

SOUTH AFRICA / JUDGMENT

Special Investigating Unit v Vigario Consulting (Pty) Ltd and Others (MP07/2023) [2023] ZAST 11 (13 October 2023)

[2023] ZAST 11

COURT
Special TribunalBEFORE
L T ModibaCASE / FILE NUMBER
MP07/2023

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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)

Case

No: MP07/2023

In

the matter between:

Special
Investigating Unit
Applicant
and
Vigario
Consulting (Pty) Ltd
First
Respondent
Safarmex
Medical Logistics (Pty) Ltd
Second
Respondent
Department
Of Health, Mpumalanga
Third
Respondent

JUDGMENT

Summary

Administrative law – legality review in terms of section 8(2) of the Special Investigating Unit and Special Tribunals Act 74 of 1996 – whether the Mpumalanga Department of Health complied with the applicable procurement laws and regulations when it procured PPE items from Vigario Construction. No case for the legality review made out. Application dismissed.

Costs – whether the present circumstances warrant a punitive cost order.

Modiba J:

INTRODUCTION

- [1] On 31 March 2021, the Special Investigating Unit (“SIU”) instituted this review application in this Tribunal by way of a notice of motion. It seeks to have the contract the Department of Health, Mpumalanga (DOH) awarded to Vigario Consulting Pty Ltd (“Vigario”) for the supply of personal protective equipment (“PPE”, “the contract”) declared unlawful and invalid and set aside, as well as a variety of consequential relief.
- [2] The SIU brings this application in its own name and right in terms of s 4(1)(c) read with s5(5) of the Special Investigation Unit and Special Tribunals Act[1], seeking relief to which the DOH is entitled. Unless otherwise specified in this judgment, references to statutory provisions are to this Act.
- [3] Although the SIU has joined Safarmex Medical Logistics (Pty) Ltd (“Safarmex”) and the Member of the Executive responsible for Health in Mpumalanga (“MEC”) in his capacity as a representative for the DOH as the second and third respondents respectively, it seeks no relief against them.
- [4] Vigario seeks condonation for filing its opposition papers outside the timeframes directed by this Tribunal. I grant condonation satisfied that Vigario meets the requirements for it.
- [5] This judgment sets out background facts, grounds of review and opposition and the applicable statutory and regulatory provisions relied on by the SIU. The grounds of review are tested against the applicable statutory and regulatory provisions and grounds of opposition. The issue of costs is addressed. Lastly, an order concludes the judgment.

BACKGROUND

FACTS

- [6] The background facts relied on by the SIU are largely common cause because Vigario either admits them or is in no position to deny them as it has no knowledge of them. Where there is a conflict in the parties' respective versions, it is resolved based on the Plascon Evans Rule. In other words, the application is determined on the SIU's version to the extent not denied by Vigario taken together with Vigario's version.
- [7] The advent of the 2019/ 2020 Covid 19 pandemic as outlined in the founding affidavit is well documented. Following the outbreak of Covid 19 towards the end of 2019, on 11 March 2020, the World Health Organisation ("WHO") declared Covid 19 to be a global pandemic and called on countries across the globe to put appropriate measures in place to curb its spread.
- [8] To ensure that the South African government responds appropriately to the Covid 19 global pandemic, on 15 March 2020, the President of the Republic of South Africa declared a national state of disaster in South Africa. On 18 March 2020, Government Notice No 318 was gazetted setting out Disaster Management Regulations ("DMR") issued in terms of section 27(2) of the Disaster Management Act. In terms of the DMR, all spheres of government were directed to implement appropriate measures to curb the spread of the Covid 19 pandemic. The procurement of PPEs, including the PPEs subject to this review, became necessary.
- [9] Subsequently, irregularities in the procurement of PPEs by organs of state became widely publicised. On 23 July 2020, by way of proclamation R.23 of 2020, the President authorised the SIU to investigate allegations of impropriety in the procurement of PPE by organs of state. The SIU investigated the impugned procurement as authorised by proclamation R.23 of 2020. As part of the investigation, the SIU investigator who was assigned to this investigation subpoenaed documents from Dr Mahongi, the DOH head of department ("Dr Mahongi", "HOD"), in terms of s5(2), calling for documentation in respect of the impugned procurement. She also deposed to the founding affidavit that grounds this application. Although she does not expressly mention this in the founding affidavit, it is evident that the investigator also interviewed various DOH officials, including the HOD and Mr Mahlalela, Chief Director: Financial Services of the Department. He also interviewed, Mr Pillay, a director in Vigario. It appears that the SIU investigator obtained affidavits from most if not all the persons she interviewed. However, the SIU failed to disclose all the affidavits in these proceedings. Further, although the affidavits deposed to by Mr Mahlalela and Mr Pillay are expressly mentioned in the founding affidavit and attached as annexures, key annexures to these affidavits are not attached.
- [10] Further, the process followed to compile the affidavits elicited during the investigation is not explained. It is also unclear who drafted them. I leave the issue here because Vigario has not problematized it.

- [11] Various DOH officials interviewed by the SIU investigator either put forward explanations regarding the impugned procurement process or defences to the SIU's grounds of review. I find it disturbing that the SIU ignored key aspects of their explanations and/ or defences. This is inconsistent with the duty upon the SIU to conduct its investigations in the interest of justice and not simply to catch out and haul before this Tribunal organs of state, state officials, entities and or other persons implicated in procurement maladministration. The SIU investigator largely made findings based on documents submitted to her in response to the s5(2) subpoenas. She states this in paragraph 37 of the founding affidavit. The SIU has in turned grounded this review on her findings. As I later find in this judgment, she failed to investigate key issues to properly establish some of the SIU's grounds of review.
- [12] In May 2018, pursuant to a tender concluded under tender no: HEAL/024/18/MP, the DOH concluded a service level agreement ("SLA") with Safarmex in terms of which the latter provided various supply chain management services to DOH. These include procurement, warehousing and distribution of pharmaceutical products and sundries on behalf of DOH.
- [13] Prior to April 2020, Vigario had sourced various PPEs from China as part of a consortium. Its representatives canvassed potential customers in and outside government. It was during this process that Vigario became aware of the scarcity of these PPE items in the market and the fact that DOH required them. On 7 April 2020, a Vigario representative referred to in the answering affidavit as Manjra, approached the DOH by email addressed to Dr Mahongi, informing him of the number of 3-ply disposable masks Vigario has in stock and the fact that it offered them at R14-R16 per item excluding VAT, depending on the quantity ordered. Dr Mahongi replied that one of DOH officials would be in touch with Manjra. That official was Mr Tshegofatso Moralo ("Mr Moralo"), Assistant Director and Manager of the Mpumalanga Pharmaceutical Depot. After exchanging various correspondence over several days, Mr Moralo requested a formal quotation from Manjra for 300,000 disposable masks. He responded on the same day by submitting a quotation at R9.50 per unit excluding VAT and other documents required by Mr Moralo. Subsequently, DOH concluded the impugned contract with Vigario. Reliance is placed on a purchase order DOH issued to Vigario on 29 April 2020. Thus, the implied date of the impugned contract, which Vigario takes no issue with, is 29 April 2020. This is an important date for the purpose of this review as it determines which Treasury Regulation was applicable when the impugned procurement was embarked on.

GROUNDINGS OF REVIEW

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

14.1 the deviation on which the procurement was based fails to comply with the applicable procurement regulations.

14.2 the PPE items were not centrally procured, warehoused, and distributed as required in terms of Treasury Note Instruction 3 of 2020/2021 ("TNI 3/2020/21").

14.3 the procured items exceeded the maximum price per unit as prescribed by paragraph 6.3 of TNI 3/2020/21.

[15] In its heads of argument, the SIU relied on additional grounds of review not pleaded in its founding affidavit. This is patently inappropriate. It is for that reason that I do not cite the additional grounds of review here. I deal with them in paragraph 35 to 42 below to show that these grounds completely lack merit and that they justify together with other factors outlined in paragraphs 49 and 51 of this judgment, deprecation by way of a cost order.

GROUND OF OPPOSITION

[16] Vigario relies on the following grounds of opposition:

16.1 The procurement process was managed based on an approved deviation.

16.2 This matter involves the informal exercise of the powers granted to Mr Moralo. The principle of legality finds no application in this matter because Mr Moralo in law had the requisite legal (ostensible) authority to conclude the impugned contract. Since Mr Moralo was clothed with the requisite legal authority, the authority of any other DOH official is irrelevant.

16.3 The SIU is estopped from relying on the alleged irregularities because the alleged irregularities fell outside Vigario's knowledge. Vigario was entitled to assume that:

16.3.1 all internal mechanisms and procedures had been followed.

16.3.2 Mr Moralo was held out as the person Vigario had to deal with in respect of the impugned contract.

16.3.3 Mr Moralo was for the purpose of concluding the impugned contract, the mouthpiece of the DOH, duly authorised.

16.3.4 Mr Moralo had ostensible authority, alternatively, denial of his authority could be met by a defence of estoppel.

[17] During oral argument, counsel for Vigario informed this Tribunal that he no longer persists with the ostensible authority ground of opposition. It is for that reason that this Tribunal does not deal with this ground of opposition in this judgment.

THE PROCUREMENT FRAMEWORK

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

- [19] The Public Finance Management Act[2] (“the PFMA”) makes provision for such a system. In terms of s38(1)(a)(iii) and 51(1)(a) of the PFMA, an accounting authority for a national or provincial department or public entity must ensure that his department maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive, and cost-effective. S76 authorises National Treasury to issue instructions and regulations in respect of matters provided for in the PFMA.
- [20] National Treasury has issued the following National Instructions and Regulations relied on by the SIU:
- 20.1 Treasury Practice Note 8 of 2007/2008, “Supply Chain Management: Threshold values for the procurement of goods, works and services by means of petty cash, verbal / written price quotations or competitive bids”, dated 29 November 2007 (“TPN 8/2007”).
- 20.2 National Treasury Instruction 3 of 2016/17, issued on 19 April 2016, “Preventing and Combating Abuse in the Supply Chain Management System”, (“NTI 3/2016/17”).
- 20.3 National Treasury Instruction Note 8 of 2019/20, “Emergency Procurement in Response to National State of Disaster”, dated 19 March 2020 (“TNI 8/ 2019/20”).
- 20.4 National Treasury Instruction 3 of 2020/2021 dated 19 April 2016, “Preventing and combating abuse in the Supply Chain Management system” (“TNI 3/2016”).
- [21] In terms of Regulation 9(a) of the DMR, procurement regulations proclaimed in terms of s76 of the PFMA remained applicable during the Covid 19 national disaster period. Together with Treasury Regulation 16A of 2005, NTI 3/2016/17 regulates emergency procurement. Recognising the limitations of Treasury Regulations issued before the advent of the Covid 19 to regulate procurement in the context of a global pandemic, National Treasury proclaimed TNI 8/2019/20 and TNI 8/2020/21 to further regulate emergency procurement during the Covid 19 national disaster period.
- [22] To avoid prolixity, I do not regurgitate the provisions cited by the SIU in its founding affidavit here. I do so at the appropriate point in this judgment to the extent they are relevant in resolving the issues that arise between the parties.
- [23] Although the SIU cited several other Treasury regulations, ultimately, when question during oral argument, counsel for the SIU reiterated that the SIU only placed reliance on non-compliance with Treasury Note 3 of 2020/2021 (“TN3”). The procurement requirements set out in TNI 3/2020/21 underpin its grounds of review. Therefore, the issue that arise for determination between the parties is narrow. It is whether the impugned procurement and specifically, the approved deviation fails to comply with TNI 3/2020/21, and whether such non-compliance renders the procurement irregular.

ANALYSIS

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

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

“If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.”

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

[27] It is common cause that the Covid 19 pandemic created an emergency as envisaged in clause 16A.6.4 of the 2005 Treasury Regulations. Therefore, the DOH HOD as the Accounting Officer had to invite as many suppliers as possible and select the preferred supplier using the competitive bid system. A deviation is allowed in exceptional circumstances. The requirement that the deviation ought to be approved by National Treasury is ameliorated by TNI 8 2019/20 as superseded by TNI 3 2020/21. These TNIs dispensed with the need for National Treasury approval. In terms of clause 2.3 of TNI 8 of 2019/ 2020, clause 16A.6.4 of the 2005 Treasury Regulations and TNI 3/2016/17 remained applicable subject to the following prescribed provisions:

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

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

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

Deviation

[28] The SIU alleges that DOH, specifically Mr Moralo, procured directly from Vigario without utilising the procurement services Safarmex provided DOH in terms of an SLA and that it did not find any evidence that Mr Moralo tried to procure PPEs from companies listed in Annexure A to TNI 8/2019/20. I find that there is no merit to this allegation. The SIU disturbingly fails to deal with the explanation for this allegation offered by DOH officials. It left Mahlalela's version on this issue buried in an Annexure to its founding affidavit. At paragraph 7.1 of his affidavit, Mr Mahlalela explained that in terms of clause 6.1 of the SLA, Safarmex may only procure items on transversal contracts and those on the DOH provincial code list and provincial tenders or items approved as such. Items falling beyond these parameters may only be procured when authorised by the DOH duly authorised representative.

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

Non-compliance with TN 3 of 2020/2021

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

below:

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

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

30.3 Clause 2.16 states that "In order to facilitate an efficient and effective delivery of goods and services to address COVID-19 requirements, whilst ensuring that the core values of fairness, transparency, competitiveness, cost effectiveness and equitability as enshrined in section 217 of the Constitution are adhered to, National Treasury, in terms of section 76(4)(c) of the PFMA has developed this instruction to determine a procurement and provisioning framework"

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

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

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

[32] SIU made out no case in its founding affidavit that the PPEs procured in terms of the impugned contract fail to comply with 3.7.6 (i). On the authority in Zeelwa[4], no case is made out that the prices agreed to under the impugned contract exceed those set out in Annexure A as required in terms of clause 3.7.6(ii). The allegation that Vigario failed to comply with paragraph 3.7.6 (iii) is devoid of any merit. Vigario was registered on Central Supplier Database (“CSD”) at the time when Manjra approached DOH. There is no prohibition against a supplier registering on CSD as Vigario did in this case. Further, there is also no requirement that a supplier may only supply PPEs to an organ of state when it had previously supplied these items to an organ of state.

[33] At paragraph 46 of its founding affidavit, the SIU pleads a deviation prepared by Mr Moralo and approved by Mr Mahlalela. From Mr Mahlalela’s affidavit, it appears that the deviation was also approved by the DOH ultimate authority, the HOD, authorising a departure from the normal procurement procedure. When preparing and approving the deviation, the relevant officials were guided by both the DOH SCM Procurement Policy and TPN 3/2016/17 read with TNI 3/2020/21. Reasons for the deviation are recorded which the SIU does not seriously attack on any sustainable ground. The SIU complains of lack of evidence of

attempts to procure from transversal contracts and failure to follow normal procurement procedures such as information on the platform used to share the RFQ, list indicating the number of bidders invited to bid and scoring information. Yet, it fails to bring to this Tribunal's attention that when he motivated for Vigario's appointment, Moralo listed three other entities from which it sourced quotations. From that motivation, it appears that Vigario is the only entity that could meet the required quantities. A quote approval checklist is attached to Moralo's motivation annexure "MJ6". I have already found that it was not peremptory for DOH to procure from the Safarmex contract.

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

NEW CASE IN THE HEADS OF ARGUMENT

- [35] As already mentioned, inappropriately, the SIU relies on a completely new case set out for the first time in its heads of argument. Its new case, grounded on the contentions set out below is completely unsustainable.
- [36] The SIU makes a bald allegation that the impugned procurement contravened the express provisions of an emergency deviation as provided for in Treasury Regulation 16A6.4. As already indicated, no reference to this Treasury Regulation is made in the founding affidavit. The heads of argument are devoid of any substantiation for this bald allegation.
- [37] The SIU alleges that Vigario is not registered as a medical or pharmaceutical supplier with the South African Health Products Regulatory Authority ("SAHPRA"). Again, it cites no authority for this proposition. In MEC for Treasury Free State[5], this Tribunal held that surgical gowns are not medical devices as defined in the Medicines Act.[6] No case is made out that the 3-ply surgical masks Vigario supplied to DOH are medical devices as defined in the Medicines Act or that Vigario is not registered with SAHPRA, and that absent such registration, Vigario was prohibited from supplying the 3-ply

surgical masks in question to DOH.

- [38] The SIU contends that DOH's Supply Chain Management ("SCM") division did not source, vet or appoint the service providers. Again, it failed to deal with the version of the DOH officials it interviewed. According to Mr Mahlalela, when the impugned procurement process was implemented, DOH worked on skeleton staff due to the Covid 19 restrictions. According to Mr Moralo, previously, he was Director SCM. When the impugned contract was concluded, although he had since been promoted to Chief Director Finance, he continued to function as Director: SCM as the vacancy created by his promotion had not been filled. Therefore, it is incorrect that SCM officials were not involved in the bid because Mr Moralo still worked in that capacity.

- [39] The SIU complains that Vigario is not a sole applier. But the impugned deviation was not approved on the sole supplier basis. As already found, 4 entities bid in the impugned procurement. There is therefore no basis on which to find that the sole supplier rule was applicable and not complied with.
- [40] At paragraph 15 of the SIU heads of argument, the following issue is raised: “The issue is whether there was compliance with a fair, equitable, transparent, and cost-effective process. Central to this investigation is the deviation itself which is annexure “MJ6” to the founding affidavit. There is no objective documentation or reasons as to why Moralo approached the four suppliers listed at 001-107 for the supply of the masks referred to therein. Startling is the fact that in the case of Vigario the document dated 23 April 2020 refers to quantity of 300,000 and price of R3,346,500.00 and that is precisely the contents of” MJ7” dated 6 days later, namely 29 April 2020. The only reasonable inference is that Moralo was in contact with Vigario, and this undermines a fair and transparent process.” It would be prejudicial to Vigario to consider this issue as it is only raised in the heads of argument. Vigario has not been given an opportunity to answer thereto.
- [41] The SIU further alleges that there is nothing in the deviation shows that the four suppliers listed at 001-107 are “registered”

or that their prices are equal or lower than the prices listed in annexure A – this was an issue for the SIU to investigate. It is not for the respondents to disprove this allegation. The SIU has not investigated whether the other suppliers are not registered. It has also not established, on the authority in Zeelwa, that their quoted prices are equal or lower to those listed in Annexure A. As found above, the pricing contention completely lacks merit.

- [42] At paragraph 17 of its heads, the SIU complains that “There is no indication whatsoever of competitive bids. In fact, on the contrary the pricing at 001-107 is warped. There is no analysis nor any reason why the material discrepancies. Thus, for instance, 100,000 masks is purchased by from Shabatsu Intelligence (or at least approval is sought) at the price of R4,136,000.00 but approval is also sought for 300,000 from Vigario at a price of R3,346,500.00.” [Sic] Again, it was for the SIU to investigate

this issue and present evidence before the Tribunal to prove a procurement irregularity. It has failed to investigate this issue.

It has not dealt with it in its founding affidavit, again denying Vigario an opportunity to answer to it.

FAILURE TO DISCLOSE ALL ANNEXURES RELIED UPON

- [43] The SIU has duplicated annexures and failed to disclose documents on which it grounds its case. Two different annexures to the founding affidavit are marked Annexure MJ3 and MJ4 respectively. The first MJ3 and MJ4 are not what paragraphs 43 and 45 of the founding respectively state they are.

- [44] As already stated, more seriously, Annexures to the affidavits of Mr Mahlalela and Mr Pillay are not attached, for example, Annexure LM-B, the DOH SCM Procurement Policy which Mr Mahlalela contends he followed when he approved a deviation in respect of the impugned procurement is not attached to his affidavit.
- [45] Vigario's attorney filed a notice in terms of Uniform Rule 35(12) on the SIU, seeking to inspect documents referenced in the founding affidavit. The SIU offered that Vigario's counsel may inspect the documents at the chambers of the SIU's counsel. Astonishingly, all the documents Vigario sought to inspect were not part of the brief of the SIU's counsel either.
- [46] I therefore find that the SIU failed to disclose to this Tribunal documents on which it premised its case.

CONCLUSION

- [47] For reasons set out in this judgment, I find that the impugned procurement is not irregular on the basis contended by the SIU. Therefore, this application falls to be dismissed.

COSTS

- [48] Vigario seeks costs on a punitive scale, inclusive of the costs of two counsel. Counsel for the SIU contended that the SIU should not be ordered to pay costs on a punitive scale because it was entitled to bring this application to the Tribunal.
- [49] For reasons set out below, I find that the present circumstances justify a punitive costs order against the SIU. The SIU failed to properly investigate the impugned contract. As already found, during its investigation, it also failed to act in the interests of justice.
- [50] The SIU case is wholly unfounded. It utterly fails to make out a case for the relief sought. This was pointed out to counsel for the SIU when the SIU applied for default judgment on 29 August 2023. On that day, Vigario appeared seeking a postponement to file opposing papers. That I was not satisfied that the SIU had made out a case for the relief sought weighed in favour of Vigario during its request for a postponement. I made this remark even though the SIU had agreed to the postponement. The SIU has persisted with this application without amending its papers. Instead, it inappropriately made out a completely new case in its heads of argument.
- [51] The presentation of the SIU papers was also shoddy. Annexures to Mahlalela and Pillay's affidavit which did not support its case were excluded from the papers. Not all papers relied on were disclosed.
- [52] Vigario should not be out pocketed under these circumstances. Costs on a punitive scale are also the most appropriate way of expressing the Tribunal's disapproval of the SIU conduct.
- [53] In the premises, the following order is made:

ORDER

1. The application is dismissed with costs on the attorney and client scale, inclusive of the costs of two counsel where so employed.

JUDGE L. T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES Attorney for the plaintiff: Ms S Zondi, State Attorney, Pretoria Counsel for the plaintiff: Adv N Cassim SC assisted by Adv F Thema and Adv. C B Sefahamela Attorney for the defendants: Mr I Osman, Rosseau Litigation Attorneys Counsel for the defendants: Adv RA Solomon SC Date of hearing: 03 October 2023 Date of Judgment: 13 October 2023

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- [1] 74 of 1996.
- [2] 1 of 1999.
- [3] 5 of 2000.
- [4] Special Investigating Unit v Zeelwa Trading Pty (Ltd) and Another (MP03/2021) [2022] ZAST 22.
- [5] Special Investigating Unit v MEC for Treasury Free State Province and Others (FS01/2020) [2022] ZAST 2.
- [6] No 101 of 1965.

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