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

CASE NO: GP21/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
	28/04/2026
_____ SIGNATURE	_____ DATE

In the matter between:

THE SPECIAL INVESTIGATING UNIT

Applicant

and

STEELWOOD INTERNATIONAL t/a MADENA (PTY) LTD

First

Respondent

MEC: GAUTENG DEPARTMENT OF HEALTH

Second Respondent

DEPARTMENT OF HEALTH: GAUTENG

Third Respondent

Summary

Administrative Law — Legality Review — Locus Standi — Undue Delay — Condonation — Material Non-Joinder — Hearsay Evidence — Just and Equitable Remedy.

JUDGMENT

MASHILE J

Introduction

[1] The Applicant (“the SIU”) seeks to review and set aside a decision of Ms Lehloeny, the Chief Financial Officer of the Gauteng Department of Health (“the Department”) dated 20/21 April 2020. In terms of the decision, the Department procured personal protective equipment (“PPE’s”) from the First Respondent (“Steelwood”). The SIU further seeks to have this Tribunal declare unlawful and invalid all resulting commitment letters, contracts, and purchase orders issued by the Department to Steelwood.

[2] The application is founded on the Department’s failure to observe legally prescribed procurement processes when awarding the bid and thereafter entering into the contract with Steelwood. These processes stem from Section 217 of the Constitution of

the Republic of South Africa 1996 (“the Constitution”) and from other legal prescripts through which it finds expression. These are the National Treasury Instructions Notes and the applicable provisions of the PFMA, with the associated Regulations, germane to emergency procurement processes.

[3] Steelwood opposes the application. It has raised various preliminary points on which it contends the review application should be dismissed. The remaining respondents (“the MEC”) and the Department are not challenging the application, perhaps suggesting that they will abide by the outcome. I deem it important to address these preliminary points before merits, as each could be dispositive of the application. The following are the bases on which Steelwood maintains that the application should be dismissed:

- 3.1 The SIU lacks *locus standi*;
- 3.2 The entire application is premised on inadmissible hearsay evidence;
- 3.3 There is a material non-joinder of persons who have a direct and substantial legal interest in the matter;
- 3.4 There is material dispute of fact which is incompatible with seeking final relief in motion proceedings;
- 3.5 The SIU has unreasonably delayed bringing the review application; and
- 3.6 The facts on which the application is premised do not support disgorgement of profits or are against Steelwood.

[4] Steelwood has also brought a counterclaim against the Department for payment of the amount of R43 057 925.35. The SIU opposes the counterclaim on the basis that the Department, and not the SIU, is the proper party against whom such a claim ought to be instituted. In addition, the SIU contends that the Department is entitled to raise a defence of prescription, insofar as Steelwood may have failed to deliver the mandatory notice in terms of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2000, should it be found that such notice ought to have been given prior to 6 November 2023.

Preliminary Points

The Siu's Lack of *Locus Standi*

[5] Before dealing with the merits of this matter, the main issue of which I have outlined above, I deem it opportune to evaluate the points raised by Steelwood. Steelwood contends that the SIU lacks *locus standi* because, in support of the relief it seeks, it has attached the incorrect proclamation to its founding affidavit. Instead of annexing Proclamation R.23/2020, it attached notice Proclamation 74/2022. This incorrect proclamation concerns the period from 1 January 2013 to 11 April 2022. It concerns unlawful or improper conduct by claimants or Applicants or their agents in the institution of civil action or civil application proceedings for relief against the institutions in respect of medical negligence claims in a manner that was fraudulent or conducted by or facilitated through the improper or unlawful conduct of employees or officials of the institutions or any other person or entity to corruptly or unduly benefit themselves or any other person and any related losses or irregular or fruitless and wasteful expenditure incurred by institutions or the State as a result thereof.

[6] According to Steelwood, this administrative error deprives the SIU of the authority to pursue the relief sought against it. Steelwood contends that, although the SIU has subsequently annexed the correct proclamation to its replying affidavit after realising its error, it has failed to make out a proper case in its founding affidavit. On this basis, Steelwood submits that the application falls to be dismissed, as it is trite that an applicant must stand or fall by the averments contained its founding affidavit, which must be self-contained. The SIU, for its part, attributes the error to an administrative oversight on the part of its attorneys and seeks to remedy it by the annexure of the correct proclamation in reply.

[7] While the SIU has corrected the mistake, says Steelwood, it has not attached any confirmatory affidavit from its attorneys in support of this. Additionally, the SIU has not made any attempt to supplement the founding affidavit. In this regard, Steelwood has referred this Tribunal to several cases as authority for their assertion, among which is *ACSA (SOC) Ltd v Tswelokgotso Trading Enterprise CC*¹, where the Court held:

“Consequently, the applicant must set out sufficient facts in the founding affidavit to disclose a cause of action; that is, the founding affidavit must be self-contained. The replying affidavit (and in this instance the supplementary affidavit) cannot be used to augment the applicant's case.”

[8] To cite the *ACSA* case *supra* in support of the SIU's lack of *locus standi* is somewhat disingenuous because the facts are obviously distinguishable from this matter. I say this because the *ACSA* matter did not involve a situation in which the averments in the affidavit were correct, but the annexure was not. In this case, all the necessary averments in the founding affidavit are accurate, including the reference to the Proclamation. The only sin is that the SIU attached the wrong proclamation. For Steelwood to succeed with this point, a demonstration of prejudice is necessary.

[9] Steelwood cannot seriously contend that it was unable to respond to the allegations contained in the founding affidavit merely because an incorrect attachment was furnished. As correctly observed, the most straightforward course available to Steelwood would have been to request the correct attachment. Moreover, if Steelwood contends that it suffered prejudice as a result of the error, it has failed to demonstrate such prejudice to the satisfaction of this Tribunal. In these circumstances, the omission cannot be elevated to a fatal defect. This approach is consistent with the position adopted by the Court in *Trans-African Insurance Co Ltd v Maluleka*² conveying when it stated:

¹ *ACSA (SOC) Ltd v Tswelokgotso Trading Enterprise CC* [2022] ZAGPJHC 410 at para 9.

² *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F-G.

“Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

[10] Other than the above, this Tribunal held in *SIU v Fikile Mpofana (Pty) Ltd and Others*³ That Section 5(5) read with Section 4(1)(c) of the SIU Act empowers the SIU to bring civil proceedings in its own name, seeking the relief to which the Department is entitled. The review application falls within the rubric of civil proceedings as envisaged in Section 5(5). It emanates from an investigation conducted by the SIU within its investigative mandate as set out in Section 2(2) of the Act. The impugned decision relates to an alleged unlawful and irregular acquisitive act or transaction as envisaged in Section 2(2)(d) of the SIU Act.

[11] The Court in *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit*⁴ held that:

“[14] It further held that the review and setting aside of improper or unlawful conduct by employees of any state institution arising out of an investigation in section 2(2) of the Act is competent relief that may be sought within the meaning of civil proceedings in the SIU Regulations.

[15] It held that the SIU has the necessary locus standi to institute proceedings in the Special Tribunal.”

In the result, this point is bereft of any merit and is dismissed.

Material non-joinder

[12] Steelwood contends that the SIU makes serious allegations against Ms Lehloeny and states that it could not find deviations made by Professor Lukhele. These allegations,

³ *SIU v Fikile Mpofana (Pty) Ltd and Others* (GP13/2021) [2022] ZAST 4 (10 February 2022) at para 26.

⁴ *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* [2023] ZACC 8 at paras 14-15.

says Steelwood, are inadmissible in the absence of primary facts and proper evidence. Having regard to the allegations made, Ms Lehloenya and Professor Lukhele have a direct and substantial legal interest in this matter. As such, continues Steelwood, they should have been joined as parties to the proceedings or at least afforded a fair opportunity to respond to the allegations against them. Had either of these happened, they could have shed light on the bald averments made by the SIU.

[13] The legal position on joinder is succinctly captured in the case of *Cuducap (Pty) Ltd v De Bruyn*⁵ where the Court per Meyer JA stated:

“[9] It was not competent for the full court to make that order. It granted relief that was not sought by Mr de Bruyn. Furthermore, the full court made findings adverse to Standard Bank’s interests, without it being a party to the proceedings before the full court and the high court. The law on joinder is well settled. A court would not deal with matters where a third party who may have a direct and substantial interest in the litigation was not joined in the suit or where adequate steps could not be taken to ensure that its judgment will not prejudicially affect the party’s interests, nor would it make findings adverse to any person’s interests, without that person first being a party to the proceedings before it.”

[14] As early as 1949 and well before *Cuducap supra*, the Court in *Amalgamated Engineering Union v Minister of Labour*⁶ held that the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the litigation, but upon the manner in which, and the extent to which, the Court's order may affect the interests of third parties. In *Judicial Service Commission v Cape Bar Council*⁷ the Court said that the mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. Thus, the question is whether Ms Lehloenya and Professor Lukhele will have a direct and substantial interest

⁵ *Cuducap (Pty) Ltd v De Bruyn* 2024 JDR 1708 (SCA) at para 9.

⁶ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657

⁷ *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at 176I–177A.

in the order this Tribunal will make, or whether the order made will not be sustained or carried into effect without prejudicing them.⁸

[15] The SIU is unwavering in its view that there is no need to join Professor Lukhele, Ms Lehloenya, or any other official of the Department. I agree with that submission because, as in the *Judicial Service Commission* case *supra*, Ms Lehloenya and Professor Lukhele may have an interest in the outcome, but that interest may not be sufficient to constitute a direct and substantial one triggering non-joinder. Their interest in the order is no more than the possibility of criticisms of lapses in compliance with Section 217 of the Constitution and other legal prescripts governing the procurement process of Organs of State, such as the current one.

[16] Accordingly, their interest in the proceedings is, in the main, administrative in nature and does not constitute a direct and substantial legal interest in the outcome of this review as contemplated in our case law. On the facts of this matter, no basis exists upon which their joinder could be justified, save for a scenario in which the SIU were to seek substantive relief directly against them. Indeed, their non-joinder operates to their advantage, as any decision by the Department to pursue a claim for damages against them would have to be founded upon the statutory contract and would, in all likelihood, be met with a defence of prescription. Properly characterised, their rights are not affected by the subject matter of this litigation, and they accordingly lack a direct and substantial interest in its outcome. It follows that the *point in limine* based on non-joinder cannot succeed.

The entire application is premised on inadmissible hearsay evidence.

[17] Steelwood argues that the SIU's application is wholly founded on inadmissible hearsay evidence. Additionally, the SIU has made no attempt to address the provisions of Section 3 of the Law of Evidence Amendment Act in its founding affidavit. Ms Olivier's

⁸ *Kethel v Kethel's Estate* 1949 (3) SA 598 (A) at 610.

statement that the contents of her founding affidavit fall within her personal knowledge and are true and correct is objectively false. As such, says Steelwood, the SIU is precluded from relying on facts which do not fall within Ms Olivier's personal knowledge. As an example, Steelwood points out that Ms Olivier was not directly involved in the procurement of the masks and gowns mentioned above. Instead of attaching confirmatory affidavits from officials involved in the procurement of the gowns and masks, she has attached affidavits from officials who signed those affidavits before her founding affidavit.

[18] I am at a loss as to why Steelwood regards the affidavits of the Department's officials as hearsay evidence requiring confirmation. Ms Olivier, the deponent to the founding affidavit, conducted the interviews with those officials and reduced their evidence to sworn statements. Given that background, how can such evidence be inadmissible hearsay when Ms Olivier conducted the interviews personally? The affidavits may not be confirmatory, but they are certainly admissible as evidence relevant to this application. As such, she has first-hand knowledge of what the individuals she interviewed stated. There is no place in those statements where an appeal to the credibility of a third party is necessary. In the *Mpofana* case mentioned *supra*, this Tribunal held that such affidavits obtained under similar circumstances were admissible.

[19] The relevant statutory provision, insofar as hearsay evidence is concerned, is Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, which lays down that:

“Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (c) the court, having regard to-
 - (i) the nature of the proceedings.
 - (ii) the nature of the evidence.
 - (iii) the purpose for which the evidence is tendered.

- (iv) the probative value of the evidence.
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends.
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should, in the opinion of the court, be taken into account, believes that such evidence should be admitted in the interest of justice.”

[20] The Supreme Court of Appeal in *S v Ndhlovu* defined “probative value” in the following terms:

“Probative value’ means value for purposes of proof. This means not only, ‘what will the hearsay evidence prove if admitted?’, but ‘will it do so reliably?’ In the present case, the reliability guarantees are high. The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness.”⁹

[21] The Constitutional Court in the matter of *Kapa v S*¹⁰, held that admission of hearsay evidence is only allowed if it is in the interest of justice to do so, together with the factors in Section 3(1)(c) of the Law of Evidence Amendment Act, as I have set out above.

“In determining whether the evidence is reliable, the court must consider (i) any interest in the outcome of the proceedings by the witness (ii) the degree to which it is corroborated or contradicted by other evidence (iii) the contemporaneity and spontaneity of the hearsay statement and (iv) the degree of hearsay.”

⁹ *Ndhlovu and others v S* [2002] 3 All SA 760 (SCA) at 45.

¹⁰ *Kapa v S* 2023 (4) BCLR 370 (CC) at para 77.

[22] The significance of the evidence placed before this Tribunal lies in its corroborative value in relation to the SIU report. The report details the circumstances under which Ms Lehloenya selected and appointed Steelwood, including her decision to depart from a competitive procurement process. The evidence further confirms Steelwood's submission of a quotation and the various steps undertaken prior to the conclusion of the contract. Notably, Steelwood does not dispute the veracity of the affidavits deposed to by the officials concerned. In these circumstances, Steelwood cannot persuasively contend that it has suffered any prejudice. Moreover, no application has been brought to strike out the impugned hearsay evidence. To the extent that any such evidence relates to alleged non-compliance by departmental officials with the prescribed procurement processes, its admission is, in any event, in the interests of justice, particularly where its purpose is to establish the constitutional invalidity of the contract concluded between the Department and Steelwood.

[23] Additionally, the impact of refusing to admit the evidence should not be downplayed or forgotten. In short, it will defeat the objective of the whole investigation intended to detect irregularities, unlawful conduct and malfeasance, which had caused loss to the fiscus. A further purpose of the evidence is to set aside an unlawful contract and obtain a just and equitable remedy. If there is any prejudice of the amount to be paid by Steelwood, it will be addressed by an order of just and equitable relief. Its admission will therefore serve the interests of justice.

[24] I should add that rule 28(2) empowers the Special Tribunal, in the exercise of its powers and the performance of its functions, to take such steps in relation to the hearing of a matter as may include the relaxation or abandonment of the strict application of the rules of evidence, where this is necessary to give effect to the objects of the Act. In light of this provision, I would in any event be prepared to invoke the rule for purposes of admitting the affidavits which Steelwood contends constitute inadmissible hearsay. It is,

however, unnecessary to do so, as the affidavits do not constitute hearsay evidence. To the extent that any such invocation may nevertheless be required, rule 28(2) is applicable.

Material Disputes of Fact

[25] Steelwood claims that the SIU has come to this Tribunal seeking final relief on motion proceedings concerning issues which it must have foreseen, or ought reasonably to have foreseen, are replete with disputes of fact. Steelwood adds that this relates not only to the review relief, but also to the relief it seeks concerning the amount it alleges Steelwood should pay, totalling R11 393 825.94, according to Ms Le Roux. Steelwood contests the amount calculated as due and owing by Steelwood. Instead, Steelwood maintains that the Department owes it R43 057 925.35 for which it has launched a counterclaim against the Department.

[26] Essentially, disputes of fact arise because Steelwood maintains that it challenges the whole basis of the SIU's application. Furthermore, it disputes the contents of Ms Le Roux's affidavit. Her affidavit, argues Steelwood, cannot be correct where the SIU seeks relevant information as part of the court order to determine income, expenditure and profit. Steelwood concludes that this constitutes a genuine dispute of fact and a contradiction of facts on the SIU's version.

[27] Steelwood further argues that it has dealt with the SIU's non-meritorious defences to the counterapplication. I agree with the SIU that there is no substantiation for the relief Steelwood seeks. However, this does not mean that I have disregarded Steelwood's entire answering affidavit. On the contrary, I have carefully perused the answering affidavit. At paragraph 75 of the answering affidavit, Steelwood refers to Annexure "AA10", which is supposed to be a breakdown of the amount claimed by Steelwood in the counterapplication. On perusal, I could not find the breakdown of the amount nor could I find Annexure "AA10". All there is are invoices strewn about, and they are not marked.

Needless to state that I could not trawl through them to determine their relevance to the amount Steelwood is claiming in the counterapplication.

[28] In the circumstances, I discern no disputes of fact arising from Ms Le Roux's computation of the amount of R11 393 825.94 allegedly due by Steelwood to the Department. While the evidence explaining the manner in which this amount was calculated is clear and unambiguous, it is of no relevance to the determination of whether a factual dispute exists for purposes of these proceedings. This is so because the relief sought in the notice of motion is directed at requiring Steelwood, by reference to its financial statements and invoices, to determine the profit it earned from the Department. Accordingly, the fact that Steelwood has launched a counterapplication claiming payment in the amount of R43 057 925.35 does not give rise to a dispute of fact in the matter between Steelwood and the SIU.

[29] The main obstacle to the Tribunal's jurisdiction over disputes of fact is that it lacks jurisdiction to adjudicate contractual disputes between the Department and Steelwood. The matter with which this Tribunal is concerned emanates from the Department and Steelwood undermining Section 217 of the Constitution and other legal prescripts governing the procurement processes of Organs of State. To the extent that Steelwood may argue that the SIU has brought this review on behalf of the Department, I need to state that the SIU is doing so as a separate and independent entity, not on behalf of the Department. This is notwithstanding that the SIU, were it not for Section 4(1)(c) of the SIU Act, would not have had jurisdiction to sue Steelwood.

[30] Quite apart from the fact that the disputes raised by Steelwood are not *bona fide*, they do not arise on the facts of this matter, as the amount of R43 057 925.35 claimed in its counterapplication is not capable of determination in these proceedings. This Tribunal's mandate is circumscribed by the provisions of the SIU Act, and it does not extend to adjudicating contractual claims for payment advanced by Steelwood against the

Department. Steelwood's failure to draw a distinction between the SIU and the Department is thus misplaced. In the result, there is no basis for a referral to oral evidence, and the point raised in respect of disputes of fact must be rejected.

Undue Delay

[31] Steelwood contends that the delay in the institution of these proceedings is so unreasonable that the SIU ought not to be granted condonation for the late launch of the application. The factual background explaining why the SIU instituted the proceedings approximately one year and ten months after the conclusion of its investigation is not in dispute. The parties are, however, sharply divided on whether the delay is unreasonable and, if so, whether, having regard to all the relevant circumstances, condonation ought nonetheless to be granted.

[32] The approach to be adopted in condonation under the principle of legality is now settled, as is borne out by decisions of the Constitutional Court, the Supreme Court of Appeal and various Divisions of the High Courts. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*¹¹, the Court held:

“[48] Legality review, on the other hand, has no similar fixed period. This Court, in *Khumalo*, endorsed the test enunciated by the Supreme Court of Appeal in *Gqwetha* for assessing undue delay in bringing a legality review application (the *Khumalo* test). Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. Secondly, if the delay is unreasonable, the question becomes whether the Court's discretion should nevertheless be exercised to overlook the delay to entertain the application ...”

[33] It was further held in the *Buffalo City Metropolitan Municipality* case that, in assessing the undue delay, the clock starts running from the date the applicant became

¹¹*Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*, 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) at paras 48 to 63.

aware, or reasonably ought to have become aware, of the action taken. In opposition to *Urban Tolling Alliance v South African National Roads Agency Ltd*¹², it was explained that in legality principle matters, unlike in PAJA cases, there is no statutory presumption that after the expiry of the hundred and eighty days, mentioned in the Promotion of Administrative Justice Act ...the delay will automatically become inordinate, requiring a party to apply for condonation. All that is required is the application of the two-stage *Khumalo* Test, as I have set out above.

[34] The reasonableness of the delay in legality principle matters under the first leg of the *Khumalo* test is that it ought to be evaluated on, among others, the explanation offered. Where the assessment reveals that the delay is elucidated and excusable, it will be reasonable, and a consideration of the merits will be necessary. The explanation required for the delay must cover the whole period of the delay.¹³

Was The Delay Reasonable or Unreasonable

[35] The impugned decisions were taken on 20 and 21 April 2020, respectively. The Proclamation entrusting the SIU with the investigation was promulgated on 23 July 2020. Given that background, it can be inferred that the SIU received formal instructions to investigate from the President shortly after the Proclamation. The investigation commenced then and concluded on 29 August 2022, after which Ms Olivier submitted her findings to the SIU Management Team. Following the finalisation of the investigation, the SIU issued the founding papers in this application during June 2024. The question is whether the period taken to issue the founding papers in this application was unreasonable, given the context in which it occurred.

¹² *Opposition Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) at para 26.

¹³ *Tasima (Pty) Ltd v Department of Transport and Others* 2017 (2) SA 622 (CC) at para 153. Where there is no explanation, the delay will necessarily be unreasonable. See also *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

[36] The delay spans the period 23 July 2020, when the SIU became aware of the impugned decisions, to 11 June 2024, being the date on which this application was launched. The delay is therefore approximately four years. The explanation advanced for this period, particularly the phase between the receipt of the mandate to investigate and the conclusion of the investigation, is couched in broad and general terms. The SIU avers, for example, that it became inundated with matters requiring investigation and was compelled to prioritise those involving substantial amounts of public funds. However, it fails to provide any meaningful detail, such as the dates on which those matters were referred to it or when they were finalised by the courts. In my view, this explanation falls short of the standard required, as articulated in *Tasima (Pty) Ltd v Department of Transport and Others*, namely that an explanation for delay must cover the entire period thereof.

[37] The explanation that this matter delayed in the hands of the Office of the State Attorney, that the Auditor General challenged the validity of the panel of attorneys and that there were many back and forth of files between these various institutions is not sufficient. I say this because there have been instances where the SIU had successfully applied to use private attorneys i.e. those not on its panel. Why did it not do this when it realised that some of these matters were not moving due to compliance with formalities? When the matter ultimately landed on the table of its Counsel in November 2023, a further consultation with its Counsel was postponed to 6 March 2024. Apart from stating that the recess period intervened after its first consultation in November 2023, it is completely silent on why it did not do so at the end of the period, which is usually during the second half of January. Against that backdrop, I am constrained to find that the delay was indeed unreasonable, which triggers the second leg of the *Khumalo* test.

Should The Court Exercise Its Discretion and Condone the Unreasonable Delay

[38] In the Constitutional Court case of *Grootboom v National Prosecuting Authority & another*,¹⁴ the Court, admitting that the concept of the ‘interest of justice’ was nebulous, stated:

“[22] I read the judgment by my colleague Zondo J. I agree with him that, based on Brummer and Van Wyk, the standard for considering an application for condonation is the interests of justice. However, the concept ‘interests of justice’ is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.”

[39] In the same vein, Victor JP in *SIU v Kwasa Food Suppliers (Pty) Ltd and Others*,¹⁵ stated that the second stage of the *Khumalo* case inquiry entail a consideration of the following factors:

- 39.1 The nature of the decision to be reviewed;
- 39.2 The duty to review in terms of the relevant empowering legislation;
- 39.3 The consequences of setting aside the decision to be reviewed;
- 39.4 The potential prejudice to the affected parties;
- 39.5 The court’s ability to grant a just and equitable relief;
- 39.6 The interests of justice.

[40] Turning to the nature of the decisions sought to be reviewed, Ms Lehloenya took the first impugned decision on 20 April 2020, in terms of which the Department procured 1 500 three-ply surgical masks from Steelwood at a unit price of R16.50 (VAT inclusive), for a total consideration of R24 753 750.00. The second decision followed on 21 April 2020, pursuant to which the Department procured 500 disposable theatre gowns

¹⁴ *Grootboom v National Prosecuting Authority and Another* 2014 (1) BCLR 65 (CC) at para 22.

¹⁵ *SIU v Kwasa Food Suppliers (Pty) Ltd and Others* case no: EC02/2024 at para 31.

from Steelwood at a unit price of R175.00, resulting in a total contract value of R87 500 000.00. The SIU seeks an order declaring the contract concluded between the Department and Steelwood, together with all purchase orders issued pursuant thereto, unlawful and constitutionally invalid. In addition, the SIU seeks the disgorgement and divestiture of any profits earned by Steelwood from the supply of personal protective equipment under the impugned contract.

[41] It is not disputed that Ms Lehloenya did not have authority to make the decisions she did. Her power was limited to R500 000.00. Any procurement of goods or services above that amount had to be made by the accounting officer, Professor Lukhele in this instance. In any event, by the time Professor Lukhele issued the PO Ms Lehloenya had already cancelled the letter of commitment. Besides, Professor Lukhele did not report this to the Provincial Treasury within 10 days from the date of the decision. The contract was as such, irregular, constitutionally invalid and destined to be set aside.

[42] The SIU has a duty to review under the SIU Act. The Act authorises the SIU to launch civil proceedings to review and set aside unlawful decisions, and to seek damages where appropriate. While Ms Le Roux has computed the amount representing the Department's overpayment, the SIU is not specifically pursuing payment of that amount. It seeks relief to review and set aside the award of the tender, not for damages. Paragraph 3.3 of the notice of motion reads that if a dispute arises on the amount to be paid back by Steelwood, the matter be re-enrolled for determination by this Tribunal.

[43] If the application is successful, the consequence of setting aside the decisions of Ms Lehloenya will be that Steelwood will be directed to repay the amount by which it has been overpaid from the irregular and unlawful transaction concluded between it and the Department. According to Ms Mbeki of Supply Chain Management, notwithstanding the irregularities identified in the procurement process, the Department continued to enter into the contract with Steelwood and to make payments thereunder. This occurred despite

internal concerns having been raised regarding compliance with applicable procurement prescripts and the absence of proper authority for the decisions taken. The Department's continued performance under the contract cannot, however, serve to validate an agreement that was unlawful from inception, nor can it shield Steelwood from the consequences of having benefited from an invalid administrative act.

[44] Steelwood contends that the absence of evidence does not necessarily mean that the evidence was inaccessible. However, this argument overlooks a critical point. The SIU investigator specifically requested several documents, including proof of authorisation for the deviation in accordance with applicable procurement prescripts. Although the Department provided some of the requested documents, it failed to produce others, including the authorised deviation. In these circumstances, it is reasonable to infer that the Department did not possess the information it failed to furnish.

[45] The absence of proof of authorised deviation constitutes a clear contravention of Section 217 of the Constitution, as the process was neither fair, equitable, transparent, competitive, nor cost-effective. Setting the contract aside can only restore confidence in the rule of law.

[46] It must be emphasised that Steelwood will suffer no prejudice, as the claim concerns the return of amounts paid in excess of what was lawfully due to it. Whether Steelwood should ultimately be deprived of the profit derived from the transaction depends on whether the Department benefited from Steelwood's performance and whether Steelwood's participation contributed to the constitutional invalidity of the contract. The return of any amount overpaid by the Department will not prejudice either party. Conversely, if an overpayment occurred and condonation is refused, the fiscus will be impoverished by the amount of the overpayment.

[47] The relief sought by the SIU is the review and setting aside of the contract,

followed by the granting of just and equitable relief by this Tribunal. An assessment of the circumstances under which the parties concluded the contract indicates irregularity and unlawfulness. If this is established, it would be just and equitable to review and set aside the contract and to fashion an appropriate remedy in terms of Section 172(1)(b) of the Constitution. It bears emphasis that, in crafting such a remedy, this Tribunal is not confined to the relief set out in the SIU's notice of motion.

[48] A clear contravention of the constitution undermines the rule of law. Where this occurs, it will always be in the interest of justice that the situation be corrected - reviewing and setting aside the contract in this instance. Besides, the contract with Steelwood deprived many other potential service providers of the opportunity to bid, thereby disadvantaging the Department's ability to compare prices. For this reason too, the interest of justice dictates that condonation be granted.

[49] Other factors for consideration when deciding whether to grant condonation for undue delay are:

- 49.1 The nature of the relief sought;
- 49.2 The extent and the cause of the delay;
- 49.3 The effect of the delay on the administration of justice;
- 49.4 The reasonableness of the explanation for the delay;
- 49.5 The importance of the issue raised.

[50] According to Ms Mbeki, the SCM Management Team unequivocally informed Ms Lehloenya that Steelwood's appointment, and the subsequent conclusion of the contract, contravened the Constitution and the procurement prescripts governing the acquisition of goods and services by organs of state. The SCM Management Team further advised her to reverse the appointment and recommence the procurement process in compliance with Section 217 of the Constitution. Ms Lehloenya disregarded this advice and proceeded with the appointment. For this reason alone, there are good prospects of success.

[51] The reasons given for the undue delay in launching the review are valid. Most of the limitations were caused by factors outside the SIU's power. Mindful that I have stated that they could have applied for to use private attorneys instead of the Office of the State Attorney, the process of doing so itself could have protracted and the SIU could have found itself in the same position. It is also evident that the Office of the State Attorney was overwhelmed by a sudden influx of cases. I do accept that those matters had to be prioritised to ensure that those involving large amounts were addressed first, lest the funds be dissipated.

[52] The back-and-forth of the matters from the SIU to the Office of the State Attorney, to the panel of attorneys, the Auditor General challenging the validity of the panel of attorneys, and then back to the Office of the State Attorney had its own fair share of the delay. I am aware that the consultation with the SIU's counsel in March 2024 was rather delayed and that the SIU does not give a proper account for it. That said, and given that by then the case had been delayed already, no difference would have been made by consulting on the first available opportunity following the recess period. In any event, the magnitude and significance of this case warrant that condonation be granted.

[53] Undue delays in these matters, especially those involving the contravention of the Constitution, cannot be decided independently of public policy, which is an important consideration for certainty and finality of matters.¹⁶ The use of State funds for public benefit must be executed in a manner consistent with applicable legislation. No party can be given an advantage over others, as did the Department for Steelwood by not advertising the tender. Officials in office, such as Ms Lehloenya and Professor Lukhele, have a duty to comply fully with the procurement laws. Accordingly, public policy determines that the unlawful conduct in awarding the contract be authorised. Like in

¹⁶ *Special Investigating Unit v Member of the Executive Council for the Department of Transport, Kwazulu-Natal and Another* (KN/01/2021) [2024] ZAST 2 (27 February 2024) at para 51.

many other cases of this kind, Ms Lehloenya defied the advice she received from the SCM Management Team when she unlawfully appointed Steelwood.

[54] Turning to the issue whether the decision, although unlawful, was made in good faith.¹⁷ When Ms Lehloenya, on behalf of the Department, appointed Steelwood, it was in complete defiance of the advice the SCM Management Team had given her. The question arises: why was she so eager to proceed to the point of disregarding the officials involved in the process? The feeling that there was something for her in it if the transaction materialised is not easy to shake-off. Professor Lukhele, too, knew that he had not obtained approval for the emergency deviation. By overlooking compliance with these peremptory steps, they excluded other potential service providers who could not only have legitimised the process but would also have assured a fairer and equitable outcome. Thus, the decisions were not made in good faith.

[55] The issue is whether, in light of the facts relating to the SIU's delay in instituting this application, this Tribunal should exercise its discretion to condone the undue delay. It is trite that the Tribunal's discretion to condone an unreasonable delay is broad. However, as this Tribunal stated in *Kwasa supra* at paragraph 13, there must be a factual basis upon which that discretion is exercised in each case. Having regard to the evidence advanced in explanation of the delay, it would be in the interests of justice to exercise the discretion in favour of condonation. Accordingly, this preliminary point must fail.

Factual Matrix

[56] Attendant upon the advent of COVID-19 and the subsequent declaration of the National State of Disaster in March 2020 were several tender irregularity complaints. These complaints pertained to the procurement procedures to which Organs of State had to adhere when acquiring PPS during the National State of Disaster. When the disorders

¹⁷ *South African Broadcasting Corporation SOC Limited and Another v Former Chief Operating Officer: Motsoeneng and Others* (GP01/2021) [2022] ZAST 23 (18 October 2022) at para 64.

bedevilled the procurement processes, rendering the awards of various bids vulnerable to compromise, the President of the Republic of South Africa issued and published Proclamation R.23 of 2020 (“the Proclamation”).

[57] The Proclamation directed the SIU to investigate the matters referred to in the Schedule to the Proclamation. The investigation covered the period from 19 April 2020 to 23 July 2020, within dates of publication of the Proclamation, although it also authorised investigations into matters that took place prior to 19 April 2020 or after 23 July 2020, if they were relevant to, connected with, incidental or ancillary to the matters mentioned in the Schedule to the relevant Proclamation or involve the same persons, entities or contracts investigated under the authority of the Proclamation.

[58] The SIU investigation laid bare that the procurement of the PPEs in the Department involving Steelwood was flawed with grave irregularities. To understand the different defences raised by Steelwood, it is important to set out a full background of the facts.

[59] In March 2020, Ms Trinity Ncala (“Ms Ncala”), an entrepreneur, seized opportunity to assist Government and the private sector to source and supply PPE (“PPE”). Ms Ncala grew a network of suppliers and buyers of PPE in order to supply PPE to Government and the private sector. One of the companies Ms Ncala contacted was Steelwood. Steelwood thereafter engaged Ms Ncala as an independent business development consultant who would find opportunities in the public sector to grow the business. Through the efforts of Ms Ncala, Steelwood became an accredited vendor with Government on 26 March 2020. Following placing calls to various departments in different provinces, Ms Ncala ultimately secured the Department, which invited Steelwood to submit quotations.

[60] On 19 April 2020, the Managing Director of Steelwood, Mr Quentin McNamara (“Mr McNamara”) sent a written quotation to Ms Lehloenya regarding the sale of large quantities of various PPEs by Steelwood. The PPEs comprised of 3-Ply Surgical Masks and Disposable Theatre gowns. On 24 April 2020, in her capacity as CFO, Ms Lehloenya issued commitment letters to procure 1 500,000 of 3-Ply Surgical Masks at R 16,50 each, and 500 000 of disposable theatre gowns at R 175.00 each on behalf of the Department from Steelwood. All these prices were VAT inclusive. The combined cost of items was R112 253 750.00.

[61] It is not disputed that Ms Lehloenya did not have the delegation to sign contracts worth more than R500 000.00. On 29 April 2020, Professor Lukhele, the HOD, signed and issued Purchase Order (“PO”) Number 4250900261 for the supply of gowns in the total value of R87 500 000.00. The SIU alleges firstly, that Professor Lukhele did not approve the deviation from the normal procurement procedures when contracting with Steelwood. Secondly, the procurement incident was never reported to the Gauteng Provincial Treasury for the condonation of the deviation.

[62] On 03 May 2020, Ms Lehloenya sent an email to Steelwood attaching a cancellation letter for the commitment letter issued on 21 April 2020 for the delivery of the disposable theatre gowns. The reason for the cancellation of the letter was Steelwood’s failure to deliver the gowns within 7 days of receipt of the commitment letter. Although the commitment letter of 21 April 2020 was cancelled due to non-delivery, the PO of 29 April 2020 with PO number 4250900261 was not cancelled. On 24 April 2020, Ms Ntombiputhi Pooe (“Ms Pooe”) completed a RLS01 – Purchase Request Form (“RLS01”). Ms Pino subsequently signed this for the 500 000 gowns at R175.00 each.

[63] On 05 May 2020, a RLS01 was completed by Ms Pooe and signed by Ms Pino for the supply and delivery of 1 500 000 3-ply Surgical Masks at R16.50 each. An

uncompleted RLS02 - Good & Services Receipt Note (“RLS02”) was uplifted from the Department for the delivery of the 3-ply Surgical Masks.

[64] In an affidavit obtained from Ms Nombulelo Mbeki (“Ms Mbeki”), Deputy Director General: Supply Chain Management, Gauteng Department of Treasury, she confirms that she was nominated as an advisor to the Department: SCM. She was further elected to be the Chairperson during the COVID-19 period. Ms Mbeki was elected to be the Chairperson of the SCM Stream. The purpose of the SCM Stream was to provide advice on SCM processes and to conduct oversight of the processes followed in the Procurement of PPE by the Department.

[65] In the aforesaid affidavit, Ms Mbeki further deposed to the fact that:

65.1 During one of the SCM Stream meetings in May 2020 Ms Lehloenya was requested to give a break down on what processes of procurement was followed and how much stock was available. Ms Lehloenya did not attend the next meeting. When she eventually did, she stated that she did not have enough staff and she used to phone the suppliers herself to request PPE and to issue commitment letters to every service provider personally. Ms Lehloenya was informed that her process of appointing service providers was not transparent and was contrary to the provisions of Section 217 of the Constitution;

65.2 Ms Lehloenya was instructed to cancel the commitment letters which were issued irregularly and without following a procurement process.

[66] In an affidavit obtained from Mr Lesiba Arnold Malotana (“Mr Malotana”), Chief Operations Officer (“COO”), the Department, Mr Malotana stated that he was delegated to co-ordinate the Department’s response to the Covid pandemic during the first week in March 2020. He stated and confirmed that:

- 66.1 He was appointed on 16 April 2020 as the Deputy Chairperson of the Covid-19 Bid Adjudication Committee (“BAC”). According to him this BAC only dealt with PPE in response to the pandemic. BAC was not constituted at the time the Department first started to formulate a response to the pandemic, but months after;
- 66.2 During the initial period, there was no process to assist with the procurement of PPE. The Department did not have an approved tender process for the procurement of PPE. There was no established Bid Specification Committee (“BSC”), Bid Evaluation Committee (“BEC”) and BAC. According to Mr Malotana, Ms Lehloenya had taken over the SCM process for the procurement of PPE;
- 66.3 On 06 May 2020, Mr Malotana had a meeting with Professor Lukhele during which he complained that they were set up for failure as the BAC were completely ignored as procurement continued;
- 66.4 He explained that during a normal procurement process, the procurement is completed with the Department issuing a purchase order to the supplier before delivery of the products. The explanation that was given to him for the issuing of the commitment letters was that the Department was buying in an emergency situation, and because the Department was replenishing stock, the Department had to allow the supplier to source the products while SCM was checking the minimum governance requirements for issuing the PO.

[67] On 6 July 2020, the SIU (represented by the Project Manager, Ms Lorinda Adlam and the Senior Forensic Lawyer, Mr Robert Walser) interviewed Professor Lukhele. The SIU subsequently compiled a draft affidavit, which Professor Lukhele reviewed. However, the SIU did not finalise the affidavit; consequently, Professor Lukhele could not sign it. It is common cause that the head office of the Department received various allegations of irregularities and maladministration in respect of the procurement of PPEs

by the Department during the National State of Disaster, resulting from the COVID-19 pandemic.

[68] Among the concerns raised involved an allegation that Ms Lehloenya was procuring PPEs and related goods and services without involving any, or all the other role players, especially the Clinicians and End Users of such PPEs and related goods and services. Another main disquiet was that Ms Lehloenya was not sharing the scenarios and statistics compiled by the Scenario Makers and Actuaries with the other role players, which made it impossible for such role players, the Clinicians and End Users to know and understand:

- 68.1 The need and the estimated quantities that could be required at different times during the national disaster;
- 68.2 What was being procured in what quantities, and when such goods or services could be expected;
- 68.3 Goods were procured from suppliers who are not listed on National Treasury's Central Supplier Database;
- 68.4 Suppliers without verifiable banking details were appointed;
- 68.5 Orders were placed without the necessary Purchase Orders being issued on SAP;
- 68.6 Suppliers did not have valid tax clearance certificates;
- 68.7 Suppliers were paid without proof of delivery;
- 68.8 There appeared to be duplicate payments made to suppliers;
- 68.9 Prices of PPEs may have been inflated as they did not accord with Covid-19 PPE price thresholds set by the National Treasury;
- 68.10 Suppliers were paid from the Sundry Account of the Department which avoids certain checks and balances in the safeguarding of the procurement and payment processes;
- 68.11 Ms Lehloenya carried out the abovementioned or it occurred with her knowledge, or she ought to have been aware of its occurrence. Ms

Lehloenya did not have any authority empowering her in respect of anything done by her and had not been given any new, additional or further Delegations of Authority during the national state of disaster to act for and on behalf of the Department.

[69] The Department could not furnish the SIU with the original or copy of the deviation signed by any person required to do so in accordance with applicable procurement regulations. In the absence of evidence for the approval of the deviation, the SIU asks this Tribunal to infer that Professor Lukhele has never signed or approved the deviation.

[70] The SIU investigator declares that she has neither at any stage sighted any report to the Gauteng Provincial Treasury from Professor Lukhele regarding this procurement occurrence nor submission of any report to the Office of the Auditor General from him within 10 days from the date of issuance of the Purchase Order regarding the impugned procurement decision as per paragraph 3.4.3 of National Treasury Practice Note 8 of 2007/8. The Department could not produce such evidence to her or the investigation team.

[71] Between 20 April and 4 August 2020, Steelwood delivered 1 500 000 (580 boxes of three-ply surgical masks and 32 995 disposable gowns to Ms Lizelle Van Rooyen (“Ms Van Rooyen”) at 3G Warehouse, 1[...] K[...] Avenue, Lyttleton Manor, Centurion. On 05 August 2020, Ms Thandi Pino (“Ms Pino”), Department SCM, sent an email to Ms Van Rooyen advising her to stop receiving PPE goods at the Warehouse. On 11 December 2020, Ms Van Rooyen enquired from the Department the number of gowns to be delivered by Steelwood. Ms Van Rooyen stated in her email that the original number of gowns to be delivered (as per the commitment letter) was 500 000 and the PO stipulated the value as R87 500 000. Ms Van Rooyen calculated that Steelwood delivered

735 294 gowns which were more than 500 000 gowns required as per the purchase order. Steelwood delivered 235 462 quantities of extra gowns to the Department.

[72] Mr Dave Selby (“Mr Selby”), of the Department, confirmed this. According to him, the price of R119.00 per Gown was in line with National Treasury Regulations. On 15 December 2020, Ms Van Rooyen emailed Mr Selby to inform him that there were two suppliers of which Steelwood was one, who had valid PO’s and who could deliver gowns. Steelwood delivered in total 735 462 disposable theatre gowns to the 3G Warehouse of which 168 was a donation. Thereafter, the Department flagged Steelwood as one of several entities that were irregularly appointed for the procurement of PPEs. Hence, the Department refused to accept further deliveries of the balance of the remaining procured PPEs from it.

[73] During the same period, Steelwood submitted invoices to the Department for the PPEs in the amount of R99 823 742.60 and the Department has paid Steelwood R76 307 757.45. A balance of R 26 815 553.60 is outstanding due to the flagging based on irregularity that marred its appointment. The Department claims that it has not paid the balance as a result of the irregularity in the appointment of Steelwood. On the authority of the Proclamation, the SIU probed the procurement processes and concluded that Steelwood was irregularly appointed.

[74] On 29 March 2022, Ms Hesti Le Roux (Ms Le Roux), a Forensic Accountant appointed by the SIU conducted a financial analysis between prices on the invoices issued by Steelwood to the department for the products delivered in comparison to the regulated prices set by the National Treasury. The analysis has thus far indicated that Steelwood has potentially overcharged the Department by R 29 753 372.55 and that if reduced by the amount payable by the Department of R17 805 877.21, then the net amount of R11 393 825.94 is repayable by Steelwood to the Department.

[75] The SIU alleges that, apart from the fact that the procurement regulations were not complied with, Steelwood has overpriced the goods delivered to the Department. The SIU concludes that the evidence gathered demonstrates that the procurement processes were compromised when Steelwood was appointed.

Issues

[76] The main issue is to determine whether the Department has, by awarding the bid and concluding a contract with Steelwood, contravened the various legal procurement prescripts governing the procurement process of goods and services by Organs of State. If so, the Municipality has necessarily violated Section 217 of the Constitution that requires that Organs of State must procure goods and services using a system that is fair, equitable, transparent, competitive and cost-effective.

Legal Framework and Application

National Treasury Instruction (“NTI”) Note 8 Of 2019/2020

[77] Acting in terms of Section 76(4)(c) and (g) of the Public Finance Management Act, 1 of 1999 (“PFMA”) and pursuant to paragraph 9(a) of the Initial Covid-19 Regulations, National Treasury issued Instruction Note 8 of 2019/2020 headed: “Emergency Procurement in Response to National State of Disaster”. The pertinent paragraphs of the Instruction Note 8 state the following:

77.1 Its purpose was to facilitate emergency procurement to deal with the COVID-19 pandemic declared a national disaster on 15 March 2020. Paragraph 2.2 mentions a circular issued by the Department of Public Service and Administration (“DPSA”). In that circular the DPSA indicates that it is mandatory on all departments to “*procure sufficient hand sanitisers, soap, gloves, masks, tissues and, where possible, temperature scanners for use to monitor employees’ possible exposure*” to the COVID-19 virus;

- 77.2 Paragraphs 2.3 and 2.4 record that the regulations published under the Disaster Management Act, 2002 required institutions to continue complying with the PFMA and the applicable emergency provisions, but institutions would have to put in place additional measures to prevent the spread of the COVID-19 virus;
- 77.3 Paragraphs 2.5, 2.6 and 2.7 note that the nature of the goods were not goods that were ordinarily procured and the high demand might lead to uncompetitive and inflated prices and National Treasury had therefore put in place measures to assist institutions to procure the basic items and that the goods procured “*comply with the specification[s] as determined by the National Department of Health and at negotiated prices as agreed with suppliers*”;
- 77.4 To this end, paragraph 2.8 provides that National Treasury has engaged with Transversal Contract suppliers of these items and has put in place measures to ensure continuity of supplies, “*and to keep the prices in check*”. These items and prices were reflected in an addendum Annexure A: Table 1 to the Instruction Note 8;
- 77.5 Paragraph 2.9 records that for items not on Transversal Contracts, quotations had been sought from suppliers, and these were recorded in Annexure A: Table 2 attached to the Instruction Note;
- 77.6 Paragraph 3.3.2 notes that institutions that were already participating in Transversal Contracts “*may continue placings orders as usual*”;
- 77.7 In terms of paragraph 3.4, accounting officers “*may place orders with the suppliers listed on Table 2 for the specific items required*”;
- 77.8 In terms of paragraph 3.5, items that are not listed in Annexure A that are deemed to be “a specific requirement for the Institution” must make use of the emergency procurement prescripts in Instruction Note 3. Entities making use of the emergency procurement prescripts “*may deviate [from] inviting competitive bidding in cases of emergency*” and accounting officers

and accounting authorities were permitted to expand contracts for goods and services by up to 15% or R15 million. Anything above that required treasury approval;

77.9 Paragraph 3.7 stipulated that where more than one supplier per item was listed on Annexure A, an institution could procure from any suppliers that had stock available but where an institution or treasury already had a contract in place, that contract had to be honoured and the institution had to continue procuring in terms of that contract;

77.10 Paragraph 3.7.6 provided that:

“Institutions may approach any other supplier to obtain quotes and may procure from such suppliers on condition that-

- i. the items are to the specifications as determined by the National Department of Health;
- ii. the prices are equal or lower than the prices in Annexure A; and
- iii. the supplier is registered in the Central Supplier Database.”

77.11 Paragraph 3.7.7 provides that where institutions had already procured items prior to the issue of the Instruction Note using the emergency procurement procedures of Instruction Note 3, *“such procurement must be reported within 10 days to the relevant treasury.”*

Regulation 16A.6.4 with Section 38(1)(a)(iii) of the PFMA

[78] Regulation 16A.6.4 prescribes:

“If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority”.

[79] Section 38 of the PFMA is headed: “General responsibilities of accounting officer” and provides:

- “(1) The accounting officer for a department, trading entity or constitutional institution –
 - (a) must ensure that that department, trading entity or constitutional institution has and maintains –
 - (i) ...
 - (ii) ...
 - (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.”

[80] Steelwood contends that it cannot be held liable because it did not participate in the process leading to its appointment or the award of the contract. In essence, it claims to have been unaware of the procedure followed and to have assumed that the Department had complied with legally prescribed procurement processes. Without making any finding on Steelwood’s innocence, this contention is more appropriately considered in the context of determining a just and equitable remedy. To the extent that the point is raised to challenge the award of the bid and the conclusion of the contract itself, it is misplaced.

[81] Ms Lehloenya had no authority to make the decision to appoint Steelwood because of several reasons. When making the award, she failed to comply with NTI 03 of 2020/2021 and NTI 05 of 2020/2021. annexure A of the NTI 03 of 2020/21, which repealed NTI 05 of 2020/2021 states that Mask, face, aseptic: Fluid resistant, Molded, Blue (3 Ply), good breathability, internal and external faces should be clearly identified Type I, with ear loops or tie-on unit price is R10.22 per mask (3-ply Surgical Patient Mask) and Mask, face, aseptic: Fluid resistant, Molded, Blue (3 Ply), good breathability, internal and external faces should be clearly identified Type II, with ear loops or tie on unit price is R12.48 per mask (3 Ply-Surgical Mask -Health Care worker Mask).

[82] When Steelwood submitted the quotation, it specified that it would supply and deliver 3-ply surgical masks for health workers. The prices for both 3 ply masks, one being for patients and the other for health workers, and disposable gowns, as charged by Steelwood, did not accord with the pricing schedules per annexure A of the NTI 03 of 2020/2021. Ms Lehloenya appointed Steelwood on 20 April 2020 for the supply and delivery of the 3-ply masks at R16.50 instead of R12.48 per mask. On 21 April 2020, she issued another letter of commitment appointing Steelwood for the supply and delivery of disposable gowns at R175.00.

[83] Ms Lehloenya made the impugned decisions after NTI 03. of 2020/2021 had come into effect on 15 April 2020. The pricing structure of 3 ply mask and disposable Gowns, reflected on Annexure A of NTI 03 of 2020/2021 stayed the same after the repeal of Instruction Note No. 3 was repealed by National Instruction Note No. 5 of 2021/21. Paragraph 6 of NTI 03 of 2020/2021 requires state institutions to obtain relevant treasury approval in case of deviation for emergency procurement of masks and gowns as per annexure A. Steelwood's argument that Ms Lehloenya's failure to comply was due to the cancellation of NTI 03 of 2020/21 is rejected because the repeal did not change the pricing structure. Ms Lehloenya was therefore obliged to observe it, which she failed to do.

[84] On 3 May 2020, Ms Lehloenya cancelled the letter of commitment due to Steelwood's failure to deliver disposable gowns within 7 days from the date of appointment. NTI 05 of 2020/2021 repealed NTI 03 of 2020/2021, which came into effect on 28 April 2020. Professor Lukhele issued the purchase order after Instruction Note 5 had taken effect. The issuing of the purchase order was non-compliant as it was at variance with Instruction Note 5, which sets out the pricing structure for the procurement of disposable gowns and masks as per annexure A. Professor Lukhele's

issue of the purchase order, its cancellation notwithstanding, exacerbated the unlawfulness of the impugned decision as he did not obtain Treasury approval.

[85] Ms Lehloenya's failure to request quotations from multiple potential suppliers after cancelling the letter of commitment constitutes a direct violation of Section 217 of the Constitution. The process was neither fair, equitable, transparent, competitive, nor cost-effective. It lacked transparency because no explanation was provided why Steelwood was selected as the sole preferred supplier. The appointment could not have been fair or equitable to other potential service providers who were excluded from the process. Nor was it competitive or cost-effective, as no other suppliers were invited to submit quotations—an omission that denied the Department the opportunity to consider alternative service providers and to secure value for money.

[86] Steelwood accepts that the prices it charged for the items exceeded those stipulated in Annexure "A" but contends that this was justified by the superior quality of the products supplied. It further asserts that the Department acknowledged the enhanced quality. However, the prices charged for the 3-ply masks (for patients and healthcare workers) fell outside the price parameters prescribed in NTI 03 and 05 of 2020/2021, irrespective of the quality of the material used. If Steelwood elected to supply higher-quality materials at prices that were not negotiated or approved, it was not entitled to vary the agreed prices unilaterally. Steelwood was aware of the nature and specifications of the masks required by the Department and, having surveyed the market at the relevant time, ought to have supplied products that complied with those specifications.

[87] Turning to the disposable Gowns, Steelwood charged the Department R175.00 per disposable gown as is evident from the letter of commitment and Purchase order. In terms of Annexure A of the NTI 03 2020/2021 and NTI 05 of 2020/2021, the price for disposable gowns is R135.00 per disposable Gown. I agree that the prices set out in

annexure A of the NTI represent the maximum price for PPEs, having regard to product specified by Steelwood to supply and deliver to the Department, which was included in the pricing regime of the instruction note. There is a huge obvious difference between the R175.00 and the amount set out on Annexure A. It should not be disputable that the difference is the overpayment to Steelwood.

[88] The parties dispute where the onus lies to establish whether Professor Lukhele did, or did not, obtain deviation approval from National Treasury. Steelwood maintains that the absence of proof of such approval cannot be equated with its non-existence. However, when the SIU conducted its investigation, it was provided with the documents necessary to enable it to do so. Those responsible for furnishing the SIU with relevant material did not produce any deviation approval; instead, they produced only the purchase order signed by Professor Lukhele.

[89] The difficulty in matters of this nature is that officials employed by organs of state at the time an investigation commences are often themselves implicated in wrongdoing. In an effort to avoid accountability, such officials may withhold information that could implicate them or otherwise frustrate the investigative process by failing to cooperate with investigators. I accept that, if Steelwood were aware that the deviation approval existed, it would be in its own interest to produce it, as doing so would undermine the SIU's contention that no Treasury approval was obtained for the deviation. In these circumstances, it is reasonable to infer that Steelwood's failure to produce the deviation approval is indicative of its non-existence. On the available evidence, Professor Lukhele signed the purchase order without obtaining Treasury approval.

[90] Professor Lukhele failed to comply with Section 38(1)(a)(iii) of the PFMA by ensuring that the Department maintained a procurement system that was fair, equitable, transparent, competitive and cost-effective when Ms Lehloenyha made and communicated the impugned decisions to Steelwood on 24 and 29 April 2020. In terms of Regulation

16A.6.4, Professor Lukhele should have reported the deviation from the competitive procurement process to the AGSA. He also failed to comply with NTI 05 of 2020/2021, which required him to report the deviation from the normal procurement process to the Provincial Treasury. Thus, the process was flawed and rendered the transaction constitutionally invalid and unlawful.

Supply Chain Management Policy

[91] By signing and issuing the commitment letters before the completion of the Purchase Request forms (RLS01), Ms Lehloenya violated SCM Policy 2017. It is not contested that she completed the RLS01 for Masks on 05 May 2020, and that this was after the commitment letter was signed and issued to Steelwood. She also completed and issued the two RLS01 Forms for the gowns on 24 April and 5 May 2020 respectively. This occurred after the signature of the commitment letter of Steelwood.

[92] Ms Lehloenya also lacked the mandatory delegation to sign any Commitment Letter on the Department's behalf, as per SCM Delegation signed on 21 June 2018. Item number 42 of the SCM Delegation provides that the Accounting Authority has the power to award contracts above R500 000.00.

[93] In *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC*¹⁸, it was held that a tender concluded in breach of the legal provisions designed to ensure a transparent, cost-effective, and competitive tendering process in the public interest is invalid. In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer South African Social Security Agency*¹⁹, the Court held that: "if the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had the procedural requirements been 'properly

¹⁸ *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA) at para 16.

¹⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at paras 24 and 27.

observed”” and “deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process.”

[94] The foregoing constitutes a clear demonstration of a violation of the legislation governing the procurement process, rendering the transaction constitutionally invalid and unlawful. As a result, the impugned decisions are susceptible to review under the principle of legality, as entrenched in Section 1(c) of the Constitution, pursuant to which this review is brought. Accordingly, the decisions to appoint Steelwood and to conclude the contract are declared constitutionally invalid and are reviewed and set aside in terms of Section 172(1)(a) of the Constitution.

Just and Equitable Remedy

[95] According to the SIU, a just and equitable remedy would be achieved if this Tribunal directs Steelwood to disgorge the profits derived from the transaction in the amount of R17 827 252.48, alternatively, such amount as may be determined following a proper audit. The SIU further submits that such an order would not amount to the divestment of justly earned profit. Instead, it would secure the return of profits unduly received as a result of exorbitant pricing, in the total amount of R11 393 825.94.

[96] The essence of Steelwood’s counter-argument is that this Tribunal is not a court, and that Section 172(1)(b) of the Constitution confers remedial powers only on courts. Steelwood further contends that it played no role in the Department’s decision-making processes and is therefore an innocent party inadvertently caught in the impugned transaction.

[97] The Constitutional Court has confirmed that, although the Special Tribunal is not a court as contemplated in Section 166 of the Constitution, it is nevertheless empowered to perform functions ordinarily exercised by High Courts, including the adjudication of legality reviews and the granting of appropriate remedial relief. In *Ledla Structural*

Development (Pty) Ltd and Others v Special Investigating Unit,²⁰ the Court held that the Tribunal’s jurisdiction encompasses the review and setting aside of unlawful procurement decisions under the principle of legality.

[98] Steelwood’s asserted innocence may well be a relevant consideration when determining the appropriate remedy following a finding of constitutional invalidity. It is, however, immaterial to the anterior enquiry—namely, whether the impugned decision is constitutionally invalid in the first place. The declaration of constitutional invalidity turns on the objective lawfulness of the exercise of public power, not on the culpability or otherwise of the beneficiary thereof.

[99] Against that backdrop, it is proper to cite the provisions of Section 172(1)(b) of the Constitution, which provides:

“When deciding a constitutional matter within its power, a court –

(a) ...

(b) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[100] Steelwood have referred this Tribunal to various cases which warn that the following ought to be taken into account when crafting a remedy:

100.1 Considerations of pragmatism, including the prejudice that would eventuate from an order setting aside the impugned decision;

100.2 The extent of complicity or innocence of counterparties to state conduct;
and

²⁰ *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* [2023] ZACC 8 at paras 23-28.

The extent of the state's delay in instituting and prosecuting proceedings to review.

[101] I do not accept that the three considerations referred to above are relevant in this matter. The relief sought by the SIU is not divestment or disgorgement in the conventional sense. Put simply, the SIU seeks the return of the amount identified by Ms Le Roux as having been overcharged by Steelwood.

[102] Apart from a bald denial that it overcharged the Department, and an assertion that the Department in fact owes it an amount of approximately R43 057 925.35, Steelwood has failed to substantiate or amplify its denial. The SIU's position, as I understand it, is that although the appointment and award of the contract may have been constitutionally invalid, Steelwood did perform in terms of the contract, and the Department derived a benefit therefrom. That benefit, however, cannot extend beyond what Steelwood was lawfully entitled to receive. In these circumstances, it would be inappropriate to take the above considerations into account. Any third parties who may have been adversely affected are not without recourse and may pursue claims against the party or parties responsible for their loss.

[103] Having reflected on the above, I make the following order:

1. The SIU's delay in launching this application is condoned.
2. The decision of the Department to enter into and award, to Steelwood a contract as a service provider under Purchase Order No: 4250900261, including any or all commitment letters, extensions and addenda to such purchase orders is declared inconsistent with the Constitution and invalid.
3. The decision to enter into the aforementioned contract or any other contract that resulted from such decision is reviewed and set aside.
4. Steelwood is directed to submit a detailed statement (supported by all relevant documentation) of all income received and expenditure made in

respect of its appointment, performance and payment as a service provider by the Department to determine the overpayment by the Department within 30 days of the date of this order.

5. If the accounting and/or the sum of profit determined is disputed by either the SIU or Steelwood, either party may re-enrol the matter for a determination by this Tribunal.
6. This Tribunal may issue directives on any issue regarding the orders sought herein.
7. If the accounting and the sum of profit is not disputed or is agreed between the SIU and Steelwood, such profit shall be paid to the Department within 15 days of such agreement, together with interest as prescribed in the Prescribed Rate of Interest Act *a tempore morae*. from date which such agreed sum was paid to the Department until date of payment.
8. Steelwood is liable for the costs of this application, including such costs as may have been occasioned by the employment of two Counsel.

COUNTERCLAIM

[1] For the sake of clarity, the parties are referred to as they are cited in the claim in convention. In this counterclaim, the Respondent is the Department, which appears as the Third Respondent in the claim in convention. Steelwood, cited as the First Respondent in the claim in convention, is the Applicant in the present counterclaim.

[2] Steelwood has instituted a counterclaim for payment of an amount of R43 057 925.35. This counterclaim is not directed at the SIU, which is the Applicant in the claim in convention, but against the Department. Steelwood contends that it is entitled to pursue a counterclaim in these proceedings because the claim advanced by the SIU against it is, in substance, a claim brought on behalf of the Department. On this basis, Steelwood submits that it is permissible to counterclaim against the Department rather than to institute separate proceedings.

[3] Conversely, the SIU submits that Steelwood may not permissibly utilise these proceedings to advance a claim against the Department. The claim in convention arises from the failure of both the Department and Steelwood to comply with section 217 of the Constitution, which governs procurement by organs of state, as well as the broader statutory and regulatory framework through which section 217 is given effect. Moreover, although the SIU's authority to pursue this claim is derived solely from section 4(1)(c) of the SIU Act, the SIU is neither a privy to the Department nor its alter ego, but a distinct and independent statutory entity.

[4] The resolution of this counterclaim need not detain the Tribunal for long. This Tribunal lacks jurisdiction to entertain it. Its jurisdiction is confined to matters investigated by the SIU and placed before the Tribunal by the SIU for prosecution. The counterclaim does not implicate the SIU in any respect. It therefore falls outside the Tribunal's jurisdiction and does not belong in this forum. In the result, I make the following order:

1. The counterclaim is dismissed as this Tribunal lacks jurisdiction to entertain it.
2. Steelwood is liable for the costs of the SIU, including those for the employment of two Counsel.

JUDGE BA MASHILE
MEMBER OF THE SPECIAL TRIBUNAL

Appearances:

For the Applicant:	Adv T Ncongwane SC Adv MC Setlhako
Instructed by:	Office of the State Attorney, Pretoria
For the Respondent:	Adv N Maritz SC Adv T Govender
Instructed by:	Victor Nkhwashu Attorneys Inc

Date of Judgment: 28 April 2026

Mode of delivery

This judgment is handed down by email transmission to the parties' legal representatives, uploading on Caselines and release to SAFLII and AFRICANLII. The date of delivery is deemed to be 28 April 2026