



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

**CASE NO.: MP05/2023**

In the matter between:

**SPECIAL INVESTIGATING UNIT**

Applicant

and

**NOZIHLE CONSTRUCTION AND PROJECTS CC**

First Respondent

**SAFARMEX MEDICAL LOGISTICS (PTY) LTD**

Second Respondent

**DEPARTMENT OF HEALTH, MPUMALANGA**

Third Respondent

**TSHEGOFATSO MORALO**

Fourth Respondent

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## JUDGMENT

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### Petersen J

[1] The applicant, the Special Investigative Unit (the SIU) acting in terms of s 4(1)(c) read with s5(5) of the Special Investigation Unit and Special Tribunals Act 74 of 1996, steps into the shoes of the third respondent (the DOH Mpumalanga) in approaching the Special Tribunal, seeking an order against the first respondent (Nozihle Construction and Projects) and the fourth respondent (Moralo) in the following terms:

1. Declaring the Personal Protective Equipment contract ("the PPE Contract" awarded by the Mpumalanga Department of Health ("the Department") to Nozihle Construction and Projects unlawful and therefore invalid; and/or
2. Reviewing and setting aside the PPE Contract due to its unlawfulness constitutional invalidity; and/or
3. Directing the First Respondent to furnish the Applicant with audited financial statements reflecting all expenses incurred, all income and net profit received pursuant to the PPE Contract.
4. Granting consequential relief for the recovery of all financial losses suffered by the First Respondent pursuant to the conclusion of the unlawful PPE contract, including;
  - a. Repayment of the amount of R1 035 000.00 (One Million and thirty-five thousand rands), representing the profit gained by the supplier, being the difference between the purchase price paid (R 2 645 000.00) in respect of the masks procured, delivered and utilised by the Respondent and the price the masks were sourced for by the First Respondent (R1 610 000.00); or
  - b. Repayment of the amount of R2 427 333.30 (Two Million, four hundred and twenty-seven thousand, three hundred and thirty-three rands) representing the

- difference between the purchase price paid (R 2 645 000.00) in respect of the masks procured, delivered and utilised by the Respondent and the average price of the masks provided for on the transversal contracts (R217 666.70);
5. Granting costs occasioned by this application against any Respondent opposing this application, including cost for two Counsel.
  6. Further and/or alternative relief as Special Tribunal might deem fit.

[2] Nozihle Construction and Projects through its sole member (Mbuyane) opposes the relief sought and has filed an answering affidavit. Whilst Moralo, unrepresented in this matter, has filed what is purportedly an answering affidavit, no notice of opposition has been filed. No relief is sought against the second respondent (Safarmex) and the DOH Mpumalanga.

[3] Nozihle Construction and Projects despite being aware of the date of hearing and furnished with the link for the hearing, made no appearance. This follows what appears to be an attempt by the legal representative of Nozihle Construction and Projects unsuccessfully engaging the SIU to have the application postponed.

[4] At the outset, I note that the present application follows a litany of litigation against several entities, under different case numbers, predicated on a similar cause of action. The present application precedes, by two case numbers, the application in the reported decision of this Tribunal in *Special Investigating Unit v Vigario Consulting (Pty) Ltd and Others*<sup>1</sup>, which also implicated the supply of PPE to the DOH Mpumalanga. In fact,

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<sup>1</sup> *Special Investigating Unit v Vigario Consulting (Pty) Ltd and Others* (MP07/2023) [2023] ZAST 11 (13 October 2023).

the investigation in *Vigario* was precipitated by the same proclamation issued by the President of the Republic of South Africa on 23 July 2020. I fully align myself with the reasoning of Modiba P in the *Vigario* judgment insofar as the succinct summary of the background facts is concerned.<sup>2</sup>

[5] On 11 March 2020, the World Health Organisation (WHO) declared the COVID-19 outbreak a pandemic and called for countries across the globe to employ responsive measures, to curb the rise in COVID cases. Subsequent thereto, the President of the Republic of South Africa, on 15 March 2020, declared a national state of disaster. The declaration was followed by the publication of Government Notice No 318 issued on 18 March 2020, wherein regulations were promulgated in terms of section 27(2) of the Disaster Management Act 57 of 2002. The regulations introduced measures to prevent the spread of the pandemic ('the DMR'). The DMR required of all spheres of government to implement emergency procedures for procurement of Personal Protective Equipment ('PPE'); for the period between 19 March 2020 to 15 April 2020. The procurement of PPE by public institutions was regulated by what has come to be known as Note 8.

[6] On 23 July 2020, by way of a Proclamation No. 23 of 2020 (Government Gazette 43548), the President of the Republic of South Africa referred allegations of impropriety which occurred between 1 January 2020 (or prior thereto) and 23 July 2020 (or subsequent thereto) related to the procurement of PPEs, for investigation by the SIU, in terms of section 2(1)(a)(ii) of the SIU Act. The SIU duly conducted investigations into the

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<sup>2</sup> *Vigario* at paras 6 to 12.

procurement processes of the DOH Mpumalanga in terms of section 4(1) of the SIU Act.

- [7] The designated SIU investigator subpoenaed documents from the HOD of the DOH Mpumalanga, Dr Mahongi ('Dr Mahongi') in terms of section 5(2) of the SIU Act related to the procurement of PPE during the investigation period. From the documentation provided by Dr Mahongi, it was established that the DOH Mpumalanga pursuant to a tender under tender no: HEAL/024/18/MP, concluded a service level agreement ('SLA') with Safarmex, in terms of which Safarmex would manage the procurement processes (supply chain management) of the DOH Mpumalanga. At the time of the procurement of PPEs, Safarmex was contractually obligated to procure, warehouse and distribute pharmaceuticals and sundries on behalf of the DOH Mpumalanga.
- [8] In terms of the SLA, Safarmex, at the commencement of procurement processes, was required first to generate stock codes for approval of the quotation process document, in order to determine the stock levels of the specific item to be procured. Following the Approval of the Quotation document, an RFC would be sent to potential suppliers. The entire procurement process from issuing RFQs, sourcing and scoring the quotations, issuing supplier orders, receiving delivery and distribution of items procured and signing relevant documents was the sole responsibility of Safarmex. The accounting officers had to comply with the provisions of Note 8, which was 'tailor made' for the procurement of PPEs on behalf of the DOH Mpumalanga, amid the COVID-19 pandemic.

- [9] Safarmex had to make use of the transversal contracts to ensure consistency of price and item specifications and/or to report any difficulties encountered in the process of procuring the relevant items listed on the transversal contracts to the National Treasury Transversal Contracting Unit for intervention.
- [10] On 3 April 2020, the DOH Mpumalanga issued a requisition of supplier quotations ('RFQ'), for the supply and delivery of 6 290 000 3ply surgical masks. No indication was provided of the list of suppliers invited to respond to the RFQ. On 8 April 2020, Nozihle Construction and Projects submitted a quotation, for the supply of 100 000 3ply surgical masks totalling R 2 645 000.00 (R26,45 per item incl. VAT).
- [11] On 9 April 2020, Morale, the Assistant Director and Department Manager sent a request in terms of Note 3 of 2016/17 to the HOD, for the deviation in transversal contracts, and for purposes of procuring PPE from suppliers who are not listed on Annexure A of Note. The request was granted on 10 April 2020.
- [12] On 22 April 2020, the DOH Mpumalanga issued a supplier order to Nozihle Construction and Projects, for the supply of 100 000 3ply surgical masks with ear loops totalling to R 2 645 000.00(incl. VAT). 2000 boxes containing 50 masks were delivered at the Depot on 28 April 2020. The invoice dated 22 April 2020 was stamped by the DOH Mpumalanga confirming receipt of same. On 30 April 2020, the DOH Mpumalanga issued a note confirming receipt of the masks. Subsequent

thereto on 2 May 2020, Safarmex issued a completion certificate for the goods delivered.

[13] On 5 May 2020, Safarmex issued a consolidated invoice totalling R17 572 785.45, which included the invoice for Nozihle Construction and Projects, in the amount of R2 645 000.00. Morale made a request for the payment of the invoice which request was approved on 7 May 2020. Nozihle Construction and Projects received payment from the DOH Mpumalanga via Safarmex, in the amount of R2 645 000.00 on 11 May 2020.

[14] Mbuyane, the sole member of Nozihle Construction and Projects deposed to an affidavit as part of the SIU investigation. The dates reflected above commencing on 3 April 2020, accords with the documents provided by Dr Mohangi. Subsequent to submitting a quotation on 8 April 2020, Nozihle Construction and Projects proceeded to purchase 50 000 masks from Quatre Salsons Cleaning Trading CC, in the amount of R805 000.00 (including VAT) on 17 April 2020. It is common cause that Nozihle Construction and Projects received the Supplier Order on 22 April 2020 and delivered 100 000 3ply surgical masks to the DOH Mpumalanga on 28 April 2020. The SIU states that Nozihle Construction and Projects did not disclose details of the procurement of the other 50 000 masks delivered to the Department whereas same is pertinently reflected in its own papers that the purchase was made by Nozihle Construction and Projects from Popjabus Production and Trading CC at R16.10 (Sixteen Rand Ten Cents) (VAT inclusive) amounting to R805,000 (Eight Hundred and Five Thousand Rand) (VAT inclusive).

[15] The following grounds of review are ascertainable from the papers of the SIU:

15.1 an alleged substantial deviation from the standard applicable procurement regulations for the procurement of PPE on behalf of the DOH.

15.2 the procedure utilised for the procurement of goods and services on behalf of the State, subsequent to the substantial deviation, was in direct contravention of the constitutional requirements of section 217 of the Constitution of the Republic of South Africa, 1996.

[16] In espousing on her opposition to the application, Mbuyane for Nozihle Construction and Projects maintains that she was registered with the Companies Intellectual Property Commission (CIPC) around 2002 and registered as a VAT vendor since 2004. Nozihle Construction and Projects from its incorporation to date has rendered construction and cleaning services. Nozihle Construction and Projects were registered on the Central Supplier Database (CSD) with supplier number MAM0052766. Since it is not unheard of for government departments to issue RFQs to potential service providers, she had no reservations or suspicions about the RFQ. The RFQ stated which information had to be provided and the deadline for same. No reference was made in the email received from the DOH Mpumalanga to internal policies and/or regulations that were to be used and/or followed by the DOH Mpumalanga. The email was silent on a minimum or maximum amount that could be charged per mask nor what the maximum profit margin should be. The email was equally silent on



who would be evaluating the questions or what criteria would be used. The email made no reference to an SLA between Safarmex and the DOH Mpumalanga, which would have enabled Nozihle Construction and Projects to discern whether the DOH Mpumalanga was acting outside of any scope of contracts it had with Safarmex or any other party. In fact, Nozihle Construction and Projects maintains that it was unaware of the conclusion of an SLA between Safarmex and the DOH Mpumalanga and the terms of such SLA. Nozihle Construction and Projects assert that the DOH Mpumalanga presented itself a party with the authority to contract with it, and it had no reason to doubt same.

[17] Ultimately Nozihle Construction and Projects contend that the DOH Mpumalanga was not obligated to accept Nozihle Construction and Projects quotation. Nozihle Construction and Projects were not aware of any internal policies and procedures that the DOH was obliged to follow. And, in the final analysis the SIU has not produced any evidence indicating that Nozihle Construction and Projects knew or ought to have reasonably known that some and/or any and/or all of the internal procurement policies and procedures were not followed by the DOH Mpumalanga and should therefore have not contracted with the DOH Mpumalanga. Resultantly, Mbuyane maintains that the SIU has failed to demonstrate any wrongdoing on the part of Nozihle Construction and Projects.

[18] Against the aforesaid background, the upshot of the application before me, save for the arguments predicated on the alternative claim based on the Medicines and Related Substances Control Act, which I deal with later, is succinctly captured by Modiba P at para [6] of *Vigario*, as follows:

‘[T]he background facts relied on by the SIU are largely common cause because Vigario either admits them or is in no position to deny them as it has no knowledge of them. Where there is a conflict in the parties’ respective versions, it is resolved based on the Plascon Evans Rule. In other words, the application is determined on the SIU’s version to the extent not denied by *Vigario* taken together with Vigario’s version.’

[19] Nozihle Construction and Projects are similarly in no position to deny much of the background facts on which the SIU relies as it has no knowledge of such facts.

[20] As to the applicable procurement framework, I can do no better than refer to paragraphs 18 to 23 of *Vigario*:

“[18] S217 of the Constitution sets out the constitutional framework for public procurement in South Africa. It requires that when an organ of state at all spheres of government contracts for goods and services, it must do so in accordance with a system that promotes and respects the values of fairness, equitability, transparency, competitiveness, and cost-effectiveness.

[19] The Public Finance Management Act 1 of 1999 (“the PFMA”) makes provision for such a system. In terms of s38(1)(a)(iii) and 51(1)(a) of the PFMA, an accounting authority for a national or provincial department or public entity must ensure that his department maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive, and cost-effective. S76 authorises National Treasury to issue instructions and regulations in respect of matters provided for in the PFMA.

[20] National Treasury has issued the following National Instructions and Regulations relied on by the SIU:

20.1 Treasury Practice Note 8 of 2007/2008, “Supply Chain Management: Threshold values for the procurement of goods, works and services by means of petty cash, verbal / written price quotations or competitive bids”, dated 29 November 2007 (“TPN 8/2007”).

20.2 National Treasury Instruction 3 of 2016/17, issued on 19 April 2016, “Preventing and Combating Abuse in the Supply Chain Management System”, (“NTI 3/2016/17”).

20.3 National Treasury Instruction Note 8 of 2019/20, “Emergency Procurement in Response to National State of Disaster”, dated 19 March 2020 (“TNI 8/ 2019/20”).

20.4 National Treasury Instruction 3 of 2020/2021 dated 19 April 2016, “Preventing and combating abuse in the Supply Chain Management system” (“TNI 3/2016”).

[21] In terms of Regulation 9(a) of the DMR, procurement regulations proclaimed in terms of s76 of the PFMA remained applicable during the Covid 19 national disaster period. Together with Treasury Regulation 16A of 2005, NTI 3/2016/17 regulates emergency procurement. Recognising the limitations of Treasury Regulations issued before the advent of the Covid 19 to regulate procurement in the context of a global pandemic, National Treasury proclaimed TNI 8/2019/20 and TNI 8/2020/21 to further regulate emergency procurement during the Covid 19 national disaster period.

[22] To avoid prolixity, I do not regurgitate the provisions cited by the SIU in its founding affidavit here. I do so at the appropriate point in this judgment to the extent they are relevant in resolving the issues that arise between the parties.

[23] Although the SIU cited several other Treasury regulations, ultimately, when question during oral argument, counsel for the SIU reiterated that the SIU only placed reliance on non-compliance with Treasury Note 3 of 2020/2021 (“TN3”). The procurement requirements set out in TNI 3/2020/21 underpin its grounds of review. Therefore, the issue that arise for determination between the parties is narrow. It is whether the impugned procurement and specifically, the approved deviation fails to

comply with TNI 3/2020/21, and whether such non-compliance renders the procurement irregular.’

[21] The dramatis personae who featured in the *Vigario* investigation are the same as in casu, including Dr Mahongi, Mr Mahlalela, Chief Director: Financial Services of the DOH Mpumalanga and Mr Moralo. The same indictment against the SIU as stated at para 11 of *Vigario* applies:

‘[11] Various DOH officials interviewed by the SIU investigator either put forward explanations regarding the impugned procurement process or defences to the SIU’s grounds of review. I find it disturbing that the SIU ignored key aspects of their explanations and/ or defences. This is inconsistent with the duty upon the SIU to conduct its investigations in the interest of justice and not simply to catch out and haul before this Tribunal organs of state, state officials, entities and or other persons implicated in procurement maladministration. The SIU investigator largely made findings based on documents submitted to her in response to the s5(2) subpoenas. She states this in paragraph 37 of the founding affidavit. The SIU has in turned grounded this review on her findings. As I later find in this judgment, she failed to investigate key issues to properly establish some of the SIU’s grounds of review.’

[22] I further fully align myself with the analysis of the relevant treasury instruments by Modiba P against the evidence adduced by the SIU, which is equally applicable in casu, with the necessary changes applicable to Nozihle Construction and Projects. There is no need to re-invent the wheel in this regard. For ease of reading and avoiding cross reference to *Vigario*, I quote paragraphs 24 to 34:

[24] In 2005, National Treasury issued Treasury Regulations that primarily regulate the process for deviating from the normal procurement process. Although in its founding affidavit, the SIU did not cite these Treasury Regulations, it is important to refer to them since the SIU contends that the deviation that formed the basis of the impugned procurement process was irregular.

[25] Clause 16A is the first Treasury Regulation to specifically deal with supply chain management in the context on an emergency that renders it impossible to comply with normal procurement processes. Clause 16A.3 provides that the accounting officer of an organ of state of a government department must develop and implement an effective and efficient supply chain management system in his or her institution for the acquisition of goods and services. The supply chain management system must be fair, equitable, transparent, competitive, and cost effective. The system must also be consistent with the Preferential Procurement Policy Framework Act.<sup>[3]</sup> Regulation 16A.6.4 is the most relevant to this matter. It provides 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.”

[26] Essentially, regulation 16A.6.4 provides that in exceptional circumstances, an organ of state may procure goods or services in a manner that deviates from the normal procurement process. TNI 8/2019/20 gives effect to regulation 16A.6.4 in the context of the Covid-19 pandemic. TNI 8/2019/20 was promulgated on 19 March 2020, four days after the declaration of a national state of disaster on 15 March 2020. It was replaced by TNI 3/2020/21 on 29 April 2020. As already mentioned, this is the day on which the impugned contract was impliedly concluded.

[27] It is common cause that the Covid 19 pandemic created an emergency as envisaged in clause 16A.6.4 of the 2005 Treasury Regulations. Therefore, the DOH HOD as the Accounting Officer had to invite as many suppliers as possible and select

the preferred supplier using the competitive bid system. A deviation is allowed in exceptional circumstances. The requirement that the deviation ought to be approved by National Treasury is ameliorated by TNI 8 2019/20 as superseded by TNI 3 2020/21. These TNIs dispensed with the need for National Treasury approval. In terms of clause 2.3 of TNI 8 of 2019/ 2020, clause 16A.6.4 of the 2005 Treasury Regulations and TNI 3/2016/17 remained applicable subject to the following prescribed provisions:

27.1 Clause 2.8 states that National Treasury has engaged with transversal Contract suppliers of PPE items and has put measures in place to ensure continuity of supplies and to keep the prices in check. The transversal suppliers, their supplies and prices quoted to National Treasury are set out in Annexure A. The SIU places specific reliance on the supplies and prices listed in Table 1.

27.2 In terms of clause 3.3.2, institutions that are participating in transversal contracts may continue placing orders as usual. In this case, given that the Safarmex contract being a transversal contract was in place, DOH could order PPEs in terms of that contract. It is the SIU case that by not procuring PPEs through the Safarmex contract, Mr Moralo acted irregularly. But, as I find below, the Safarmex contract entitled DOH to place orders outside the Safarmex contract notwithstanding the provisions of both clause 3.3.2 of TNI 8/2019/20 and clause 6.1 of the Safarmex contract.

27.3 In terms of Clause 3.7.4 of TNI 3/2020/21, if an institution experiences any challenge with ordering the required items listed in Annexure A, it must immediately communicate the challenge to National Treasury Transversal Contracting Unit to intervene. This requirement does not apply in this case because DOH never attempted to order PPEs from any of the suppliers listed in Annexure A.

## **Deviation**

[28] The SIU alleges that DOH, specifically Mr Moralo, procured directly from Vigario without utilising the procurement services Safarmex provided DOH in terms of an SLA and that it did not find any evidence that Mr Moralo tried to procure PPEs from companies listed in Annexure A to TNI 8/2019/20. I find that there is no merit to this

allegation. The SIU disturbingly fails to deal with the explanation for this allegation offered by DOH officials. It left Mahlalela's version on this issue buried in an Annexure to its founding affidavit. At paragraph 7.1 of his affidavit, Mr Mahlalela explained that in terms of clause 6.1 of the SLA, Safarmex may only procure items on transversal contracts and those on the DOH provincial code list and provincial tenders or items approved as such. Items falling beyond these parameters may only be procured when authorised by the DOH duly authorised representative.

[29] According to Mr Mahlalela, when procuring from Vigario, DOH relied on clause 6.1 of the Safarmex contract which authorises procurement outside the Safarmex contract when approved by DOH. Notably, the latitude the Safarmex contract afforded DOH to procure outside it is consistent with that TNI 8/2019/20 and TNI3/2020/21 afforded organs of state. I deal with it below and find that the SIU has failed to persuade this Tribunal that the DOH was obliged to procure PPEs through the Safarmex contract.

#### **Non-compliance with TN 3 of 2020/2021**

[30] TNI 3/2020/21, sets out general and specific instructions and applicable procedures for the procurement of PPEs. I deal with them below:

30.1 In terms of clause 1.1, accounting officers may implement a central emergency procurement process for the procurement of PPEs.

30.2 Clause 2.15 provides that “It is also important that Government sets the maximum price per product it will pay in the current disaster environment, which is more akin to war situation with serious shortages and where rationing and price controls may be required...”

30.3 Clause 2.16 states that "In order to facilitate an efficient and effective delivery of goods and services to address COVID-19 requirements, whilst ensuring that the core values of fairness, transparency, competitiveness, cost effectiveness and equitability as enshrined in section 217 of the Constitution are adhered to, National Treasury, in terms

of section 76(4)(c) of the PFMA has developed this instruction to determine a procurement and provisioning framework"

[31] I find it disturbing that the SIU failed to consider the overriding exception to the provisions dealt with above, which it should be aware of considering the plethora of Covid 19 related procurement contract reviews it has litigated in especially in this Tribunal. Paragraph 3.7 provides for general compliance measures. The most relevant is paragraph 3.7.6 which states that:

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

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

[32] SIU made out no case in its founding affidavit that the PPEs procured in terms of the impugned contract fail to comply with 3.7.6 (i). On the authority in *Zeelwa*<sup>3</sup>, no case is made out that the prices agreed to under the impugned contract exceed those set out in Annexure A as required in terms of clause 3.7.6(ii). The allegation that Vigario failed to comply with paragraph 3.7.6 (iii) is devoid of any merit. Vigario was registered on Central Supplier Database ("CSD") at the time when Manjra approached DOH. There is no prohibition against a supplier registering on CSD as Vigario did in this case. Further, there is also no requirement that a supplier may only supply PPEs to an organ of state when it had previously supplied these items to an organ of state.

[33] At paragraph 46 of its founding affidavit, the SIU pleads a deviation prepared by Mr Moralo and approved by Mr Mahlalela. From Mr Mahlalela's affidavit, it appears

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<sup>3</sup> *Special Investigating Unit v Zeelwa Trading Pty (Ltd) and Another* (MP03/2021) [2022] ZAST 22.



that the deviation was also approved by the DOH ultimate authority, the HOD, authorising a departure from the normal procurement procedure. When preparing and approving the deviation, the relevant officials were guided by both the DOH SCM Procurement Policy and TPN 3/2016/17 read with TNI 3/2020/21. Reasons for the deviation are recorded which the SIU does not seriously attack on any sustainable ground. The SIU complains of lack of evidence of attempts to procure from transversal contracts and failure to follow normal procurement procedures such as information on the platform used to share the RFQ, list indicating the number of bidders invited to bid and scoring information. Yet, it fails to bring to this Tribunal's attention that when he motivated for Vigario's appointment, Moralo listed three other entities from which it sourced quotations. From that motivation, it appears that Vigario is the only entity that could meet the required quantities. A quote approval checklist is attached to Moralo's motivation annexure "MJ6". I have already found that it was not peremptory for DOH to procure from the Safarmex contract.

[34] Further, in his affidavit, Mr Mahlalela elaborately explained that the procurement process that was followed was commensurate with the emergency under which the DOH procured PPEs and the supply challenges it faced at the time. The SIU also failed to deal with this explanation in its founding affidavit.'

[23] As in *Vigario*, no case is made out in the founding affidavit for the relief sought in the notice of motion on the procurement argument. As in *Vigario*, I find that the impugned contract was not irregular on the basis contended by the SIU. The relief sought against Moralo similarly cannot be sustained. The application accordingly falls to be dismissed on the procurement argument.

[24] The SIU, in its alternative relief seeks an order impugning the contract on the basis that Nozihle Construction and Projects were not licenced to distribute face masks and consequently could not contract with the DOH

Mpumalanga for the supply of face masks as it did. The argument for the SIU is that the Medicines and Related Substances Act 101 of 1965 (Medicines Act) read with the Regulations relating, inter alia, to medical devices, promulgated under the Medicines Act, prohibits under criminal sanction, the sale of medical devices by a company not licenced to do so.

[25] Before turning to the evidence adduced in support of the licencing argument, it is apposite to set out the applicable legislative framework. Sections 22(C)(1)(b) and 22(6) of the Medicines Act, in its amended form since 2015, provides as follows under the heading ‘Licencing’:

‘22C(1)(b) the Authority may, on application in the prescribed manner and on payment of the prescribed fee, issue to a medical device or IVD establishment, manufacturer, wholesaler or distributor of a medicine, Scheduled substance, medical device or IVD a licence to manufacture, import, export, act as a wholesaler of or distribute, as the case may be, such medicine, Scheduled substance, medical device or IVD upon such conditions as to the application of such acceptable quality assurance principles and good manufacturing and distribution practices as the Authority may determine.

...

(6) No medical device or IVD establishment, manufacturer, wholesaler or distributor referred to in subsection (1) (b) shall manufacture, act as a wholesaler of or distribute, as the case may be, any medicine, Scheduled substance, medical device or IVD unless he or she is the holder of a licence contemplated in the said subsection.’

[26] The criminal sanction for distributing a medical device is a *‘fine or imprisonment for a period not exceeding 10 years.’* The SIU submits that it is not only a criminal offence to engage in any of the activities

envisaged by s22C(6) of the Medicines Act, but that any transaction in contravention thereof is unlawful and invalid. Reliance for this contention is placed on *Schierhout v Minister of Justice*<sup>4</sup> where it was held that '*It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.*'

[27] In terms of s. 35(1)(xxvii) of the Medicines Act, the Minister, in consultation with the Authority, made regulations prescribing the circumstances in which, the conditions under which and the persons or categories of persons to whom any medicine, Scheduled substance, medical device or IVD (*in vitro* diagnostic) may be sold. In terms of Regulation 5(1)(a)(i) to be licensed prior to commencing business. Nozihle Construction and Projects were acting as a distributor and thus required a distribution licence. Reg. 19(1)(b) as with s22(C)(6) makes it a criminal offence to act as a distributor of medical devices carrying with it a fine or imprisonment for a period not exceeding 10 years upon conviction.

[28] It was further submitted on behalf of the SIU with reference to *Maharaj and Others v Rampersad; Messenger of the Magistrate's Court, Durban v Pillay*<sup>5</sup> that whether non-compliance with a statutory prohibition nullifies an act must be determined with reference to the language of the statute concerned and the purpose of the prohibition. And, with reference to *Cool Ideas 1186 CC v Hubbard and Another*<sup>6</sup> that

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<sup>4</sup> *Schierhout v Minister of Justice* 1926 AD 99 at 109.

<sup>5</sup> *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A); *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A).

<sup>6</sup> *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 9.

where a statutory provision under consideration amounts to a prohibition, an act performed contrary to it would be invalid, unless it is clear from the statute that, in the light of its scope and object, invalidity was not intended. In other words, it is the prohibition which ‘operates to nullify the act’ performed contrary to it.

[29] For the licencing argument to succeed, against the legislative background sketched above, the SIU has to establish that the 3 ply face masks supplied by Nozihle Construction and Projects, constitutes a medical device as envisaged by the Medicines Act and relevant Regulations promulgated thereunder. At the outset of the Medicines Act, a medical device is defined in s1 as:

‘medical device’ means any instrument, apparatus, implement, machine, appliance, implant, reagent for *in vitro* use, software, material or other similar or related article, including Group III and IV Hazardous Substances contemplated in the Hazardous Substances Act, 1973 (Act 15 of 1973) -

(a) intended by the manufacturer to be used, alone or in combination, for humans or animals, for one or more of the following:

- (i) diagnosis, prevention, monitoring, treatment or alleviation of disease;
- (ii) diagnosis, monitoring, treatment, alleviation of or compensation for an injury;
- (iii) investigation, replacement, modification or support of the anatomy or of a physiological process;
- (iv) supporting or sustaining life;
- (v) control of conception;
- (vi) disinfection of medical devices; or
- (vii) providing information for medical or diagnostic purposes by means of *in vitro* examination of specimens derived from the human body; and

(b) which does not achieve its primary intended action by pharmacological, immunological or metabolic means, in or on the human or animal body, but which may be assisted in its intended function by such means.”

[30] The SIU in casu, has secured extrinsic evidence to prove that the masks constitute a medical device, against the backdrop of the applicable law. The evidence adduced by the SIU secured from the South African Health Products Regulatory Authority (SAHPRA) incontrovertibly proves that face masks, in three different categories are considered medical devices. The definition of a medical device in my view is wide enough to cover a face mask as integral part of preventing, inter alia, the spread of disease and as a protective measure to health care professionals in the context of the present application.

[31] The widespread distribution of face masks at the height of the Covid 19 pandemic, as in casu and several other matters before the Tribunal, prompted SAHPRA to issue a communication to all stakeholders on 8 September 2020, albeit after the supply of the face masks in casu, on the ‘Licensing and Regulatory requirements for the manufacture and distribution of medical and respirator masks during Covid-19.’ The communique simply stated the law applicable to the supply and distribution of masks, prior to its distribution to stakeholders.

[32] Of relevance from the communique, is the following:

‘Background

1. The supply of sub-standard medical masks and respirator masks (FFP1 and FFP2) to the healthcare professionals during the Covid-19 pandemic, and the failure of

these masks to meet the applicable compliance standards, has prompted SAHPRA to draft an amendment to the licensing and regulatory requirements for the manufacture, importation and distribution of said masks.

#### Current Regulatory and Licensing Requirements

2. Masks, fall into different regulatory groups depending on the type of face mask and intended use of the face mask: a. General,  
b. Medical (Surgical) Masks Non-Sterile, (Class A)  
c. Medical (Surgical) Masks Sterile, and (Class A Sterile)  
d. Respirator Masks. (Class B)

3. Masks are regarded as medical devices and are regulated by the Medicines and Related Substances Act, 1965 (Act 101 of 1965) (the Medicines Act) when they are intended for use in a healthcare, clinical or high-risk setting and make claims to protect the patient from the wearers respiratory emissions or to protect the wearer from droplets or splatter.

4. Any company or individual intending to manufacture, distribute (import/export) or wholesale a medical device/IVD is required, in terms of Section 22C of the Medicines Act to be licensed by SAHPRA.

5. Individuals/companies may not manufacture/distribute/wholesale medical devices without a valid SAHPRA medical device establishment licence.'

[33] Nozihle Construction and Projects could not dispute that it did not have a distribution licence or any other licence prescribed by the Medicines Act. Resultantly, Nozihle Construction and Projects were prohibited from selling face masks to the DOH Mpumalanga. Ignorance of the law in this regard, can be no excuse.

[34] Consequently, as correctly asserted on behalf of the SIU, the sale of the face masks by Nozihle Construction and Projects to the DOH Mpumalanga was contrary to the law; is void and renders the agreement between the DOH Mpumalanga and Nozihle Construction and Projects unlawful.

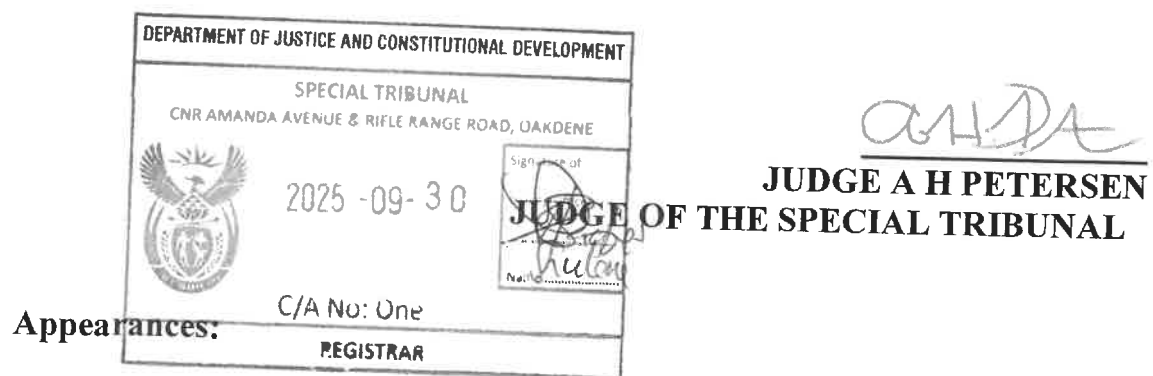
[35] The licencing argument on behalf of the SIU must accordingly succeed. Nozihle Construction and Projects was therefore not entitled to the monies unlawfully paid to it by the DOH Mpumalanga. Nozihle Construction and Projects are therefore liable for payment of the amount of R2,645,000.00 less the average price of the masks provided in the transversal contracts, totalling R217,666.70. Nozihle Construction and Projects are therefore to repay an amount of R2,427,333.30 to the DOH Mpumalanga.

[36] The SIU is entitled to its costs, including the costs of counsel, and I can find no basis to order otherwise.

#### Order

[37] Having considered the various permutations provided by the SIU, relevant to the licencing argument, and the draft orders provided, it is ordered that:

1. The Personal Protective Equipment (PPE) contract awarded by the Mpumalanga Department of Health to the first respondent in April 2020 is declared unlawful and void *ab initio* and is hereby set aside.
2. The first respondent shall pay to the Applicant an amount of R2,427,333.30 (Two Million, Four Hundred and Twenty-Seven Thousand, Three Hundred and Thirty-Three Rands and Thirty Cents) together with interest on the aforesaid amount at the rate of 8.75% per annum calculated from 11 May 2020 to date of payment.
3. The first respondent is ordered to pay the applicant's costs, including costs occasioned upon the employment of two Counsel.



**Date of hearing: 18 June 2025**

**Date of judgment: 29 September 2025**



**Mode of delivery**

This judgment is handed down by email transmission to the parties' legal representatives and uploading on Caselines. The time for delivery is deemed to be 12H00 on 29 September 2025.