



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF
THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996**

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: FS01/2020

In the matter between:

SPECIAL INVESTIGATING UNIT

Applicant

And

**MEC FOR DEPARTMENT OF TREASURY
FREE STATE PROVINCE**

First Respondent

MEC FOR FREE STATE DEPARTMENT OF HEALTH

Second Respondent

ABI KUNDU (PTY) LTD

Third Respondent

AFRICA HLAHLA INVESTMENTS CC

Fourth Respondent

ANDZILE GROUP (PTY) LTD

Fifth Respondent

BLAQ AIG TRADING CC

Sixth Respondent

BAHURUTSI PROJECTS (PTY) LTD

Seventh Respondent

BASADZI PELE MANAGEMENT CONSULTING AND PROJECTS CC	Eighth Respondent
BATHOSI TRADING ENTERPRISE (PTY) LTD	Ninth Respondent
BAZIX FIRST (PTY) LTD	Tenth Respondent
DS TRADING AND PROJECTS (PTY) LTD	Eleventh Respondent
HALCYON IMPORT AND EXPORT (PTY) LTD	Twelfth Respondent
HERO INVESTMENTS 1 (PTY) LTD	Thirteenth Respondent
HOPE MED (PTY) LTD	Fourteenth Respondent
LE DI PHAKA PHAKA (PTY) LTD	Fifteenth Respondent
LUYOLWE HOLDING (PTY) LTD	Sixteenth Respondent
MAPHCON CONSULTING (PTY) LTD	Seventeenth Respondent
MOHAU AND SON INVESTMENT (PTY) LTD	Eighteenth Respondent
MPHORE 101 TRADING (PTY) LTD	Nineteenth Respondent
NEWTONGATE (PTY) LTD	Twentieth Respondent
NNZM TRADING AND PROJECTS (PTY) LTD	Twenty First Respondent
PHILETHA PROJECTS AND SERVICES (PTY) LTD	Twenty Second Respondent
QWANTHU TRADING CC	Twenty Third Respondent
RAL CORPORATION (PTY) LTD	Twenty Fourth Respondent
RISE NOW TRADING 34 (PTY) LTD	Twenty Fifth Respondent
SEHOLOHOLO TRADING CC	Twenty Sixth Respondent
SILVER POWER MEDICAL (PTY) LTD	Twenty Seventh Respondent

SLYDEB (PTY) LTD	Twenty Eight Respondent
TRIBUSAT (PTY) LTD	Twenty Ninth Respondent
VESEAL (PTY) LTD	Thirtieth Respondent
VMD INNOVATIONS (PTY) LTD	Thirty First Respondent
YATOLA PROJECTS CC	Thirty Second Respondent

JUDGMENT

MODIBA J:

INTRODUCTION

- [1] The advent of the covid-19 pandemic in March 2020 saw organs of state at various levels of government haste to procure personal protective equipment (PPE items) required to combat the spread of the covid-19 disease. Shortly thereafter, news of rampant corruption and irregularities in covid-19 related procurement began to surface. These precipitated the issuance of proclamation number R23 of 2020¹ by President Cyril Ramaphosa. The Proclamation authorizes the Special Investigating Unit (SIU) to investigate the procurement of goods and services and payments made in a manner that is not fair, competitive, transparent, equitable or cost-effective and contrary to the applicable

¹ Proclamation number R23 of 2020 was issued on 23 July 2020 under Government Gazette No. 43546 dated 23 July 2020.

constitutional, statutory and regulatory provisions in relation to the state of national disaster declared on 15 March 2020.²

- [2] Following its investigative work in various organs of state, the SIU instituted various legal proceedings in the Tribunal to have various tenders reviewed and set aside for lack of compliance with the applicable constitutional, statutory and regulatory requirements. The instant legal proceedings were instituted in this context.
- [3] In this review application, the SIU seeks have the appointment of the third to the thirty second respondents (collectively, the respondent entities) by the Free State Treasury Department, to supply surgical gowns to the Free State Department of Health in terms of RFQ SCMQ 11/2020: Covid-19 (RFQ) reviewed and set aside for want of compliance with section 217 of the Constitution, the relevant provisions of the Preferential Procurement Policy Framework Act³ (PPPFA), the Public Finance Management Act⁴ (PFMA) and the applicable procurement regulations.
- [4] A novel ground of review arises in this application, namely whether suppliers of medical devices are required to be bearers of a licence issued in terms of section 22(1)C(b) of the Medical and Related Substances Act⁵ (the MRSA) in order to operate as suppliers of sterile surgical gowns (surgical gowns). The SIU's case is premised on the proposition that a surgical gown is a medical device and as such, compliance with section 22C(1)(b) is mandatory under these

² The state of national disaster was declared in terms of Government Notice No. 313 of 15 March 2020.

³ 5 of 2000

⁴ 1 of 1999

⁵ 101 of 1965

circumstances. Hence, it relies on non-compliance with section 22C(1)(b), (and on other grounds dealt with in this judgment) to have the appointment of the respondent entities by the Free State Treasury Department reviewed and set aside.

[5] Given that the Tribunal has been inundated with review applications to set aside tenders for the supply of PPE items, it is curious that non-compliance with section 22C(1)(b) arises for the first time in the present application.

[6] It is against this background that I outline the facts of the application and the issues arising for determination. I then discuss the applicable legal framework from which I derive guidance when determining the arising issues. I then discuss and analyse the issues within that framework and make findings. Then, I determine the appropriate remedy and the question of costs. Lastly, the order concludes the judgment.

THE FACTS

[7] As did many organs of State, after the proclamation of the national disaster by President Cyril Ramaphosa, the Free State Provincial Government implemented various measures to curb the spread of the Covid19 pandemic. These included the procurement of PPE items. The Executive Council for the Free State Provincial Government directed that all procurement of PPEs be centralized at the Free State Treasury Department. On 5 July 2020, the Free State Treasury Department procured the supply of surgical gowns and other PPE items for use by the second respondent, the Free State Department of Health under the RFQ.

- [8] To adapt the procurement process to the emergency conditions created by the Covid-19 pandemic, the Head of the Free State Treasury Department, Mr Mahlatsi, approved a deviation from the standard procurement process. Subsequently, a request for quotations (“RFQs”) was published, inviting quotations for the supply of various PPE items, including surgical gowns. More than 60 bids were received. The Free State Treasury Department convened an Emergency Procurement Task Team (EPTT) as well as a Bid Quotation Committee (BQC) to manage the procurement process.
- [9] Mr Mahlatsi approved the BQC’s recommendation, leading to the issuing of appointment letters to the successful bidders on 5 July 2020. The respondent entities are among these. Subsequently, orders for PPE items were placed with the successful bidders. They delivered the procured items to the designated delivery points. Thereafter, the process of dispatching the items to various health service points got underway.
- [10] The procurement seemed to have gone very well until the Free State Department of Health started receiving complaints from several health service points that surgical gowns of inferior quality were delivered to them. The complaints prompted the Free State Department of Health to embark on an investigation of the complaints. The Free State Department of Health’s Ms Riddles compiled a report containing findings from the investigation.
- [11] The report only identified 3 of the 32 successful bidders as having delivered surgical gowns that comply with the RFQ technical specifications. These respondents are the 16th respondent Luyolwe Holding (Pty) Ltd (Luyolwe), the

24th respondent Ral Corporation (Pty) Ltd (Ral Corporation) and the 25th respondent Rise Now 34 Trading (Pty) Ltd (Rise Now).

[12] The Free State Department of Health had difficulty matching the rest of the surgical gowns to the bidders who supplied them because:

12.1 the large volume of surgical gowns ordered and delivered made the validation process impossible;

12.2 most of the boxes in which the surgical gowns were delivered were not marked, making it impossible to identify the bidders who supplied and delivered the boxes;

12.3 that several bidders sourced the gowns from the same dealers only exacerbated the problem;

12.4 in some depots, surgical gowns delivered in terms of the RFQ were mixed up with those donated by a named donor;

12.5 some of the boxes in which surgical gowns were delivered had been dispatched to health service points.

[13] The Free State Treasury Department has committed funds in the amount of R39,150,739.60 towards the surgical gowns. It has made payment to several bidders in the amount of R9,512,837.68. Some of these bidders were identified to have delivered non-compliant gowns. It has received invoices from several other bidders but is yet to honour the invoices. Payment to these respondents in the amount of R23,2 million is due and payable. There are respondents who are yet to remit invoices to the Free State Treasury Department. The value of orders placed with these respondents is approximately R6,4 million.

- [14] In her report, Ms Riddles recommends that the non-compliant respondent entities be penalised R1 per surgical gowns on the price quoted and be paid the difference invoiced. The BQC had to agree to the final recommendations to be submitted to Mr Mahlatsi for approval.
- [15] The SIU takes issue with this recommendation. It alleges that the payments will constitute a breach of the applicable laws. It also alleges that the payments will amount to irregular and wasteful expenditure.
- [16] The Free State Department of Health was still in the process of inspecting and verifying the surgical gowns delivered to the designated delivery points by the bidders when the SIU stepped in to conduct its own investigation. The SIU halted further orders, deliveries and payments pending its investigation. Having found several irregularities in the procurement process, the SIU instituted these proceedings.

THE PARTIES CONTENTIONS AND ISSUES TO BE DETERMINED

- [17] The SIU initially sought relief in two parts, A and B. In Part A, the SIU sought to interdict the Free State Treasury Department as the first respondent and the Free State Department of Health as the second respondent (jointly, the Departments) from further implementing the RFQ. This relief became redundant when the Departments made an undertaking, as demanded by the SIU, not to implement the RFQ further pending the determination of the relief set out in Part B of the SIU's notice of motion.

[18] In Part B, the SIU initially sought an order to set aside as ultra vires, null and void, alternatively unreasonable, the following two decisions:

18.1 the awarding of the RFQ to the respondent entities. For convenience I refer to this award as the whole RFQ;

18.2 the awarding of the RFQ to the respondent entities in respect of surgical gowns. For convenience I simply refer to this award as the RFQ.

[19] The whole RFQ and the RFQ emanated from the same procurement process. However, the SIU seeks to distinguish between the two. The whole RFQ relates to the procurement of a suite of PPE items, inclusive of surgical gowns. Save for the procurement of surgical gowns, the SIU does not enumerate any irregularities in the procurement of the rest of the PPE items procured under the whole RFQ. Hence, the SIU has only set out grounds of review that relate to the RFQ. It prudently did not persist with the review of the whole RFQ as it did not make out a case for it in its founding and supplementary founding affidavits. Consequently, the SIU abandoned the order addressed in paragraph 18.1 of this judgment, which is set out in paragraph 3 of the notice of motion.

[20] The SIU also seeks an order in terms of which the respondent entities are ordered to pay the first respondent 'any and all sums of money paid to them respectively under the whole RFQ. It also seeks a cost order against any opposing respondent(s).

[21] The Departments, Silver Power Medical (Pty) Ltd (Silver Power) as the twenty seventh respondent, the Bahurutsi Projects (Pty) Ltd (Bahurutsi), Le Di Phaka Phaka (Pty) Ltd (Le Di Phaka) and Newtongate (Pty) Ltd (Newtongate) as the seventh, fifteenth and twentieth respondents and Philetha Projects and Services (Pty) Ltd (Philetha) as the twenty second respondent are opposing the application on the basis I will deal with shortly.

[22] Bahurutsi, Le Di Phaka and Newtongate have mounted a joint opposition. For convenience, I refer to them as the Newtongate Respondents. I refer the other respondent entities individually by their names. I refer to all the opposing respondents jointly as the opposing respondents. Where I need to distinguish between the Departments and the other opposing respondents, I refer to the opposing respondent entities as such.

[23] The SIU's main premise for the review is as detailed in paragraphs 4 above. In essence, the SIU alleges that having failed to comply with the applicable laws when it appointed the respondent entities, the Free State Treasury Department lacked the requisite authority, and as such contravened with the principle of legality.

[24] The SIU relies on the following grounds of review:

24.1 non-compliance with the MRSA⁶, the regulations thereto and the SAHPRA Guidelines;

24.3 non-compliance by the respondent entities with the conditions of the
RFQ

⁶ Act 101 of 1965

24.3 non-segregation of duties between members of the EPTT and the BQC;

[25] Initially, the opposing respondent entities opposed the merits of the review application and the relief sought by the SIU. During oral argument, they abandoned their opposition to the merits of the application. They persisted with their opposition to the relief, contending that they are entitled to just and equitable relief.

[26] The Departments focussed their opposition on the merits of the application.

[27] The Departments insist that the process that led to the procurement of the surgical gowns complied with the applicable prescripts and was therefore lawful. To the extent that defective surgical gowns were delivered to the Free State Department of Health, this is a performance issue that arises between the Departments and the relevant service providers. The Departments is entitled to resort to contractual remedies at its disposal to resolve this difficulty. They seek confirmation that the procurement process was lawful. They also seek a dismissal of the review application with costs.

[28] The Departments specifically deny that:

28.1 a legality review is competent. They allege that the SIU should have brought a review in terms of the Promotion of Just Administration Act (PAJA)⁷;

⁷ Act 3 of 2000

- 28.2 there is any conduct on the part of the Departments that renders the matter to fall within the ambit of section 2(1)(a)(ii) of the Special Investigating Unit and the Special Tribunals Act (SIU Act)⁸;
- 28.3 they failed to comply with the MRSA, regulations thereto and SAHPRA Guidelines and that the respondent entities failed to comply with the conditions of the tender;
- 28.4 they failed to comply with the applicable constitutional, statutory and legislative procurement provisions.

[29] It follows that the following issues stand to be determined:

- 29.1 whether a legality review is incompetent;
- 29.2 whether this matter falls outside the scope of section 2(1)(a)(ii) of the SIU Act;
- 29.2 whether the respondents failed to comply with section 22C(1)(b) of the MRSA, its regulations and the SAHPRA guidelines.
- 29.3 whether the surgical gowns delivered to the Free State Department of Health did not comply with the technical specifications set out in the RFQ; and
- 29.4 whether the process of evaluating bidders complied with the applicable statutory and regulatory prescripts, rendering the awarding of the tender to the successful bidders was irregular and unlawful.

⁸ Act 74 of 19966

THE APPLICABLE LEGAL FRAMEWORK

[30] As to the applicable legal framework as set out below, there is no dispute between the parties:

30.1 the Constitution provides that when procuring goods or services, an organ of state must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. As required in terms of section 217(3), government has developed procurement policy in accordance with a procurement legislative framework enacted by parliament.⁹ The legislative framework comprises the PPPFA, the PFMA and Regulations issued pursuant to it;

30.2 the PPPFA provides that when procuring goods or services, organs of state should only consider "acceptable" tenders. Section 1 of the PPPFA defines an "acceptable" as "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document";

30.3 when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and may make any order that is just and equitable, including— an order limiting the retrospective effect of the declaration of invalidity or an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.¹⁰

⁹ Section 217

¹⁰ Section 172(1) of the Constitution

WHETHER A LEGALITY REVIEW IS INCOMPETENT

- [31] The Departments contend that where an organ of State such as the SIU acts in the public interest to challenge the lawfulness and fairness of an administration action of another organ of state, in this case the Free State Treasury Department, the SIU enjoys all the rights and obligations that those affected by the decision would enjoy. Therefore, the SIU should have brought the review application in terms of PAJA. The SIU does not specifically deal with this issue in reply. This omission is inconsequential because this issue is essentially of a legal nature.
- [32] The Departments' contention is legally unsustainable. When the SIU institutes proceedings in the Tribunal, it may do so in its own capacity as authorised by section 5(5) of the SIU. This section provides that the SIU *'may institute proceedings in a Special Tribunal if, arising from its investigation, it has obtained evidence substantiating any allegation contemplated in section 2(2).'* When it does, the SIU almost always places concomitant reliance on section 4(1)(c) which provides that *'The functions of the Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in section 2(1) – (c) to institute and conduct civil proceedings before a Special Tribunal or a court of law for any relief to which the state institution itself is entitled'*.¹¹ In such proceedings, the SIU is only entitled to the relief to which the organ of state allegedly implicated in the incidents enumerated in section 2(2) of the SIU Act is entitled.

¹¹ See also *Special Investigating Unit v Engineering Systems Solutions (Pty) Ltd* (Case no 216/2020) [2021] ZASCA 90 (25 June 2021) at paragraph 3.

- [33] This is the case in the present proceedings. The SIU is not seeking to vindicate any right to administrative justice. As already mentioned, it only seeks relief in terms of section 172(1)(a) and (b) of the Constitution. This is the relief to which the Departments would be entitled, had they brought the review application themselves. The present proceedings are therefore akin to a self-review as referenced by the Constitutional Court in *Gijima*¹². For the same reasons set out in *Gijima*, a review in terms of PAJA is incompetent.
- [34] I therefore, find that the SIU correctly brought this review in terms of the principle of legality.

WHETHER THIS MATTER FALLS OUTSIDE THE SCOPE OF SECTION 2(1)(a)(ii) OF THE SIU ACT

- [35] Section 2(1)(a)(ii) provides as follows:

“2 President may establish Special Investigating Units and Special Tribunals

“(1) The President may, whenever he or she deems it necessary on account of any of the grounds mentioned in subsection (2), by proclamation in the Gazette-

“(a) (i)...

(ii) refer the matter to an existing Special Investigating Unit for investigation;”

- [36] The procurement of surgical gowns in terms of the RFQ is allegedly irregular and unlawful. Therefore, the respondents are implicated in the unlawful and irregular acquisitive act or transaction having a bearing upon State property as envisaged in section 2(2)(d).

¹² *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC)

[37] As already mentioned, the SIU may only investigate matters referred to it by the State President in terms of Section 2(1)(a)(ii). To the extent that the present matter involves the procurement of PPE items required to combat the Covid 19 disease, it falls within the scope of Proclamation 23. As already mentioned, it is in terms of this proclamation that the President referred the present matter to the SIU for investigation.

[38] Accordingly, the SIU is authorised by Proclamation 23 to investigate the procurement process that was employed in terms of the RFQ and to seek recourse in the Tribunal in terms of section 5(5) read with section 4(1)(c).

[39] I therefore find that this matter falls within the scope of section 2(1)(a)(ii).

NON-COMPLIANCE WITH THE MRSA, THE REGULATIONS THERETO AND THE SAHPRA GUIDELINES

[40] The SIU alleges that the respondent entities failed to comply with the mandatory provisions of section 22C(1)(b) of the MRSA read with Regulation 19 of the regulations issued in terms of the MRSA in that they are not bearers of a licence issued in terms of that section.

[41] To bring surgical gowns into the ambit of section 22C(1)(b), the SIU's case developed progressively as follows:

41.1 in its supplementary founding affidavit, it alleges that SAHPRA has classified a surgical gown as a Schedule "A" medical device;

41.2 in its replying affidavit dated 2 August 2021, it contends that any item which has sterility as part of the specifications is deemed to be a medical device subject to the MRSA and SAPHRA guidelines;

41.3 in its supplementary heads of argument filed on 8 December 2021, it contends that, a surgical gown is a medical device as defined because “it is intended to be used alone or in combination for humans for the diagnosis, prevention, monitoring, treatment or alleviation of disease.” (sic) Therefore, as such, section 22C (1) (b) is applicable to the RFQ;

41.4 in its further supplementary heads of argument filed on 18 January 2022 in reply to the Departments’ supplementary heads of argument, it invited the Tribunal to borrow from the categorization of a surgical gown as a medical device by the United States Food and Drug Administration (FDA), which defines a medical device to include a surgical gown.

[42] It is common cause that:

42.1 the RFQ did not specifically require the bidders to have a licence issued

in terms of section 22C(1)(b);

42.2 all the respondent entities are not previously or currently registered or licenced to manufacture, wholesale or distribute a medical device in terms of section 22C(1)(b) of the MRSA;

42.3 before the SIU instituted the review application, none of the respondent entities had applied to SAHPRA for such a licence;

[43] Section 22C(1)(b) provides as follows:

“Section 22(C) Licencing:

(1) Subject to the provisions of this section-

(b) the council may, on application in the prescribed manner and on payment of the prescribed fee, issue to a manufacturer, wholesaler or distributor of a medicine or medical device a licence to manufacture, import or export, act as a wholesaler of or distributor, as the case may be, such medicine or medical device, upon such conditions as to the application of such acceptable quality assurance principles and good manufacturing and distribution practices as the council may determine.”

[44] Section 1 of the MRSA defines a medical device as:

“any instrument, appliance, material, machine, apparatus, implant or diagnostic agent –

(a) used or purporting to be suitable for use or manufactured or sold for use in –

- (i) the diagnosis, treatment, mitigation, modification, monitoring or prevention of disease, abnormal physical or mental states or the symptoms thereof; or*
- (ii) restoring, correcting or modifying any somatic or psychic or organic function; or*
- (iii) the diagnosis or prevention of pregnancy, and which does not achieve its purpose through chemical, pharmacological, immunological or metabolic means in or on the human body but which may be assisted in its function by such means; or*

(b) declared by the Minister by notice in the Gazette to be a medical device, and includes any part or an accessory of a medical device.”

[45] The prohibition against manufacturing, wholesaling or distributing medical products without a licence is contained in Section 22C(6). It provides that:

“No manufacturer, wholesaler or distributor referred to in subsection (1)(b) shall manufacture, import or export, act as a wholesaler of or distributor, as the case may be, of any medicine unless he or she is the holder of a licence contemplated in the said subsection.” (Emphasis added)

[46] Regulation 19 provides for the procedure to be followed when applying for a licence. It provides that the person referred to in section 22C(1)(b) must, prior to commencing business as such, *“apply to the Council to manufacture, import, or export, act as a wholesaler or distributor of medicines, scheduled substances or medical devices.”*

[47] The Departments deny that the respondent entities did not comply with these provisions. The Free State Treasury Department did not make compliance with these provisions a condition of the RFQ. It contends that:

47.1 compliance with the MRSA, its Regulations and registration with SAPHRA is not a requirement in terms of any of the Instruction Notes issued by National Treasury as the regulatory body on supply chain management processes;

47.2 it took guidance from the applicable National Instructions, in particular, paragraph 4 of National Instruction 5 which regulates the emergency procurement of PPE items. It provides that the supply of PPE items will be open to all suppliers that confirm to the COVID19 item specifications as issued by WHO and the NDOH;

47.3 hence, the RFQ did not require the bidders to register with SAPHRA;

[48] The contention that section 22C(1)(b) applies to surgical gowns is unsustainable for the following reasons:

48.1 the SIU has not submitted any evidence that SAHPRA has classified a surgical gown as a Schedule "A" medical device. With reference to products listed on the SAHPRA website, the Departments dispute this. The SIU has advanced no reason why it has not made this important evidence available to the respondents and to the Tribunal;

48.2 the proposition that any item which has sterility as part of the specification is deemed to be a medical device subject to MRSA and SAPHRA guidelines is not supported by reference to such a deeming provision either in the MRSA, its regulations or SAHPRA guidelines. Neither is it supported by any judicial authority;

48.3 none of the respondent entities engaged with the Free State Treasury Department as manufacturers or wholesalers of surgical gowns. They

engaged with it as suppliers of surgical gowns. As such they are distributors as envisaged in section 22C(1)(b);

48.4 section 22C(1)(b) simply bestows a discretion upon the council to, on application to it, issue a licence to a manufacturer, wholesaler or distributor of medicines or medical devices, subject to such conditions as it may determine. It does not require manufacturers, wholesalers or distributors of medical devices to obtain a licence;

48.5 it is section 22C(6) which prohibits manufacturers, wholesalers or distributors from trading without a licence. Notably, section 22C(6) excludes the manufacturing, wholesaling or distribution of medical devices from the prohibition;

48.6 the exclusion of medical devices from section 22C(6) is consistent with its exclusion from section 14 and section 19 and other sections that prohibits the sale of unregistered medicines;

48.7 if the legislature intended to prohibit the distribution of medical devices without a licence, not only would it have expressly included it in section 22C(6), it would have also set out consequences for non-compliance as it did in sections 14 and 19 in relation to medicines;

48.8 interpreting section 22C(1)(b) with reference to the FDA definition of a medical device would not cure these omissions;

48.9 even if I were to accept that a surgical gown is a medical device as contended by the SIU, it is not mandatory for manufacturers, wholesalers or distributors of surgical gowns to obtain a licence in terms of section 22C(1)(b) for the purpose of manufacturing, wholesaling or distribution surgical gowns. For these traders, the provisions of section 22C(1)(b) are discretionary;

48.10 that the regulatory regime that governs the procurements of PPEs items, namely the National Instruction 5 and 8 and the National Health Specifications does not require supplies to have a licence issued in terms of section 22C(1)(b) is consistent with this interpretation.

[49] Consequently, by not requiring bidders to be bearers of a licence issued in terms of section 22C(1)(b), the Free State Treasury Department did not contravene that section.

[50] Determining whether a surgical gown is a medical device as defined becomes superfluous, as it does not advance the SIU case.

[51] For these reasons, this ground of review stands to be rejected.

NON-COMPLIANCE WITH THE RFQ SPECIFICATIONS

[51] The RFQ required the bidders to comply with the following technical specifications:

“gown, surgical, non-woven polypropylene body +-54g/m sleeves +-66g/m long sleeves with cuffs. Reinforced in chest and forearm areas. Resistant to liquid penetration. Lint free, non-flammable, Bacteria barrier efficiency, to comply with SANS 53795, compliance certificates to be submitted, sterile, individual double peel packed. (sic)

[52] The RQF provided as follows regarding the submission of samples:

“8 Quality

“8.7.1 Where specific specifications and/ or stands are applicable on materials and supplies, the quality of products shall not be less than the requirements of the latest edition of such specifications and/ or standards.

“8.7.2. Samples submitted for Visual Screening (sic)

“(a) samples must be submitted before or on the closing date of the sample, for evaluation of compliance with specifications and/standards. (sic)

“(b) All samples submitted for visual screening must be a true representation of the product which will be supplied.”

[53] I deal with the bidders’ alleged non-compliance with the above specifications under two broad topics. SANS 53795 certificate and the quality of the surgical gowns.

SANS 53795 certificate

[54] The SIU alleges that none of the bidders submitted a SANS 53795 certificate as a required in terms of the RFQ. Silver Power and Philetha have not placed their alleged non-compliance with this requirement in dispute.

[55] The Newtongate respondents contend that they individually lodged ‘compliance certificates’. It is unclear what they mean by compliance certificates. To their answering affidavit, they have attached as annexure ‘TM1’, a SANS 53795 certificate issued by Defcon Protec (Pty) Ltd in respect of a MYZ sample of a surgical gown material. This document is not referenced and explained in the answering affidavit. The Newton Gate respondents do not even allege that this is the document they attached to their respective quotations. This evidence is rejected on the basis of the following evidence advanced by the SIU, as it does not constitute compliance with the RFQ specifications:

55.1 the SIU perused the respective quotations submitted by these respondents. None of the respondents attached TM1 to their respective quotations;

55.2 all three respondents sourced the surgical gowns they supplied to the Free State Department of Health from Rui Star Trading, a company

based in Welkom and not from any company with the letters MYZ to its name.

55.3 TMI only deals with the measurable strength factors of a sample of material used to manufacture a sterile surgical gown. It does not certify that a surgical gown complies with SANS53795.

[56] I therefore find that all the respondents failed to submit a SANS 53795 certificate as required in terms of the RFQ.

The quality of the surgical gowns

[57] I determine this issue with reference to the following three factors relied on by the SIU:

57.1 the submission of samples by bidders

57.2 the testing of the samples by the EPTT/ BQC

57.3 the state of the gowns delivered in terms of the RFQ

The submission of sample by bidders

[58] The SIU alleges that it did not find any evidence that the bidders submitted samples in compliance with the technical specifications.

[59] The Newton Gate respondents insist that they submitted compliant samples. Philetha, also insists that it submitted a compliant sample.

[60] The Compliance Sheet for Bidders (the compliance sheet) reflects that most of the respondent entities submitted surgical gown samples. Notably, the compliance sheet records that Philetha's sample was acceptable.

[61] Even if I were to accept that the Newton Gate respondents and Philetha submitted samples, it is not for these respondents to test and approve their samples. This ought to have been done by the EPTT/BQC. As determined under the subheading 'the testing of samples' below, the Departments have not disclosed this evidence. The basis on which to accepted the contention by these respondents that their samples were compliant is absent. Therefore, their contention is rejected.

[62] In its answering affidavit, Silver Power painstakingly details the process it followed when it responded to the RFQ. However, nowhere does it dispute the allegation that it did not submit samples as required. Instead, it relies on:

62.1 the fact that in her report, Ms Riddles has not made any adverse findings in respect of the surgical gowns it delivered to the Free State Department of Health;

62.2 the finding by the Public Protector that the process followed in respect of the RFQ was regular and lawful, a defence that was not persisted with.

[63] In their answering affidavit, in the main, the Departments do not deal with the SIU allegations. It is disturbing that the Departments do not dispute that they have not furnished the SIU with any evidence that the bidders submitted compliant samples given that the submission of samples was a distinct technical specification of the RFQ.

The testing of the samples

- [64] The SIU alleges that it has not found any evidence that the samples were appropriately tested. It found no evidence that testing was conducted by a SANS accredited laboratory representative and/ or were verified by SANAS.
- [65] Although the compliance sheet reflects that most of the respondent entities submitted samples of the surgical gowns, the sheet does not constitute evidence that the samples submitted by the respondents were compliant as the sheet is silent on the specific specifications each sample complied with as well as method and criteria used for testing the samples. The sheet only reports on the compliance status of each bidder. Further, the minutes of the EPTT/BQC do not reflect this information. The minutes also fail to record by whom or how the samples were tested.
- [66] The government respondents' contention that the EPTT/BQC properly assessed the sample during the bidding phase of the procurement process and found them compliant is untenable. They have not genuinely disputed the above allegations.
- [67] The SIU's version, that it was not furnished with this evidence, leads to the finding that this evidence does not exist. At the very least, these samples ought to have been presented to the SIU as evidence that the samples complied with the technical specification. This was not done.
- [68] In any event, even if the respondent entities had presented compliant samples, the failure to submit SANS certificates disqualified them from the bid.

The state of the surgical gowns that were delivered in terms of the RFQ

[69] Regarding the status of the surgical gowns that were delivered in terms of the RFQ, the SIU relies on Ms. Riddles' report as well as its own investigation.

[70] Ms. Riddles reports that "the items outside the boxes states "surgical sterile gowns" but what is inside the boxes were discovered as "non-sterile isolation surgical gowns."" (sic)

[71] The SIU further alleges that when its team visited the medical depot and the site at Universitas Hospital where the surgical gowns were delivered to, it found that some of the boxes in which the gowns were delivered were:

71.1 not from any known reputable manufacturer in the medical environment;

71.2 severely damaged and as a result, the gowns were no longer sterile;

71.3 poorly made;

71.4 not reinforced in the chest and forearm area and peel packaged. This is contrary to the label on the boxes in which the surgical gowns were delivered.

71.5 packaged in a normal household bag.

[72] The SIU also found that some of the gowns were bundle wrapped in plastic and the description of the gowns hand written on a A4 manuscript page.

- [73] The SIU team also identified boxes which contained gowns that appeared to comply with the technical specifications. As already mentioned, Ms Riddles have pinned these gowns to Luyolwe, Ral Corporation and Rise Now.
- [74] The allegation by one of the opposing respondent entities that the surgical gowns it delivered to the Free State Department of Health have been distributed and used and were not part of the surgical gowns inspected by the SIU, is unsubstantiated.
- [75] None of the opposing respondent entities were found to have delivered compliant surgical gowns as reported by Ms. Riddles. The Tribunal is unable to rely on the allegation that the surgical gowns it delivered in terms of the RFQ had been dispatched to health service points and used when the SIU team visited the delivery points. The allegation is not substantiated. The respondent entities simply have no way of knowing whether the surgical gowns they delivered have been dispatched and used as none of them were involved in the dispatching of the surgical gowns to health service points. Notably, the Departments have not put up any evidence regarding who has supplied the surgical gowns that have been dispatched to health serve points. On the conspectus of the evidence presented by all the parties in these proceedings, there is no such evidence.
- [76] Save for alleging that the RFQ did not include any specifications for the labelling of the boxes in which the surgical gowns are delivered, the Departments have actually admitted these allegations. Correctly so, as they are based on Ms Riddle's findings.

[77] The Departments contend that the fact that 3 of the 32 respondent entities delivered non-compliant surgical gowns that do not meet tender specifications does not affect the validity of an otherwise lawful and regular tender process. The Departments further allege that they were in the process of resolving these issues with the bidders when the SIU took over the investigation. These contentions bear no relevance to the issue under consideration.

[78] The fact that inferior surgical gowns were delivered casts doubt on the veracity of the assessment of the samples. It is improbable that defective surgical gowns would have been delivered if the samples that were assessed met the requisite SANS standard. Failure to verify the quality of the gowns delivered, to ensure that they are consistent with the approved samples further casts doubt on the Departments' mindedness to the importance of quality assurance throughout the RFQ process. So is the appointment of the respondent entities notwithstanding their failure to submit SANS53795 certificates.

[79] In the premises, I find that:

79.1 the samples submitted by the bidders were not appropriately tested;

79.2 with the exception of Luyolwe, Ral Corporation and Rise Now, there is no evidence that the respondent entities submitted gowns that comply with the technical specifications for the RFQ.

[80] Therefore, this ground of review stands to be upheld.

NON-SEGREGATION OF DUTIES BETWEEN MEMBERS OF THE BID COMMITTEES

[81] It is common cause that the EPTT and the BQC comprised of the same four officials. The SIU alleges that the EPTT and the BQC did not function independently and impartially when adjudicating the bids that were submitted in response to the RFQ. The role of the EPTT was to check the quotations for administrative compliance. The BQC was to test the samples, adjudicate the quotations and make recommendations. On 20 May 2020, Mr Mahlatsi granted approval to collapse the EPTT and the BQC because it was impractical to function through two committees as very few officials were allowed to be at work because of the lockdown restrictions.

[82] The SIU has not disputed the Department's version. Neither has it disputed Mr Mahlatsi's authority to collapse the two committees. The Department's version is practical as dictated by the exigencies of a Covid-19 lockdown. Mr Mahlatsi as the Free State Treasury Department accounting officer had the authority to approve a deviation from prescribed procurement processes in terms of Treasury Regulations 16A6.4.

[83] Therefore, this ground of review stands to be rejected.

WHETHER THE PROCUREMENT PROCESS FOLLOWED BY THE FREE STATE DEPARTMENT OF TREASURY WAS IRREGULAR AND UNLAWFUL

[84] Having determined that all the respondent entities failed to comply with the technical requirements for the RFQ, it follows that their quotations were not acceptable as envisaged in section 15(1)(2) of the PPPFA. Therefore, their quotations ought to have been rejected by the EPTT/BQC. It was highly irregular for the Free State Treasury Department to appoint the respondent entities notwithstanding their failure to comply with the technical specifications of the RFQ.

[85] I find the respondent entities' non-compliance with the technical requirements of the RFQ is material and offends section 217(1) of the Constitution for the reasons set out below.

[86] The process followed to appoint the respondent entities was not efficient in the following respects:

86.1 the submission of a SANS certificate was a mandatory requirement.

86.2 the SANS certificate was critical for the purpose for which the surgical gowns were procured. It was the first in the line of assurance that the respondent entities would supply gowns that meet the technical requirements for the RFQ.

86.3 compliant samples were the second in line. As found, there is no evidence that the surgical gowns were appropriately tested.

86.4 given that the assurance indicators the Department had set in the RFQ were not met, it is hardly surprising that the Departments are now saddled with poor quality gowns.

86.5 the technical requirements for the surgical gowns were purposed to ensure that bidders supply the Departments with good quality gowns that are fit for purpose and to eliminate the risk that any of the bidders supply the Departments with gowns of a poor quality. Given that the Department of Health required the gowns for the treatment of patients infected with Covid-19, the importance of the quality of the gowns cannot be underplayed, especially considering the globally recognised highly infectious nature of the Covid-19 disease;

86.6 by proceeding to appoint the respondent entities notwithstanding their failure to submit SANS 53795 certificates and not properly testing the surgical gowns samples, the Free State Treasury Department displayed reckless disregard for the SANS 53795 quality standard.

86.7 that the Free State Department of Health could not identify the bidders who delivered non-compliant gowns reveal the inefficiencies in the management of the delivery and depot systems at the Free State Department of Health.

[87] These inefficiencies undoubtedly render the procurement process not cost effective as required in terms of section 217 because, with the exception of the gowns supplied by Luyolwe, Ral Corporation and Rise Now, the surgical gowns

that were supplied by the remaining respondent entities cannot be used for the purpose for which they were procured. It follows that the costs incurred by the Departments in respect of the non-compliant surgical gowns stand to be wasted. Given that approximately R30 million is yet to be paid to the respondent entities,

[88] Permitting the appointment of the respondent entities in terms of the RFQ, to the extent that it relates to surgical gowns, to survive this review under these circumstances would gravely undermine section 217 of the Constitution. It will pave the way to ameliorate the looming fruitless and wasteful expenditure.

[89] Therefore, the appointment of the respondent entities in terms of the RFQ, to the extent that it relates to surgical gowns, falls to be declared to be ultra vires and null and void. It also falls to be and set aside.

JUST AND EQUITABLE RELIEF

[90] Having declared the appointment of the respondent entities irregular and unlawful in terms of section 172(1)(A) of the Constitution, the stage is set to consider just and equitable relief in terms of section 172(1)(b) of the Constitution.

[91] Just and equitable relief is discretionary in nature. Its purpose is to pre-empt or correct or reverse an improper administrative function. In this regard the

Constitutional Court in *Bengwenyama*¹³ stated that: “*The apparent rigour of declaring conduct in conflict with the Constitution ... unlawful is ameliorated ... by providing for a just and equitable remedy in its wake.*”

[92] The relief must fit the injury. The relief must be fair to those affected by it and yet vindicate effectively the right violated. In the instant case, the anomaly to be ameliorated is the prevention of loss to the Departments and to the extent that it has already incurred the loss, to mitigate the loss resulting from the irregular and unlawful appointment of the respondent entities. Given that approximately R30 million is yet to be paid to the respondent entities, this is not a trifling endeavour.

[93] The SIU prays for an order in terms of which all the respondent entities pay back the money they have been paid by the Free State Treasury Department in terms of the RFQ. Such an order would be just and equitable if the Departments were able to return to each tenderer the surgical gowns it delivered to the Free State Department of Health, particularly in light of the respondent entities own culpability by not submitting SANS 583795 certificates. Since the Department is unable to return to each bidder the gowns supplied by it, such an order would not be just and equitable.

¹³ *Bengwenyama Minerals (Pty) Ltd and Others v General Resources (Pty) Ltd and Others* (CCT 2011 (4) SA 113 (CC))

[94] The opposing respondents are no longer insisting on full payment as they have conceded that just and equitable relief should be ordered. As such, they have accepted the principle in *All Pay 2*¹⁴ that no one should benefit from an irregular procurement process. On the present facts, consistently with the no profit principle, in light of the Departments' inability to return the surgical gowns to the respondent entities, the respondent entities should not unduly be prejudiced from the declaration of the invalidity of their appointment.

[95] In these circumstances, I find that it is just and equitable that:

95.1 the respondent entities are divested of the profit they have or stand to derive from the RFQ;

95.2 with the exception of Luyolwe, Ral Corporation and Rise Now and any other respondent entity who is subsequently found to have delivered compliant surgical gowns, the respondent entities are treated the same for the purpose of determining just and equitable relief.

95.3 the SIU enlist the services of appropriate independent expert to assess the fair value of the surgical gowns delivered by the respondent entities which are still in the possession of the Departments;

95.4 the surgical gowns supplied by 16th respondent Luyolwe, Ral Corporation, Rise Now and any other respondent entity who is subsequently found to have delivered compliant surgical gowns are excluded from the assessment referenced in paragraph 97.3

¹⁴ *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (4) SA 179 CC as paragraph 63.

95.5 any respondent entity who was not given an opportunity to identify the surgical gowns they delivered to the Departments, they are allowed to do so.

95.6 the fair value of the surgical gowns so determined, including any costs incurred by the respondent entities to deliver the service to the department in terms of the RFQ to determine the amount in respect of which the respondent entities are to be divested;

95.7 to the extent that the Departments stand to suffer any loss from the RFQ, the Heads of the Departments should invoke section 38(1)(h) of the PFMA against the implicated Departmental officials to recover any fruitless and wasteful expenditure incurred or to the incurred from the RQF.

[96] To give effect to the just and equitable relief, it is expedient that the respondent entities are directed to submit an audited statement and debatement of account in respect of all the money received from the Free State Treasury Department in terms of the surgical RFQ and all the costs that they have incurred in order to meet their obligations in respect of the surgical gowns component of the RFQ.

COSTS

[97] In the event that the review application is granted, no reasons have been advanced as to why costs should not follow the course.

ORDER

1. The review application succeeds.
2. It is declared that the appointment of the third to the thirty second respondents (the respondent entities) in respect of request for quotation number SCMQ 11/2020: COVID19 to the extent it relates to the procurement of surgical gowns (the RFQ) is unlawful and irregular.
3. The appointment of the respondent entities is also declared to be invalid and set aside.
4. The respondent entities are divested of the profit they have derived or stand to derive from the RFQ.
5. The Special Investigating Unit (SIU) shall enlist the services of an appropriate independent expert to assess the surgical gowns delivered to the Free State Departments of Treasury and Health (the Departments) in respect of the RFQ by the respondent entities which are still in the possession of the Departments to:
 - (a) assess the quality of the surgical gowns and their appropriate use;
 - (b) determine the fair value of the surgical gowns in light of their quality and appropriate use.
6. Within 30 days of this judgment, the SIU shall file an expert report compiled by the expert in terms of paragraph 5 of this judgment.
7. The SIU and the Departments shall permit any respondent entity who was not given an opportunity to identify the surgical gowns they delivered to the Departments, to do so.
8. The surgical gowns supplied by 16th respondent Luyolwe Holding (Pty) Ltd (“Luyolwe”), the 24th respondent Ral Corporation (Pty) Ltd (“Ral Corporation”), the 25th respondent Rise Now 34 Trading (Pty) Ltd (“Rise Now”) and any other

respondent entity who is subsequently found to have delivered compliant surgical gowns shall be excluded from the assessment referenced in paragraph 5 of this order.

9. In the event that any respondent entity disputes the determination made in terms of paragraph 5 of this order, it is entitled to appoint their own expert and file their expert report. In that case, the respondent entity shall, within 5 days of the report referenced to in paragraphs 5 and 6 being filed, notify the other parties of its intention to appoint its own expert. Thereafter, it shall file its expert report within 15 days.
10. The fair value of the surgical gowns so determined, shall be used to determine the profit the respondent entities derived or stand to derive from the RFQ for the purpose of giving effect to paragraph 4 of this order.
11. The actual costs incurred to source the surgical gowns supplied in terms of the RFQ shall be used to give effect to paragraph 4 of this order by Luyolwe, Ral Corporation and Rise Now and any respondent entity who is subsequently found to have delivered compliant surgical gowns.
12. Luyolwe, Ral Corporation and Rise Now are directed to file, within 20 days of the handing down of this judgment, file an audited statement and debatement of account in respect of all the money due or received from the Free State Treasury Department for supplying surgical gowns to the Departments and all the costs that they have incurred in order to meet their obligations in respect of the surgical gowns component of the RFQ. The cost of the surgical gowns shall be the cost referred to in paragraph 11 of this order.
13. The respondent entities are directed to submit, within 20 days of expiry of the period referred to in paragraph 9 of this order, an audited statement and

debatement of account in respect of all the money due or received from the Free State Treasury Department for supplying surgical gowns to the Departments and all the costs that they have incurred in order to meet their obligations in respect of the surgical gowns component of the RFQ. The cost of the surgical gowns shall be the cost referenced in paragraphs 5 and 11 of this order.

14. In the event that the SIU disputes any of the respondent entities' audited statement and debatement of account, it is entitled to subject it to an audit by its auditors. In that event, the SIU shall file the statement and debatement of account audited by its auditors within 20 days of expiry of the period referenced in paragraph 12 or 13 of this order as appropriate.

15. In the event that any dispute arises between the parties regarding the implementation of this order, the parties may approach the Tribunal on supplemented papers for an appropriate order.

16. To the extent that the Departments stand to suffer any loss from the RFQ, the Accounting Officers for the Departments shall invoke section 38(1)(h) of the PFMA against the implicated Departmental officials to recover any fruitless and wasteful expenditure incurred or to be incurred from the RQF.

17. The respondents shall pay the SIU costs of the application jointly and severally, the one paying the other to be absolved. Such costs shall include the costs of two counsel where so employed.

A handwritten signature in black ink, appearing to read 'L.T. Modiba', is written over a horizontal line. The signature is stylized and somewhat cursive.

JUDGE L.T. MODIBA

MEMBER OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the applicant:	Adv. T Norman SC, assisted by Adv. R Athmaram
Attorney for the applicant:	Ms. S Zondi, Office of the State Attorney, Pretoria
Counsel for the 1 st & 2 nd respondent:	Adv. A Katz SC, assisted by Adv. Sarah Pudifin Jones
Attorney the 1 st & 2 nd respondent: Attorneys	Ms. N Van Deventer, Ian Levitt
Counsel for 7th, 15th & 20th respondents:	Adv. W Mokhari SC assisted by Adv. C Lithole.
Attorney for the 7th, 15th & 20th respondents:	Mr. T Masoetsa, Moroka Attorneys
Counsel for the 22 nd respondent: Attorney the 22 nd respondent:	Adv. D.R. Thompson Mr. M.L. Gcasamba Gcasamba Attorneys Inc
Counsel for the 27th respondent: Attorney the 27th respondent:	Adv. R. Du Plessis Ms. Alicia, Riaan du Plessis Attorneys
Date of hearing:	25 August 2021
Date for the filing of the last further written submission:	18 January 2022
Date of judgment	31 January 2022

Mode of delivery: this judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time of delivery is deemed to be 10am on 31 January 2022.