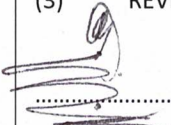




**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE
SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996
(REPUBLIC OF SOUTH AFRICA)
HELD VIRTUALLY**

CASE NO: MP02/2024

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
	30/10/2025
SIGNATURE	DATE

In the matter between:

THE SPECIAL INVESTIGATING UNIT

APPLICANT

and

TEPA TRADING AND PROJECTS (PTY) LTD

FIRST RESPONDENT

MPUMALANGA DEPARTMENT OF HEALTH

SECOND RESPONDENT

**MEMBER OF EXECUTIVE COUNCIL FOR THE THIRD RESPONDENT
HEALTH: MPUMALANGA**

SAFARMEX MEDICAL LOGISTICS PTY LTD

FOURTH RESPONDENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 30 October 2025 at 10:00.

JUDGMENT

Mashile J

Introduction

[1] The Applicant ("the SIU") seeks a declarator that the decision of the Second Respondent ("the Department") to appoint the First Respondent ("Tepa Trading") to supply and deliver personal protective equipment ("PPE") in April 2020 in the Province of Mpumalanga is unconstitutional, unlawful, and invalid. Furthermore, the SIU seeks to review and set aside the decision of the Department to appoint Tepa Trading to supply and deliver PPE during April 2020 in the Province of Mpumalanga. If this Tribunal agrees, it is to exercise its discretion either to craft a suitable remedy or grant an order that is just and equitable as envisaged in section 172(1)(b) of the Constitution of the Republic of South Africa ("the Constitution").¹

[2] In opposition to the application, Tepa Trading has raised certain preliminary points. Firstly, the Department ought to be estopped from recanting the legality of the representations it made to Tepa Trading as an innocent party. Furthermore, asserts Tepa

¹ Constitution of the Republic of South Africa Act 108 of 1996.

Trading, the SIU must be thwarted from relying on the irregularity of the procurement process as a ground for holding it accountable, as it had no reason to be apprehensive of any procedural flaws in the manner its services were procured. If there were irregularities in the process, such happened wholly within the province of the Department. Accordingly, it would be unjust and unconscionable to punish it for matters that fell outside its influence, knowledge and authority.

[3] Secondly, the application is an abuse of process as there is an alternative basis for implicating Tepa Trading beyond the scope of the initial findings of the investigation. Besides, there is a lack of detail that would support the assertion that the actions of Tepa Trading were directly connected to the irregularities discovered in the procurement process. Mr Masombuka ("Masombuka"), the deponent to the First Respondent's answering affidavit, was misled into signing the affidavit as he was not informed that it was an affidavit that would subsequently be used in litigation. He deposed to it because he was told that it was an affidavit that he deposed to as part of the procedural formalities designed to finalise the PPE procurement during the COVID lockdown period, and that it was part of an administrative process necessary for the pursuit and prosecution of certain officials of the Department.

[4] Lastly, the application is based on hearsay evidence as there is no confirmatory affidavit from Mr De Jager and the averments made in the Applicant's founding affidavit relating to Mr De Jager should therefore be struck out from the founding affidavit.

[5] This application is brought under the doctrine of legality, which means that there is no prescribed time within which it should have been launched. While that is the case, it is generally accepted that it ought to be launched within a reasonable period. The reasonable time within which it must be brought is ordinarily determined by having regard to the time it took a party after the 180 day-period, the period within which the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), matters are brought, to launch it. It is common cause that the SIU was late in launching this application. As a result, the SIU simultaneously applied for condonation for the late bringing of this application.

[6] Tepa Trading is not opposing the condonation nor does it the main application. Fundamentally, Tepa Trading seeks to mitigate the repercussions of its transgressions. I have perused the condonation application and am satisfied that it will be in the interest of justice to grant it. To that end, it will be appropriate to conclude by referring to the matter of *Buffalo City Metropolitan Municipality*² where the Court stated:

"... Gijima dictates that where the unlawfulness of the impugned decision is clear and not disputed, then this Court must declare it as unlawful. This is notwithstanding an unreasonable delay in bringing the application for review for which there is no basis for overlooking. Whether an impugned decision is so clearly and indisputably unlawful will depend on the circumstances of each case."

Factual Matrix

[7] The background facts surrounding this matter are broadly not contested by Tepa Trading, the Department, the Third Respondent ("the MEC") and the Fourth Respondent ("Safaremex"), to which I shall henceforth refer to as the Respondents. Following the failure of the MEC and/or the Department to observe Supply Chain Management policies ("SCM Policies"), the Department appointed Tepa Trading, and thereafter the parties concluded a contract in terms of which the latter was to supply PPE. The shortcomings in compliance ultimately turned into abuse of public resources.

[8] It was in the context above that the President of the Republic of South Africa instructed the SIU to investigate certain allegations of corruption and irregularities with respect to the procurement of COVID-19-related PPE. To that end, the President issued Proclamation No. R.23 of 2020 ("the Proclamation"), published in the Government Gazette No. 43546 on 23 July 2020. The Proclamation authorised the SIU to investigate the procurement of, or contracting for goods, works and services, including the construction, refurbishment, leasing, occupation and use of immovable property, during or in respect of the National State of Disaster, as declared by Government Notice No. 313

² Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC) at para 66.

of 15 March 2020, by or on behalf of the State Institutions and payments made in respect thereof in a manner that was:

- 8.1 Not fair, competitive, transparent, equitable or cost-effective;
- 8.2 Contrary to applicable legislation, manuals, guidelines, practice notes, circulars or instructions issued by the National Treasury or the relevant Provincial Treasury; or manuals, policies, procedures, prescripts, or practices of or applicable to the State Institutions;
- 8.3 Conducted by or facilitated through the improper or unlawful conduct of employees or officials of the State Institutions, or other person or entity to corruptly or unduly benefit themselves or any other person; or fraudulent and any related unauthorised, irregular, or fruitless and wasteful expenditure incurred by the State Institutions or the State;
- 8.4 Any improper or unlawful conduct by the officials or employees of the State Institutions or any other person or entity, in relation to the allegations set out in paragraph 1 of this Schedule, including the causes of such improper or unlawful conduct and any loss, damage, or actual or potential prejudice suffered by the State Institutions or the State.

[9] The investigation into the affairs surrounding the procurement of PPE by the Department extends over the period from 1 January 2020 to 23 July 2020. That said, the Proclamation also authorises investigation into matters that took place prior to 1 January 2020 or after 23 July 2020. In terms of Section 5(2)(a) of the Special Investigating Units and Special Tribunals Act 74 of 1996, and on 27 August 2020, the SIU requested information relating to the procurement of PPE from the Head of Department, Dr Savera Mohagi ("Dr Mohagi"). On 3 September 2020, the Department supplied the documents.

[10] The SIU conducted interviews with the officials of the Department and of Safarmex. Where possible, the SIU secured affidavits from the representatives of those institutions. In that regard, Mr Luck Douglas Mahlalela ("Mr Mahlalela"), a Chief Director of Financial Accounting for the Department at the time, and who has since resigned, deposed to an

affidavit explaining the process that was followed by the Department during the Covid-19 period. Furthermore, the SIU also requested bank statements of Tapa Trading.

[11] The investigation of the SIU revealed that before the declaration of the state of national disaster, the Department had, in terms of a contract ("SLA"), appointed Safarmex to manage procurement, warehousing and distribution of Pharmaceuticals and Surgical Sundries and the supply and management of information on its behalf. Safarmex shared offices with the officials of the Department at the Middelburg Pharmaceutical Depot ("the Depot"). The duration of the contract was for three years commencing on 1 May 2018 and culminating on 30 April 2021.

[12] Principally, the appointment entailed that Safarmex would procure any Medical, Management, Pharmaceuticals and Surgical Sundries for the benefit of the Department. Additionally, it meant that Safarmex would be responsible for the warehousing and distribution of the Pharmaceuticals and Surgical Sundries, where they could be required at various health facilities in the province. The SLA provided, in relevant part, that:

12.1 Safarmex would procure on behalf of the Department only items on transversal contracting on the provincial code list/formulary and provincial (decentralised) tenders as supplied by the Department or items approved by the Department (clause 6.1);

12.2 Items requested and not provided for in the code list or not available on the national transversal contracting tenders and provincial tenders shall be procured and ordered by Safarmex after a written authorisation has been obtained from the Department (clause 6.2);

12.3 Safarmex undertook to comply with supply chain management, the Public Finance Management Act 29 of 2000 and National Treasury Practice Note 8 of 2007/2008³ and all other relevant applicable legislation (clause 6.4);

12.4 The responsibility for stock availability remains with Safarmex (clause 6.6);

12.5 Safarmex was required to maintain stock levels of between 12 – 18 weeks for individual items, unless there is a justified reason to increase or decrease such levels, in

³ Issued in terms of section 76 (4) (c) of the Public Finance. Management Act 29 of 2000.

which case a request shall be made in writing, by Safarmex to the Department, to increase or decrease stock levels (clause 6.8);

12.6 Safarmex was to place orders as per an ordering schedule agreed to with the Department (clause 8.9);

12.7 Safarmex was responsible for the seeking of quotations, ordering, receiving and distributing of such items (clause 6.11).

[13] On 3 April 2020, and after the declaration of the state of disaster, the Department issued a Requisition for Supplier Quotation ("RFQ") for the supply and delivery of 3-Ply Surgical Masks, with reference number COVID-1901/2020, which closed on 09 April 2020. According to the SIU investigation, the masks were available from some suppliers on Annexure A of the National Treasury Instruction Note 8 of 2019/2020. The RFQ was for the supply and delivery of 6 290 000 3-Ply Surgical Masks.

[14] There is no evidence that Safarmex provided the Department with stock availability at the Depot, and that the request was made by Safarmex to increase the stock of Surgical Masks, and how much lead time was available. As part of normal procurement processes, the RFQ would be preceded by a stock code required for the approval of the quotation process document generated by Safarmex to indicate available stock levels for a specific item and in this instance, it was not attached to the RFQ. Safarmex did not provide any of the stock code required for approval and proceeded to procure the stock on behalf of the Department in terms of both clauses 6.1 and 6.2 of the SLA.

[15] At the time of issuing the RFQ, Mr Tshegofatso Moralo ("Moralo") was an Assistant Director and Depot Manager at the Department. Mr De Jager ("De Jager") of Safarmex was the General Manager of Safarmex and both were involved in the events that led to the impugned decision. De Jager was interviewed on 3 September 2020. He stated that they did not adhere to the correct procurement process during the National State of Disaster period. Some stock was just delivered to the Depot in April 2020. He added that the quotations for these were not obtained by Safarmex.

[16] On 09 April 2020, and pursuant to the RFQ, Tapa Trading submitted its quotation for the supply of only 220 000 Surgical Masks at R21.50 (VAT excluded) per item, adding in all to R4 730 000.00 (VAT excluded). It is not immediately decipherable how Tapa Trading only quoted for 220 000 Surgical Masks whereas the RFQ was for 6 290 000 Surgical Masks. In the second place, although documents were requested, the Department failed to provide proof or any evidence to justify how the other eleven suppliers were invited to submit the bid. The director and shareholder of Tapa Trading, Masombuka, too, interviewed by SIU on 26 July 2021, could not say how Tapa Trading was invited to supply and deliver the 3-Ply Surgical Masks.

[17] On 9 April 2020, 3 working days after the RFQ was issued, Moralo sent a request for deviation from the transversal contracts in appointing service providers for the supply and delivery of Surgical Masks required for the Covid-19 outbreak to Dr Mohagi. The deviation was —

17.1 Sought in terms of National Treasury Instruction Note 03 of 2016/2017 and which request was for deviation from the Transversal Contracts in appointing service providers;

17.2 Submitted with the list of twelve (12) suppliers, all of which quoted for different quantities of 3-Ply masks, including Tapa Trading, but all accurately amounted to a total of 6 290 000 put together; and

17.3 The motivation was that the suppliers in transversal contracts were unable to supply stock for the province and not willing to confirm delivery dates;

17.4 That the Depot was in urgent need of Surgical Masks for Covid-19;

17.5 That the recommendation was to appoint all the suppliers listed, which was subsequently approved by Dr Mohagi on 10 April 2020; whereafter

17.6 Dr Mohagi approved the deviation on condition that it was “preferable from Clinipro and Tuwo Rhodesia as they were under R20.00”.

[18] Thereafter, the Department purchased Surgical Masks from all 12 suppliers. It is perplexing how all 12 suppliers, including Tapa Trading, in the deviation were able to

quote the quantities, which in total amount to the quantities in the RFQ. The appointed suppliers, which include Tepas Trading, were not in competition with one another. The deviation sought was only for deviating from transversal contracts and did not mean that the Department subsequently approved to deviate from all normal procurement processes, including quotations.

[19] In relation to the 12 suppliers, including Tepas Trading, the Department again failed to provide evidence showing how all the 12 suppliers were invited to bid and how they managed to quote the quantities, which in total amount to the quantities in the RFQ. Dr Mohagi approved the deviation and recommended Clinipro and Tuwo Rhodesia as preferred suppliers based on their price being less than R20.00. Dr Mohagi's recommendation of Clinipro and Tuwo Rhodesia clearly serves as an indication that he thought that the suppliers were in competition with one another. A comparative Price schedule must be completed as part of the procurement process before the quotation can be sent for approval. However, in this instance, it was only completed on 7 May 2020 after the appointment was already approved. In any event, Tepas Trading was the only company evaluated.

[20] On 7 May 2020, a supplier order MP/20/8934 was issued for the supply of 220 000 Surgical Masks 3-Ply ear loops at R21.50, totalling R4 730 000.00. Moralo approved this order, aside from his delegation of authority being limited to transactions under R500 000.00. Tepas Trading did not supply a delivery note for the supply of the masks, but even so, it submitted an invoice number TT-003 dated 15 May 2020 in the sum of R4 730 088.00 (VAT excluded).

[21] The Department issued a goods received note dated 19 May 2020. On 19 May 2020, Safarmex submitted a tax invoice to the Department for payment of invoices, among which was the invoice of Tepas Trading in the amount of R4 730 088.00, for which Moralo requested approval for payment of the suppliers. Safarmex settled the amount with Tepas Trading on 4 June 2020. The SIU established during its interview with Masombuka that Tepas Trading had an agreement with TRC for the supply of the masks

at R12.00 per unit, amounting in all to R2 640 000.00. That said, an additional consultation fee of R264 000.00 was added. The total amount paid to TRC for the supply of 220 000 masks became R2 904 000.00. Tepa Trading therefore acquired the masks from TRC at an amount of R13.20 (VAT excluded).

[22] In addition, Mahlalela's affidavit sets out the process that was followed by the Department and suggests three parts:

22.1 Firstly, he confirms that the SLA arrangement between the Department and Safarmex was entered into before the announcement of the COVID-19-related National State of Disaster. Mahlalela does nothing more than just to recite the relevant clause of the SLA. He, further, confirms the process as envisaged in the SCM policy;

22.2 Secondly, during or after the declaration of the National State of Disaster in paragraphs 8 and 9 —

22.2.1 Mahlalela describes the process of procurement under emergency situations, and that the Department followed this process in terms of the SCM policy and the relevant Treasury Instruction Notes being Note 3 of 2016/2017, Note 5, and Note 8 of 2019/2020;

22.2.2 He states that at the start of the national disaster, suppliers in the transversal contract did not have stock available or were unwilling to confirm delivery dates, but does not present any proof to this effect;

22.2.3 He mentions that a decision was taken to deviate from transversal contracts and to follow emergency procurement, the deviation should have followed paragraph 6.2 of the SCM Policy, which mandates that deviation applies to quotations;

22.2.4 He further mentions that some suppliers were issued with promissory notes and received delivery before the order was issued, but that process is not provided for in any of the Department's SCM policy frameworks;

22.2.5 Where only one quote was obtained, the Department relied on an interpretation of paragraph 3.7.6 of National Treasury Instruction Note 8 of 2019/2020 to approach suppliers for quotation;.

22.3 Lastly, the third process is explained under paragraph 10 in that —

22.3.1 Items that did not fall within the scope of the Safarmex contract were bought from the transversal contract suppliers and suppliers on the Central Suppliers Database;

22.3.2 The Department relied on the emergency provisions of National Treasury Note 5 and National Treasury Note 3 to facilitate the process;

22.3.3 A motive-for-approval was signed, and in some other instances, promissory letters were issued even though the Department did not have a policy which allowed appointment of service providers by promissory letters and whereas in some instances, delivery would take place before a formal order was issued. The SCM Policy prohibits the delivery of goods before a formal order is issued.

Issues

[23] The major issue is whether this Tribunal ought to declare the appointment of Teka Trading and all the resultant contracts, transactions and payments between the parties invalid, reviewed and set aside. To decide that issue, the Tribunal must determine whether:

23.1 Teka Trading unduly benefited from an unlawful and irregular appointment;

23.2 The parties' officials colluded about the way the RFQ was submitted;

23.3 The Department followed the procurement processes as set out in the National Treasury Instruction Note 8 of 2019/2020 in appointing the First Respondent;

23.4 The innocence of Teka Trading is of no consequence in circumstances where the Department alone is found to have been the main perpetrator of the non-compliance;

23.5 On the facts of this matter, there is a case for abuse of process by the SIU in bringing this application;

23.6 There are parts of the evidence of Ms Jacobs, the deponent to the founding affidavit, which Mr De Jager has not confirmed, now unavoidably hearsay.

Legal Framework and Application

Doctrine of *Estoppel*

[24] The argument of Tepas Trading in this respect is closely related to its claim of innocence. Tepas Trading asserted that the principle of *estoppel* should operate against the Department. This is necessary to stop the Department from denying the legality of the representations that it made to Tepas Trading, which was, in its argument, an innocent party and had no knowledge or reason to suspect any procedural defects in the procurement process. I find myself in agreement with the SIU that nothing turns on this point. The issue is whether Tepas Trading undeservedly benefitted from an unlawful and irregular process, which allowed it to profit therefrom. The answer is indubitably in the affirmative, and *estoppel* cannot assist it.⁴

[25] In the second place, Tepas Trading claims that it is oblivious to how it landed the RQF and was ultimately selected. Tepas Trading advances this assertion in the face of abundant evidence that its appointment could only have been accomplished with some measure of connivance between it and the officials of the Department. If there was no collusion between these parties, the question that I posed earlier in this judgment of how Tepas Trading knew the exact number of Surgical Masks for which it had to quote persists. The notion that the Department represented certain facts to Tepas Trading stands to be rejected.

[26] I also agree with the SIU that even assuming that Tepas Trading was innocent in this entire process, it is not a license for Tepas Trading to reap the benefits of the unlawful appointment. As far as public procurement is concerned, *estoppel* will not immunise the appointment of Tepas Trading from scrutiny, nor will it save it from being set aside. The non-observance of the various legal prescripts governing the procurement processes by

⁴ Merifon (Pty) Limited v Greater Letaba Municipality and Another [2022] ZACC 25 at para 42.

the Department means that the appointment has been contaminated, and estoppel is not available in those circumstances to rescue the situation⁵. In *RPM Brides (Pty) Ltd v City of Tshwane Metropolitan Municipality*⁶, the Court confirmed that a failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied by *estoppel* because that would give validity to a transaction which is unlawful, therefore *ultra vires*.

Abuse of Process

[27] Tapa Trading contends further that the application is an abuse of process because there are alternative grounds on which to implicate it beyond the scope of the initial findings of the investigation, and yet it stopped short of mentioning these alternative grounds. Additionally, argues Tapa Trading, there is no factual basis to support the claim that its actions were directly connected to the irregularities exposed during the procurement process. Again, I find myself agreeing with the SIU that, in the absence of Tapa Trading stating that the evidence levied is beyond the scope of the investigation described in the Proclamation and failing to distinguish between the evidence of the SIU before this Tribunal and the contents of the report that form part of its answering affidavit, its assertions are unsustainable.

[28] The report aforesaid mentions Tapa Trading as one of the suppliers appointed without following the proper procurement processes of the Department. More damning to Tapa Trading is that the report is categorical that the Department did not follow a fair and competitive procurement process. It is, of course, extraordinary that these allegations are not disputed by Tapa Trading. It is the connivance with the officials of the Department that openly links it to the irregularities. In these circumstances, I am struggling to determine how Tapa Trading could attempt to sway this Tribunal to believe that the application is an abuse of process.

⁵ See Merifon supra.

⁶ *RPM Brides (Pty) Ltd v City of Tshwane Metropolitan Municipality* 2007 (9) BCLR 93 (TPD) at para 26.

Use of Evidence Improperly Obtained

[29] Here, the argument is that Masombuka, the director and shareholder of Tepas Trading, was deceived into deposing to the affidavit that the SIU has now attached to the founding affidavit. Tepas Trading argues that the deceit consists in Ms Jacobs, the deponent to the founding affidavit, keeping tight-lipped that she intended to use his affidavit in litigation about to follow against Tepas Trading. I find myself in agreement with the SIU; it is neither here nor there that Masombuka deposed to an affidavit, ignorant that it would be used in litigation subsequently.

[30] The contents of Masombuka's affidavit are representative of uncontested testimony by Tepas Trading. In any event, the evidence having been obtained without the application of any form of unlawful pressure or physical force, it should ordinarily be admissible. For as long as the truth that he told at the time of deposing to the affidavit is still the same and not in any manner challenged by him, his protestations concerning his obliviousness of the purpose for which it was required ring hollow and must be rejected.

Hearsay Evidence

[31] Tepas Trading also contends that certain parts of Mr De Jager's ("De Jager") affidavit constitute hearsay. As such, those offending parts of his affidavit should be declared inadmissible and must be struck out. Tepas Trading has referred this Court to the matter of *Hewan v Kourie NO and Another*⁷ where the Court quoted with approval a passage by the learned author *Paizes* discussing the role of the hearsay rule:

"(t)he hearsay rule spans the straits between two conflicting evidentiary principles. On the one hand, it is desirable that all relevant evidence be received and evaluated by the trier of fact, and on the other, it is equally desirable that all witnesses testify subject to 'ideal conditions' of the courtroom, where such evaluation may be properly conducted."

⁷ *Hewan v Kourie NO and Another* [1993] 4 All SA 227 (T), at page 233.

[32] Hearsay evidence is defined in Section 3(4) of the Law of Evidence Amendment Act, 45 of 1988, which governs hearsay evidence both in civil and criminal courts. It is: "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence." Section 3(1) of the same Act sets out instances in which hearsay may be admitted, and these are:

"Hearsay evidence—

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
 - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
- (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence."

[33] The response of the SIU on the matter of the hearsay nature of the evidence of De Jager is simply that Tepa Trading is mistaken because De Jager's confirmatory affidavit is attached to the founding affidavit. As I understand the contention of the SIU, the affidavit of De Jager is confirmation of the contents of the founding affidavit. If hearsay evidence is one whose probative value depends on the credibility of any person other than the

person giving it, then the SIU is incorrect. Moreover, the SIU's approach must be wrong because the alleged confirmatory affidavit of De Jager was signed on 30 September 2020, whereas Ms Jacobs deposed to the founding affidavit on 28 March 2024. It is evident that the probative value of Ms Jacob's evidence is dependent on that of De Jager. As such, the affidavit of De Jager cannot be a confirmation of the founding affidavit. Everything said on this matter, the case of the SIU does not stand or fall by the affidavit of De Jager for, as will be apparent from the admitted facts below, the decision of the Department to award the bid to Tepas Trading was constitutionally invalid.

[34] De Jager's affidavit is distinctly hearsay. A relevant issue for consideration in these circumstances is, given the unmistakable hearsay nature of the evidence, should this Tribunal proceed to consider whether the affidavit should be admitted under section 3(1)(c). The SIU seems to have not paid any serious attention to the issue of the admissibility or inadmissibility of the evidence of De Jager as it did not deal with any of the provisions of section 3(1)(c). This makes it difficult for this Tribunal to gloss over the difficulties that stick out against admissibility. In the result, the affidavit of De Jager is inadmissible because it is hearsay.

Consequences of The Innocence of Tepas Trading, If Established

[35] When Tepas Trading was appointed, National Treasury Instruction Note 3 of 2016/2017, issued in April 2016, was applicable. Its purpose was to combat and prevent abuse in the SCM System, and section 8 thereof provides that:

35.1 Accounting officers must only deviate from inviting competitive bidding in cases of emergency and sole supplier;

35.2 Accounting officers must invite as many suppliers as possible and select the preferred supplier using the competitive bidding committee system.

[36] National Treasury Instruction Note 08 of 2019/2020 was applicable when Tepas Trading was appointed. It was introduced to:

36.1 Facilitate emergency procurement to deal with the COVID-19 pandemic and avoid the abuse of the SCM system;

36.2 Institutions were to make use of the transversal contracts to ensure consistency of price or specifications, and a list of items was provided;

36.3 Where items were not on the transversal contract, it allowed for emergency procurement to be followed by deviating from inviting competitive bidding;

36.4 All items procured in terms of paragraph 3.5 as emergency procurement related to Covid-19 must be reported to the relevant treasury within 30 days;

36.5 Where an institution or a provincial treasury already has a contract in place for the same items listed in Annexure A, the institution must honour the contract and continue to procure from that contract;

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

36.1.1 the items are to the specifications as determined by the National Department of Health;

36.1.2 the prices are equal to or lower than the prices in Annexure A; and

36.1.3 the supplier is registered in the Central Supplier Database (paragraph 3.7.6).

[37] Generally, the SCM Policy of the Department of 2017 discriminates between the threshold for appointment of bidders and suppliers. These thresholds are used as guidance on which goods and services may be procured by open bidding process and quotation process. In either case, the SCM Policy does not contemplate the appointment of any supplier without a competitive process. That said, Paragraph 6.2 of the SCM Policy of the Department makes provision for emergency procurement cases and states that:

37.1 When certain circumstances necessitate deviation from the normal bid procedures, motivation to that effect must be presented for recommendation to the Bid Adjudication Committee, which must recommend for approval to the Accounting Officer.

Where it is impractical for the Bid Adjudication Committee to do so, the Chief Financial Officer is delegated to make such recommendations for the Accounting Officer's approval;

37.2 Applications must be fully motivated and reasoned, and acceptable reasons advanced why the normal bid procedures cannot be followed. The required tasks to be carried out must still be defined fully in terms of time and cost to enable the Accounting Officer to make an informed decision. The deviation or exemption applies to quotations as well.

[38] In terms of paragraph 19.2 of the SCM Policy, no arrangements must be made for the rendering or delivery of goods until an official order has been placed by the Department with the supplier.

[39] In terms of item 1 of the Department Finance Delegation of 2018 for Middelburg Depot:

39.1 Deputy Director: Finance delegation is up to R500 000;

39.2 Deputy Director: Pharmaceutical Services' delegation is up to R5 000 000; and

39.3 For cases above R5 000 00.00, the approval was to take place on BAS.

[40] One of the themes in the papers of Tepas Trading is that it was innocent in all that transpired concerning its appointment. The essence of that assertion is that it could not have known that the Department had failed to comply with certain applicable pieces of procurement legislation when appointing and concluding a contract with it. Closer scrutiny of the facts, however, reveals the converse of what Tepas Trading would have this Tribunal believe. Tepas Trading could not explain how, on 9 April 2020, it submitted its quotation for the supply of only 220 000 Surgical Masks at R21.50 per item, adding in all up to R4 730 000.00 when the RFQ was for 6 290 000 Surgical Masks.

[41] The assertion of the SIU that some officials from the Department provided guidance to Tepas Trading and all the other 11 suppliers on how much to quote is very apparent. If it is not, how was it possible for all the suppliers to submit a quotation for the

same number of surgical masks? The proposition here is that Tepas Trading was intimately involved with the officials of the Department who prepared and directed it on how and what to quote. Other than the argument of innocence being vain for purposes of serving as a defence, it is downright false. Needless to state, this rendered the procurement process irregular and unconstitutional. In that regard, one is reminded of the provisions of Section 217 of the Constitution, which prescribes that:

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

[42] It is interesting and staggering that the Department was unable to demonstrate or justify how the other suppliers were invited to submit their bid. As though that was not enough, the director and shareholder of Tepas Trading, Masombuka, could not say how Tepas Trading was invited to supply and deliver the 3-Ply Surgical Masks. Surely, Masombuka does not expect this Tribunal to believe that, as a shareholder and director of Tepas Trading, he does not know or remember how his company got to participate in this whole process that led to the appointment.

[43] The alleged innocence of Tepas Trading is further contradicted by Masombuka's admission that the Department alerted him to the general criteria of bidding when he was pursuing prospective opportunities from it on behalf of Tepas Trading. Moreover, it is the version of Tepas Trading that, after the RFQ, it enquired to satisfy itself that procedures were followed. In *SIU v Vision View Productions, Special Investigating Unit and Another*⁸ the Court held that:

“it is clear that the same situation does not pertain to the respondent in this case. On the contrary, the respondent adopted a supine approach to the procurement processes. It is inconceivable that any businessperson operating on the scale that the respondent operates would be ignorant of the basic tenets of public procurement process, viz. the need for a competitive, fair and transparent tender process.”

⁸ *Special Investigating Unit and Another v Vision View Productions CC* [2020] ZAGPJHC 421 at para 77.

Tepa Trading Unduly Benefitted from an Unlawful and Irregular Appointment

[44] A consideration of whether Tepa Trading was irregularly appointed must begin with those matters that are not in dispute between the parties. In this regard, it could be instructive to mention *Plascon-Evans Paints Ltd v Van Riebeeck Paints*⁹ where the Court quoting from the decision of *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*¹⁰ stated the following:

"... where there is a dispute as to the facts, and a final interdict (it) should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

[45] These common cause facts are:

45.1 The appointment of Tepa Trading through the RFQ violated the procurement prescripts of the Department as provided for in section 217 of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA"), and the Public Finance Management Act. 1 of 1999 ('the PFMA') and its Regulations read together with National Treasury Instruction Notes and the Second Respondent's Supply Chain Management Policy ("SCM Policy");

45.2 The appointment of Tepa Trading was consequently unfair, uncompetitive, not transparent, nor cost-effective;

45.3 The appointment was further contrary to applicable legislation, including National Treasury Circulars and instructions;

45.4 Despite the Department having a discretion to approach any other supplier to obtain quotes, it failed to do so. As such, competitiveness and fair pricing were absent;

⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

¹⁰ *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E – G.

45.5 The orders that Moralo, whose delegation was R500 000.00 or below, issued to Tepas Trading were unlawful because the value of the RFQ was R4 730 088.00. That was in contravention of item 1 of the Department's Finance Division delegations; and

45.6 The Department failed to first consider suppliers under the Transversal Contract as per the terms of the Service Level Agreement that Safarmex had concluded with it in line with the provisions of National Treasury Note 8 of 2019/2020, prior to the approval of the deviation that led to the appointment of Tepas Trading.

[46] It is unquestionable from the common cause facts above that the appointment of Tepas Trading infringed the provisions of section 217 of the Constitution insofar as it did not result in a system which is fair, equitable, transparent, competitive, and cost-effective. The non-compliance of the section also trickled down to all those different legal prescripts that govern the procurement process of Organs of State that are meant to respire life into section 217. The irregularity of the appointment becomes evident when the following is considered:

46.1 The RFQ that led to the appointment of Tepas Trading was sent to it in circumstances that can only be described as odd. Neither Tepas Trading nor the Department would disclose how the former or any other company was requested to provide for the RFQ;

46.2 The knowledge of Tepas Trading of how it had to pitch for the quotation that ultimately resulted in its appointment leads to one inexorable inference that it was tipped and coached on how to adapt the quote to secure its selection. This made it complicit in this whole plan;

46.3 The individuals who advised Tepas Trading could only have come from within the Department because only they would have known the precise numbers, hence Tepas Trading, although it knew that the RFQ required 6 290 000 3-Ply masks, chose to quote for 220 000 3-Ply masks;

46.4 National Treasury Instruction Note 3 of 2016/2017 provides that the Department is obliged to invite as many suppliers as possible and select a preferred supplier for

competitiveness, even in circumstances where goods are to be procured in an emergency;

46.5 The SCM Policy of the Department does not permit the appointment of a single supplier during emergencies without a competitive bidding system;

46.6 The Department took the decision notwithstanding that the quotation submitted by Tapa Trading did not comply with National Treasury Instruction Note 8 of 2019/2020;

46.7 The purchase order of Tapa Trading in the amount of R4 730 088.00 was approved by Moralo of the Department, who had no delegation of authority to authorise amounts more than R500 000.00 in terms of the SCM and delegation framework of the Department. This was in breach of the PFMA.

[47] With the above in mind, it is evident that the conduct of the Department contradicted the provisions of section 217 of the Constitution because its actions were not transparent, fair, equitable, cost-effective and competitive. It could not have been transparent, as no one, including Tapa Trading itself, knows how it was appointed. This was necessarily unfair to the other potential bidders. Additionally, it will never be known that this was the most cost-effective because the Department did not have the advantage of what it would have cost had the other bidders been invited¹¹.

[48] A tender concluded in breach of the legal provisions designed to ensure a transparent, cost-effective, and competitive tendering process in the public interest is invalid¹². In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer South African Social Security Agency ("Allpay I")*¹³, the Court held that:

"if the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had the procedural requirements been 'properly observed' and 'deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process'".

¹¹ See *City of Tshwane Metropolitan Municipality v Moipone Group of Companies (Pty) Ltd and another* 2024 JDR 2162 (GJ) at para 35.

¹² *Municipal Manager: Gaukeni Local Municipality and Another v FV General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA) at para 16.

¹³ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer South African Social Security Agency (No 1)* (1) SA 604 (CC) at para 24.

[49] I agree that, notwithstanding that a deviation from the transversal contract was authorised by the Department, the invalidity and unlawfulness in the appointment and award of the tender to Teka Trading would linger because:

49.1 The deviation further contravened paragraph 3.7.2 of National Treasury Instruction Notes 8 of 2019/2020¹⁴;

49.2 The Department failed to appoint Teka Trading following approval of the deviation in terms of paragraph 6.2 of the SCM policy, which states that deviation is applicable to quotations as well¹⁵;

49.3 The deviation did not comply with paragraph 8.4 of National Treasury Instruction Note 3 of 2016/2017 in that the suppliers appointed were not in competition with one another; and

49.4 The deviation was only applicable to the transversal contract and not the normal procurement process or quotations.

[50] The explanation extended by Mahlalela for the deviation is not practical and, in any event, is not countenanced by any prescripts governing procurement processes. Mahlalela refers to National Treasury Instruction Note 3 of 2016/2017 with which the Department failed to comply. He states that the procurement process was followed. However, and shortly thereafter, a decision was taken to change the process, but it is silent on the course to which they adhered and the policy that guided the choice of their trajectory.

[51] Mahlalela also states that the suppliers were asked to send a quote and deliver the goods first before any documents were completed by the Department. He makes that declaration in the face of the absence of any policy that permits the department to accept delivery of goods after the fact. Moreover, there is also no procurement policy that allows the Department to issue promissory letters to the suppliers. Mahlalela confessed that in

¹⁴ See para 36 supra.

¹⁵ See para 37.2 supra.

most instances only one quote was obtained and that decision was made with reliance to paragraph 3.7.5 of National Treasury Instruction Note 8 of 2019/2020. This construction is plainly incorrect as it was expected of the Department to obtain as many quotes as possible from which to select a preferred supplier. Mahlalela fails to explain or to levy evidence to demonstrate the sensible steps the Department took to obtain a fair price.

[52] The above constitutes clear evidence of the non-observance of procurement processes rendering the transaction constitutionally invalid and unlawful. As such, it is reviewable in terms of the principle of legality as envisaged in section 1(c) of the Constitution under which this review has been brought. Accordingly, the decision to award the bid to Tepas Trading and the resultant contract concluded between the two parties are reviewed and set aside in terms of section 172(1)(a) of the Constitution. It is at this juncture that I proceed to consider a just and equitable remedy in terms of section 172(1)(b).

Just and Equitable Remedy

[53] In this regard, the SIU seeks to review and set aside the decision of the Department to award the bid to Tepas Trading and the resultant contract that it had concluded following the aforesaid award of the bid. Insofar as the SIU is concerned, an order directing Tepas Trading to return the monies paid pursuant to the unlawful award of the Bid and the conclusion of the contract ought to be a matter of course. Alternatively, the SIU seeks an order directing Tepas Trading to file an audited statement of expenses it had incurred, the income received and the net profit it has made under the disputed tender and/or services contract within 30 days of the order.

[54] Conversely, the counter assertion of Tepas Trading is essentially that it had nothing to do with the decision of the Department and that it is an innocent party, unfortunately entangled in this web. Having declared the decision of the Department to be invalid and unlawful, it is befitting to refer to section 172(1)(b) of the Constitution, which provides that:

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

- (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[55] The SIU justifies the remedy it seeks above on the basis that in the case of *AllPay* //¹⁶, the Court held that a service provider will be liable to account for any profit derived from an unlawful tender process and that any benefit that such service provider derives is subject to public scrutiny. The Court further ordered that the successful tenderer, Cash Paymaster in that case, was required to continue to render the services in question on a cost only basis and was obliged to account for its profits. The remedy was granted notwithstanding that the service provider, Cash Paymaster, had claimed a lack of knowledge of the irregularities committed by the service grantor, the Department. Accordingly, the innocence that Tepa Trading claims in the current matter cannot assist it as this Court is bound by the *AllPay* decision¹⁷.

[56] It is only logical that the finding that the irregularities were of such a scale warrants this Tribunal to exercise its discretion to consider a just and equitable remedy under section 172(1)(b). To do this, it must reflect on the nature of the irregularity, role of the respective parties and conduct before and after the irregularity was exposed. The irregularities were unquestionably grave. The infringement weakened and encouraged the non-observance of procurement processes and marred the rights of other potential participants leading to the contravention of the provisions of section 217 of the Constitution.

[57] The facts presented clearly show that Tepa Trading was not as blameless as it would have this Tribunal believe. It has already been demonstrated that Tepa Trading actively contributed toward the irregularities that ensued. It could not explain how it knew that it had to tender for a different number of masks when, in terms of the RFQ, the

¹⁶ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) (*AllPay* No.2) at para 67.

¹⁷ See also *Special Investigating Unit and Another v Vision View Productions CC* [2020] ZAGPJHC 421.

quantity required was larger. I deem it appropriate to conclude by reference to the decision of *Mining Qualifications Authority v FIU Training Institute* following *Allpay II*¹⁸ where the Court held that:

“...taking the circumstances under which the respondent came to be awarded the tender, no factor is apparent why it should retain any profit made by its efforts. In my view it is unnecessary that a clear case of complicity is proven; it is enough that the award is tainted by irregularity. Were it otherwise, the plea of an innocent tenderer would as a matter of course outweigh the public interest. The pendulum should usually swing the other way. What one has not obtained through a fair and transparent process ought not to vest any moral claim to retain the spoils.”

[58] The contribution of Tepas Trading toward the irregularities constrains this Tribunal to follow in the footsteps of the *Mining Qualifications Authority*. In any event, where a matter involves public procurement, the public interest must be paramount, and the interest of the service provider cannot outweigh the priority to be given to the public good.¹⁹ In other words, Tepas Trading must return the profit that it has accrued because of the irregularly awarded bid and contract. In the circumstances, I direct as follows:

1. The delay in the launching of this application is condoned;
2. The decision of the Department appointing Tepas Trading for the supply and delivery of 220 000 three-ply masks to the value of R4 720 000.00 under the request for quotation dated 3 April 2020 with reference COVID1901/2020 in Mpumalanga Province is declared unconstitutional, unlawful and invalid;
3. The decision of the Department appointing Tepas Trading for the supply and delivery of 220 000 three-ply masks to the value of R4 720 000.00 under the request for quotation dated 3 April 2020 with reference COVID1901/2020 in Mpumalanga Province is reviewed and set aside;
4. Tepas Trading is ordered to disgorge the profits enjoyed directly or indirectly by it and to that end, it must, within 30 days of this order, submit a detailed statement, supported by all relevant documentation, of all income received and expenditure made in

¹⁸ *Mining Qualifications Authority v IFU Training Institute (Pty) Ltd* [2018] ZAGPJHC 455 at para 41. See also *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12.

¹⁹ *Mjayeli Security and others v SABCO and Other* [2023] ZAFSHC 197 at para 154.

respect of its appointment, performance and payment as a service provider by the Department, to determine the profits derived by it;

5. Should the accounting and/or the sum of profit determined be disputed by either the SIU, on the one hand, or Tepas Trading or the Department, on the other, the SIU and Tepas Trading may re-enroll the matter for determination by the Tribunal;

6. This Tribunal may issue directives on any issue regarding the orders sought herein;

7. If the accounting and the sum of profit is not disputed or is agreed between the SIU and either Tepas Trading or the Department, such profit shall be paid to Safarmex within 15 days of such agreement, together with interest as prescribed in the Prescribed Rate of Interest Act *a tempore more* from date which such agreed sum was paid to Tepas Trading until date of payment;

8. Tepas Trading is liable for payment of the costs of the SIU at Scale B of party and party;

9. The costs mentioned in Para 8 above shall include those of two Counsel.

B A MASHILE
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

Counsel for the Applicant:	Adv M Majozi Mr V Sihawu
Instructed by:	State Attorney, Pretoria
Counsel for the Respondents:	Adv N Sibanyoni
Instructed by:	Nyalunga Attorneys
Date of Judgment:	30 October 2025