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 NUMBER: GP03/2022

In the matter between:

Special Investigating Unit — First Applicant

MEC: Gauteng Department of Health — Second Applicant

and

LNG (PTY) Ltd — First Respondent
(Registration number: 2014/009577/07)

JUDGMENT

Summary:

Administrative law – legality review – whether a public procurement contract was awarded irregularly - consequential relief in terms of s8(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996

Civil procedure – application to set aside a notice in terms of Tribunal Rule 21(1) as an irregular step – whether pending appeal, directives issued by the Tribunal for the further conduct of the review application are automatically suspended in terms of Uniform Rule 18.

INTRODUCTION

[1] This judgment is rendered in respect of two applications. The first is an application for default judgment by the Special Investigating Unit ("SIU"). The second is an application by LGN Scientific (Pty) Ltd ("LNG") to set aside the default judgment as an irregular step. I conveniently refer to these applications as the default judgment application and the irregular step application respectively.

[2] LNG has not filed opposing papers in the default judgement application. It only resists the default judgment application to the extent that it wants it struck out as an irregular step. It. On the other hand, the SIU opposes the irregular step application. Since the irregular step application will, if it succeeds, quash the default judgment application, it makes sense to deal with it first. But firstly, I describe the parties. Then, I set out the background facts to the applications.

THE PARTIES

[3] The SIU is the first applicant. It is a statutory investigating body established in terms of s2(1)(a) of the Special Investigating Units and Special Tribunals Act 74 of 1996 and proclamation R.118 of 2001 Government Gazette 22531 of 31 July 2001. It is a juristic person with the capacity to sue and be sued in its own name.

[4] The Member of the Executive Council for Health: Gauteng Province ("the MEC") is the second applicant. He is the executive authority for the Gauteng Department of Health ("GDOH").

[5] LNG is a private company incorporated according to the company laws of the Republic of South Africa and has its registered business in Pretoria, Gauteng.

[6] The SIU brings the application in terms of section 4(1)(c) read with section 5(5) and 8(2) of the Act in its own name and on behalf of the GDOH represented by the MEC. The GDOH is also an interested party in terms of section 8(2), read with Regulation 6 of the Regulations issued under the Act, published in Government Notice

R1263, Government Gazette 42729 of 26 September 2019, seeking relief to which the GDOH is entitled.

BACKGROUND FACTS

[7] The advent of the Covid 19 global pandemic is widely documented, including in various judgments handed down by the Tribunal. So are regulations that under which a National State of Disaster was declared in March 2020 and organs of state instructed to take measures to curb the spread of the pandemic, including the procurement of PPEs.

[8] The SIU alleges that on 23 April 2020, the executive chairman and sole director in LNG, Mr Thabiso Lekoana ("Mr Lekoana") made a written proposal to the then incumbent Chief Financial Officer ("CFO") in the GDOH, Ms Kabelo Lehloenya ("Ms Lehloenya") regarding the sale by LNG of large quantities of various PPEs. The PPEs comprised of N95 masks, three-ply surgical masks, and sterile, powder-free surgical gloves.

[9] On 24 April 2020, in her capacity as CFO, Ms Lehloenya took the decision to procure 500,000 N95 masks at R55,50 each, 1,000,000 three-ply surgical masks at R18.00 each and 250,000 boxes of 100 sterile, powder-free surgical gloves at R270 per box on behalf of the GDOH from LNG ("the impugned decision"). All these prices are VAT inclusive. The total cost of all the items is R113,250,000.00. On 28 April 2020, she communicated the decision to Mr Lekoana. On the same day, Mr Lekoana accepted the decision in writing after which a contract between LNG and the GDOH was concluded on the terms Ms Lehloenya communicated to Mr Lekoana.

[10] On 30 April 2020, Ms Lehloenya made a submission to the then GDOH incumbent HOD, Professor Lukhele recommending that he approve her deviation from the normal procurement procedures when contracting with LNG and this procurement incident be reported to the Gauteng Provincial Treasury for its condonation of the deviation. The applicants have not sighted the original or copy of the deviation signed by any person for whom provision for their signature was made on the document. These persons have since left the GDOH employment and have not cooperated with

the SIU in its investigation. The applicants infer that the HOD never signed or approved the deviation. The applicants have also not sighted any report to the Gauteng Provincial Treasury from the GDOH HOD regarding this procurement. In an affidavit deposed to by one of its officials, Ms Mariette Hefer, the Office of the Auditor General allege that it did not receive a report from the GDOH HOD within 10 days of 28 April 2020 regarding the impugned procurement.

[11] Under these circumstances, I find that the HOD did not approve the deviation and it was not reported to the Gauteng Provincial Treasury under the applicable procurement regulation.

[12] Between 4 May and 4 August 2020, LNG delivered all the 500,000 N95 masks, all the 1,000,000 three-ply surgical masks and 176,590 boxes of 100 non-sterile examination gloves. Thereafter, GDOH flagged LNG as one of several entities that were irregularly appointed for the procurement of PPEs. Hence, it refused to accept further deliveries of the balance of the remaining procured from LNG.

[13] During the same period, LNG submitted invoices to the GDOH for the PPEs in the amount of R93, 430, 856.74. GDOH has paid LNG R59,404,345.50. A balance of R34,026,511.24 is outstanding. LNG is one of several entities that GDOH flagged as irregularly appointed. Hence GDOH has not paid this amount to LNG.

[14] On the authority of proclamation R.23 of 2020,[1] the SIU investigated the procurement process that led to the impugned decision and found that it was inconsistent with the applicable statutory and regulatory provisions. Hence, it seeks the impugned decision reviewed under the principle of legality in terms of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). It relies on the Tribunal's jurisdiction in terms of section 8(2) of the Act. On the authority in *Ledla*,[2] the Tribunal enjoys jurisdiction over legality reviews in terms of this provision.

[15] The SIU also found that all the 176,590 boxes of 100 gloves LNG delivered to

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[1] Published in the Government Gazette 43546.

[2] *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* ("Ledla") (CCT 319/21) [2023] ZACC. 8; 2023 (6) BCLR 709 (CC); 2023 (2) SACR 1 (CC) (10 March 2023).

the Department were not the costly sterile surgical gloves it had contracted to deliver but cheap non- sterile examination gloves. I consider this issue in more detail later in this judgment.

[16] The circumstances that led to the irregular step application are fully set out in a judgment I handed down on 3 February 2023. It is for that reason that I only briefly set them out here, lest I render this judgment unnecessarily prolix.

[17] The SIU instituted the review application on 11 April 2022. It has not progressed because LNG sought an order compelling the applicants to furnish it with a record of the impugned decision. In a judgment handed down on 29 June 2022, I ordered the applicants to furnish LNG with a record of the impugned decision in terms of in terms of Tribunal Rule 17(4) read with Uniform Rules 35(13), (1) and (2). LNG filed an application for leave to appeal that order. In an order handed down on 7 September 2022, I ordered that LNG has an automatic right to appeal to the Full Court. It subsequently filed its appeal there. At a case management meeting held in November 2022, a dispute arose between the parties regarding the period by which LNG ought to have filed its appeal with the Full Court and whether the Tribunal's 7 September 2022 order is suspended in terms of s18(1) of the Superior Court's Act[3]. I answered these questions in a judgment handed down on 3 February 2023, and issued directives for the further conduct of the review application pending the appeal before the Full Court. On 14 February 2023, LNG noted an appeal in the High Court against the 3 February 2023 judgment and directives. On 17 February 2023, the SIU filed a notice to oppose the appeal. In terms of the directives issued on 3 February 2023, LNG had to file its answering affidavit in the review application by 6 March 2023. LNG has not complied with the directive. As a result, the review application is unopposed. On 27 March 2023, the SIU filed a default judgment application in terms of Tribunal Rule 22(1). On 28 March 2023, LNG filed an irregular step notice in terms of Uniform Rule 30 (2) (b) read with Tribunal Rule 28, affording the SIU 10 days to withdraw its default judgment application because it constitutes an irregular step ("irregular step notice"). The SIU did not comply with the irregular step notice. As a result, on 9 May 2023, LNG filed the irregular step application.

[3] Act 10 of 2013.

IRREGULAR STEP APPLICATION

[18] LNG has set out several grounds on which it contends that the irregular step application ought to succeed. Firstly, it contends that noting an appeal automatically suspends the directives. Therefore, it is irregular for the applicants to seek to further conduct the review application by way of a default judgment application under circumstances where the judgment directing further proceedings in the review application is subject to a pending appeal.

[19] Secondly, it contends that the 3 February 2023 judgment is final in its effect because it is not susceptible to alteration by the Tribunal being the adjudicator of first instance. It is definitive of the parties' rights in that it grants definitive and distinctive relief. It has the effect of disposing of a substantial portion of the relief claimed in the main proceedings.

[20] Thirdly, it contends that it was open to the applicants to obtain an order in terms of s18(3) of the Superior Court's Act[4] for leave to execute the directives pending appeal. In the s18(3) application, the applicants would have carried the onus to prove on a balance of probabilities that they would suffer irreparable harm should the directives not be executed, and LNG would suffer no harm should the directives not be suspended. The applicants would not discharge this burden. Their failure to seek an order in terms of s18(3) is fatal to their notice of default judgment.

[21] Lastly, LNG contends that if the review application is determined by way of default judgment, the latter judgment would render two appeals currently set down before the Full Court on 14 May 2023 moot. It persists with its assertion that it is entitled to a record in terms of Uniform Rule 53(1) to answer allegations levelled against it in the review application. The two pending appeals are significant to LNG and public law practitioners who appear before the Tribunal. It is also entitled to have this issue further ventilated before the Full Court. The 03 February 2023 order pre-empted the outcome of the Full Court. This is prejudicial to it [LNG].

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[4] 10 of 2013.

[22] The applicants oppose the irregular step application on the basis that the notice of the appeal against the 3 February 2023 judgment does not suspend the operation and execution of the directives issued in that judgment. Therefore, contrary to the contention by LNG, the SIU contends that s18(3) is not applicable to the Tribunal's directives. The applicable provision is s18(2).

[23] The parties are not in agreement regarding the issue that arises for determination in this application. LNG contends that the issue is whether the directives issued in the 3 February 2023 judgment are appealable to the High Court in terms of section 8(7). The SIU does not contend that they are not. It reserves its right to ventilate this question in the High Court. It contends that the noting of the appeal does not suspend the operation and execution of the directives.

[24] Whether the directives are appealable is not a question that arises from the parties' grounds of application and opposition. Since Tribunal's orders are appealable to the Full Court of the High Court with jurisdiction without the Tribunal's leave, the question falls outside this Tribunal's jurisdiction. But, more importantly, it is irrelevant for the purpose of the irregular step application. Even if the directives are appealable, the key issue is whether, pending appeal, the directives are automatically suspended as contended by LNG or not, as contended by the applicants.

[25] This question is regulated by the provisions of s18 of the Superior Court's Act.

It provides as follows:

18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application

for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

[26] These provisions draw a distinction between two impugned decisions. Section18(2) applies to interlocutory orders not having the effect of a final judgment. Section18(1) simply refers to a decision. It has been held to apply to a decision that if final in effect. A section18(1) decision is suspended pending the determination of the application for leave to appeal or appeal, unless the court under exceptional circumstances orders otherwise, while a section 18(2) decision, unless the court under exceptional circumstances orders otherwise is not suspended pending the determination of an application for leave to appeal or appeal.

[27] It is important to determine the nature of the impugned directives. I quote the relevant portions of the judgment below:

"[23] In the premises, the applicants' request for directives for the further conduct of the review application to be issued is granted.

[24] The following directives are issued:

1. The respondent shall deliver its answering affidavit, if any, by 6 March 2023.

2. The applicants shall deliver their replying affidavit by 24 March 2023. 6

3. The applicants shall deliver their heads of argument by 7 April 2023.

4. The respondent shall deliver its heads of argument by 21 April 2023.

5. The registrar is directed to arrange with the parties a date of hearing in the second term 2023."

[28] The directives relate to the further conduct of the review application. It is clear from the directive's wording that they are interlocutory and do not have the effect of

disposing of the whole or a portion of the review application. They are also not final in effect. They are subject to alternation by the Tribunal should it be impractical to implement them. Therefore, they do not constitute a final judgment in the review application.

[29] As contended by the applicants, if implemented, the directives will not result in an injustice which cannot be remedied by an appeal in the review application as all the documents which constitute the record of the impugned tender have been disclosed following the discovery procedure. Therefore, LNG was able to file its answering affidavit. It has enjoyed ample time to do so since November 2022 when the applicants discovered the documents that constitute the record of the impugned tender. It failed to do so. The Tribunal subsequently directed that if LNG applies for condonation, it is granted, and if the Tribunal grants the irregular step application, it will issue directives for the filing of further papers in the review application.

[30] LNG elected not to apply for condonation and not to file its answering affidavit in the review application. It also did not bring an application in terms if s18(2) and (3) to have the operation and execution of the directives suspended pending appeal. It has failed to make a proper case for striking out the applicants' notice in terms of Tribunal 22(1) seeking the review application to be determined on a default basis. Consequently, the irregular step application falls to be dismissed with costs. Nothing stands in the way of determining the applicants' application for default judgment.

[31] In the event the LNG's pending appeals succeed, SIU has undertaken to consent to the High Court remitting the review application to the Tribunal for the SIU to deliver a record in terms of Uniform Rule 53 and, thereafter, LNG to deliver its answering papers, the SIU to deliver their replying papers and so on. Thus, determining the default judgment application will not render LNG's pending appeals moot. It also would not imperil their right in terms of s34 to have their pending appeals determined.

[32] LNG contends that if the irregular step application fails, a cost order should not be made based on the trite Biowatch principle. I disagree. On the authority in *Ledla,* the Tribunal is not a court. It therefore lacks jurisdiction to determine constitutional rights. Further, LNG's s34 rights argument was only raised incidentally in the irregular step application. It is not an issue for determination. The Biowatch principle does not apply under these circumstances. No other reason has been advanced as to why costs should not follow the cause.

REVIEW APPLICATION

Delay in bringing the application.

[33] The applicants have put up an explanation for the delay in bringing the review application. Their explanation is that during June 2020, the SIU seconded several of its officials to the Office of the Premier, Gauteng, to assist with an internal investigation into allegations of irregularities in the procurement of PPEs and related payments by the Gauteng government.

[34] On 23 July 2020, the President published Proclamation R.23 of 2020 from which the SIU derives authorisation to investigate the impugned decision. On 3 August 2020, Ms Roeland was tasked with conducting investigations in GDOH, including the LNG investigation. She details the investigation in paragraph 58 and 59 of the founding affidavit. It is clearly wide ranging, including referring the allegations against LNG to the Competition Commission, National Prosecuting Authority, South African Health Products Regulatory Authority ("SAHPRA") and the South African Police Services for further investigation. In mid-July 2021, the SIU engaged the office of the state attorney regarding the appointment of counsel. Counsel was ultimately only appointed in November 2021. During December 2021, the need for further investigation regarding the type of gloves LNG delivered to the GDOH was identified. This process was time consuming because the identified witnesses were recalcitrant.

[35] This application was instituted in April 2022, some 21 months after proclamation R.23 was gazetted. Given the wide-ranging scope of the investigation, the need for further investigation and challenge's experienced in that regard, and a delay of almost

6 months in getting the office of the state attorney to brief counsel, which was not occasioned by the SIU, I am satisfied that the delay in bringing this application was not unreasonable.

Application for default judgment

[36] At the instance of the applicants, the review application is proceeding on a default basis because LNG has not filed opposing papers. Ordinarily, I would have disposed of this application by simply granting an order. However, due to two pending appeals regarding the furnishing of the record of the impugned decision, it is likely that an order by default would not finally resolve the dispute between the parties. It is for that reason that I am rendering a reasoned decision.

Statutory and regulatory provisions relied on by the applicants

[37] The applicants rely on various statutory and regulatory provisions to establish that the impugned decision was irregularly made. I detail the general provisions in this section of the judgment. Where the applicants' grounds of review implicate statutory and regulatory provisions, I examine those at the relevant point in the judgment.

[38] On 15 March 2020, the Minister of Cooperative Governance and Traditional Affairs ("COGTA Minister") declared a Covid 19 national state of disaster in terms of section 27(1) of the Disaster Management Act 57 of 2002 ("the DMA"), which President Cyril Ramaphosa announced. Section 27(2) of the DMA authorises the COGTA Minister to issue disaster management regulations. It provides as follows:

"(2) If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning-…

(l) emergency procurement procedures;"

[39] On 18 March 2020, acting in terms of section 27(2) of the DMA, the COGTA Minister made regulations for the Covid-19 national state of disaster. The initial Covid

18 regulations were published on18 March 2020[5] ("the Initial Covid-19 Regulations"). Regulation 9(a) of the Initial Covid-19 Regulations provides as follows:

"9 Emergency Procurement Procedures:
Emergency procurement for institutions is subject to
(a) the Public Finance Management Act, 1999 (Act No. 1 of 1999), and the applicable emergency provisions in the Regulations or
Instructions made under section 76 of that Act;"

[40] The applicable provisions of the PFMA include the definition of a "department" in section 1. GDOH is a department as defined. In terms of section 36(2)(a), the accounting officer for the GDOH is the Head of Department ("HOD"). In relevant parts, section 38(1)(a)(iii) provided that the accounting officer of a department must ensure that the department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive, and cost-effective."

[41] The applicable emergency provision in the Treasury Regulations made under section 76 of the PFMA is regulation 16A.6.4. It provides as follows:

Treasury Regulation 16A6.4 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 competitive bids must be recorded and approved by the accounting officer or accounting authority."
Regulation 16A.6.4 allows an organ of state to deviate in circumstances when it is impractical to invite competitive bids.

[42] On 19 March 2020, acting in terms of section 76(4)(c) and (g) of the PFMA and pursuant to paragraph 9(a) of the Initial Covid-19 regulations, National Treasury issued National Instruction No 08 of 2019/2020 ("NTI 08 of 2020/2021"). It was headed Emergency Procurement in Response to National State of Disaster. It was repealed before Ms Lehloenya made the impugned decision.

[43] On 15 April 2020, acting in terms of section 76(4)(c) and (g) of the PFMA and pursuant to paragraph 9(a) of the Initial Covid-19 Regulations, National Treasury issued National Instruction No 03 of 2020/2021 ("NTI 03 of 2020/2021. It is headed Covid-19 Disaster Management Central Emergency Procurement Strategy for PFMA

[5] In Government Notice 318 in Government Gazette 43107.

Organs of State. It was in operation when Ms Lehloenya made the impugned decision. It repealed NTI 08 of 2020/2021.

[44] On 28 April 2020, acting in terms of section 76(4)(c) and (g) of the PFMA and pursuant to paragraph 9(a) of the Initial Covid-19 Regulations, National Treasury issued National Instruction No 05 of 2020/ 2021 ("NTI 05 of 2020/2022"). It is headed Covid-19 Disaster Management Central Emergency Procurement Strategy for PFMA Organs of State.

[45] On 29 April 2020, acting in terms of section 27(2) of the DMA, the COGTA Minister issued new Covid 19 regulations for the post lockdown period ("Post Lockdown Regulations"). They were gazetted in Government Notice R.480 in Government Gazette 43258 of 29 April 2020. They became operational on 1 May 2020, repealing and replacing the Initial Covid-19 Regulations. Regulation 11(a) of the Post Lockdown Regulations replicates Regulation 9(a) of the Initial Covid 19 regulations.

[46] To the extent they are relevant to establishing a case for the relief the applicants seek, I deal with the provisions of the last NTI 08 of 2020/2021 and NTI 05 of 2020/2021 at a pertinent point in this judgment.

Grounds of Review

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

47.1 Ms Lehloenya was not authorised to make the impugned decision.

47.2 She failed to procure PPEs from national government's central implementation Agent, Imperial Health Sciences ("HIS") as required by NTI 03 of 2020/2021.

47.3 She failed to comply with the provisions of NTI 05 2020/2021 which applied when she communicated the impugned decision to LNG in various respects.

47.4 She failed to invite competitive bids and to ensure that reasons for deviating from this requirement are recorded and approved by the HOD as required by regulation 16A.6.4.

47.5 When Ms Lehloenya made and communicated the impugned decision on 24 and 28 April 2020 respectively, the HOD failed to comply with his obligation in terms of section 38(1)(a)(iii) of the PFMA to ensure that the GDOH had and maintained an

appropriate procurement and provisioning system which is fair, equitable, transparent, competitive, and cost-effective.

47.6 LNG is not a holder of a SAHPRA issued licence authorising it to conduct the business of wholesaling and distributing medical devices.

<u>The CFO's lack of authority</u>

[48] Whether Ms Lehloenya lacked the authority to make the impugned decision is a conclusion to be drawn once all the other grounds of review are established. The reason for this is that other grounds of review implicate the applicable statutory and regulatory procurement provisions. If I find that when she made the impugned decision, Ms Lehloenya failed to comply with the applicable provisions, it follows that she lacked the requisite authority to make the impugned decision. I therefore defer this conclusion accordingly.

<u>Failure to procure PPEs from IHS</u>

[49] The applicants assert that when the impugned decision was made on 24 April 2020, NTI 03 of 2020/21 applied. It required GDOH to procure PPEs from IHS only. By procuring these items from LNG, the CFO failed to comply with NTI 03 of 2020/21. Below, I quote the relevant sections from the founding affidavit that reflect the interpretation of NTI 03 of 2020/21 that the applicants are contending for:

"26.3 Its purpose was to provides for a disaster management central emergency procurement process for PPE that may be implemented by the accounting officers and accounting authorities of all such department, institutions, and entities (par 1);

"26.4 It listed, in annexure A, certain PPE items and the prices which the National Treasury and the national Department of Health had determined for them; and said the national Government would make those PPE items available to government bodies at those prices (par 3.7). The items listed in Annexure A included N95 masks, three-ply surgical masks, sterile surgical gloves, and non-sterile examination gloves.

"26.5 It contained processes for placing orders for items listed in Annexure A by government bodies with the national Government's central implementing agent, Imperial Health Sciences; for the consolidation and prioritization of the PPE; and for invoicing and payment by the ordering institutions (par 4).

"26.6 It said government bodies may procure items not listed in Annexure A, by following certain emergency procurement prescripts, namely in cases of emergency,

accounting officers could deviate in terms of Treasury regulation 16A.6.4 from inviting competitive bidding; and they should report to the relevant treasury all such instances where the value of goods or services concerned exceeded R1 million, and include in the report a description of the goods or services, the names of the supplier. The amount involved and the reasons for dispensing with competitive bidding. (par 5.1).
"27. I submit it follows from parts of Treasury Instruction 3 of 2020/21 described in paragraphs 26.4 to 26.6 above, that the Department could procure items listed in Annexure A… from the National Government's central implementation agent… only."

[50] The interpretation the applicants contend for is inconsistent with the clear wording of NTI 03 of 2020/21. NTI 03 of 2020/21 did not make provision for procurement from IHS only. Departments could also procure PPEs from entities listed in annexure A at the listed prices, which National Treasury had negotiated with the relevant entities. Therefore, not procuring from IHS does not constitute non-compliance with NTI 03 of 2020/21. Therefore, this ground of review stands to fail.

<u>Non-compliance with NTI 05 2020/2021</u>

[51] The applicants allege non-compliance with NTI 05 of 2020/21 on several basis, which I list below:

51.1 competitive bidding was not followed and deviation from this process was not duly approved.

51.2 the contracted prices were more than those listed in annexure A.

51.3 LNG was not registered on the CSD for the supply of PPE.

[52] NTI 05 of 2020/21 was not in operation when the impugned decision was made on 24 April 2020. It only came into operation on 28 April and applied when CFO communicated the impugned decision to LNG. Nonetheless, for reasons set out below, two requirements introduced by NTI5 of 2020/21 which I set out in paragraph 51.2 and 51.3 above do not sustain the applicants case. The Initial Covid-19 Regulations made it plain that emergency procurement procedures remained applicable during the period of the Covid-19 national disaster. Save for the requirement set out in 51.2 above, Regulation 16A.6.4 prescribed the same requirements. The other additional requirement introduced by NTI 05 of 2020/21 is the report to the Gauteng Provincial Treasury. Regulation 16A.6.4 prescribed a report to the office of the Auditor General.

[53] LNG submitted a written proposal directly to Ms Lehloenya. According to Mr Lesiba Arnold Malotana, on 16 April 2020, the HOD established a Bid Adjudication Committee ("BAC") for GDOH. It was in operation well into May 2020. It was sidelined by the GDOH PPE procurement process.

[54] No evidence of approval of a deviation from the competitive bidding process by all indicated to give the approval was found. Proof that the approved deviation was reported to the office of the Auditor General was also not found. If it had been submitted, it would have been obtained from these objective sources.

[55] Under these circumstances, I am constrained to find that the SIU has successfully established that when the impugned decision was made, competitive bidding was not followed, the BAC process was sideline and Ms Lehloenya singularly made the impugned decision as alleged by the applicants. Deviation from non-competitive bidding was also not duly approved as required in terms of Treasury Regulation 16A.6.4.

[56] The applicants have not sustained the remaining two sub grounds.

[57] On the authority in *Zilwa*[6], annexure A does not set the maximum price for PPEs. A greater difficulty facing the applicant is that even if I were to accept that it does, to find that LNG supplied PPEs to GDOH at prices higher than those in annexure A, the two prices ought to be compared. Price comparison can only be made with refence to product specifications. The SIU has not alleged specifications to allow a comparison of the prices charged by LNG and those listed in annexure A s of PPEs.

[58] NTI 05 of 2020/21 only required registration on CSD. It did not prescribe any requirement regarding categories of commodities and services for which a supplier or service provider may register. On the applicants' own case, LNG registered on CSD on 14 April 2020 by simply submitting a form online. Its registration was not subject to

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[6] *Special Investigating Unit v Zeelwa Trading Pty (Ltd) and Another* (MP03/2021) [2022] ZAST 22 (13 October 2022).

any vetting process by GDOH. I find that it was duly registered on CSD as required by NTI 05 of 2020/21.

<u>Non-compliance with regulation 16A.6.4 and section 38(1)(a)(iii) of the PFMA</u>

[59] For reasons set out above, I have found that the CFO failed to comply with regulation 16A.6.4 when she made the impugned decision. I find that she did so for further reasons asserted by the applicants.

[60] To the extent that the bidding process Ms Lehloenya followed when appointing LNG failed to follow a procurement system that is fair, equitable, transparent, competitive and cost-effective, the HOD failed to comply with section 38(1)(a)(iii) of the PFMA, read with regulation 9(a) of the Initial Covid-19 Regulations and was riddled with other irregularities found established above which undermine the requirements in section 38(1)(a)(iii).

<u>Lack of a SAHPRA licence</u>

[61] The applicants contend that as a supplier of PPEs, LNG was required to hold a valid licence in terms section 22C (1)(b) and (6) of the Medicines Act and Regulation 5 of the Medical Devices Regulations ("MDR"). LNG did not hold such a licence until SAHPRA issued it to it on 14 October 2020. They rely on an announcement SAHPRA made on 20 March 2020 to all stakeholders reminding them that the PPEs procured under the impugned contract are medical devises as defined in terms of the Medicines Act. This is stated in paragraph 4 of the written announcement.

[62] This Tribunal has twice held that PPEs are not medical devices as defined. Firstly, in Free State Treasury[7], where the PPE concerned were surgical gowns and secondly in C-Squared[8] where the PPE concerned were disinfectant sprayers, 3-ply facial masks, pendo-fog machines, sanitiser 1 Litre bottles, 3-ply surgical masks, taxi disinfectant sprayers, latex gloves, disinfectant refill for sprayers and coveralls. For

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[7] *Special Investigating Unit v MEC for Treasury Free State Province and Others* (FS01/2020) [2022] ZAST 2 (31 January 2022).

[8] *Special Investigating Unit v C Squared Consumer Connectedness (Pty) Limited and Others* (FS01/2022) [2023] ZAST 13 (25 October 2023).

undisclosed reasons, in these two cases, the applicant(s) did not rely on SAHPRAs 20 March 2020 announcement.

[63] Here too, for reasons set out below, I remain unpersuaded that the PPEs procured from LNG are medical devices as defined.

[64] Firstly, the 20 March 2020 announcement is not authority for the proposition advanced by the applicants simply because the interpretation of statutory provisions fall within the province of courts, and in this instance the Tribunal as an independent statutory adjudicative body. SAHPRA lacks powers to interpret statutory provisions.

[65] Secondly, MDRs were published in December 2016. This is more than three years before the advent of the Covid-19 National State of Disaster in South Africa. MDRs do not define a medical device. Neither do they expressly mention PPEs procured for use as described in paragraph 4 of the announcement. Therefore, the definition of medical device in the Medicines Act is applicable. This Tribunal has interpreted it to exclude the PPEs referenced above. The 20 March 2020 announcement is not subordinate legislation. Therefore, SAHPRA may not, by way of an announcement, extend the definition of medical devices to PPEs procured in response to the covid-19 pandemic.

[66] Thirdly, even if I found that the announcement properly imputed the definition of medical devices to PPEs, the applicants would have to lay a proper basis for such a finding. The applicants have selectively quoted paragraph 4 of the notice, leaving out elements in this paragraph that are not established in their founding papers. Paragraph 4 of the notice states as follows:
"Products intended to be supplied to support the diagnosis or prevention of the spread of covid-19 such as masks, gloves, antiseptics and germicides <u>used on inanimate surfaces in areas of high risk and IVDs used to diagnose Covid-19</u> fall within the definition of a medical device and are regulated by SAHPRA as medical devices under the ambit of the Medicines and Related Substances Act, 1965 (Act 101 of 1965)" (Emphasis added).

[67] The applicants have not set out any basis to find that, owing to the use for which the PPEs were procured, paragraph 4 was applicable to LNG when it supplied PPEs to the GDOH.

[68] Therefore, this ground of review also falls to be dismissed.

[69] For the reasons set out above, I find that when she made the impugned decision, the CFO lacked the requisite authority. Therefore, the impugned decision was made in breach of the principle of legality.

[70] I am satisfied that the applicants have made a proper case for the impugned decision to be reviewed and set aside. Since the procurement process that led to the impugned decision being made was not in accordance with a provisioning system that meets the requirements in section 38 (1)(a)(iii) of the PFMA and the decision maker lacked the requisite authority, the impugned decision has been reviewed and set aside on substantive grounds. Therefore, together, with the purchase orders GDOH issued to LNG pursuant to the impugned decision, the impugned decision falls to be declared invalid.

Delivery of Non-Sterile Examination Gloves

[71] To establish the basis for this claim, the applicants rely on two sources of evidence. The first, is from entities that supplied gloves to LNG during the period under review. The second is expert evidence from a seller of PPEs, Mr Benjamin du Toit ("Mr du Toit").

[72] The SIU called on Mr Lekoana to disclose the particulars of entities that supplied LNG with gloves. He did so after some reluctance, furnishing the SIU with their contact details and invoices to LNG. The SIU contacted all of them but two of those contacted, only 9 persons named in the affidavit were willing to make affidavits. All of them except for one, report that they supplied LNG with non-sterile examination gloves at LNG's request. The exception could not state whether the gloves his entity supplied to LNG were sterile or non-sterile because he does not know the difference between the two.

[73] Further, according to Mr Du Toit, during April to August 2020, sterile examination gloves were selling between R500 and R600 excluding Vat for a box of 100 pairs. This comes to R575 to R690 including VAT. They were hard to find world-wide due to high demand induced by the covid-19 pandemic. Non-sterile examination gloves were easier to find and sold between R125 and R145 excluding VAT for a box of 100 pairs. This comes to R144 to R167 including VAT. None of the gloves sourced by LNG came close in price to that charged for sterile gloves per box of 100. LNG charged the GDOH R270 including VAT per box of 100. It is improbable that LNG would discount non-sterile examination gloves by R431-523 as it would not make business sense for it to incur such a substantial loss from the impugned tender. Rather, it is more probable that it would mark them up by R125-R145 to yield a profit from the impugned tender.

[74] I am satisfied that the applicants have properly established that the examination gloves LNG supplied to GDOH are not sterile surgical medical devices.

Just and Equitable Remedy

[75] The SIU sees just and equitable in the terms set out below.

[76] That LNG pay GDOH:

76.1 R59,404,345.50 being the aggregate of the profit it made on the supply of the KN95 marks in the amount of R13,193,076.81, three-ply surgical masks in the amount of R11,310,600.80 and R39,481,177.40 being the difference between the contract price of the 176,590 boxes of 100 gloves it delivered to GDOH at the cost of R47,682,017.00 and the maximum price of those gloves in the amount of R8,200,839.60 permitted by paragraph 4.6(b) of NTI 5 of 2020/21 read with Annexure A thereto. The sum of these amounts is R63,984,855.01. To be reduced by the amount GDOH has paid to LNG; alternatively

76.2 R45,697,853.13 being the profit LNG made on the supply to GDOH of the KN95 masks in the amount of R13,193,076.13, three-ply surgical masks in the amount of R11,310,600.80 and the gloves in the amount of R21,194,175.52; alternatively

76.3 LNG be divested of the profits it made on the supply to GDOH of all the PPEs under the impugned contract. To this end:

76.3.1 LNG shall, within 30 days of the granting of this order deliver by filling on Caselines, audited statements setting out their income and expenses in relation to its the PPE's it delivered to the GDOH pursuant to the impugned contract supported by such expert reports as LNG may consider necessary.

76.3.2 The SIU shall, within 30 days thereafter, deliver, by filling on Caselines, a report by a duly qualified expert, addressing such audited statements and expert reports, including but not limited to the reasonableness of the income and expenses set out in such statements;

76.3.3 Thereafter, the parties shall, within 10 days, file a joint minute by the auditors of such statements and the parties' experts if any, setting out the issues on which they are in agreement and the issues on which they disagree. If the join minute reflects a disagreement on the profits LNG made on the supply of PPEs under the impugned contract, any of the parties may approach the Tribunal for an appropriate order on supplemented papers as it may consider necessary. If the joint minutes reflects no disagreements, LNG shall be liable to pay to the GDOH the amount of its profits specified in the joint minute, alternatively

76.4 R14,368,839.75, being the aggregate of:

76.4.1 the difference between the amount LNG charged GDOH for the 500,000 KN95 masks (R27,755,089.75) and the maximum price thereof permitted in terms of Annexure A (R18,900,000.00), namely R8,855,089.75) and (b) the difference between the amount LNG charged GDOH for the 1,000,000 three-ply surgical masks (R17,993,750) and the maximum price thereof permitted in terms of Annexure A (R12,480,000.00) namely R5,513,750.00;

76.4.2 the difference between the amount LNG charged GDOH for the 1, 000, 000 three-ply surgical masks (R17,993,750.00) and the maximum price thereof permitted by paragraph 4.6 (b) of NTI 5 2020/21 read with annexure A thereto (R12,480,000.00), namely R5,513,750.00.

[77] In the alternative to the just and equitable remedy articulated above, the determination of the amount LNG ought to pay GDOH be referred to oral evidence or to trial on such terms as the Tribunal may consider fit to impose.

[78] The SIU relies on the no profit and no loss principle set out in *All Pay II*[9] and the authorities this Tribunal relied on in *Mlangeni*[10]. This Tribunal has consistently applied the no profit no loss principle in cases where an appropriate case for the divestment of profits was made. After reserving judgment in this application, this Tribunal became aware of the Supreme Court of Appeal judgment in *Special Investigating Unit v Phomella and Another*[11] *(Phomella)*. In *Phomella,* the SCA held that it is wrong that the Constitutional Court in *All Pay II* had established the no-profit-no-loss principle to the effect that invalidating a contract resulting from an invalid tender should not result in any benefit or loss to the successful tenderer. If the SCA's interpretation of the dictum in *All Pay II* is correct, it would mean this Tribunal has been wrongly applying that dictum and that it may not base the just and equitable remedy sought by the SIU in this application on that dictum. This prompted this Tribunal to direct the SIU to file further heads of arguments addressing the following questions:

78.1 Whether, with reference to the above judgment, it has alleged and established factors that warrant the exercise of the Tribunal's discretion to grant just and equitable relief on any of the terms the Applicant prayed for.

78.2 Reasons if any, it contends the Tribunal is not bound by the above judgment in the application for default judgment.

[79] The SIU duly complied with the directive. I am duly indebted to the counsel for the SIU for their assistance in determining the implications of the SCA judgment in Phomello. The SIU has submitted persuasive arguments with which I agree, as to why the SCA judgment in Phomello is wrong. I deal with them below.

[80] In *Phomella*[12] the SCA overruled the SCA *dictum* in *Central Energy Fund* at paragraph 41 that in *Allpay II* at paragraph 67 the CC had established a 'no-profit-no-loss' principle to the effect that the invalidation of a contract resulting from an invalid tender should not result in any benefit or any loss to the successful tenderer. It

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[9] *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 II).

[10] *Special Investigating Unit v Mlangeni Brothers and Another* (GP07/2021) [2022] ZAST 26 (14 November 2022).

[11] 2023 (5) SA 601 (SCA).

[12] Phomella at paragraph 19.

explained that it is overruling *Central Energy Fund* on the basis that a careful and contextual reading of *AllPay II* reveals that what the CC had in mind was that, to the extent that the successful tenderer in that matter, Cash Paymaster Services ("CPS") benefitted from the contract resulting from the unlawful tender, its benefit should be open to scrutiny by the public.

[81] The SIU relies on two Constitutional Court judgments handed down after *All Pay II* in which the Constitutional Court itself has held that CPS has no right to retain a profit from the impugned tender. The judgments are the following:

81.1 In *AllPay III*[13], the Constitutional Court held that: "*It should not be forgotten that our judgment in AllPay 2 clearly stated that, despite the suspension of the declaration of invalidity of the contract, CPS (1) has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational; (2) has no right to benefit from an unlawful contract; and (3) was ordered to account for its benefits under the invalid contract. These aspects may, if necessary, be pursued in the future.*" (Emphasis added)

81.2 In *Black Sash I,*[14] the Constitutional Court pointed out that '*in Allpay 2 the [Constitutional] court held that the suspension of the validity of the contract between SASSA and CPS did not prevent the court from regulating and supervising both the content and performance of the contract… The conclusion that the contract was invalid meant that CPS could not benefit from it, but, conversely, should not suffer prejudice from being compelled to continue its performance in the face of its invalidity*'.

81.3 In *Shabangu*[15] the Constitutional Court held that:

> '*[26] The problem of the original invalidity may be addressed in another way. Recovery of what was transferred under an invalid agreement is governed*

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[13] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2015 (6) BCLR 653 (CC) (*AllPay III*) para 15.

[14] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC)at paragraph 40.

[15] *Shabangu v Land and Agricultural Development Bank of South Africa and Others* 2020 (1) SA 305 (CC) ('*Shabangu*') paragraphs 26-28.

either by enrichment or what was referred to in argument as the "no-profit principle" put forward by this court in AllPay Remedy.[17]

[27] While there is some kind of overlap between the basis for an enrichment claim (restoring a legally unjustified imbalance) and the "no-profit principle" (not allowing profit from unlawfulness), there are differences. Enrichment is a valid claim that may arise from an unlawful contract, while the no-profit principle prevents the perpetuation of unlawfulness. The latter is part of regulating the just-and-equitable relief of suspending the declaration of unlawfulness in respect of a contract. It is therefore bound up in that just-and-equitable assessment and the continued (if suspended) operation/enforcement of an unlawful agreement; something different to the remedial nature of an enrichment claim.

[28] Whatever the merits or demerits are of substituting a just-and-equitable remedy in keeping with the "no-profit principle", for an ordinary enrichment claim in invalid contracts by organs of state,[18] *recovery for unjust enrichment or profit gained from an invalid agreement both seek to ameliorate or redress the consequences of the invalidity through the retransfer of unjustified gains*' added).

[82] As the SIU contends, the above judgments are binding on all South African court, the SCA included, and on this Tribunal.

[83] In Central Energy Fund, the SCA observed that:

[42] The law draws a distinction between parties who are complicit in maladministration, impropriety, or corruption on the one hand, and those who are not, on the other. The category into which a party falls has a significant impact on the appropriate just and equitable remedy that a court may grant. Parties who are complicit in maladministration, impropriety or corruption are not only precluded from profiting from an unlawful tender, but they may also be required to suffer losses. On the other hand, although innocent parties are not entitled to benefit from an unlawful contract, they are not required to suffer any loss as a result of the invalidation of a contract.'

[84] The SIU locates LNG in the first category. It relies on two factors namely, delivering cheap non-sterile examination gloves not ordered by GDOH and grossly overcharging for these gloves. As a result, the SIU contends that LNG sought to grossly profiteer at the expense of the State during the COVID-19 pandemic, an unprecedented disaster which stretched the resources of the State their limits, calls for a remedy aimed not only at ensuring that LNG disgorge its profits to the State but also at signalling that our courts and tribunals, the custodians and guardians of justice and equity, do not tolerate reprehensible behaviour of that sort.

[85] Based on findings made in this judgment, the SIU has not succeeded in establishing any irregularity on the part of LNG that led to the awarding of the impugned contract. Defective delivery of the non-sterile gloves is not a review ground because this cause of action arose after the impugned contract had been awarded. Further, having not established that LNG charged prices in excess of those prescribed in Annexure A of NTI5 of 2020/21 for any PPEs, the Tribunal lacks a basis for making any monetary award for any loss quantified on the alleged price threshholds.

[86] Under these circumstances it is just and equitable to divest LNG of the profits it earned from contracts awarded pursuant to the impugned decision.

COSTS

[87] The SIU seeks costs of the application. I find no reason why costs should not follow the cause.

ORDER

[88] In the premises, the following order is made:

1. The decision of the Chief Financial Officers of the Gauteng Departmenr of Health ("GDOH") taken on or about 24 April 2020 that the Department procure from LNG Scientitific (Pty) Ltd ("LNG")

1.1 500,000 KN95 masks at R55,50 (including value added tax ("VAT") each

1.2 1 000 000 three-ply surgical masks at R18.00 (including VAT) each, and

1.3 250,000 boxes of 100 surgical powder-free, sterile gloves at R270,00 (including VAT) per box, ("the impugned contract") is reviewed and set aside.

2. The resulting contract between LNG and GDOH for such supply and all purchase orders issued by the GDPH to LNG pursuant thereto, is declared unlawful and invalid.

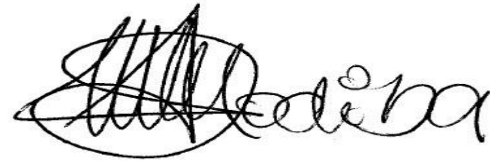
3. LNG is divested of the profits it made on the supply to GDOH of all the PPEs under the impugned contract. To this end:

3.1 LNG shall, within 30 days of the granting of this order deliver by filling on Caselines, audited statements setting out its income and expenses in relation to the PPE's it delivered to the GDOH pursuant to the impugned contract supported by such expert reports as LNG may consider necessary.

3.2 The Special Investigating Unit ("SIU") shall, within 30 days thereafter, deliver, by filling on Caselines, a report by a duly qualified expert, addressing such audited statements and expert reports, including but not limited to the reasonableness of the income and expenses set out in such statements;

3.3 Thereafter, the parties shall, within 10 days, file a joint minute by the auditors of such statements and the parties' experts if any, setting out the issues on which they agree and the issues on which they disagree. If the join minute reflects a disagreement on the profits LNG made on the supply of PPEs under the impugned contract, any of the parties may approach the Tribunal for an appropriate order on supplemented papers as it may consider necessary. If the joint minutes reflects no disagreements, LNG shall be liable to pay to the GDOH the amount of its profits specified in the joint minute.

4. LNG shall pay the costs of both the irregular step and default judgment applications.



JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the 1st and 2nd applicant: Adv. AM Breitenbach SC, assisted by Adv. S Khoza

Attorney for the applicant: Ms S Zondi, State Attorney, Pretoria

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Attorney for the respondent: Mr M Ngozo, Diale Mogashoa Attorneys

Date of judgment: 7 February 2024.

Mode of delivery: *this judgment is handed down by sending it by email to the parties' legal representatives, loading on Caselines and release to SAFLII and AFRICANLII. The date and time for delivery is deemed to be 10 a.m.*