



**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: GP06/2025

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
14/09/2026	
SIGNATURE	DATE

In the matter between:

SPECIAL INVESTIGATING UNIT

APPLICANT

and

**MEMBER OF EXECUTIVE COUNCIL
FOR HEALTH: GAUTENG PROVINCE**

FIRST RESPONDENT

**MEMBER OF EXECUTIVE COUNCIL
FOR EDUCATION: GAUTENG PROVINCE**

SECOND RESPONDENT

IKATHI HEALTH (PTY) LTD

THIRD RESPONDENT

RELEBOGILE JUDY BATHIBANG

FOURTH RESPONDENT

KAT LABORATORY AND MEDICAL (PTY) LTD

FIFTH RESPONDENT

ADAM DODKINS

SIXTH RESPONDENT

DENISHE NADESAN N.O.

SEVENTH RESPONDENT

TRACEY HEMPHILL N.O.

EIGHTH RESPONDENT

JUDGMENT

Mashile J

Introduction

[1] This is a legality review in which the Applicant, the Special Investigating Unit ("SIU"), seeks to impugn the decision of the First Respondent, the Gauteng Department of Health ("the Department"), to appoint Ikati Health (Pty) Ltd ("Ikati Health") for the supply of 5 000 infrared non-contact digital thermometers ("the Thermometers") pursuant to Request for Quotation ("RFQ") No. COVID 19/155 T. The SIU seeks an order reviewing and setting aside that decision, together with an order declaring the resultant contract unlawful, constitutionally invalid and void *ab initio*.

[2] As a just and equitable remedy in terms of section 4(1)(c), read with section 8(2), of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("the SIU Act"),

an order declaring the ensuing contract between the Department and Ikati Health, including any approval of award letter, letter of commitment, purchase order or any other document claiming to establish an agreement (collectively, "the impugned contract"), constitutionally invalid. In the alternative, the SIU seeks an order reviewing and setting aside the impugned contract as unlawful, invalid and void *ab initio*. In addition, the SIU seeks consequential relief directing Ikati Health, together with the Fifth Respondent, Kat Laboratory and Medical (Pty) Ltd ("Kat Lab") and any other respondent found to have benefited from the impugned contract, to repay all profits derived therefrom.

[3] The SIU found the review on seven grounds, which I briefly proceed to set out below:

- 3.1 When the Department approved Ikati Health's quotation for the supply of 5 000 thermometers, the Head of Department failed to comply with paragraphs 3.4 and 3.5, read together with paragraph 3.1, of National Treasury Instruction Note No. 05 of 2020/21;
- 3.2 Paragraph 4.6(c) of the Instruction Note required the Department to procure Personal Protective Equipment ("PPE") from suppliers registered on the Central Supplier Database ("CSD") and any other database approved by the National Treasury. Ikati Health was not registered on the CSD as a supplier of medical supplies or PPE at the relevant time. Accordingly, the Department was not entitled to invite Ikati Health to respond to the RFQ, and its inclusion in the procurement process was contrary to the requirements of paragraph 4.6(c) of the Instruction Note;
- 3.3 In approving Ikati Health's quotation for the supply of 5 000 thermometers, the Department acted in contravention of section 2 of the Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA"), regulation 6 of the Preferential Procurement Regulations, 2017, Treasury Regulations 16A3.2(b) and (c) and 16A6.3(b), and paragraph 26 of the Department SCM Policy. These prescripts were applicable to and binding upon the

procurement process in question, and the Department's non-compliance therewith rendered the process irregular, unlawful and constitutionally invalid;

- 3.4 In response to the RFQ, Ikati Health furnished a B-BBEE certificate reflecting that it was a 100% black female-owned enterprise. The investigation established that this representation was false and materially misleading. The submission of the false ownership information constituted a fronting practice and/or a misrepresentation prohibited by the Broad-Based Black Economic Empowerment Act 53 of 2003 ("B-BBEE Act") and rendered Ikati Health liable to criminal sanction under section 130 thereof. The misrepresentation unlawfully influenced the outcome of the procurement process and thereby violated the procurement principles enshrined in section 217(1) of the Constitution, namely that public procurement must be conducted in accordance with a system that is fair, equitable, transparent, competitive and cost-effective;
- 3.5 The Department's conduct was inconsistent with paragraph 4.6 of the Instruction Note. Although more than one quotation was received in response to the RFQ, the Department proceeded to make multiple awards to different suppliers under the same RFQ, thereby splitting and duplicating the specified PPE quantities among those suppliers without first subjecting each award to a separate competitive process. In effect, each award constituted a distinct procurement decision, yet no competitive quotations were obtained and evaluated in respect of the quantities awarded to each successful supplier. This deprived the Department of the benefit of proper price competition and rendered the procurement process unfair, non-competitive and inconsistent with section 217(1) of the Constitution;
- 3.6 Following the award, Ikati Health effectively ceded or subcontracted the whole of the impugned contract to Kat Lab. Such subcontracting exceeded the 25% limit prescribed by regulations 6(5) and 12 of the Preferential

Procurement Regulations, 2017. Moreover, Kat Lab, which was wholly owned by Mr Keith Dodkins ("Keith Dodkins") at the time, did not possess the preferential procurement credentials relied upon by Ikati Health in securing the award and, at best for the respondents, qualified for a materially lower preference than that claimed by Ikati Health. The arrangement therefore undermined the objectives of the PPPFA and the B-BBEE Act, constituted an impermissible circumvention of the applicable procurement framework, and rendered the award and its implementation unlawful and invalid; and

- 3.7 Ikati Health and Keith Dodkins abused the distinct juristic personalities of Ikati Health and Kat Lab as a façade to obscure the true flow of benefits under the impugned contract and to conceal the excessive profits jointly extracted from the transaction. The effect of their arrangement was that the respondents realised a profit of approximately 185% from a procurement undertaken during a national state of disaster and a global pandemic. Such conduct undermined the constitutional imperatives of fairness, transparency, competitiveness and cost-effectiveness in public procurement, constituted an abuse of corporate personality, and rendered the resulting transaction unlawful, invalid and inconsistent with section 217(1) of the Constitution.

[4] In opposing the review application, the Respondents advance the following contentions:

- 4.1 The procurement was lawfully conducted in terms of the emergency deviation framework applicable at the time;
- 4.2 Whether regarded as mandatory preconditions under the earlier Treasury Instruction Notes or as substantive indicators of constitutional compliance under the subsequently adopted emergency framework, the procurement satisfied each of the three recognised safeguards applied by this Tribunal in COVID-19 procurement matters, which are:

- (a) the thermometers complied with the specifications prescribed by the Department;
 - (b) the contract price was materially below the applicable benchmark; and
 - (c) Ikati Health was properly registered on the CSD.
- 4.3 Ikati Health submitted the lowest quotation among the responsive bidders;
- 4.4 The goods were duly delivered, accepted, and deployed for their intended public purpose;
- 4.5 The Respondents acted in good faith and were not complicit in any alleged procedural irregularity; and
- 4.6 The extraordinary relief sought by the SIU, including disgorgement of profits, the piercing of the corporate veil, and the imposition of personal liability, is disproportionate, legally unsustainable, and precluded by recent authority of the Supreme Court of Appeal. In particular, the Respondents rely on *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others*,¹ in which the Court rejected the proposition that the disgorgement of profits is automatic or punitive in circumstances where a contract has been fully performed at competitive market prices.

Factual Matrix

[5] On 23 July 2020, the President of the Republic of South Africa referred allegations of impropriety relating to the affairs of various state institutions, including the Department and the Second Respondent (collectively, “the Departments”), to the SIU. The referral was effected through Proclamation R.23 of 2020 (“the Proclamation”), published in Government Gazette No. 43546 on 23 July 2020. The Proclamation defined the terms of reference of the SIU and authorised it to:

- 5.1 Investigate any unlawful conduct in connection with the procurement of goods or services during, or in respect of, the National State of Disaster

¹ *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others* [2025] ZASCA 179.

declared under Government Notice No. 313 of 15 March 2020, by or on behalf of all state institutions, including the Departments, and any payments made pursuant thereto in circumstances where such procurement or payments were irregular or otherwise unlawful; and

- 5.2 Exercise and perform all functions and powers assigned to or conferred upon the SIU by the SIU Act, including the recovery of any losses suffered by the Departments arising from the matters identified in the Schedule to the Proclamation.

[6] Following the publication of the Proclamation, the SIU conducted an investigation under the authority conferred upon it. The present civil proceedings are instituted by the SIU in terms of sections 4(1)(c) and 5(5) of the SIU Act, read with the Proclamation, and arise from the investigation conducted pursuant to the Proclamation.

[7] The Second Respondent, the Department of Education, approached the Department for assistance with the procurement of PPE to prevent and mitigate the spread of the COVID-19 pandemic in its schools. Accordingly, on or about 21 May 2020, the Health Procurement Committee convened a meeting to discuss the quantities of PPE required by the Department of Education to ensure that adequate supplies were available before the reopening of schools on 1 June 2020. Digital thermometers were among the PPE items identified for procurement.

[8] Following the above, the Department drafted a specification for the procurement of 5 000 thermometers. The SIU's forensic investigation was unable to establish which officials were responsible for drafting the specification or what information informed its formulation. The specification required bidders to supply 5 000 thermometers. On 23 May 2020, the Department issued an RFQ based on that specification to nine companies. The SIU investigators were unable to locate any records indicating how those nine suppliers

were identified or selected to receive the RFQ, and no witness could provide an explanation in this regard.

[9] The closing date for the submission of quotations was 24 May 2020 at 10h00. The bidders had less than 30 hours within which to prepare and submit their quotations. On 23 May 2020, Mr Adam Dodkins ("Adam Dodkins"), the Administration Manager of Ikati Health, submitted a written quotation by email on behalf of Ikati Health to the Department. In its quotation, Ikati Health offered to supply the Department with 5 000 thermometers at a unit price of R895.00. The total quoted price for the supply of the 5 000 thermometers was R4 475 000.00.

[10] The minutes of the Bid Evaluation Committee ("BEC") meeting held on 24 May 2020 at 10h30 reveal that only six of the nine companies invited to submit quotations responded to the RFQ. Following the evaluation of the quotations received, the BEC resolved as follows:

- 10.1 Ikati Health be awarded the contract for the supply of 5 000 thermometers at a total contract value of R4 475 000.00;
- 10.2 Three other companies were recommended but did not receive any award; and
- 10.3 One company was found to be non-compliant.

[11] The quotations submitted by the remaining bidders reflected unit prices ranging from R1 461.36 to R2 498.00 per thermometer. Accordingly, the quotation submitted by Ikati Health, at R895.00 per unit, was the lowest-priced compliant bid received by the Department.

[12] Ms Bathibang ("Bathibang") and Keith Dodkins are reflected as directors of Ikati Health in a report obtained from the Companies and Intellectual Property Commission ("CIPC"), the statutory body with which the company is registered. The CIPC records

indicate that both Bathibang and Keith Dodkins were appointed as directors of Ikati Health on 4 April 2019. In addition, the CSD registration report for Ikati Health, dated 6 May 2020, reflects that the company was registered on the CSD on 23 April 2020 under the category of human health and social work activities.

[13] On 25 May 2020, the Department approved the quotation submitted by Ikati Health. The letter awarding the contract to Ikati Health was signed by Ms K Lehloenya ("Lehloenya"), who at the time served as the Department's Chief Financial Officer. On the same date, the award was approved by Professor M Lukhele ("Prof. Lukhele"), the then Head of Department. The following day, namely 26 May 2020, Bathibang formally accepted the appointment of Ikati Health.

[14] It is common cause that the Department awarded the bid to Ikati Health, following which the latter concluded a written agreement with the Department. It is further undisputed that Ikati Health appointed Kat Lab as a subcontractor to procure the 5 000 thermometers required under the contract. In explaining this arrangement, Keith Dodkins stated that Kat Lab possessed enormous experience in the healthcare industry, whereas Ikati Health had no such experience. According to him, Ikati Health was primarily established to assist Bathibang, whose grandmother had been in his employ for many years. The company was intended to generate income to finance Bathibang's B.Com studies at the North-West University, where she was then a student.

[15] During the course of its forensic investigation, the SIU requested the Department to produce the procurement records pertaining to the acquisition of the thermometers. The Department, however, was unable to furnish a number of documents which, according to the SIU, ought ordinarily to have been generated and retained as part of the procurement process. These included:

- 15.1 documentary proof of the emails allegedly sent to six prospective service providers inviting them to submit quotations in response to the RFQ;

- 15.2 the prescribed SBD 4 (Declaration of Interest), SBD 8 (Declaration of Bidder's Past Supply Chain Management Practices), and SBD 9 (Certificate of Independent Bid Determination) forms that should have accompanied the quotations submitted by the six invited service providers; and
- 15.3 the minutes of the Bid Specification Committee ("BSC"), recording and confirming the determination of the specifications and quantities required, together with the minutes of the Bid Adjudication Committee ("BAC"), recording and confirming the appointment of Ikati Health for the supply of 5 000 thermometers.

[16] Following its appointment, Ikati Health undertook to deliver, and ultimately delivered, 5 000 thermometers to the 3G Warehouse utilised by the Department for the storage of PPE during the COVID-19 pandemic. The first consignment, comprising 500 thermometers, was delivered on 28 May 2020, while the remaining 4 500 thermometers were delivered on 8 June 2020. The letter of appointment expressly stipulated that delivery of the items ordered was to be "immediate". Notwithstanding this requirement, the full complement of thermometers was delivered only on 8 June 2020. The SIU contends that the delivery timeline calls into question the existence of the alleged urgency relied upon to justify the procurement process. According to the SIU, this is particularly so in circumstances where both Departments either knew, or ought reasonably to have known, well in advance of the anticipated reopening of public schools.

[17] The Department subsequently furnished the SIU with a Purchase Request Form ("RLS 01 Form") linked to SAP Purchase Requisition Number 1002163213. The form records an amount of R4 475 000.00 for the procurement of 5 000 thermometers. It further reflects that the requisition was compiled by Nthombifuthi Pooe, approved by Ms Pino, captured by Thembile Msibi, and released by Percy Nyambi on 5 June 2020.

Summary of the SIU's Findings Relating to Ikati Health and Kat Lab

Alleged B-BBEE Fronting and Misrepresentation

[18] The SIU investigation established that Ikati Health was registered on the CSD as a 100% black female-owned enterprise, with Bathibang identified as the sole black female owner and principal beneficiary of the company. The company's B-BBEE status was further supported by a confirmation letter issued by its accountants, D Kalmin & Company Inc., certifying that Ikati Health was a 100% black-owned and 100% black female-owned entity. However, the investigation revealed facts suggesting that this representation did not reflect the true position. Although Bathibang was listed as a director, banking records obtained by the SIU showed that Keith Dodkins was the sole signatory on Ikati Health's business bank account. The SIU regarded this as inconsistent with the claim that Bathibang was the effective owner and controlling mind of the company.

[19] The investigation further disclosed that, shortly after the Department paid Ikati Health a total of R4 475 000.00 for the supply of 5 000 infrared thermometers, substantial portions of those funds were transferred to Kat Lab, a business solely owned by Keith Dodkins. The SIU interviewed Bathibang on 25 November 2020. According to the interview record, she described her role as largely administrative, involving filing, photocopying and contacting clients. She further stated that she was a full-time student and had not been involved in the day-to-day management of the company. She indicated that she had never previously seen several key company documents, including banking records, CSD registration documentation and the B-BBEE certification relied upon by Ikati Health.

[20] She also reported that she received a modest monthly salary, initially R1 700 and later R10 000 per month for a limited period following payment by the Department. She

also mentioned that the directors of Ikati Health were to receive R100 000.00 performance bonuses. The R100 000.00 performance bonus that should have been paid to her was queried by the SIU as no such payment was reflected in Ikati Health's bank statements and also not in her personal bank statements. She further explained that she had not received all the money at the time of the interview, i.e. on 25 November 2020.

[21] On the basis of this evidence, the SIU contends that Bathibang served as a director in name only and that Ikati Health falsely represented itself as a 100% black female-owned enterprise in order to obtain procurement advantages under the preferential procurement framework. The SIU alleges that this conduct constituted B-BBEE fronting and fraud, designed to secure an unlawful advantage in the public procurement process and thereby prejudice the Department and competing suppliers. The SIU further contends that such conduct contravened the B-BBEE Act and undermined the constitutional procurement principles of fairness, equity, transparency, competitiveness and cost-effectiveness embodied in section 217 of the Constitution.

Procurement of Thermometers and Flow of Funds

[22] The evidence shows that the Department paid Ikati Health R4 475 000.00 during June 2020 for the supply of 5 000 infrared thermometers. Payment was effected in two tranches:

- 22.1 R447 500.00 on 18 June 2020; and
- 22.2 R4 027 500.00 on 22 June 2020.

[23] The SIU's analysis of bank statements demonstrated that, after receipt of these funds, substantial payments were made by Ikati Health to Kat Lab.

[23] According to the invoices reviewed by the SIU:

- 23.1 Ikati Health sold the thermometers to the Department for R4 475 000.00; and

23.2 Ikati Health purchased the same thermometers from Kat Lab for R2 846 250.00 (including VAT).

[24] The investigation further established that Kat Lab had sourced the thermometers from international suppliers and paid approximately R1 570 670.71 in acquisition and transport costs, including purchases from Guangzhou McCan Medical Limited, Heal Force International Trading (Shanghai) Co. Ltd, and Natco International Transport (Pty) Ltd.

Alleged Excessive Profits

[25] The SIU contends that Kat Lab served no genuine commercial purpose and functioned merely as an intermediary through which Keith Dodkins extracted the majority of the financial benefit arising from the contract. According to the SIU, the arrangement concealed the true extent of the profits earned and enabled Keith Dodkins to benefit from the procurement advantages obtained through the alleged B-BBEE fronting structure. The SIU's profit analysis reflects the following:

- 25.1 Ikati Health generated a profit of approximately R1 628 750.00, representing a margin of about 57% on the contract price paid by the Department;
- 25.2 Kat Lab generated a further profit of approximately R1 275 579.29, representing a margin of about 81% on its supply of the thermometers to Ikati Health;
- 25.3 The combined profit realised through the transaction amounted to approximately R2 904 329.29, equating to an overall profit margin of about 185%.

[26] The above translates into the following calculation:

- 26.1 Total profit: $R1\ 628\ 750.00 + R1\ 275\ 579.29 = R2\ 904\ 329.29$;
- 26.2 Procurement cost: R1 570 670.71;
- 26.3 Profit percentage: $R2\ 904\ 329.29 \div R1\ 570\ 670.71 \times 100 = 184.91\%$ (approximately 185%).

Excessive Pricing During the COVID-19 Pandemic

[27] The SIU relies on regulations issued under Government Gazette No. 11057 of 19 March 2020, which were enacted to protect consumers and public institutions against unjustified price increases during the national disaster. The regulations identified emergency products and medical supplies as goods requiring particular protection from excessive pricing practices. They further provided that material price increases unsupported by corresponding cost increases, or those that substantially elevated profit margins above pre-pandemic levels, could constitute prima facie evidence of excessive or unfair pricing. Against this regulatory backdrop, the SIU contends that the profits realised by Ikati Health and Kat Lab were unjustifiable, excessive and contrary to the objectives of the emergency pricing regime.

[28] The SIU contends that, on the evidence before the Tribunal, the amount of R1 628 750.00, representing the profit retained by Ikati Health, is recoverable from Kat Lab as part of the proceeds of payments that were unduly made pursuant to the impugned transaction. The SIU further contends that the amount of R1 275 579.29, being the profit retained by Kat Lab after payment of its suppliers, is likewise recoverable from Kat Lab. According to the SIU, Kat Lab was no more than the alter ego of Ikati Health and was unnecessarily interposed by Keith Dodkins in the transaction to enable him to receive the greater portion of the funds paid by the Department.

[29] The SIU alleges that this arrangement allowed the transaction to benefit from the preferential procurement advantages associated with Ikati Health's purported B-BBEE status while simultaneously concealing the true extent of the excessive profit derived, directly or indirectly, from the contract with the Department. Accordingly, the SIU submits that the total profit of R2 904 329.29 realised through the transaction is liable to be disgorged and recovered from the respondents.

SIU's Conclusion

[30] In summary, the SIU alleges that:

- 30.1 Ikati Health falsely represented itself as a 100% black female-owned enterprise, amounting to B-BBEE fronting and fraud;
- 30.2 Bathibang was not the true beneficial owner or controlling mind of the company but a nominal director;
- 30.3 Keith Dodkins exercised effective control over the company and its finances;
- 30.4 Kat Lab functioned as an unnecessary intermediary designed to channel the bulk of the financial benefit to Keith Dodkins;
- 30.5 The procurement process was tainted by misrepresentation and was inconsistent with constitutional and statutory procurement requirements;
- 30.6 Ikati Health and Kat Lab jointly earned excessive profits of approximately R2.9 million from the thermometer transaction during the COVID-19 national disaster;
- 30.7 The profits allegedly constitute amounts recoverable by the State as unlawfully obtained benefits arising from the impugned procurement.

Issues

[31] The overarching issue for determination is whether the SIU has established a case for the relief it seeks. In resolving that issue, the Tribunal must consider and evaluate whether the grounds advanced by the SIU are sustainable in law and supported by the evidence before it. The SIU puts forward seven principal grounds upon which it contends the procurement process and consequent award were unlawful, irregular and liable to be set aside. These grounds are:

- 31.1 The Department's failure to comply with the requirements of paragraphs 3.1, 3.4 and 3.5 of the National Treasury Instruction Note No. 05 of 2020/21;
- 31.2 The Department's failure to comply with paragraph 4.6(c) of the National Treasury Instruction Note, which required the procurement of PPE and related goods from duly registered and qualifying suppliers, by inviting and

considering a quotation from Ikati Health despite its alleged non-compliance with the prescribed supplier registration requirements;

- 31.3 The Department's failure to conduct the procurement process in line with the legislative and policy framework governing public procurement and preferential procurement;
- 31.4 Material misrepresentation of B-BBEE status;
- 31.5 The Department's failure to obtain and evaluate competitive quotations in the manner contemplated by paragraph 4.6 of the Instruction Note;
- 31.6 Impermissible subcontracting; and
- 31.7 Abuse of corporate structures and excessive profiteering.

[32] Finally, I will explore the SIU's contention that Ikati Health and Kat Lab utilised their separate juristic personalities to conceal the true nature and extent of the profits derived from the transaction. It is alleged that the arrangement enabled the parties to realise an excessive profit margin of approximately 185% during the COVID-19 pandemic, conduct which the SIU characterises as unlawful, unconstitutional and contrary to public policy.

Legislative Framework

[33] Section 217 of the Constitution deals with procurement, and sub-section (1) provides that when an Organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

[34] Section 38(1)(a)(iii) of the Public Finance Management Act 1 of 1999 ("PFMA") is concerned with the general responsibilities of accounting officers. It prescribes that the accounting officer for a department, trading entity or constitutional institution must ensure that that department, trading entity or constitutional institution has and maintains an

appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. Section 38(1)(b) of the PFMA further stipulates that an accounting officer is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution.

[35] Treasury Regulation 16A3.1 reads as follows:

“The accounting officer or accounting authority of an institution to which these regulations apply must develop and implement an effective and efficient supply chain management system in his or her institution for –

- (a) the acquisition of goods and services; and
- (b) the disposal and letting of state assets, including the disposal of goods no longer required.”

[36] Treasury Regulation 16A3.2(a) provides that “A supply chain management system referred to in paragraph 16A3.1 must be fair, equitable, transparent, competitive and cost effective”. Regulation 16A3.2(b) and (c) state that “A supply chain management system referred to in paragraph 16A3.1 must: (b) be consistent with the Preferential Procurement Policy Framework Act, 2000(Act No. 5 of 2000); (c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)”.

[37] Treasury Regulation 16A6.4 reads as follows:

“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.”

[38] Section 216(1) of the Constitution provides for national legislation to establish a National Treasury and prescribe measures to ensure both transparency and expenditure

control in each sphere of Government by introducing uniform treasury norms and standards. The PFMA is the national legislation foreshadowed in section 216(1) of the Constitution. The National Treasury is established in section 5 of the PFMA. Section 2 of the PFMA provides that the object of the PFMA is to secure transparency, accountability, and the sound management of the revenue, expenditure, assets, and liabilities of the institutions to which the PFMA applies. Section 3(1) of the PFMA provides that the PFMA applies to all departments. This will include both Departments.

[39] Section 76(4)(c) of the PFMA endows the National Treasury with powers to make regulations or issue instructions applicable to all institutions to which it applies concerning, *inter alia*, the determination of a framework for an appropriate procurement and provisioning system which is *fair, equitable, transparent, competitive, and cost-effective*. In the face of the COVID-19 pandemic, the National Treasury issued the Instruction Note in accordance with section 76(4)(c) and (g) of the PFMA.

[40] Paragraphs 3.1, 3.4, and 3.5 of National Treasury Instruction Note No. 05 of 2020/21 provide as follows:

- “3.1 Accounting Officers and accounting authorities must put in place the following additional procurement and expenditure measures to address the programme of preventing the spread of the COVID-19 virus:
- (a) Internal system for financial control, risk management and reporting in order to account for the funds used for the COVID-19 disaster;
 - (b) Ensure that officials committing any expenditure are duly authorised or properly delegated;
 - (c) Avail internal audit functions to conduct audit checks in order to pick up and prevent irregularities pro-actively;
 - (d) Regular monitoring of expenditure and generate frequent expenditure reports (at least weekly) including monitoring any risks that may arise.

...

- 3.4 The emergency procurement provisions provide for accounting officers/authorities to procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons should be recorded and approved by the accounting officer/Authority or his/her delegate.
- 3.5 National Treasury Practice Note No. 8 of 2007/08, paragraph 3.4.3, requires accounting officers and accounting authorities to report within 10 working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R 1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include a description of goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process.”

[41] The purpose of the Instruction Note is fourfold:

- 41.1 To prescribe emergency procurement procedures for the COVID-19 pandemic;
- 41.2 To avoid abuse in the supply chain management system during the disaster;
- 41.3 To prescribe emergency procurement procedures for COVID-19 PPE items and cloth masks for ease of supply by the Small, Medium, and Macro Enterprises (SMMEs); and
- 41.4 To set the maximum prices to be paid by institutions for selected COVID-19 PPE items and cloth masks.

[42] Section 1 of the PFMA states that “*‘this Act’ includes any regulations and instructions in terms of section 69, 76, 85 or 91*”. As such, this Instruction Note has the force of law and must be obeyed by both Departments.

Whether There Has Been an Unreasonable Delay in Launching the Application

[43] The parties adopt diametrically opposed positions on this issue. The SIU contends that it has furnished a full and satisfactory explanation for the delay and that, properly assessed, the delay was neither undue nor unreasonable. It further submits that, even if this

Tribunal were to conclude that the delay was excessive, which the SIU disputes, the interests of justice warrant that it be excused, particularly because the matter concerns the recovery of public funds intended to benefit vulnerable members of society. The Third to Eighth Respondents ("the Respondents"), on the other hand, maintain that there is no basis for condonation. Their principal contention is that the SIU's explanation is inadequate because it contains material gaps and periods of delay that remain unexplained. According to the Respondents, the authorities require a full, reasonable, and acceptable explanation covering the entire period of delay, and the SIU has failed to meet that standard. Consequently, they submit that the delay should not be condoned.

[44] Against that background, I turn to the factual matrix underlying this matter. Although the impugned decision was taken on 25 May 2020, the SIU acquired the requisite authority to investigate only when the Proclamation was issued on 23 July 2020. The Ikati Health and Kat Lab matter was one of many COVID-19 PPE investigations undertaken across the country under severe resource constraints. The investigation commenced in August 2020 and was finalised in May 2021.

[45] According to the SIU, the investigation was conducted primarily by a single investigator, assisted by one other official, while both were concurrently engaged in numerous investigations of a similar nature across the country. The investigation was further impeded by the restrictions associated with the COVID-19 pandemic, which limited access to witnesses, documents and relevant officials. Substantial volumes of documentary material, including bank records and procurement documentation, had to be obtained, collated and analysed. The investigation also entailed tracing the flow of funds, calculating profits, conducting numerous witness interviews, and considering the evolving Treasury and supply chain management regulatory framework applicable during the pandemic. In addition, witness availability was frequently affected by self-isolation requirements, illness and remote working arrangements.

[46] Following the completion of the investigation, the matter had to proceed through the Office of the State Attorney, which was itself under considerable strain as a result of a significant influx of COVID-19 recovery litigation. According to the SIU, the Office of the State Attorney experienced a range of operational challenges, including:

- 46.1 Significant case backlogs;
- 46.2 Administrative inefficiencies;
- 46.3 Delays in the appointment of counsel;
- 46.4 Delays in the payment of counsel; and
- 46.5 The loss of legal practitioners who were unwilling to continue acting in matters where payment remained outstanding.

[47] The SIU states that it took active steps to mitigate these difficulties, including the secondment of senior legal officials to the Office of the State Attorney and efforts aimed at expediting the litigation process.

[48] From May 2021 onwards, the SIU sought the necessary authority to brief counsel and engaged repeatedly with the Office of the State Attorney concerning the appointment process. According to the SIU, a number of administrative difficulties contributed to substantial delays, including:

- 48.1 Mislaid or misplaced instructions;
- 48.2 The Office of the State Attorney's counsel rotation policies;
- 48.3 Difficulties in securing the services of junior counsel;
- 48.4 Procurement requirements necessitating the obtaining of multiple quotations;
and
- 48.5 Lengthy internal approval processes.

The SIU maintains that, notwithstanding these challenges, it continuously followed up on the matter and took active steps to advance the litigation and bring it to finality.

[49] Because the Office of the State Attorney could not effectively process matters, the SIU established a panel of private attorneys in late 2022. Although the attorneys were appointed, implementation was delayed by:

- 44.1 Service level agreement negotiations;
- 44.2 Internal procurement processes; and
- 44.3 Development of operational procedures.

Further setbacks occurred when evidence bundles were lost and had to be reconstructed.

[50] The SIU further explains that the Auditor-General raised concerns regarding the legality of the procurement process through which the attorney panel had been appointed. Pending the resolution of those concerns, and in order to avoid potential non-compliance with the PFMA, the SIU suspended all work performed by panel attorneys in July 2023. This, in turn, required the transfer of affected matters back to the Office of the State Attorney, resulting in further delays and requiring the implementation of fresh administrative and briefing processes.

[51] Throughout the relevant period, the SIU was continuously taking steps to advance the matter. However, delays resulted from:

- 51.1 The complexity and scale of the investigation;
- 51.2 COVID-19 disruptions;
- 51.3 Institutional capacity constraints;
- 51.4 Procurement and governance requirements applicable to public bodies; and
- 51.5 Difficulties in securing and managing legal representation.

[52] The SIU has sought condonation for the delay in bringing its application, which is founded on the principle of legality. In *Buffalo City Metropolitan Municipality v Asla Construction*,² the Constitutional Court distilled and developed the principles governing

² In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at paras 48-63.

delay in legality reviews, particularly where an organ of state seeks to review and set aside its own unlawful decision. The Court reaffirmed that the two-stage test formulated in *Khumalo v Member of the Executive Council for Education, KwaZulu-Natal*³ applies to legality reviews. The first enquiry is whether the delay in instituting the review proceedings was unreasonable. If the delay is found to be unreasonable, the second enquiry is whether the court should nevertheless overlook the delay in the interests of justice.

[53] In conducting the second enquiry, the Court emphasised that, in contrast to the Promotion of Administrative Justice Act 3 of 2000, the assessment of legality reviews is flexible, fact-sensitive and context-driven. Relevant considerations include the explanation advanced for the delay, whether that explanation covers the entire period of the delay, the prejudice that may be suffered by affected parties, the consequences of setting aside the impugned decision, the nature and seriousness of the alleged illegality, and the conduct of the litigant seeking the review. The Court further stressed that organs of state bear a heightened constitutional duty to act lawfully, expeditiously and in the public interest, and are generally expected to provide a full and satisfactory explanation for any delay in seeking to correct their own unlawful decisions.

[54] The Court also recognised that, notwithstanding an unreasonable delay, the interests of justice may warrant overlooking the delay where considerations of legality, accountability and good governance weigh in favour of entertaining the review. In particular, the strength of the legality challenge and the extent of the impugned unlawfulness are material factors in determining whether a delay should be condoned. Ultimately, the enquiry requires a balancing of all relevant considerations in order to determine whether the interests of justice favour adjudication of the legality challenge despite the delay.

³ *Khumalo v Member of the Executive Council for Education, KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC).

[55] A finding that the delay was unreasonable does not bring the enquiry to an end. The Court must still determine whether, notwithstanding the delay, it should be overlooked in the interests of justice. This entails a value-laden and context-sensitive assessment in which all relevant considerations must be weighed. As the Constitutional Court observed in *Buffalo City*, delay cannot be assessed in isolation from the broader circumstances of the case.

[56] Relevant considerations include the explanation for the delay and whether it accounts for the entire period of inactivity; the prejudice that may be suffered by affected parties; the practical consequences of setting aside the impugned decision; and whether any resulting prejudice may be ameliorated through a just and equitable remedy under section 172(1)(b) of the Constitution. The existence of prejudice does not, without more, preclude a court from entertaining a legality review where constitutional considerations favour intervention.

[57] The strength and nature of the alleged illegality are also material considerations. In *Buffalo City*, the Court made clear that the merits are not irrelevant to the condonation enquiry. On the contrary, the seriousness of the unlawfulness may itself justify overlooking an otherwise unreasonable delay. A Court is therefore entitled to consider whether the impugned conduct constitutes a significant departure from constitutional or statutory requirements.

[58] Particular scrutiny is required where the applicant is an Organ of State seeking to impugn its own decision. State litigants bear a heightened constitutional obligation to act lawfully, diligently and without delay. They are ordinarily best placed to explain periods of inactivity and are expected to furnish a full and satisfactory explanation where a delay has occurred. An unexplained or inadequately explained delay by the state weighs heavily against the grant of condonation.

[59] The Constitutional Court further emphasised, with reference to *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*,⁴ *Khumalo* and *Merafong City Local Municipality v AngloGold Ashanti Limited*,⁵ that Organs of State must act as model litigants. They are required to uphold the rule of law, to take reasonable steps to correct unlawful decisions, and to do so through proper legal processes rather than by resorting to self-help or administrative inaction. Their conduct is accordingly assessed against a more exacting standard than that applicable to private litigants.

[60] Nevertheless, a delay may be overlooked where the review is pursued in good faith and forms part of a genuine effort to remedy illegality, promote accountability and advance clean governance. In such circumstances, considerations of legality and the public interest may outweigh the prejudice occasioned by the delay.

[61] Even where a Court declines to overlook a delay, the enquiry does not necessarily end there. As explained in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*,⁶ section 172(1)(a) of the Constitution obliges a Court to declare conduct invalid if it is inconsistent with the Constitution. Accordingly, a Court may be constitutionally required to declare conduct unlawful notwithstanding the delay. The remaining question is whether, and to what extent, a remedy should be granted under section 172(1)(b) of the Constitution.

[62] The test for determining condonation is whether it would be ‘in the interests of justice’ to do so. The Constitutional Court acknowledged in *Grootboom v National*

⁴ *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC).

⁵ *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) at para 61.

⁶ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) at para 52.

Prosecuting Authority and Another,⁷ that this is a very flexible term. Zondo J, as he then was, set out the test for the granting or refusal of condonation in the following terms:

“[50] In this court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that enquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.”

[63] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive, and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition, the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.

[64] According to the evidence of the SIU, it had access to all the Department’s procurement records from the outset of the investigation following the Proclamation

⁷ *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC).

published in Government Gazette No. 43546 of 23 July 2020. The SIU's statutory investigative powers further enabled it to obtain, by subpoena, all relevant documentation and bank records. The investigation report, completed on 31 May 2021, confirms that the SIU had by then obtained all material documentation relevant to its investigation. These documents included:

- 64.1 The RFQ documentation and award letter;
- 64.2 The BEC minutes dated 24 May 2020;
- 64.3 Delivery notes dated 28 May 2020 and 8 June 2020;
- 64.4 Payment schedules reflecting the relevant transfers;
- 64.5 Bank statements of the third and fifth respondents; and
- 64.6 Interview notes obtained from Bathibang on 25 November 2020.

[65] Accepting that the SIU had immediate access to the documentation required for its investigation and that the investigation was completed on 31 May 2021, the period reasonably attributable to the investigation itself must be excluded from the delay enquiry. The delay must therefore be calculated from 31 May 2021, at the latest. It is well established that an organ of state seeking condonation for delay is required to furnish a full, reasonable and satisfactory explanation covering the entire period of the delay. The explanation must be comprehensive and account for each period of inactivity. Where no explanation is provided for a portion of the delay, the delay will ordinarily be regarded as unreasonable. A partial or piecemeal explanation is insufficient. This principle was affirmed in *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd supra*.

[66] Against the backdrop of the preceding paragraph, there was no need for the SIU to explain events that transpired before 31 May 2021, as its investigations had not yet been finalised. The period thereafter is, however, relevant to the enquiry into whether there was an undue delay. Notably, the SIU provides no account of what occurred between 26 May 2021, when Dr Wells informed the investigating team that the HOD had authorised the briefing of counsel, and 22 June 2021, when Mr Walser requested Ms Zondi to register the

matter with the Office of the State Attorney. This unexplained period spans approximately 26 days and does not live up to the principle of full account.

[67] Similarly, on 1 July 2021, the SIU investigating team was requested to prepare hard copies of the evidence bundle for purposes of briefing Counsel. Yet, there is no indication that Counsel was appointed at that stage. Instead, it was only on 12 August 2021, some 43 days later, that Mr Walser sought an update regarding progress in the appointment of Counsel. It can hardly be suggested that the preparation of hard copies of the evidence bundle could reasonably have consumed that entire period. Be that as it may, the Tribunal is further informed that counsel was only appointed on 30 September 2021, a further 49 days later.

[68] Apart from recording that Mr Walser made enquiries concerning the briefing of Counsel, the SIU provides no explanation for the delay in appointing Adv. Steven Budlender SC. The SIU is consequently silent on the steps taken during this period and the reasons why the briefing process was not concluded sooner. Such an omission is inconsistent with the obligation resting upon a litigant seeking condonation to furnish a full, detailed and satisfactory account of the causes of the delay.

[69] The SIU's position fares no better in this regard. Although senior Counsel was briefed on 30 September 2021, no account is provided of what transpired between that date and 6 December 2021, when the SIU first consulted with Adv. Budlender. During that consultation, Counsel assessed the matter and requested that a junior Counsel be appointed to assist him. Thereafter, the SIU offers no explanation why the appointment of junior Counsel proved difficult. It merely states that Mr Walser made enquiries in February, 9 March, 3 May, 21 June, 13 July, 25 July and 5 October 2022. It was only on the latter date that he recommended to the Office of the State Attorney that it utilise its own processes to appoint junior Counsel. Why this course was not pursued at an earlier stage remains mysterious.

[70] The general reference to periods of delay, without any particularity or explanation, is precisely the defect to which the Court objected in *City of Tshwane v Moipone Group of Companies (Pty) Ltd and Another*.⁸ The Court observed that there were extensive periods during which absolutely nothing was done in relation to the impugned tender and for which no explanation had been provided. It further emphasised that the City of Tshwane's explanation for the delay ought to have commenced from the date on which it became aware of the impugned decision. Ultimately, the Court found the explanation for the delay to have been disappointingly insufficient and, in effect, that no satisfactory explanation had been furnished.

[71] It would appear that the SIU simply abandoned its efforts to appoint junior Counsel. After Mr Walser's recommendation that the Office of the State Attorney appoint junior Counsel in accordance with its own protocols, no explanation is provided regarding the outcome of that process. Instead, the SIU directs the Tribunal's attention to other difficulties it encountered, including challenges relating to the constitution of a panel of attorneys, the subsequent dissolution of that panel following the Auditor-General's finding that it did not comply with section 217 of the Constitution, and the secondment of another attorney to the Office of the State Attorney.

[72] Even if these matters hampered progress, it remains evident that senior and junior Counsel ought to have been appointed and briefed substantially contemporaneously. It is wholly unacceptable that senior Counsel was briefed on 30 September 2021, only for the SIU to wait almost three months before advising that junior Counsel would be required. Given the magnitude, complexity and volume of the work involved, it should have been readily apparent to any legally qualified person that the matter necessitated the appointment of both senior and junior Counsel from the outset.

⁸ *City of Tshwane Metropolitan Municipality v Moipone Group of Companies (Pty) Ltd and Another* [2024] ZAGPPHC 456 at para 164.

[73] This contention bears a close resemblance to the argument rejected by the Supreme Court of Appeal in *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd*.⁹ Also closely related is the judgment of this Tribunal in *Special Investigating Unit v Member of the Executive Council for the Department of Transport, KwaZulu-Natal and Another*,¹⁰ where the Tribunal held that explanations such as difficulties in briefing Counsel and the fact that officials were on leave during the festive season do not constitute acceptable grounds for the delay. The Tribunal regarded such reasons as objectionable and insufficient to justify non-compliance with the applicable time periods.

[74] In the final analysis, the delay was both substantial and unjustified. On the SIU's own version, it is evident that these proceedings could have been instituted considerably earlier than they were. The existence of an undue delay is therefore plainly established. The remaining question is whether that delay ought nevertheless to be condoned. It is to that issue that I now turn.

Should The Undue Delay Be Condoned?

[75] Notwithstanding the shortcomings identified in relation to the first leg of the enquiry, the SIU contends that it has adequately accounted for the delay and that the Tribunal should therefore find in its favour. It further submits that, should it become necessary to consider the second leg of the test, the interests of justice justify overlooking the delay, having regard to the scale of the matter and its public significance. What ultimately weighs against the SIU, however, is the combination of its poor prospects of success and its inadequate explanation for the delay. The explanation furnished provides scant insight into what transpired and why the application was not launched timeously.

⁹ *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* [2021] ZASCA 90; [2021] 3 All SA 791 (SCA); 2022 (5) SA 416 (SCA).

¹⁰ *Special Investigating Unit v Member of the Executive Council for the Department of Transport, KwaZulu-Natal and Another* [2024] ZAST 2.

[76] As the Constitutional Court observed in *Grootboom*, a deficient explanation for a delay may, in appropriate circumstances, be offset by strong prospects of success. That is not the position here. The SIU's sparse and dissatisfactory explanation is not complemented by compelling prospects on the merits. In those circumstances, it is difficult to discern any basis upon which condonation should be granted where both the explanation for the delay and the underlying application are weak. It may be argued that courts and tribunals have, in appropriate cases, condoned even lengthier delays where the interests of justice so warranted.

[77] In those instances, however, the authorities make plain that condonation is a contextual and fact-specific enquiry, and that the mere invocation of the phrase "interests of justice" does not suffice. Whether condonation should be granted depends on a consideration of all relevant factors, including the explanation for the delay and the prospects of success. In many of the cases where substantial delays have been condoned, the underlying merits disclosed serious and demonstrable irregularities warranting the Court's intervention notwithstanding the delay.

[78] This is an appropriate juncture at which to consider the strength of the SIU's case against the Respondents to determine whether its prospects of success are sufficient to compensate for its weak explanation of the inordinate delay. The SIU advances seven grounds which, it contends, justify the relief sought against the Respondents. I now turn to consider each of those grounds in turn.

Deviation Recordal / Approval and Reporting

[79] The SIU alleges that the Department failed to comply with paragraphs 3.1, 3.4 as read with 3.5 of National Treasury Instruction Note No. 05 of 2020/21. According to the SIU, the Department did not properly record the reasons for deviating from the ordinary procurement processes contemplated in Treasury Regulation 16A.6.4, nor did it obtain the requisite approval for such deviation from the accounting officer or a duly authorised

delegate. Additionally, the SIU contends that where goods or services exceeding R1 000 000.00 were procured pursuant to Regulation 16A.6.4, the Department failed to report the deviation to the relevant treasury and the Auditor-General within ten days, as required by the Instruction Note. On the strength of these alleged non-compliance findings, the SIU submits that the procurement decision was unlawful and consequently invalid.

[80] In *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit*,¹¹ the Constitutional Court recognised that the COVID-19 pandemic created an exceptional context warranting departures from ordinary procurement processes, provided that such departures remained compliant with the emergency safeguards prescribed by the applicable legal framework. The legality of the impugned appointment must therefore be evaluated within the emergency procurement regime that governed procurement during the national state of disaster, rather than by reference to the standard competitive procurement requirements ordinarily applicable.

[81] The legality of emergency procurement undertaken during the COVID-19 national state of disaster must be assessed within the emergency deviation framework established by Treasury Regulation 16A.6.4 and the National Treasury Instruction Notes issued in response to the pandemic. Within that framework, the Special Tribunal has consistently evaluated the substantive lawfulness and constitutional validity of deviation-based PPE procurement against three recognised safeguards designed to ensure that emergency measures remain consistent with the principles of legality, accountability, and prudent financial administration. These safeguards are:

- 81.1 The goods complied with the specifications determined by the National Department of Health;
- 81.2 Pricing was equal to or below the benchmark prices prescribed by the National Treasury; and

¹¹ *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* [2023] ZACC 8; 2023 (6) BCLR 709 (CC); 2023 (2) SACR 1 (CC) at paras 3-5.

81.3 The supplier was duly registered on the CSD.

[82] There is no proof that the Department complied with Treasury Instruction Note No. 05 of 2020/21. In the absence of interviews with the relevant departmental officials, can it be conclusively determined that there was no deviation from the prescribed procurement requirements? Even if it is assumed that no deviation occurred, the further question is whether the non-compliance was material when viewed in the context of the National State of Disaster. The materiality of such non-compliance must be assessed against the circumstances prevailing during the National State of Disaster, particularly with reference to the three safeguards mentioned above.

[83] Accordingly, the first enquiry is whether the goods supplied complied with the specifications prescribed by the Department. While the Applicant seeks to cast doubt on the quality of the thermometers supplied by the third respondent, its case goes no further than asserting that it is unable to verify whether those thermometers complied with the specifications of the World Health Organisation and the National Department of Health.

[84] That falls far short of establishing, on a balance of probabilities, any defect or non-compliance. The evidence shows that, before delivery, a sample of the thermometers was presented to and accepted by the relevant departmental official on 27 May 2020, and that the devices were FDA approved. No complaint was ever raised concerning their quality, specifications, calibration, accuracy or fitness for purpose. Moreover, the goods were received and consumed without any adverse consequences, which in all probability supports the contention that the goods were indeed compliant.

[85] The second question is whether the pricing was equal to or below the benchmark prices prescribed by the National Treasury. It is common cause that the maximum amount set by the Department was R2 537.00 per unit. By contrast, Ikati Health charged approximately R895.00 per unit, substantially below the Department's prescribed

benchmark. Furthermore, none of the other bidders submitted prices comparable to those charged by Ikati Health. In these circumstances, it would be untenable to suggest that Ikati Health and Kat Lab earned an excessive profit or overcharged the Department. Such an argument undermines the Department's benchmark amount of R2 537.00, which served as guidance of what bidders could not go beyond.

[86] The third question is whether the potential supplier was registered on the CSD. The argument advanced by the SIU here is that Ikati Health was indeed registered on the CSD, but such falls short of the requirement that it ought to have been registered to render services in that specific industry, in this case medical supply. This Tribunal rejected this specific contention in *Special Investigating Unit v Vigario Consulting (Pty) Ltd and Others*,¹² and *Special Investigating Unit v Nozihle Construction and Projects CC and Others*¹³ adopted a similar approach. Accordingly, any argument to the contrary stands to be rejected as devoid of any merit.

[87] Organs of State are required, even in emergency procurement situations, to invite as many suppliers as is reasonably possible in order to preserve competitiveness. However, it would be impractical to interpret the emergency procurement framework as requiring accounting officers to invite every conceivable supplier or to embark upon a full public tender process. Rather, the framework requires accounting officers to promote competition "as far as feasible" within the limitations imposed by the emergency. This is particularly so in circumstances such as those that prevailed during the COVID-19 pandemic, where urgency necessarily constrained the extent to which ordinary competitive procurement processes could be followed.

[88] The SIU's case is founded primarily on documentary evidence, from which it concludes that the deviation is non-existent or, if it is, it was neither recorded nor approved,

¹² *Special Investigating Unit v Vigario Consulting (Pty) Ltd and Others* [2023] ZAST 11.

¹³ *Special Investigating Unit v Nozihle Construction and Projects CC and Others* [2025] ZAST 17.

nor subsequently reported. The Respondents dispute this contention, asserting that the existence of the deviation falls within the knowledge of the Accounting Officer, the Chief Financial Officer, SCM officials, the Health Procurement Committee, and the BEC. Curiously, the SIU did not seek oral evidence from any of these witnesses. Instead, it relied solely on documents obtained pursuant to section 5(2) subpoenas, notwithstanding that the very issues in dispute concerned the conduct and decisions of the officials identified above.

[89] In *Vigario supra*, this Tribunal deprecated document-only investigations as falling short of the SIU's obligation to conduct investigations in the interests of justice. The Tribunal found it troubling that the SIU disregarded important aspects of [officials'] explanations and/or defences. In doing so, it acted contrary to its duty of investigating in the interests of justice. To the extent that the SIU failed to interview those departmental officials identified *supra*, it cannot escape the criticism it faced in *Vigario*.

[90] The SIU did not interview, nor obtain confirmatory affidavits from, the Accounting Officer, Prof Lukhele, Lehloenya, members of the Health Procurement Committee, members of the BEC, or the SCM officials who drafted the specifications and RFQs and evaluated the quotations. Notwithstanding the fact that these officials were central to the impugned procurement process and were best placed to explain the decisions taken, the SIU elected to rely exclusively on documentary evidence and to draw adverse inferences without the benefit of their accounts.

[91] The criticism articulated in *Vigario* cannot be overstated, particularly in light of the acknowledged deficiencies in the procurement record in this matter. In the face of that admission, it was not merely desirable but incumbent upon the SIU, in the proper discharge of its investigative mandate, to interview those officials directly involved in the procurement process and capable of explaining the decisions taken, the approvals granted, and the manner in which the emergency deviation was invoked. The failure to undertake such enquiries materially undermines the SIU's contention that the absence of documentary

evidence is indicative of non-compliance. Where the procurement record is admittedly incomplete, the accounts of the officials concerned may constitute an important source of evidence regarding the existence, approval, and implementation of any deviation from the prescribed procurement procedures. In fact, the SIU's rush to conclude that the lack of further documentation signified irregularity suggests an excessive eagerness to identify flaws in the procedure.

[92] The authorities establish that the decisive question is not whether every procedural requirement was perfectly documented, but whether there was compliance in substance and, if not, whether any deviation was material in light of the purpose of the requirement and the circumstances of the procurement. In *Transnet SOC Ltd v Tipp-Con (Pty) Ltd and Others*,¹⁴ relying on *Altech Radio Holdings Pty Ltd and Others v City of Tshwane Metropolitan Municipality*,¹⁵ and *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Security Agency and Others*,¹⁶ the Courts reaffirmed that public procurement processes are rarely flawless and that not every procedural defect constitutes a material irregularity. The enquiry is whether the purpose of the provision was achieved and whether the integrity, fairness, transparency, competitiveness and cost-effectiveness of the procurement process were compromised. Where those objectives are preserved, an irregularity does not justify setting aside the procurement.

[93] Applying that approach to Treasury Regulation 16A.6.4, the evidence demonstrates that a deviation was in fact authorised and implemented. The emergency circumstances were recognised, quotations were sourced, the bids were evaluated before award, the Head of Department approved the award, and a contemporaneous audit trail was preserved

¹⁴ *Transnet SOC Ltd v Tipp-Con (Pty) Ltd and Others* (797/2022) [2024] ZASCA 12 (31 January 2024) para 55.

¹⁵ *Altech Radio Holdings Pty Ltd and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) para 54.

¹⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR (CC) at para 22- 23.

through the procurement documentation. These facts show that the decision-makers applied their minds to the emergency procurement process and that the substantive safeguards underlying the deviation regime were observed. On the totality of the evidence, the existence of a deviation can be inferred from the conduct, approvals and procurement steps undertaken, even if no stand-alone “deviation memorandum” is produced.

[94] In any event, the authorities make clear that the absence of a particular document is not decisive if the purpose of the requirement has been fulfilled. *Gong Lu Maintenance Services (Pty) Ltd v City of Tshwane Metropolitan Municipality and Others*¹⁷ confirmed that courts must distinguish between genuine irregularities and mere failures of form, and cautioned against elevating procedural formalism over substantive compliance. Just as the absence of written budget confirmation did not invalidate the procurement where budget availability was otherwise established, the absence of a formal deviation record cannot be material where the reasons for deviation existed, were considered by decision-makers, and informed an approved emergency procurement process.

[95] This Tribunal in *Special Investigating Unit v Kushesh Trading CC t/a Kushesh Express and Others*,¹⁸ recognised that emergency COVID-19 procurement occurred in conditions of urgency, disruption and administrative disorder, and accepted that lawful deviation could be established from the totality of the evidence rather than from perfect documentation. The Tribunal found that emergency procurement provisions authorised a deviation and upheld the procurement notwithstanding documentary imperfections, emphasising that the ultimate question is whether the constitutional procurement principles were satisfied.

¹⁷ *Gong Lu Maintenance Services (Pty) Ltd v City of Tshwane Metropolitan Municipality and Others* (053301/2024) [2025] ZAGPPHC 892 (21 August 2025) at para 11.

¹⁸ *Special Investigating Unit v Kushesh Trading CC t/a Kushesh Express and Others* [2025] ZAST 13.

[96] It is crucial not to lose sight of the fact that a distinction must always be drawn between a transaction undertaken in an emergency, as in this matter, and one concluded in the ordinary course of events. This distinguishes this matter from *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*,¹⁹ where the Court, concerned with a non-emergency situation, held that procedural requirements cannot be bypassed based on the outcome.

[97] This matter is also distinguishable from cases such as *Special Investigating Unit v TEPA Trading and Projects (Pty) Ltd and Others*,²⁰ where multiple substantive safeguards were absent. Here, there was genuine competition among suppliers, quotations were evaluated before the award, the lowest responsive quotation was selected, approvals were obtained, and the procurement achieved its intended purpose. There is no evidence of prejudice to other suppliers, manipulation of the process, or departure from the constitutional values governing public procurement.

[98] Accordingly, the evidence supports either of two conclusions: first, that a deviation was in fact present and authorised, as demonstrated by the contemporaneous conduct, approvals and procurement record; or alternatively, that if there was any deficiency in the formal recording of the deviation, it ought to be overlooked as immaterial irregularity. The emergency nature of the procurement, together with the achievement of the underlying purposes of Regulation 16A.6.4 and the preservation of fairness, transparency, competitiveness and cost-effectiveness, render any documentary shortcoming one of form rather than substance. Under the principles articulated in *AllPay*, *Tipp-Con*, *Gong Lu Maintenance Services* and *Kushesh*, such a defect cannot invalidate the procurement.

¹⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

²⁰ *Special Investigating Unit v TEPA Trading and Projects (Pty) Ltd and Others* (MP02/2024) [2025] ZAST 20.

[99] The SIU further relies on the Respondents' alleged failure to report the deviation to the National Treasury and the Auditor-General within 10 working days, as required by paragraph 3.5 of Instruction Note 5. I agree with the Respondents that this contention amounts to a bare allegation, unsupported by any admissible evidence. In particular, the SIU has failed to place before this Tribunal:

- 99.1 A confirmatory affidavit from the National Treasury or the Office of the Auditor-General attesting that no such report was received;
- 99.2 Evidence from the relevant accounting officer or chief financial officer confirming that no report was submitted; and
- 99.3 Proof that it requested, obtained, and exhausted the relevant reporting records maintained by the National Treasury or the Auditor-General in order to verify whether such a report had in fact been lodged.

[100] There is further merit in the contention that the 10-day reporting requirement constitutes a post facto oversight obligation rather than a condition precedent to the validity of the procurement decision itself. Its purpose is to enable the National Treasury and the Auditor-General to monitor instances of emergency procurement and, where necessary, identify matters warranting further scrutiny or investigation. It does not operate to invalidate a procurement decision that was substantively lawful when made. To hold otherwise would elevate a reporting obligation, designed to facilitate oversight and accountability, into a jurisdictional prerequisite for validity, notwithstanding the absence of any indication in the Instruction Note that such a consequence was intended.

[101] In conclusion, in the absence of a record of deviation, and unless there is evidence of corruption, improper interference with the RFQ process, or other wrongdoing by Ikati Health or the Department, this Tribunal has no basis to intervene. It cannot rely on broad considerations of "the interests of justice" to excuse the SIU's excessive and poorly explained delay. This approach is reinforced by the fact that the transaction substantially complied with the constitutional requirements governing public procurement. Furthermore,

the SIU failed to prove that there was no record of an authorised deviation from the ordinary procurement process.

Failure to Register on CSD for the Commodity to be Supplied

[102] The SIU's complaint is, in essence, that Ikati Health was registered on the CSD under the commodity category relating to human health and social services and not that of medical supplies. On that basis, the SIU contends that Ikati Health was not lawfully entitled to supply medical or PPE-related goods, including thermometers.

[103] The contention above, however, warrants little consideration because in *Special Investigating Unit and Another v LNG (Pty) Ltd*,²¹ this Tribunal considered and determined that Instruction Note 5 of 2020/21 required only that suppliers be registered on the CSD and did not impose a requirement for registration under a commodity-specific category. The Instruction Note deliberately relaxed such constraints in response to the exigencies of the emergency procurement environment.

[104] It follows that registration under a particular commodity classification was not a prerequisite for participation in the procurement process. The fact that Ikati Health was registered under a category other than medical supplies is therefore of no legal consequence. Accordingly, this ground of review is devoid of merit and falls to be dismissed.

Failure to Apply the 80/20 or 90/10 Evaluation Formula as Contemplated in the PPPFA

[105] This ground of review is entirely dependent on the success of the ground concerning lack of authorised deviation. The SIU contends that the Department acted unlawfully by

²¹ *Special Investigating Unit and Another v LNG (Pty) Ltd* [2024] ZAST 1 at para 58.

failing to apply the 80/20 or 90/10 preference-point system prescribed by the PPPFA when approving the third respondent's quotation. That contention, however, presupposes that the procurement was required to follow the ordinary competitive bidding process.

[106] The Respondents' case is that the procurement was lawfully conducted through an emergency deviation under Treasury Regulation 16A6.4 and National Treasury Instruction Note 5 of 2020/21. A procurement undertaken pursuant to a lawful deviation is not conducted through a formal competitive tender process, but through alternative procurement measures authorised for emergency circumstances.

[107] The emergency COVID-19 procurement framework permitted procurement by way of quotations or negotiation and prescribed its own safeguards, namely compliance with the Department of Health specifications, adherence to National Treasury benchmark prices, and supplier registration on the CSD.

[108] In those circumstances, the focus of the legality enquiry is not whether preference points were allocated under the PPPFA, but whether the procurement complied with the emergency procurement framework and the constitutional requirements of fairness, equitability, transparency, competitiveness and cost-effectiveness under section 217 of the Constitution. The Special Tribunal's decisions in *Kushesh* and *Nozihle supra* recognise that emergency procurement during the COVID-19 pandemic operated within a distinct regulatory framework designed to facilitate urgent procurement while maintaining appropriate safeguards.

[109] Requiring full compliance with the ordinary PPPFA evaluation process, including formal tender documentation, public advertisement, bid committee processes and preference-point scoring, would have been inconsistent with the urgent circumstances that justified the deviation. The emergency procurement regime was specifically intended to permit expedited procurement where competitive bidding was impractical.

[110] Accordingly, if the respondents succeed on the deviation ground in establishing that the procurement lawfully proceeded through the emergency deviation mechanism, the premise of the SIU's PPPFA complaint falls away. This ground therefore stands or falls with the deviation ground. Once the deviation ground fails, the SIU's reliance on the PPPFA preference-point system becomes unsustainable. This current ground likewise falls to be dismissed.

Whether the B-BBEE Status Played any Role in the Award to Ikati Health

[111] The SIU's allegation of fronting is difficult to sustain when considering the procurement framework applicable to the award. Under the emergency deviation process, the B-BBEE status conferred neither a preference nor any competitive advantage. Neither the PPPFA preference point system nor the B-BBEE pre-qualification requirements found application. The award was determined with reference to the applicable safeguards, the submission of the lowest responsive quotation, registration on the CSD, and compliance of the products supplied with the Department's prescribed specifications.

[112] In those circumstances, the suggestion that Ikati Health deliberately structured itself as a 100% black female-owned entity in order to secure the award lacks any apparent commercial rationale. This matter is accordingly distinguishable from cases arising in conventional competitive procurement processes, where B-BBEE status may materially influence the outcome. Here, B-BBEE status was not a factor relevant to the award and could not have affected the result.

[113] The evidence objectively establishes that Bathibang was the sole shareholder of Ikati Health from its inception. The allegation is that the company was founded as a vehicle for Bathibang's professional and financial advancement, with the intention that she would ultimately assume its management. The arrangement between the late Keith Dodkins and Bathibang that the company income would contribute towards her maintenance and

education is consistent with legitimate enterprise development and mentorship. Viewed objectively, the structure reflects genuine empowerment rather than artificial ownership. The Respondents contend that substantial Economic Benefits Accrued to Bathibang.

[114] Bathibang, so the argument goes, received substantial and sustained economic benefits from the company, including salary, bonus payments and tertiary education funding amounting to R682 253. These benefits were properly reflected in the company's financial records and were received over an extended period. Such meaningful economic participation is inconsistent with the concept of "paper ownership" and stands in contrast to arrangements where a purported shareholder receives little or no financial benefit. On the evidence, the flow of substantial economic benefits to Bathibang militates strongly against a finding of fronting.

[115] The evidence presented by the Respondents may be true in certain respects; however, substantial portions thereof are not. The allegation that Ikati Health funded all of Bathibang's university expenses is only partially true. The documentary evidence from North-West University, which remains uncontested before this Tribunal, demonstrates that Ikati Health paid only her tuition fees while the other part was covered by NSFAS. Similarly, Bathibang confirmed the payment of a R100 000.00 bonus only in a supplementary affidavit, after the SIU had challenged the allegation. This confirmation of the payment, however, is not supported by any bank statement convincingly establishing that such payment was indeed made and received by Bathibang. Furthermore, according to Bathibang, the monthly salary of R10 000.00 was paid for only three months. Accordingly, the financial benefits alleged to have been received by her have been significantly exaggerated. In addition, the annual financial statements upon which Keith Dodkins relies to substantiate these amounts have not been audited. Their probative value is therefore diminished, rendering any reliance upon them untenable.

[116] Furthermore, while Bathibang's evidence demonstrates that she was formally involved in all material strategic decisions affecting the company, including its establishment, participation in the procurement process, acceptance of the award, supplier arrangements, financial decisions, and staffing matters, such involvement appears to have been more apparent than real. On the evidence before this Tribunal, her role was largely confined to providing the requisite approval or signature after decisions had already been formulated, rather than participating meaningfully in the negotiations or deliberations that preceded them.

[117] I am also unable to ascribe the same significance to the Respondents' submission that, while the late Keith Dodkins attended to the company's day-to-day operational functions, Bathibang remained actively involved in governance and high-level decision-making. If by this statement the Respondents mean no more than that she was kept informed of the manner in which Keith Dodkins managed the company, I would agree. However, if the submission is intended to suggest that she possessed any real ability to influence, direct, or alter the company's course, the evidence does not support such a conclusion.

[118] The arrangement described by the Respondents is, in principle, commercially orthodox where a shareholder is simultaneously pursuing tertiary studies and acquiring business experience. The distinguishing feature in the present matter, however, is that Bathibang does not appear to have acquired such experience through active participation in the management or operation of the company. Rather, the evidence suggests that her involvement remained largely formal and retrospective, notwithstanding her position as shareholder and director.

[119] Furthermore, while it is true that Bathibang's evidence demonstrates that she participated in all material strategic decisions affecting the company, including its establishment, participation in the procurement process, acceptance of the award, supplier

arrangements, financial decisions and staffing matters, these could not have been meaningful because it is clear that they only involved her signature and not her participation in negotiations before her signature. I am not certain what the Respondents mean when they state that while the late Keith Dodkins attended to daily operational functions, Bathibang remained actively involved in governance and high-level decision-making.

[120] I agree that Keith Dodkins' exercise of signing authority over the company's bank account is not incongruous with Bathibang's ownership. Ownership and operational administration are legally distinct concepts. The explanation that banking functions were delegated to a more experienced individual while Bathibang completed her studies is both plausible and commercially ubiquitous. It must, however, be emphasised that keeping Bathibang informed of important developments and requiring her signature intermittently does not constitute mentorship. Rather, it underscores the limited and peripheral nature of her involvement in the business.

[121] It is understandable that if the company were to operate daily, it could not be run remotely by an owner absent from the area where the business is carried out. So, Keith Dodkins had to ensure that the company operated in person. However, Bathibang's being informed of developments can hardly be regarded as indicative of mentorship and operational support. The plain truth is that she was an insignificant participant.

[122] Having concluded that this matter falls within the emergency procurement framework, and that its legality must be assessed within that context, the question of whether the SIU has discharged the burden of proving, through objective evidence, that the ownership structure was not genuine, that the economic benefits of the enterprise did not accrue to Bathibang, and that the arrangement was designed to circumvent the B-BBEE Act, becomes irrelevant.

[123] The above is so because B-BBEE compliance was not a prerequisite under the emergency procurement regime. In those circumstances, the genuineness of the ownership structure is not determinative of the legality of the award. It is therefore unnecessary to consider the issue further. All said, while Ikati Health's B-BBEE status is of no consequence to the issues requiring determination, it cannot be overlooked that portions of the evidence presented by the Respondents are not entirely truthful.

Failure to obtain Multiple Quotations based on Multiple Awards from One RFQ

[124] The SIU's case is that the Department failed to comply with paragraph 4.6 of National Treasury Instruction Note 5 by not obtaining more than one quotation from more than one supplier in respect of each award made to Ikati Health and other successful suppliers. This allegation is difficult to comprehend in light of the SIU's own averment that, of the two companies recommended, only Ikati Health was awarded the contract for the supply of 5 000 thermometers at a value of R4 475 000.00.

[125] Having made that allegation, the SIU then proceeds to contend that, by awarding the same contract to more than one supplier in response to a single RFQ, the Department effectively duplicated the RFQ specifications and quantities. This contention is irreconcilable with the earlier allegation that only Ikati Health received the award. The two allegations are mutually destructive and cannot coexist. Either the contract was awarded solely to Ikati Health, or it was awarded to more than one supplier. Both propositions cannot simultaneously be correct.

[126] The truth is that the procurement process followed a genuinely competitive quotation course. Nine suppliers were invited to submit quotations, six responded, and the lowest-priced compliant quotation was selected. This is perfectly in line with the provisions of section 217(1) of the Constitution, which provides that:

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

[127] The process followed in this matter plainly satisfied these constitutional imperatives. The complaint that the procurement process was not competitive is therefore unsustainable on the facts and contrary to the documentary record. This ground of review is, like the others, devoid of merit and must accordingly be dismissed.

Unlawful Subcontracting

[128] The success or failure of this ground is dependent upon whether the emergency deviation was lawful. If it was, the provisions of the PPPFA and the regulations promulgated thereunder concerning subcontracting restrictions, including Regulations 6(5) and 12, were not applicable. Those regulations are directed at competitive bidding processes evaluated under the 80/20 or 90/10 preference-point systems envisaged by the PPPFA.

[129] Where a lawful emergency deviation is invoked, procurement is governed by the distinct emergency procurement framework and its attendant safeguards. The Applicant's reliance on the PPPFA subcontracting provisions is therefore misplaced. Accordingly, this ground of review, like the others, cannot be sustained and falls to be dismissed. It is so dismissed.

[130] In light of this conclusion, it is unnecessary to determine whether Kat Laboratories was, in law and on the facts, a subcontractor. That issue arises only if the PPPFA subcontracting provisions were applicable. Having found that those provisions did not apply in the context of a lawful emergency deviation, the question of whether Kat

Laboratories was a subcontractor becomes academic, and any finding thereon would have no bearing on the outcome of this matter. This Tribunal therefore declines to decide it.

Excessive Pricing

[131] I find it extraordinary that the Department fixed the maximum permissible price for a thermometer at R2 537.00 per unit, yet now contends that Ikati Health's quotation of R895.00 per unit was excessive. On any objective assessment, that contention is difficult to sustain. Ikati Health's quoted price was approximately 65% below the ceiling price established by the Department itself and more than 50% below what the Department anticipated suppliers might charge.

[132] The minutes of the BEC further reveal that Ikati Health's quotation of R895.00 per unit was the lowest-priced responsive quotation received. That contemporaneous market evidence is inconsistent with the allegation that Ikati Health engaged in opportunistic or excessive pricing. If anything, the fact that the successful quotation fell substantially below the Department's own benchmark pricing strongly challenges any suggestion that the procurement process yielded an exorbitant outcome. The complaint is therefore not borne out either by the objective pricing data or by the comparative quotations considered during the evaluation process.

[133] The SIU sought to link Keith Dodkins' representation of Bathibang as the sole shareholder of Ikati Health, and the alleged generation of excessive profits by both entities, to its contention that the corporate veils of Ikati Health and Kat Lab should be pierced. Section 20(9) of the Companies Act 71 of 2008 empowers a court to pierce the corporate veil only where it finds that "the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity". The term "unconscionable abuse" includes conduct that is unreasonably excessive, egregious, blatant, unscrupulous, or shows no regard for conscience. It includes circumstances where the corporate structure is used as a

sham, device, stratagem, or to commit fraud, for a dishonest or improper purpose, or as a façade to conceal true facts.²²

[134] In *Butcher Shop and Grill CC v Trustees for the Time Being of the Bymyam Trust*,²³ the court firmly rejected the notion that courts possess a general discretion to pierce the corporate veil in the mere "interests of justice" absent fraud, abuse, or unconscionable conduct. The Court held that as a matter of principle, there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter.

[135] My earlier finding that Ikati Health's B-BBEE status was immaterial and could not have influenced the decision to appoint it negates any suggestion that its appointment was procured through fraud or misrepresentation, or if there was, it played no role in the appointment. Likewise, the evidence does not support the allegation of excessive profiteering. The Department's benchmark price was R2 537.00 per unit, whereas Ikati Health charged only R895.00 per unit. Besides, none of the other responsive bidders tendered below Ikati Health's bid. In those circumstances, any contention that Ikati Health made exorbitant profits is unsustainable. It too falls to be rejected.

Prejudice

[136] Having failed to establish the factual basis for its claim, the SIU fares no better in demonstrating prejudice. Although prejudice is not, strictly speaking, decisive in determining whether a delay should be excused, the nature and extent thereof remain relevant to the exercise of this Tribunal's discretion. In assessing prejudice, the parties ordinarily affected are the organ of state, the successful bidder, and the public.²⁴ The

²² See *Cellucity (Proprietary) Limited v Garcia and Others* [2025] ZAWCHC 551.

²³ *Butcher Shop and Grill CC v Trustees for the Time Being of the Bymyam Trust* 2023 (5) SA 68 (SCA) at para 45.

²⁴ See *Transnet SOC Ltd v Tipp-Con (Pty) Ltd and Others* [2024] ZASCA 12 at para 47.

commercial prejudice suffered by Ikati Health as a consequence of the delay includes the following:

- 136.1 Since August 2020, Ikati Health has been "red-flagged" and effectively prevented from trading;
- 136.2 The company is presently undergoing deregistration proceedings as a result of its failure to file annual financial statements;
- 136.3 Its inability to secure additional tenders has deprived it of the income necessary to sustain its operations; and
- 136.4 The corporate vehicle established to partially fund and facilitate Bathibang's education and long-term professional development has, for all practical purposes, been destroyed.

[137] The prejudice suffered by Ikati Health as a consequence of the SIU's delay is both substantial and irreversible. Commercially, the delay has rendered the company effectively incapable of trading, resulted in its red-flagging and impending deregistration, deprived it of opportunities to secure further tenders and generate income, and ultimately destroyed the corporate vehicle established for the finance of Bathibang's partial education and long-term professional development.

[138] Evidentially, the prejudice is even more acute. The death of Keith Dodkins, the central witness and controlling mind of Ikati Health and Kat Laboratories, has permanently deprived the Respondents of direct evidence concerning the establishment and operation of the business structure, the supplier arrangements, funding transactions and profit allocations. The passage of time has likewise resulted in the loss or deterioration of critical financial and accounting records, substantially impairing the Respondents' ability to reconstruct historical transactions, verify costs, and respond meaningfully to the SIU's claims, particularly its claim for the disgorgement of profits.

[139] The delay has further hampered the Respondents' ability to obtain third-party records, verify procurement and logistics arrangements, and establish the *bona fides* of the relationships underpinning the transaction. Collectively, these factors have materially compromised the Respondents' ability to defend the proceedings and occasioned prejudice that cannot now be remedied.

[140] In contrast, the Department stands to suffer little, if any, prejudice should condonation be refused. The contract concluded with Ikati Health was fully performed. The goods were procured and delivered during a period of emergency, were accepted and utilised for their intended purpose, and there is no suggestion that their quality was deficient. Nor is there any indication that the Department paid excessive prices or failed to receive value for money. Equally, the public has suffered no palpable prejudice. On the contrary, the procurement achieved its intended objective of safeguarding learners and educators during the COVID-19 pandemic at a competitive cost. Weighing these considerations against the substantial and irreversible commercial and evidential prejudice suffered by Ikati Health as a result of the SIU's delay, the interests of justice favour the refusal of condonation.

Finality

[141] Lastly, I agree that, following nearly four years of silence after the conclusion of the investigation, Ikati Health was entitled to assume that no proceedings would be instituted. The contract had been fully performed and payment completed by June 2020. The investigation was finalised in May 2021. By April 2024, approximately three years after the investigation had concluded, it was reasonable for the Respondents to regard the matter as having reached finality. The public interest in finality assumes particular significance in circumstances where:

- 141.1 The procurement occurred during a national emergency, namely the COVID-19 pandemic;

- 141.2 The goods were delivered, accepted and utilised for their intended purpose, the protection of learners and educators;
- 141.3 There is no allegation of corruption, bribery or political interference;
- 141.4 The pricing was competitive and approximately 65% below the applicable benchmark maximum; and
- 141.5 The constitutional imperatives embodied in section 217 of the Constitution, fairness, transparency, competitiveness and cost-effectiveness, were substantially achieved.

[142] In these circumstances, the public interest is not served by reopening an emergency procurement process some five years after its completion, where the goods were delivered, accepted and used for the benefit of the public, and where no allegation of corrupt conduct has been advanced. Rather, the interests of justice, legal certainty and finality weigh heavily against overlooking the delay.

[143] For an undue delay to be excused, the interests of justice must favour condonation. That enquiry necessarily requires a satisfactory explanation for the delay and a proper consideration of the prejudice occasioned as a result. In the present matter, significant periods of delay remain unexplained notwithstanding that an explanation was plainly necessary. Coupled with this is the absence of any material prejudice to the Department or the public should condonation be refused, contrasted with the substantial and irreversible prejudice suffered by Ikati Health as a consequence of the delay.

[144] Moreover, this is not a case where the merits overwhelmingly favour the SIU to justify overlooking its inadequate explanation for the undue delay. The merits do not constitute an exceptional circumstance warranting the exercise of the Tribunal's discretion in favour of condonation. In these circumstances, there is no cogent basis upon which this Tribunal ought to exercise its discretion in favour of condonation. Against that backdrop, condonation is refused.

Just and Equitable Remedy

[145] I considered whether, notwithstanding my refusal of the condonation, it was necessary to determine the just and equitable remedy that would have followed had the matter proceeded. I ultimately concluded that such an enquiry would serve no practical purpose in light of the dismissal of the condonation application. Nevertheless, the question of whether this would have been an appropriate case for disgorgement remains of significance.

[146] Had I found that Ikati Health was complicit in wrongdoing or had acted fraudulently in relation to the Department, I would have applied the principle that a party should not profit from its own wrongdoing and ordered the disgorgement of any unlawfully obtained gains. However, in the absence of such a finding, and being bound by the decision of the Supreme Court of Appeal in *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others supra*, the principle of “no loss, no gain” cannot be applied as a mandatory rule. The question of disgorgement must instead be determined with reference to what is just and equitable in the particular circumstances, including whether the supplier was complicit in the illegality.

[147] In the absence of any finding of corruption, fraud, dishonesty or other impropriety on the part of Ikati Health, Kat Lab, Adam Dodkins, Bathibang, or the trustees representing the late estate of Keith Dodkins, there is no basis for piercing the corporate veil or imposing personal liability upon them. The facts of this matter are, in material respects, comparable to those considered by the Supreme Court of Appeal in *Mafoko Security Patrols*, where the court emphasised that disgorgement and other remedial measures depend upon considerations of justice and equity, including the extent of a party's complicity in the impugned conduct. In the absence of evidence establishing such complicity, neither disgorgement nor the imposition of personal liability would be warranted. Against that backdrop, I consider the following order to be appropriate:

1. The review application is dismissed;
2. The SIU is liable for the costs of the Respondents, including those of two Counsel where so employed.



JUDGE BA MASHILE
MEMBER OF THE SPECIAL TRIBUNAL

Appearances:

For the Applicant: Adv J Motepe SC
Adv C Motsepe
Instructed by: Seanego Attorneys Inc

For the Third to Eight Respondents: Adv T Lipshitz
Instructed by: Hamilton Attorneys

Date of judgment: 14 September 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 14 September 2026