



**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 GP 04/2023

In the matter between:

SPECIAL INVESTIGATIVE UNIT

APPLICANT

AND

**NKHANE PROJECTS AND SUPPLY (PTY) Ltd
(REGISTRATION NO.: 2013/101871/01)**

1ST RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL:

2ND RESPONDENT

GAUTENG DEPARTMENT OF HEALTH

JUDGMENT

Summary

Administrative law – legality review in terms of s 8 (2) of the Special Investigating Unit and Special Tribunals Act 74 of 1996 – whether functionaries of the second respondent failed to comply with the applicable procurement prescripts when they awarded contracts to the first respondent – just and equitable relief

Modiba J

- [1] The Special Investigating Unit seeks an order reviewing, declaring invalid and setting aside contract(s) the Gauteng Department of Health (the Department) awarded to Nkhane Projects and Supply (Pty) Ltd (Nkhane). The contracts under review were respectively issued purchase order numbers 4250898022 and 4250899966. When necessary, I identify them under these reference numbers in this judgment. I conveniently jointly refer to the contracts as impugned contracts.
- [2] The SIU also seeks an order for just and equitable relief in terms of which Nkhane is ordered to forfeit all profits earned from the impugned contracts, the Department compensates Nkhane for all reasonable expenses incurred when rendering services in terms of the impugned contract, as well as other ancillary relief.
- [3] The SIU brings the application in terms of s4(1)(c) read with section 5(5) of the Special Investigating Unit and Special Tribunals Act (SIU Act) 74 of 1996. It seeks relief to which the Department is entitled. Its reliance on these provision to derive *locus standi* for this application is proper because its cause of action arises from an investigation it conducted as authorised in terms of Proclamation No. R.23 of 2020 published in Government Gazette no. 43546 on 23 July 2020 (the Proclamation). In terms of s 8 of the SIU Act and on the authority in *Ledla*¹, the Tribunal enjoys jurisdiction to grant the review relief of the type the SIU seeks.
- [4] The SIU did not bring the application within a reasonable time. It is for that reason that it seeks condonation. The explanation the SIU gave for its delay in bringing the application is reasonable. It has good prospects of success. Even if its explanation for the delay was not reasonable, the glaring irregularities

¹ *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* [2023] ZACC 8 at paras 65, 66, 68, 69 and 70.

that were committed during the procurement process justify condoning the delay in the interests of justice.

[5] The SIU's alleges:

- (a) Non-compliance with the applicable procurement prescripts;
- (b) Supplying hand sanitizers without the requisite licence issued in terms of Section 22 C of the Medicines and Related Substances Act, 101 of 1965 (Medicines Act);
- (c) Contractual malperformance.

Non-compliance with the applicable procurement prescripts

[4] The SIU alleges that between 1 January 2020 to 23 July 2020 the Department awarded Nkhane the impugned contracts in circumstances that violate, s 217(1) of the Constitution of the Republic of South Africa, the PFMA, its regulations and Instruction Notes issued in terms of the PFMA in that the Department's officials failed to follow the prescribed procurement procedures when they awarded the impugned contracts to Nkhane.

[5] It is common cause that Nkhane made an unsolicited proposal to the Department to supply it with personal protective equipment (PPE). When it submitted the proposal, it did not do so in response to a competitive bidding process. A request had not been made to the Accounting Officer for the Department to approve a deviation from the normal procurement process as provided in Regulation 16A.6.4 of the Treasury Regulations issued in terms of the PFMA. Reasons for the deviation were not recorded as prescribed. The approved deviation and reasons for the deviation were not reported to Treasury within 30 days as contemplated in Treasury Instruction Note 8 of 2019/2020 and Instruction No 3 of 2020/2021. The Department's then Chief Financial Officer (CFO) singularly evaluated and approved the bid and did not engage the bid evaluation committee that had been convened to

consider, evaluate and recommend for approval bids received in respect of covid-19 related procurement. She also did not utilise transversal contracts facilitated by National Treasury. Together with the then Chief Operating Officer, the CFO did not have the necessary delegation to authorise the impugned contracts. The value of the impugned contracts in the amount of R 129 375 000.00 and R 257 418 300.00 were far in excess of their delegated authority. They irregularly issued commitment letters to Nkhane in terms of the impugned contracts.

[6] These uncontested facts render the SIU's case in respect of the review irrefutable. The high-water mark of Nkhane's defence is that it is an innocent tenderer who was not aware that the Departmental functionaries failed to comply with the applicable procurement prescripts. Its counsel agreed that the innocence of a tenderer is irrelevant in this enquiry. It is only one of the factors to be considered when determining consequential relief.

[7] For the above reasons, I am satisfied that the SIU has made out a proper case for the impugned contracts to be declared invalid.

Supplying hand sanitizers without the requisite licence issued in terms of Section 22 C of the Medicines and Related Substances Act, 101 of 1965

[8] The SIU has alleged that since the sanitizers which Nkhane supplied the Department in terms of the impugned tenders were required for human hands, they are deemed to constitute a medical device, Nkhane was not a bearer of a licence issued in terms of s 22 C of the Medicines Act by the South African Health Products Regulatory Authority (SAHPRA) to manufacture, import, distribute as well as wholesale medical devices. Therefore, Nkhane masqueraded as a supplier of medical devices.

[9] The SIU appropriately abandoned this ground of review because no proper basis had been laid for it.

Contractual malperformance

[10] The SIU had also alleged that Nkhane failed to properly perform in terms of the impugned contracts. This ground of review was also appropriately abandoned because no proper basis had been laid for it.

Just and equitable relief

[11] This is the only issue that remained for determination. As already stated, Nkhane pleaded with the Tribunal not to divested of its accrued rights notwithstanding an order declaring the impugned contracts invalid because it is an innocent tenderer. This factor alone is insufficient to justify such an order. No persuasive reasons were advanced as to why the reviewed decisions and contracts should not be set aside. The consequences of setting the decisions and impugned contracts aside will be ameliorated by allowing Nkhane compensation for reasonable expenses incurred to meet its obligations to the Department in terms of the impugned tenders. In line with the no profit no loss principle enunciated in *All Pay II*², Nkhane is not entitled to retain profits earned from the impugned tenders.

[12] The SIU had prayed for elaborate orders. Based on the concessions it made during oral argument, it ultimately settled for the terms of the order granted in LNG. In the premises, the following order is made:

Order

² *Allpay Consolidated Investment Holdings (Pty) Ltd And Others V Chief Executive Officer, South African Social Security Agency And Others* 2014 (4) SA 179 (CC).

1. The decision of the Chief Financial Officer of the Gauteng Department of Health (the Department) taken on or about 30 March 2020 that the Department procure personal protective equipemtn from Nkhane Projects and Supply (Pty) Ltd (Nkhane) under purchase order numbers 4250898022 and 4250899966 is reviewed and set aside.
 2. The contracts awarded pursuant to the decision referred to in paragraph 1 above (the impugned contracts) are declared unlawful and invalid and set aside.
 3. Nkhane is divested of the profits earned under the impugned contracts.
 4. Nkhane 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 Department pursuant to the impugned contract supported by such expert reports as Nkhane may consider necessary.
 5. 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.
 6. 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 Nkhane 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, Nkhane shall be liable to pay to the GDOH the amount of its profits specified in the joint minute.
 7. Nkhane shall pay the SIU's costs of the application, including the costs of two counsel where so employed.
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JUDGE L.T. MODIBA
PRESIDENT OF THE SPECIAL TRIBUNAL

Appearances

Attorney for the applicant: Mr J Van Schalkwyk, Office of the State Attorney, Pretoria

Counsel for the applicant: Adv. B Roux SC assisted by Adv.T Radebe.

Attorney for the first respondent: Mr L Ntuli, Obert Ntuli INC.

Counsel for the first respondent: Adv. V Notshe SC assisted by Adv T Mlambo and Adv O Leketi.

Attorney for the second respondent: Ms V Malherbe, Office of the State Attorney, Johannesburg.

Counsel for the second respondent: Adv MC Erasmus SC assisted by Adv T Radebe

Date of hearing: 23 April 2024

Date of Judgment: 5 August 2024

Mode of delivery

This judgment is handed down by email transmission to the parties' legal representatives, uploading on Caselines and release to SAFLII and AFRICANLII. The date and time for delivery is deemed to be 10 am.