMBER: MP03/2025

[7] Under case number: MP03/2025, the Applicant seeks to review, declare unlawful & invalid and set aside contracts for the procurement of 150 000 type 5 protective medical jumpsuits during Covid-19 pandemic. The Applicant seeks to recover public funds wrongfully paid by the state.

[8] In this matter the parties are the same as in case number MP02/2025. On the 08 April 2020, the Department issued a binding promissory letter of award to the third Respondent (Tark Group Pty Ltd) one day before the official closing date.

[9] The Department paid the third Respondent the total sum of R13 297 500.00 for the jumpsuits

[10] The Applicant submit that this procurement flagrantly violated the constitutional and statutory procurement framework designed to ensure fairness, competitiveness, transparency, and cost-effectiveness. The process unlawfully deviated from mandatory transversal contracts and an existing fixed-term contract with Safarmex Medical Logistics, bypassed internal bid committees and involved a supplier that was neither registered on the Central Supplier Database (CSD) for medical supplies and most critically, did not hold the requisite SAHPRA licence to distribute medical devices. Furthermore, the directors of Tark Group failed to disclose material conflicts of interest.

[11] The Department is not opposing these applications and filed notices to abide.

ISSUES

[12] The issues that arise and argued in these applications are:

12.1 Whether condonation should be granted for the failure by the Applicant to act expeditiously in launching these applications to set aside the contracts and whether the undue delay defence by the Respondents can dispose of the entire applications.

ON CASE NUMBER MP02/2025

12.2 Whether the third Respondent did not hold the SAHPRA licence at the time of distribution and this rendered its participation in the procurement not merely irregular but unlawful.

12.3 Whether non-compliance with the Preferential Procurement Policy Framework Act 5 of 2000 and its 2017 Regulations.

12.4 Whether the Department did not show that it attempted to procure the masks from the multiple suppliers listed for surgical masks in Annexure A of National Treasury Instruction Note No. 8 before resorting to a deviation.

12.5 Whether the third Respondent was registered on the CSD under commodity codes for “water supply, sewerage, waste management”. It was not registered for the supply of medical devices, equipment or PPE.

12.6 Whether Paragraph 19.2 of the internal supply chain management (SCM) policy prohibits the delivery of goods before an official purchase order is

issued. In this matter goods were delivered on 20 or 23 April 2020 based on the promissory letter, the purchase order was issued only on 04 May 2020

12.7 Whether the fourth Respondent had links with the South African Airways and the fifth Respondent is the daughter of former Minister Nomvula Mokonyane. These relationships created a potential conflict of interest. Both the fourth and fifth Respondent are directors of the third Respondent. The fourth and fifth Respondents did not disclose these relationships.

12.8 Schedule and quotation approval payment pack, were generated by Safarmex weeks after the award and delivery.

ON CASE NUMBER MP03/2025

The issues are as follows:

12.9 The Department issued a binding Promissory Letter of award to the third Respondent on 08 April 2020 a day before the official closing date.

12.10 The Department received quotations from the third Respondent alone. There was no Bid Evaluation Committee (BEC) or Bid Adjudication Committee (BAC) as required by the Treasury Regulation 16A. 6.2 and 16A.6.3.

12.11 The third Respondent was not registered to supply medical devices, medical equipment or personal protective equipment. The third Respondent did not hold a SAHPRA medical device establishment licence.

12.12 Goods were delivered on a promissory letter with a purchase order only issued on 04 May 2020.

12.13 Failure to disclose material conflicts of interest.

12.14 Documents were generated by Safarmex on the 04 May 2020, weeks after the award and delivery.

RESPONDENTS DEFENCES

[13] Counsel for the Respondents abandoned the defence of prescription.

RESPONDENTS SUBMITTED THE FOLLOWING DEFENCES.

14.1 No statutory requirement existed for the third Respondent to hold a SAHPRA licence.

14.2 The non-disclosure of interest had no causative effect on the procurement outcome.

14.3 Goods were delivered, accepted and utilised. Their quality and value are not disputed and the review was instituted years after full performance. Our courts do not permit the state to retain the benefit of performance while recovering the price.

14.4 Even where invalidity is established restitution may be refused where it would serve no legitimate remedial purpose or would operate unjustly.

14.5 The claim for disgorgement is wholly unsubstantiated. The Applicant does not identify what “Profits” were earned and how they are calculated.

14.6 It would not be just and equitable to order disgorgement in the light of the elapsed time since the third Respondent has already provided the services.

DELAY BY SIU

[15] In assessing whether the delay in bringing these proceedings should be condoned and the merits of the case be determined, a number of factors require consideration. The Constitutional Court in *Buffalo City* has addressed the difference between PAJA and legality reviews in relation State self-review.¹ Whilst this case does not fall into the category of State self- review, the principles on delay nonetheless apply. It is necessary, before addressing these issues directly, to consider the assessment of delay in a legality review vis-à-vis a PAJA review. In both instances, a discretion has to be exercised whether or not to overlook a delay. The majority of the court in *Buffalo City* confirmed that the issue of reasonableness applies in both a PAJA delay and a legality review delay. Of course, the application of the reasonableness threshold differs between the two. A legality review involves a broader discretion. Theron J stated in *Buffalo City*:

*“There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available factors”*²

¹ *Buffalo city Metropolitan v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) (2019 (6) BCLR 661; [2019] ZACC 15) para 43-53

² Id par 53

[16] The Applicant submits that it completed and finalised this application within a reasonable time.

[17] Investigations by the SIU into Covid-19 procurement was vast and complex. The investigation involved many challenges like collecting and analysing voluminous records from multiple state Department and suppliers.

[18] The SIU had to unravel intricate schemes designed to bypass procurement control. Moreover, resource constraints.

[19] The Applicant submits that based on good cause and the prospects of success the Tribunal should grant condonation.

[20] The Respondents oppose the granting of condonation in the strongest terms. They point out that this application should be considered in accordance with the time frames of PAJA as it is administrative action and the review should have been instituted within 180 days.³ The Applicant contends that the review application is brought in terms of the Constitution more particularly section 1(c), 2 and 271 of the Constitution. In this case it is unnecessary to decide whether PAJA applies or legality review, as the delay is manifestly lengthy.

[21] On behalf of the Respondents it is submitted that the review was instituted outside the 180-day period.

³ Section 7 (1) PAJA

[22] It is further submitted that the Applicant alleges difficulties with the office of the State Attorney and later with private attorneys. According to the Respondents these difficulties must have been foreseen by the Applicant.

[23] The Respondent argue that the applicant did not apply for an extension of time under section 9 of PAJA. The existence of an explanation for delay cannot substitute for a section 9 application.

[24] In the absence of such an application, it is argued that the Tribunal is not vested with the authority to condone the delay regardless of the explanation advanced. It is further argued that on this ground alone, the application is fatally defective and falls to be dismissed.

[25] In my view, The Tribunal Rules do not prescribe time periods for the issue of process from date of alleged delinquency nor finalisation of the investigation. This is not a case of non-compliance within a time period envisaged by the Tribunal Rules. There are no time periods legislated. This however does not absolve an applicant from issuing process expeditiously. The requirement of the “soon as possible” principle applies to a legality review. It is necessary therefore to consider whether the delay was reasonable taking all the circumstances into account.

[26] I am mindful of all the submissions made by both parties on the question of delay. Guidance is given by Cameron J in *Buffalo City* where he stated:

“Even where a delay is found to be unreasonable, however, our precedents establish that a court retains a discretion to overlook the delay provided it is in the interests of justice to do so. This stage of procedural enquiry should not take

place in a ‘vacuum’. It must instead involve weighing (a) the effect of the delay on the parties; and (b) the nature of the impugned decision.’”⁴

[27] In applying all the principles referred to, I take all the factors into account. I find the delay was not wilful but exacerbated by the many factors referred to above. Clearly the various state entities were under-resourced at the time. There was no pre-verification in relation to their inefficiencies. The lack of resources and inefficiencies are self-evident and not obfuscated by the Applicant. The applicant has been frank with the Tribunal. The veracity of these submissions can be clearly corroborated from the facts presented.

[28] I do not discern any wilfulness on the part of the Applicant. It was caught up in a rather unique set of circumstances. The state of the National Disaster was an unusual time in our country and this seems to have resulted in some of the factual consequences in launching this application.

[29] In *Munsasmy*,⁵ Weiner J in weighing up factors pertaining to condonation referred to the Constitutional Court case in *Ferrris v FirstRand Bank Ltd* where it was held that:

“(L)ateness is not the only consideration in determining whether condonation may be granted...(T)he test for condonation is whether it is in the interest of justice to grant it. As the interest-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these

⁴ *Buffalo City Metropolitan Municipality v Asla construction (pty) Ltd* 2019 (6) BCLR 661 (cc) at para 121

⁵ *Munsamy and Another v Astron Energy (Pty) Ltd and others* 2022 (4) SA 267 (GJ) para 43

*enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors."*⁶

[30] It is trite that the delay must be judged together with the merits of the case. The Constitutional Court in *Geldenhuys v National Director of Public Prosecution and Others* held that:

*"(t)he general rule is that non-compliance with the rules of this court will be condoned when it is in the interests of justice to do so."*⁷

[31] This is a matter that requires finalisation and the proper analysis of the SIU's cause of action. Its prospects of success must be fully examined, and the interest of justice considered. In other words, the Applicant's prospects of success are not wholly without merit and an analysis is necessary to assess whether the relief sought is appropriate in accordance with our jurisprudence. It is also in the interests of justice to grant condonation for the reasons mentioned above in relation to the many challenges brought about by the state of National Disaster. The situation is linked to the under-resourced State Attorney during the State National Disaster which weighed down its resources. It must be emphasised that but for the State of National Disaster this inordinate delay would not have found success in relation to an undue delay defence. In the result I grant the Applicant condonation for the late filling of the review application.

⁶ *Ferris and another v FirstRand Bank Ltd* 2014 (3) Sa 39 (CC) Para 10

⁷ *Geldenhuys v National Director of Public Prosecutions and Others* 2009 (2) SA 310 (CC) (2009 (5) BCLR 435; [2008] ZACC 21) para 21.

[32] This Tribunal is of the view that the Applicant succeeded to prove the following on both matters MP02/2025 and MP03/2025.

32.1 The procurement process failed to adhere to the mandatory constitutional and statutory framework governing public procurement.

32.2 The process was characterised by multiple irregularities which the respondents failed to dispute.

32.3 There was no BEC or BAC meeting to adjudicate the quotations as required by Treasury Regulation 16A.6.2 and 16A.6.3 of the awards.

32.4 The Department's acceptance of non-compliant bids vitiated the legality of awards.

[33] In *Special Investigation Unit v Nozihle Construction and Projects CC and others*⁸ it was held that a contract for the supply of surgical masks without SAHPRA medical device establishment licence is unlawful and void ab initio.

[34] I am therefore of the view that the contracts in both matters are constitutionally invalid and void ab initio. The contracts in both matters are reviewed and set aside.

[35] I am further of the view that the corporate veil must be pierced in respect of the two directors and the disgorgement of profits unlawfully derived by the Respondents from the void contracts.

⁸ Case number M05/2023, delivered on 29/09/2025

[36] I make the following Order.

36.1 The draft orders marked “X” and “Y” are made the order of the court.

MAKHOB A J
MEMBER OF THE SPECIAL TRIBUNAL

Appearances:

Attorneys for the Applicant: Malatji & Co Attorneys

Counsel for the Applicant: Adv T Mosikili

Attorneys for the First Respondents: N. Z Mtshabe Inc

Counsel for the First Respondents: Adv M Mphaga SC

Date of hearing: 19 February 2026

Date of judgment: 25/3/2026

Mode of delivery

This judgment is handed down by email transmission to the parties’ legal representatives and uploading on Caselines. The time for delivery is deemed to be 12H00.