SOUTH AFRICA / JUDGMENT

Special Investigating Unit v Helicopter and Airplane Logistical Operations (Pty) Ltd and Others (GP07/2023) [2025] ZAST 8 (5 June 2025)

[2025] ZAST 8

COURT
Special Tribunal

BEFORE
Mashile

CASE / FILE NUMBER
GP07/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

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: GP07/2023
(1)
REPORTABLE:NO
(2)
OF INTEREST TO OTHER JUDGES: YES
(3)
REVISED: YES

Date: 05/06/2025
In

the matter between:	THE SPECIAL INVESTIGATING UNIT APPLICANT and HELICOPTER AND AIRPLANE LOGISTICAL OPERATIONS (PTY) LTD FIRST RESPONDENT BUTHELEZI HEMS CC SECOND RESPONDENT MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH: FREE STATE PROVINCE THIRD 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 05 June 2025 at 10:00.

JUDGMENT

Mashile J

Introduction

[1] This application concerns reviewing and setting aside the decision of the Third Respondent ("the Department"), represented by the Member of the Executive Council, to appoint the First and Second Respondents to provide aero-medical services for Emergency Medical Services ("EMS") to the Free State Provincial Government. Unless context demands that I mention the First and Second Respondents individually as HALO and Buthelezi HEMS CC, I shall refer to them as ("the JV"). The Department appointed the JV in terms of Bid Number: DOH(FS)67/2014/2015 ("the Bid"). Additionally, the Applicant ("SIU") seeks to set aside the extension of the contract between the Department and HALO alternatively, to do so only to the extent that it is unlawful, invalid and/or unconstitutional.

[2] The SIU believes that it is entitled to the remedy that it seeks as the award of the Bid to the JV was irregular, unlawful and unconstitutional in that:

2.1 There existed irregularities prior to the issuing of the tender advert;

2.2 The Department advertised the Bid as one for a period of 12 months. However, the award was for 3 years, the period of the tender having been modified after the closing date;

2.3 Not all the companies that submitted bids consented to the extension of the validity period when the period of the Bid expired. The upshot of this was that when the Bid was awarded the validity period had already lapsed;

2.4 The Bid was issued, advertised and awarded in contravention of the Construction Industry Development Board Act 38 of 2000 ("CIDB Act");

2.5 The Bid was awarded and extended in contravention of the Supply Chain Management ("SCM") Policies of the Department.

[3] Thus, the procurement process contravened, among others, section 217 of the Constitution as it was not lawful, fair, equitable, transparent and cost effective. Moreover, the process failed to comply with the Public Finance Management Act 1 of 1999 ("the PFMA") and other applicable procurement regulations. In consequence of the above, the SIU also seeks an order against the JV to pay and/or return the monies paid because of the unlawful, invalid and unconstitutional award of the tender and the unlawful extension of the contract together with the applicable interest at the legal rate. In the alternative, the SIU seeks an order against the JV to, within 30 days of the order, file an audited statement of expenses incurred,

the income received and the net profit it would have made under the disputed tender and/or services contract.

Preliminary Matters

[4] This application was launched by the SIU on behalf of the Department as a self-review under the principle of legality. The Department is cited as a Respondent. Given that background, the Department thought it wise not to participate in these proceedings. Both parties require this Court to grant them some form of condonation. Firstly, the Department made the award on 23 September 2015 but only launched this application on 9 June 2023. As such, it had to seek condonation as the application brought under legality must be launched within a reasonable period. The JV, on the other hand, needed to file a supplementary affidavit for which it required leave to file it from this Court. Instead of arguing the respective applications, the parties agreed not to oppose each other and proceeded to deal with the main application.

Jurisdiction

[5] In determining whether the SIU has jurisdiction in a matter of this kind, the starting point is always the provisions of section 8(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("the SIU Act"), which provides as follows:

"(2) A Special Tribunal shall have jurisdiction to adjudicate upon any civil proceedings brought before it by a Special Investigating Unit in its own name or on behalf of a State institution or any interested party as defined by the regulations, emanating from the investigation by such Special Investigating Unit, including the power to –

(a) issue suspension orders, interlocutory orders or interdicts on application by such Unit or party;

(b) make any order which it deems appropriate so as to give effect to any ruling or decision given or made by it; and

(c) make any order which it deems appropriate as to costs."

[6] In addition, the SIU also derives its authority from Regulation 5 of the Regulations No. 42729 published in the Government Gazette of 26 September 2019, in accordance with section 11 of the SIU Act. For its assertion that the Tribunal has jurisdiction to hear this matter, the SIU leans on the SIU Act and the case of Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit,[1] which held that even though the Tribunal is not a Court, it has the jurisdiction to adjudicate reviews brought before it by the SIU and to grant an order setting

aside an unlawful procurement contract.

[7] The JV concedes that the Ledla case supra interpreted section 8(2) to mean that the SIU indeed has jurisdiction and that this was also what the Court in Special Investigating Unit and C Squared Consumer Connectedness (Pty) Limited and Others[2] had concluded. Section 8(2) of the SIU Act does not provide the legal basis on which the review is considered, contended the JV. That might well be so, if this Tribunal can adjudicate on any civil matter, which I would imagine includes reviews, the legal basis should be that which is available to any court with jurisdiction to hear this kind of a case.

Factual Matrix

[8] To a large extent, the background of what led to this matter is common cause, but the parties are at variance on what to derive from the facts. On 8 January 2015, the Head of Department ("HOD"), Dr Motau, wrote to the Office of the National Treasury requesting it to remove the Department from its intended list of Departments which would be making use of the RT79-2015 contract, as the Department intended to procure for the service internally. The RT79 contracts for all aero-medical services at provincial level had been advertised and facilitated by the National Treasury since 2009, in terms of a decision taken by the Government.

[9] The request led to the Department facilitating its own procurement process to appoint a service provider for the rendering of aero-medical services in the Free State Province. Some of the reasons furnished for the decision were the need to reduce costs of the RT79 contracts managed by National Treasury. It was also necessary to adapt an aero-medical service that

would not only benefit the EMS but would in fact benefit the whole of the Department. The RT79-2012 expenditure would be used as benchmark for evaluating the different proposals as follows: the annual benchmarked expenditure amounted to R10 500 000.00 calculated at R873 000.00 per month which is inclusive of 30 hours of flying time.

[10] Following the approval of the above proposition, an internal memo seeking "approval for arranging of a bid -: HOH(FS)672014/2015: request approval to request proposals for Aero Medical Services for emergency medical services (EMS)" was presented. On 4 February 2015, the HOD approved the request. The process was followed by the drafting of the specifications and terms of reference by the Specifications Committee, which comprises officials of the Department. The amended and final terms of reference referring to the specifications set out the purpose and rationale, the scope of work outlining what each bidder must submit for the construction of Helipads, the operating fee, the bidder's relevant experience, the duration of the contract (3 years), the bidding process, the evaluation criteria, and so forth.

[11] Following the exhaustion of internal processes and approvals, the advert for the tender was placed in the Provincial Tender Bulletin of 13 March 2015. Contrary to the terms of reference, the advert stipulated the bid period as 12 months from the date of signature of the contract instead of 3 years. However, on 23 March 2015 during a compulsory explanatory meeting, the problem of the duration of the tender was clarified. Correcting the conflicting periods of the tender at the meeting, it was stated: "the following corrections were made to the document: - the bid period of one year 12 months and not three years (page 52)".

[12] Of the nine companies that attended the compulsory explanatory meeting, only four brought the bid documents. Among the four companies were HALO and Buthelezi HEMS CC, which later constituted themselves as a joint venture, the current JV. There are no documents indicating which company eventually submitted bids before the closing date. In terms of the report of the Technical Evaluation Committee ("TEC"), only Vusa Medical and HALO (the First Respondent) submitted their bids. There was no mention of Buthelezi HEMS CC individually or as constituting part of a joint venture with HALO at this stage of the evaluation. This is confirmed by the scorecards of the members of the TEC, which mention two companies only.

[13] The TEC subsequently held its meeting on 28 April 2015 to evaluate the bids submitted by two companies, Vuza Medical and HALO. The TEC recommended HALO for further evaluation as it was satisfied that HALO met all the specifications. Once again, there is no mention of Buthelezi HEMS CC in the recommendation by the TEC. On 4 May 2015, the Departmental Bid Evaluation Committee ("DBEC") met to evaluate the bids in terms of the Preferential Points System. The minutes of the DBEC of the aforesaid date record that the scoring system in place was the 90/10 scoring system based on the bid value. The letters of appointment or acceptance of the officials of the Department to serve on the DBEC were not provided to the SIU.

[14] The two companies identified by the DBEC were HALO and Buthelezi HEMS trading as Buthelezi EMS CC, the JV, and Vuza Medical (Pty) Ltd. The name Buthelezi HEMS appears for the first time in the evaluation process. There is obviously lack of clarity on when precisely the JV became a joint venture. This Court is not certain that the TEC refers to HALO in its joint venture form, as does the DBEC or not. That said and as I stated at the beginning, reference to HALO means the joint venture unless context suggests otherwise.

[15] In its bid documents, the JV states that the Helicopter that it intended to use was the BK 117 and that it had the correct carrying capacity in terms of paragraph 4 of the scope of work in the terms of reference. Paragraph 4 requires the Helicopter to have a carrying capacity of between 6 and 7 individuals plus 1 stretcher. The JV states further that it would supply a 12-hour (day) service for the first 3 months of the set-up phase and that thereafter they would provide a 24-hour (day/night) service. While it is stated that the JV further submitted offers for both the 12 months and three-year periods due to inconsistencies concerning the advertised contract period of 12 months and the three-year duration stipulated in the terms of reference, there are distinct scoring sheets to deal with the two different offers.

[16] The minutes of the DBEC contain a recommendation that the bid be awarded to the JV comprising HALO and Buthelezi HEMS trading as Buthelezi EMS CC as their combined bid was the only acceptable one that complied with the specifications. The DBEC awarded the bid for a three-year period. The recommendation concerning the Helipads and aircraft hangar prescribed that on completion and handover of the erection of the aircraft hangar and Helipad, a once-off payment of R1 310 000.00 be paid to the bidder. Furthermore, the DBEC recommended that on completion of the upgrade or construction of a new Helipad at the six different hospitals, a once-off payment of R650 000.00 per Helipad be paid bringing the initial amount paid for all the Helipad upgrades to R3 900 000.00. The total amount for the construction of all six Helipads would be R7 200 000.00, which works out to R1 200 000.00 per Helipad.

[17] The recommendation further provided that during the first three months, a service of 12 hours would be rendered at a cost of R1 070 240.00 per month for the first 30 hours. After the 30 hours, an amount of R14 035.00 per hour would become payable. After three months, a service of 24 hours would be rendered at a cost of R1 548 696.00 per month for the first 30 hours. After the 30 hours, an amount of R19 950.00 per hour would become payable. On completion and handover of the erection of the aircraft hangar and Helipad, a once-off payment of R1 310 000.00 would be paid to the bidder. The estimated expenditure regarding the bid amounted in all to R66 727 688.00 for 3 years (VAT included).

[18] On 19 June 2015, the Departmental Bid Adjudication Committee (“DBAC”) held its first meeting to consider the recommendations by the DBEC. The officials who served during the DBAC meeting did not have letters of appointment and/or acceptance to serve on the committee. The meeting of the DBAC resolved not to support the adjudication of the JV bid. It invited the TEC and chairperson of the DBEC to clarify some issues relating to the bid at the next DBAC meeting. The DBAC then requested the secretariat to obtain information

about the amendment of the contract after the closing date of the bid.

[19] On 6 July 2015, the DBAC held its next meeting. According to the minutes of that meeting, the DBAC decided to support the recommendation to award the bid to JV as it was the only acceptable offer which complied with the specifications. The DBAC proposed that the Department should consider amending the 12-month contract period to a longer duration. The estimated expenditure for the bid amounted to R35 499 784.00 for 12 months. The recommendation was dated and signed by various officials, with an endorsement for referral back to the DBAC and the DBEC and for the term of contract to be determined.

[20] On 23 September 2015, the DBAC convened and recommended that the bid be awarded to the JV for a period of three years. The first three months during the setup phase (construction of Aircraft Hangar, Helipads and upgrade for the six Hospitals), a twelve-hour service would be rendered. Subsequently, a twenty-four-hour service would be rendered. The Department would inform the bidder whether to upgrade or to construct new Helipads after the assessment and recommendation in line with SACAA regulations. The estimated expenditure for the three-year contract term was R66 727 688.00, VAT included. This recommendation was signed and approved by the Accounting Officer for the Department, Mahlatsi.

[21] On 1 October 2015, Messrs Horseman and Mahlatsi representing the JV and the Department respectively, signed the three-year contract, effective from 1 October 2015 to 31 October 2018. The following payments were subsequently made to the JV by the Department:

21.1 The amount paid to the JV for operating fees for the first service (Helicopter) operating from Bloemfontein –came to R55 568 677.39;

21.2 The amount paid to the JV for the rendering of Aero-Medical Services for the helicopter operating from Bethlehem (the second service) added up to R35 495 360.10;

21.3 The amount paid to the JV for operating fees (both Helicopters) at the end of the financial analysis amounted to R91 154 037.49;

21.4 The amount paid to the JV for approved fee increases in terms of the financial analysis was R671 359.74;

21.5 The amount paid to the JV for the excess hours flown in terms of the financial analysis was R4 782 015.00;

21.6 The amount paid to the JV for the extended contracts in terms of the financial analysis was R10 683 401.22;

21.7 The amount paid to the JV for the renovation of the various helipads and construction of a hangar (construction-related work) was R7 950 000.00 instead of R5 750 000.00, as per the contract;

21.8 The amount the JV paid to their sub-contractors for construction-related works in terms of the financial analysis was R6 041 479.31.

Issues

[22] From the facts before this Court, I need to determine whether there are grounds on which this Court may conclude that there have been material irregularities warranting this Tribunal to declare the contract between the Department and the JV invalid in terms of section 172(1)(a) of the Constitution. If the irregularities are so grave, set it aside and decide whether to exercise the discretion on a just and equitable remedy as contemplated in section 172(1)(b).

Legal Framework

[23] Here the starting point has to be section 217(1) of the Constitution, which provides 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". The worth of the provisions of section 217 of the Constitution is realised through different pieces of legislations and regulations among which is the Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPFA"), which defines an "acceptable tender" as any tender which in all respects complies with the specifications and conditions of the tender as set out in the tender documents.

[24] It was held in the majority judgment of Department of Transport and Others v Tasima (Pty) Ltd[3] that:

> *"Finally, in extending the contract, Mr Mahlalela violated the provisions of section 217 of the Constitution, our supreme law. This section obliges every organ of state, regardless of the sphere under which it falls, to procure goods or services 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. Evidently, the purpose of section 217(1) is to eliminate fraud and corruption in a public tender process and to secure goods and services at the best price in the market."*

[25] In Valor IT v Premier, North West Province and Others,[4] the Court, referring to the objective of section 217 of the Constitution, held that: "... Its purpose is to prevent patronage and corruption, on the one hand, and to promote fairness and impartiality in the award of public

procurement contracts, on the other". As stated supra, the PFMA", Treasury Regulations, and supply chain management policies and other similar legislations meant to be applied by Organs of State derive their relevance from section 217 of the Constitution. In that vein, the Treasury Regulations require development and implementation of an effective and efficient supply chain management system for the acquisition of goods.

[26] In Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others,[5] the court, when providing guidance on the position to adopt when dealing with procedural irregularities, held as follows:

"This judgment holds that:

(a) The suggestion that "inconsequential irregularities" are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.

(b) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

(c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding."

[27] Still on the significance of adherence to procedure, the Court in Allpay went on to state the following at paragraph 24:

"This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. 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 procedural requirements been properly observed."

[28] In the case of Pharmaceutical Manufacturers Association of South Africa; In Re: Ex Parte President of the Republic of South Africa,[6] it was held that the principle of legality is an incident of the rule of law, a founding value of our constitution. In Affordable Medicines Trust and Others v Minister of Health and Others,[7] the Court said the following concerning the doctrine of legality:

"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."

Analysis

Irregularity of the award of the tender to the JV – Extension of the period of the Tender Award

[29] The JV asserts that with the lack of evidence in certain instances; the SIU has simply failed to prove that it participated in any irregular procedure upon which the Department embarked. That argument seems to reverberate throughout its defence. The proper location of the argument, in my opinion, is at the juncture when the Court is defining a suitable

remedy. The tender period was extended from twelve months to three years after the bid had closed. The tender was advertised on 13 March 2015 as being for a duration of twelve months. On 23 March 2015 at the compulsory briefing meeting, the period was later confirmed as twelve months. This confirmation was necessary to clear the confusion that the tender was in fact for three years.

[30] It follows that those who attended the meeting thinking that the tender was for three years would have thought differently on whether to submit a bid because the duration of the tender would have a significant influence on the resources a bidder would put in the project. On 10 June 2014, the DBEC recommended to the DBAC that the JV be awarded the tender for three years and not one year as initially advertised. In doing this, the DBEC reasoned that a twelve-month award would not be cost effective and that the Department would benefit more if the duration was three years.

[31] When the recommendation of the DBEC served before the DBAC on 19 June 2015, the latter declined to approve the period of three years as proposed by the DBEC. Instead, it asked the TEC and the chairperson of the DBEC to clarify certain issues relating to bids at its next meeting. The DBAC further instructed the secretariat to enquire or obtain more information on the amendment of contracts following the closure of the bid date. On 6 July 2015, the DBAC approved the twelve-month period and went on to advise the Department that it must consider a bid for a longer period. It appears that the HOD was not satisfied with the decision of the DBAC because on 15 July 2014, he returned the Bid with instructions that the DBAC must determine the duration of the contract.

[32] On 23 September 2015, the DBAC and the DBEC held a meeting following which the latter released a communication to the Accounting Officer wherein it stated that both committees were recommending a period of three years as it would be cost-effective. The Accounting Officer, Mahlatsi, approved it on the same day. Subsequently, the tender was awarded to the JV for a period of three years instead of the advertised 12 months. Altering the duration of the tender after the closing date for submission of the bid was irregular and therefore unlawful because it has not only limited the number of bidders but has eliminated other bidders who could have submitted competitive bids thereby ensuring that the public would have a variety from which to choose.

[33] It follows that in preferring the JV the Department acted contrary to the provisions of section 217 of the Constitution in that it did not act in a manner that was transparent, fair, equitable, cost effective and competitive. It could not have been transparent as the appointment was shrouded in secrecy and as such, necessarily unfair to the other 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 invited. See, City of Tshwane Metropolitan Municipality v Moipone Group of Companies (Pty) Ltd and another.[8]

[34] Besides, what the Department did here does not fit in the mould of section 1 of the PPPF Act because as on the closing date of the submissions the period was stipulated as twelve months and not three years. Following in the footsteps of Tasima supra and many others, the Court in Gcwabe Consulting (Pty) Ltd v South African Police Services[9] held that:

"I agree with the defendant that the amendment of the bid conditions subsequent to the closing date for bids, offends the provisions of section 217.

The initial bid conditions in respect of pricing offered a fair, equitable and transparent opportunity to the public to submit a bid. The moment the defendant changed these conditions and made the amended conditions known to a select few, the bid process became unfair, inequitable and without transparency. The requirement in section 217 that the bid process must be competitive was also violated. Only a select few could after the close of the bid submit competitive bids."

[35] The Court in the Gcwabe Consulting case supra further explained that what the Department did lacked transparency. The other nine bidders were unaware because they were not invited

after the amendment. Had the Department started the process afresh and invited potential bidders once again, the process would have been free of challenges. The initial stance adopted by the DBAC of approving the advertised twelve-month period with a message that the Department ought to consider a bid for a longer duration was correct. Enigmatically, the DBAC backtracked on its initial stance that the Department ought to begin afresh if it considered that a longer period would be more beneficial to everyone involved. The point was that the duration had already been determined and advertised as twelve months. The extension to three years is therefore irregular, unconstitutional and unlawful. See also, Premier, Free State and Others v Firechem Free State (Pty) Ltd.[10]

Failure to Appoint Committee Members in Writing

[36] Clause 3.3.2 of the SCM Policy prescribes that each bid evaluation committee shall be made up of at least two officials and that the chairperson and members of the Bid Evaluation Committee shall be appointed in writing by the Accounting Officer. Clause 3.4.1 stipulates that the Accounting Officer shall appoint the Bid Adjudication Committee in writing and will also determine the term of office for members. The National Treasury Code of Conduct ("the NTC") for the Bid Adjudication Committee requires the appointment of the members of the DBAC to be in writing.

[37] Regarding the efforts of writing to the Department demanding proof of letters of appointment and the attendant acceptances of the members of the committees on 22 August 2019, the JV argues that the SIU could have done more to secure the documents that it claims were missing. Absence of the documents that the SIU sought from the Department, says the JV, does not entail their non-existence. Moreover, asserts the JV, when the SIU did so, it was already too late. For its part, the SIU asserted that the SCM Policies and the NTC for conduct

of the DBAC exist for a reason.

Thus, their non-observance will undermine the objectives of their presence.

[38] There is a ring of truth to the argument of the JV. However, is it pragmatic to expect the officials who were the enablers or even the architects of the procedural irregularities to furnish information that may incriminate them? The answer is unavoidably, in the negative. While the SUI could have done more following its letter to the Department demanding proof of appointment of the committee members, once it was manifest that the officials were implicated in any form of criminality, it would have been naïve to anticipate cooperation from them. I agree with the JV that the lack of provision of proof of appointment is ordinarily minor and technical in the greater scheme of things. That said, failure to adhere to them

nonetheless constitutes a transgression regardless of the censure that its non-compliance may attract. In short, the Department's

failure to show that the appointment of the members was in writing is irregular, unconstitutional, and unlawful.

Non-observance of the Construction Industry Development Board Regulations ("CIDB Regulations")

[39] Here the complaint consists in both the JV and the Department failing to comply with the CIDB regulations. In this regard, the request for approval endorsed by the HOD on 7 January 2015, was unequivocal in stating that the Department also requested approval for the construction of a hangar for the helicopter at Pelonomi Hospital to enable the service to be stationed at and respond from the facility of the Department. In addition, the terms of reference required the bidder to submit a detailed plan and pricing for the construction of a registered Helipad, certified by the Civil Aviation Authority ("the CAA"), for night operations at the following Hospitals:

39.1 Pelonomi;

39.2 Bongani;

39.3 Boitumelo;

39.4 Phekong;

39.5 Manapo; and

39.6 Ezi Ngubentombi.

[40] The information pertaining to the registration and certification of the Helipad by the CAA was reiterated during the compulsory briefing meeting on 23 March 2015, when it was stated that:

40.1 The bidder must submit a detailed plan and pricing for the construction of the registered Helipads certified by the CAA;

40.2 The Helicopter hangar must be erected or built by the bidder and should have a backup power source during load shedding;

40.3 All equipment and construction work to be done by the bidder will be handed over to the Department as property of the state;

40.4 The project for the construction of Helipads must not exceed the period of six months.

[41] It was evident that the tender did not only comprise a construction component but that the Department required the bidder to register the Helipad hangar and ensure that it was CAA-certified. I find it somewhat disingenuous for the JV to state that the Department has always been aware that it was not involved in the construction industry. When the JV submitted the bid, it was mindful that there was a building component to the tender. As such, it should have sought compliance with the CAA.

[42] Chapter 3 of the CIDB Act describes its ambition as, amongst others, to:

> *"... establish a public sector register of contractors that will support risk management in the tendering process; reduce the administrative burden associated with the award of contracts; reduce tendering costs to both clients and contractors ... access the performance of contractors in the execution of contract and thus provides a performance record for contractors; regulate the behaviour and*

promote minimum standards and best practice of contractors; store and provide data on the size and distribution of contractors operating within the industry and the volume, nature, performance and development of contractors and target groups..."

[43] Regulation 25(1) of the CIDB Act provides that:

> *"Subject to subregulation (1A), in soliciting a tender offer or an expression of interest for a construction works contract, a client or employer must stipulate that only submissions of tender offers or expressions of interest by contractors who are registered in the category of registration required in terms of subregulation (3) or higher, may be evaluated in relation to that contract."*

[44] It is undeniable that the Bid Specification Committee ("BSC") failed to advise the Department of the construction element of the bid. Had the BSC done so, it would have been expected that the advert that the Department placed in the Provincial Tender Bulletin of 13 March 2015 would have stipulated the minimum category of registration with the CIDB and the tender would have been advertised on the website of the CIDB. I do not appreciate why this should be raised at all when the SIU has declared that this application is a self-review. It is partly in consequence of the shortcomings of the Department that this matter is before this Court. I do not understand the SIU to be attributing any fault in that respect to the JV. In fact, in these kinds of applications the fault will almost invariably rest with the Department itself. However, that will not absolve the JV from liability.

[45] In reply to the failures of the JV to comply with the conditions laid down in the tender documents that the Helipads needed to be registered and certified by the CAA, it was argued that Mr Basil Hlatswayo of the CAA was unequivocal that the construction of Helipads was excluded from any licensing or Civil Aviation

registration requirements, provided the Helipads were not for public use. The JV makes this statement without any submissions on the meaning that this Court should assign to the word, public. There are two sides to the word. Ordinarily, it concerns people generally. HALO uses it in its restrictive sense but even then, the Helipads are still meant to serve a particular section of the public and therefore they are public and not private.

[46] The JV seems to be folding two different requirements into one. As I understand it, once it was determined that the tender had a construction section to it, as was the case here, the BSC should have advised the Department that when placing the advert in the Provincial Tender Bulletin, it ought to mention the minimum category of registration and advertise the tender on the website of the CIDB. Failure to do so constituted an irregularity. The second part – that the JV had to register and have the Helipads certified by CAA is in terms of the tender documents. It is separate from the obligation imposed by the CIDB. It is mandatory to follow because the bid documents require their observance. Their disregard is necessarily irregular.

[47] The JV would have this Court believe that the fact that the Department registered no complaints about the quality of the construction work and that, if anything, it benefitted, should somehow retrospectively justify the non-compliance of the BSC with the requirements of the CIDB or that the JV should have obeyed the terms of the tender documents concerning registration and certification of the Helipads by the CAA. This is misguided and irrelevant. The question is simply whether the BSC or the JV complied with the requirements of the CIDB or the terms of the tender documents respectively. The answer is that they did not. That being so, it was irregular for them not to have observed the procedure.

[48] The fact that the Department did not comply is unmistakable from the response of Mahlatsi to the SIU. He told the SIU that the Department did not implement the construction project and that the provision of the air ambulance services was a package. The Department anticipated the appointed service provider to procure construction services, manage the project, and obtain compliance certificates for CAA compliance purposes. To the extent that Mahlatsi's response is a departure from the procedure laid down in the terms of reference and the compulsory briefing session, it is a confession of the Department's non-compliance and, is unavoidably irregular.

[49] The gravity of disregarding the prohibition of performing work while not registered with the CIDB is conveyed in Regulation 25(1) of the CIDB Act. A contravention of the Regulation could expose a transgressor to prosecution which, if found guilty, the offence is punishable by a fine not exceeding 10% of the total value of the project.

[50] Other than the above, Clause 3.3.1 of the SCM Policy of the Department states that there shall be two separate bid evaluation committees in the department, one to evaluate any goods and services bids, the other to evaluate infrastructure/construction related bids. Observation of this Department SCM Policy would have required the Department to constitute an evaluation committee specifically to evaluate the work that pertained to the construction of the Helipad and hangar. It is not controverted that the Department did not appoint a separate evaluation committee to comply with the SCM Policy outlined above. This failure is irregular and unlawful.

Withdrawal from Transversal Contract RT 79-2015

[51] The issue that the SIU is raising with the withdrawal of the Department from National Treasury is that when the Department did so on 8 January 2015, it was already under administration. The Accounting Officer at the time was Mahlatsi and not Dr Motau. To the extent that both the withdrawal from the Transversal Contract RT 79-2015 and the preparation and invitation of potential bidders by advertisement of the tender were sanctioned by Dr Motau, the act constitutes an irregularity because he lacked authority. Mahlatsi, as the Accounting Officer for the period, would have been the right person to approve the transactions because he was in that office. Accordingly, concludes the SIU, it was irregular and unlawful.

[52] In the absence of substantiation the argument of SIU rings hollow, states the JV. There is no proof of the date on which the Department was placed under administration. Moreover, there is no evidence that Mahlatsi was appointed as the Accounting Officer, nor does the SIU try to show that Dr Motau did not have authority to communicate with National Treasury. For allegations as serious as the placement of a department under administration or appointment of an Accounting Officer, more proof should have been levied before this Tribunal. In the circumstances, the allegation that what transpired was contrary to the empowering provision is vague and embarrassing, says the JV.

[53] Indeed the assertions of the SIU are not fortified by any hard evidence. Under normal circumstances, a letter cannot be adequate to rely upon to support an allegation of the administration of a department or appointment of an Accounting Officer. Additionally, the magnitude of those decisions suggests that there should have been documentation easily available to confirm the allegations. Ordinarily, the fact that the SIU could not place the evidence before this Court would warrant a cautious approach to the matter. For allegations as fundamental as the placement of a department under administration or appointment of an Accounting Officer, more proof would have been levied before this Tribunal. Everything said, I note that the Department is not challenging the allegation that it was under administration despite the fact that it could have done so had it wished. The allegation is not a mere allegation anymore in view of that admission.

[54] However, it is important to state that the SIU finds itself in an unenviable situation. As in the case of the appointment of the committee members who did not have letters of appointment in writing or, where they existed, did not bear any signature of the Accounting Officer, if the enablers of these irregularities in these two instances knew that they would be implicated, the chances of disclosure of information or handing over documents would not be forthcoming. To demand that they should have been provided to this Tribunal is like an attempt to draw water from a stone.

Expiry of the Validity Period

[55] The issue for the SIU here is that the decision to award the tender was made during September 2015 following the extension of the validity period on two occasions. The extension could not have been legitimate because only the JV responded. No reply was received from Vusa Medical, which was the other bidder. The SIU argues that by not receiving a response from the other bidders, the Department was in the same position as a department that had not sought an extension.

[56] In justification of the above, the SIU referred this Court to the case of City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others,[11] where the Supreme Court of Appeal stated that:

> *"... as was held by the high court, the validity period is indeed one of the fundamental 'rules of the game', being the period within which the process should be finalised. To extend the tender validity period, the consent of all the participants to the tender process is required. Unless there is a timeous request and favourable response from all the tenderers prior to the expiry of the tender, the tender comes to an end."*

[57] Since the Bid was awarded after the bid validity period had culminated and that only the JV had expressed its disposition to extend, the process was irregular, concludes the SIU. In response, the JV argues that the allegation of the SIU above completely disregards that by 29 May 2015, the JV was the only bidder that remained. That could have been the position, but the point is that it was irregular to extend after the expiry of the validity period. In fact, the situation called for readvertisement because the terms of the tender had changed. Some of the bidders probably lost interest because of the duration of the bid. Altering the period without readvertisement of the bid in these circumstances was indubitably irregular and unlawful.

Unlawful Extension of the Contract

[58] Paragraph 2.8 of the National Treasury Circular on Code of Conduct for Bid Adjudication Committees issued on 30 March 2006 provides that the Bid Adjudication Committee must also consider and rule on all recommendations/reports regarding the amendment, variation, extension, cancellation or transfer of contracts awarded.

[59] Paragraph 4.3.2.2 of the SCM Policy of the Department read with Paragraphs 9.1 and 9.2 of the National Treasury SCM Instruction note 3 2016/2017 stipulates that the Accounting Officer must ensure that contracts are not varied by more than 20% or 20 million for construction related goods, or 15% or 15 million for services. Section 45 of the PFMA provides that:

"An official in a department, trading entity or constitutional institution;

(a) must ensure that the system of financial management and internal control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official;

(b) ....

(c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(d) ...

(e) is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility."

[60] The original contract was extended by the addition of a second Helicopter. This enlarged the amount of the contract by R35 495 360.10. Mahlatsi denied that the matter of the extension of the contract was ever discussed with him or that his attention was drawn to it by any person in the Department. He added that the issue was also never debated or approved at any gathering that he might have attended. In short, he knew nothing about it. There was also no documentary proof of the matter of the addition of the second Helicopter serving before the DBAC or Mahlatsi approving it.

[61] The SIU states that this is a direct breach of paragraph 2.8 of the National Treasury Circular on the Code of Conduct of Bid Adjudication Committees issued on 30 March 2006, the SCM Policy, the National Treasury Instruction Note 3 of 2016/2017 and the PFMA. In consequence of the infringement, the amount of R35 495 360.10 was irregularly expended. Without necessarily challenging the allegation that the extension was not authorised by Mahlatsi, the JV denies that the Department in incurring the expenditure violated paragraph 4.3.2.2 of the SCM Policy of the Department read with paragraphs 9.1 and 9.2 of the National Treasury SCM Instruction Note 3 2016/2017 set out at paragraph 59 supra.

[62] It is not worthwhile deciding whether the Department, by exceeding the threshold amount, breached the provisions of paragraph 4.3.2.2 of the SCM Policy of the Department read with paragraphs 9.1 and 9.2 of the National Treasury SCM Instruction note 3 2016/2017. However, for purposes of deciding whether to review, a finding that Mahlatsi, as an Accounting Officer, did not authorize the extension of the contract and that the matter did not serve before the DBAC is sufficient for a finding that the irregularity was serious. Similarly, the

extended part of the contract has the same defects as the main contract, such as, among others, the unlawful alteration of the duration of the contract from 12 months to three years, the Accounting Officer awarding a bid comprising both goods and services and construction sections when they should have been separated, failure to stipulate the minimum category of registration with the CIDB and to advertise the bid on the website of the CIDB, the violation of the provisions of section 217 of the Constitution, etc.

Declaration of Invalidity

[63] Section 172 of the Constitution is entitled: "powers of Courts in Constitutional Matters" and provides that:

"When deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(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."

[64] In all the above instances that I have traversed, the finding of this Tribunal is that in making the award of the Bid to the JV, the Department overlooked its own procurement agenda rendering the process seriously irregular. In terms of section 172(1)(a) supra, this Tribunal is enjoined to declare it unlawful. The irregularity of the process does not depend on the gravity or triviality of the irregularity. Once the process is irregular, this Tribunal is obliged to declare it unlawful and consider setting it aside and exercising its discretion on a just and equitable remedy.

[65] To the extent that the JV has asserted that the Department is, in the main, the culprit and that some of the transgressions are inconsequential, it is important to state that the purpose of the procedure to be followed by all the participants is to ensure an unblemished outcome that will survive intense assaults from aggrieved parties. The immateriality of the irregularities does not immune the innocent party from liability. If the processes in this case are not observed, the consequence would be non-competitiveness, unfairness, non-transparency and contra economical. For that reason, they could be minor but their effects are serious.

Just and Equitable Remedy

[66] In addition to reviewing the contract on the ground that the Department invalidly awarded the Bid to the JV, the SIU seeks an order directing the JV to return the monies paid pursuant to the unlawful award of the Bid and the extension of the contract plus interest at the prescribed legal rate. In the alternative, the SIU seeks an order directing the JV 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.

[67] The SIU justifies the remedy it seeks above on the basis that in the case of AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (AllPay No.2),[12] 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 costs only basis and was obliged to account for its profits. The remedy was granted notwithstanding that the service provider, Cash Paymaster, had claimed lack of knowledge of the irregularities committed by the service grantor, the department. On this aspect, the current case is “on all fours” with Allpay No. 2. See also, Special Investigating Unit and Another v Vision View Productions CC.[13]

[68] Now that this Tribunal has found that the irregularities were of such magnitude to warrant this Tribunal to exercise its discretion in considering a just and equitable remedy under section 172(1)(b), it must consider the nature of the irregularity, role of the respective parties and conduct before and after the irregularity was uncovered. I have already mentioned that the nature of the irregularities was serious – their non-compliance diminished the procedure from being observed during procurement processes and undermined the rights of other bidders. The process ultimately culminated in the contravention of the provisions of section 217 of the Constitution and, to that degree, yielded unfairness, non-transparency and little to realise for time and effort expended.

[69] I take note of the contention of the JV that it was not responsible for most or all the transgressions for which the decision was declared unlawful. That said, I must point out that on the version of the JV, it is an experienced provider of the services for which it was appointed having executed similar projects previously for the North West, Mpumalanga and Limpopo Provinces. It is reasonable to assume that the JV was a reliable service provider in the field of aero-medical services. Such experience would have been a source of knowledge of examining the adherence to procedure when dealing with Organs of State bids. I believe it is difficult to accept that the JV had no knowledge of the procedures that the Department had to undertake to produce a flawless process. To guarantee a profit, it promptly turned a blind eye to the irregularities. Accordingly, the role that it played was significant.

[70] The JV has argued that there have been several cases, which have held that a service provider such as the JV is not entitled to benefit from a contract that has been declared unlawful and set aside. On the facts of this case, the JV implored this Tribunal to make the declaration of invalidity without proceeding to consider a just and equitable remedy in terms of section 172(1)(b) of the Constitution. However, it added in the alternative that should the Tribunal nonetheless proceed to exercise its discretion as contemplated in section 172(1)(b) of the Constitution, the Tribunal must consider that the Department is largely to blame for what transpired.

[71] I wish to reiterate that on the facts of this matter, the JV, as a seasoned bidder in these types of tenders, was aware of the serious irregularities but chose to look the other way to ensure that the outcome was achieved. The transgressions were serious, requiring a declaration of invalidity. I have deemed it appropriate to set aside both the Bid and the contract. An order for the return of all the funds received by the JV may in this instance bring about injustices to the JV insofar as it may have expended funds of its own to execute the contract.

[72] I consider an order that has a provision for debatement fair, equitable and appropriate in these circumstances. It is the most suitable due to the allegations concerning overcharging and overpayment. The order will ensure that this is resolved. In this regard, I am following in the footsteps of the case of Mining Qualifications Authority v IFU Training Institute (Pty) Ltd[14], where the court granted a similar order.

Order

[73] In the result, I make the following order:

1 The decision of the Department to appoint the JV to provide aero-medical services to the Free State Provincial Government under Bid Number: DOH(FS)67/2014/2015 is reviewed and set aside.

2 The decision of the Department to extend the contract of services between it and the JV is hereby reviewed and set aside.

3 The contract of services between the Department and the JV is set aside.

4 The JV is to file with this Tribunal, within thirty (30) days of the Order, an audited statement of expenses incurred, the income received and the net profit it would have made under the disputed tender and/or services contract.

5 The parties must, within thirty days thereafter, obtain an independent audited verification of the details provided by the JV and file the audited verification with this Tribunal, alternatively, conduct a debatement exercise to determine all monies received from the Department in respect of the disputed tender and/or extension of the contract except the actual, reasonable and lawful out of pocket expenses that the JV may be able to prove that it has incurred in rendering the service.

6 The Tribunal will thereafter determine the amount to be paid by the JV to the Department or to the SIU.

7 The costs of these proceedings, including costs of two counsel, are to be paid by the JV, jointly and severally, the one paying the other to be absolved, on a scale as between party and party scale “B”.

B A MASHILE

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

Appearances Counsel for the Applicant: Adv MM Mojapelo SC Adv K Maleka Instructed by: The State Attorney, Pretoria Counsel for the Respondent: Adv E Kilian SC Adv L Fick Instructed by: HJW Attorneys Date of Judgment: 5 June 2025

[1] Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit 2023

(2) SACR 1 (CC).

[2] Special Investigating Unit v C Squared Consumer Connectedness (Pty) Limited and Others

[2023] ZAST 13.

[3] Department of Transport and Others v Tasima (Pty) Ltd 2017

(2) SA 622 (CC) para 102.

[4] Valor IT v Premier, North West Province and Others 2021 (1) SA 42 (SCA) para 40.

[5] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014

(1) SA 604 (CC) para 22.

[6] Pharmaceutical Manufacturers Association of South Africa; In Re: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

[7] Affordable Medicines Trust and Others v Minister of Health and Others

[2005] ZACC 3; 2006

(3) SA 247 (CC) para 49.

[8] City of Tshwane Metropolitan Municipality v Moipone Group of Companies (Pty) Ltd and another 2024 JDR 2162 (GJ) para 55.

[9] Gcwabe Consulting (Pty) Ltd v South African Police Services

[2022] ZAGPPHC 601 para 32 and 33.

[10] Premier, Free State and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA).

[11] City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others

[2022] ZASCA 82 para 13.

[12] 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) para 67.

[13] Special Investigating Unit and Another v Vision View Productions CC

[2020] ZAGPJHC 421.

[14] Mining Qualifications Authority v IFU Training Institute (Pty) Ltd [2018] ZAGPJHC 455

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://www.saflii.org/za/cases/ZAST/2025/8.html

CASE PAGE https://chat.esheria.ai/case-law/south-africa/special-investigating-unit-v-helicopter-and-airplane-logistical-operations-pty-ltd-and-others-unknown-topic-ast-2025--6a3ea51b3b1caa9129811bf4

Prepared on 13 October 2026 · Esheria