



**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 at the Mpumalanga High Court, Mbombela

CASE NUMBER: MP03/2021

In the matter between:

Special Investigating Unit

Applicant/ Plaintiff

and

Zeelwa Trading PTY (LTD)

Respondent/ First Defendant

Mpumalanga Department of Social Development

Second Defendant

JUDGMENT

Summary: Action – Review of the decision by the Mpumalanga Department of Social Development (DSD) to conclude transactions for the supply of personal protective equipment to Zeelwa Trading (Pty) Ltd (Zeelwa)- Whether DSD followed the prescribed procurement procedures when transacting with Zeelwa - Whether Zeelwa charged excessive pricing.

Application for absolution from the instance – Whether the Special Investigating Unit has made out a *prima facie* case for the relief sought.

MODIBA J:

[1] The Special Investigating Unit seeks an order declaring the procurement process in terms of which the Department of Social Development, Mpumalanga (DSD) appointed Zeelwa Trading (Pty) Ltd (Zeelwa) to supply it with personal protective equipment (PPE) unlawful and set aside. It also seeks an order that Zeelwa repays to the DSD an amount of R798 243.08. Alternatively, the SIU seeks a discretionary order for just and equitable relief in terms of s172(1)(b) of the Constitution.¹ DSD has not entered the fray.

[2] Zeelwa is defending the action. In its plea, Zeelwa took issue with the manner in which the SIU cited DSD in the face of the summons. It abandoned the point during oral argument, correctly so because, the manner in which the DSD is cited in the SIU's particulars of claim is consistent with the manner of citation Zeelwa contends for in its plea.

[3] During the trial, the SIU led the evidence of three witnesses and closed its case. Thereafter, Zeelwa applied for absolution from the instance. On 13 October 2022, I granted an order absolving Zeelwa from the SIU's claim. I did not give a ruling on costs because I held the view that the manner in which the SIU conducted this matter may call for censure by way of punitive costs. Further, justice and equity may not be served if Zeelwa is left out of pocket as a result of the legal costs it incurred to defend the trial. I therefore afforded counsel for the parties an opportunity to file further written submissions on 14 October 2022 addressing this issue. It is for that reason that I held back on handing down this judgment.

¹ The Constitution of the Republic of South Africa, 1996.

[4] I have considered the written submissions referenced in paragraph 3 above. In this judgment, I set out reasons for the order granted on 13 October 2022. I also include a ruling on the wasted costs occasioned by the postponement of the trial in June 2022 and the costs of the trial.

[5] The background facts are common cause. At the onset of the national state of disaster which was occasioned by the Covid 19 pandemic, DSD procured PPEs from Zeelwa by way of several transactions. The transactions which occurred between 18 and 27 March 2020 form part of the SIU's cause of action. For convenience, I collectively refer to these transactions as the impugned transactions.

[6] Although the SIU pleaded its case elaborately, in the end, it concisely set out the issues that arise for determination in the trial. The SIU alleges that when the DSD concluded these transactions with Zeelwa, it failed to comply with the applicable procurement procedures. Further, Zeelwa charged DSD prices in excess of the prices regulated in terms of the applicable National Treasury Instructions.

[7] Further, although in its particulars of claim, the SIU alleged non-compliance with several National Treasury Instructions, it ultimately placed reliance on Treasury Instruction 3 of 2016/2017 to establish its case in respect of non-compliance with procurement procedures and on Treasury Instruction 8 of 2019/2020 (TI8) to establish its case in respect of excessive pricing.

[8] The basis for Zeelwa's defence is that it was appointed following the emergency procurement procedure. Further, it contends that when the impugned transactions occurred, there was no Treasury Instruction regulating prices for PPEs.

[9] The SIU led the evidence of the following three witnesses.

9.1 Gugu Sithole (Ms Sithole), a forensic investigator employed by the SIU. She conducted the investigation in relation to the impugned transactions. She testified concerning the investigations and her findings;

9.2 Robert Masambo (Mr Masambo), the Director: Provincial Supply Chain Management (SCM) in the Mpumalanga Provincial Treasury. He testified regarding the treasury instructions that were in operation during the period of national disaster in 2020; and

9.3 Pauline Nomsa Masinga (Ms Masinga), the Financial Manager at the DSD, Enhlanzeni District. Ms Masinga testified regarding the payments DSD made to Zeelwa pursuant to the impugned transactions.

[10] At the end of the SIU case, Zeelwa applied for absolution from the instance. The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel*² where the court stated the following:

"...when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."

² 1976 (4) SA 403 (A).

[11] The above statement implies that a plaintiff has to make out a *prima facie* case to survive absolution.³

Whether DSD followed the prescribed procurement procedures when transacting with Zeelwa

[12] The SIU led no evidence to establish the allegation that when it appointed Zeelwa, the DSD did not follow the prescribed procurement procedure. According to Ms Sithole, who investigated the impugned transactions, there are no irregularities in the manner in which Zeelwa was appointed. Her evidence begs the question on what basis does the SIU allege that Zeelwa's appointment was unlawful and irregular. When asked during cross examination whether she compiled a report on the investigation into the impugned transactions, she answered in the affirmative. The SIU failed to discover this report.

[13] None of its other witnesses presented evidence that establishes a *prima facie* case that Zeelwa's appointment was unlawful and irregular.

[14] Ms Masinga was not involved in the procurement process. She only became aware of Zeelwa's appointment when she dealt with the payment of Zeelwa's invoices. All she knows is that on 19 March 2020, the DSD Head of Department issued a directive that with immediate effect, all district offices are to procure PPEs from service providers contracted to provide hygiene services to the DSD. Zeelwa falls into this cohort of service providers. It appears that it is for that reason that at the relevant times during March 2020, when it needed to procure PPEs, DSD sought

³ See also *De Klerk v ABSA Bank Limited and Others* 2003 (4) SA 315 (SCA)

a quotation from Zeelwa. Ms Masinga does not know what informed the directive. She does not have access to the supplier database. The SCM unit deals directly with service providers and sources quotations from them. Officials in the SCM unit are supervised by Denise Pansegrouw (Ms Pansegrouw) who reports to her. Ms Masinga's role is to establish that the SCM officials have sourced the quotations. She would then ensure that the amount for which payment is sought accords to the contracted amount. When she receives an invoice for the procured PPE items, she ensures that it is paid according to the contracted price.

[15] Ms Pansegrouw or any other relevant DSD SCM official would have knowledge of the procurement process followed to appoint Zeelwa in respect of the impugned transaction. Regrettably, none of these officials were called to testify.

[16] Mr Masambo testified generally regarding the procurement process to be followed when a Department seeks to procure goods and services during an emergency. He testified that during an emergency, procurement still ought to occur in accordance with a system that complies with the values set out in s 217 of the Constitution. Two processes are followed. The market has to be tested by calling for as many quotations as possible based on specifications issued by the relevant government department. Then, the quotations received ought to be evaluated to ensure compliance with the applicable procurement requirements. The quotations are then submitted to the bid evaluation committee for adjudication. If the market is unresponsive and only one quotation is received, that quotation will be considered provided that this fact is properly recorded and a motivation is made why the single quotation ought to be approved. This procedure is regulated in TI3.

[17] None of the SIU's witnesses testified regarding whether Zeelwa was appointed based on a single quotation procedure, or whether more quotations were sourced from other service providers. The inference sought to be drawn by the SIU that Zeelwa was simply appointed because it had been contracted to provide hygiene services to the DSD does not establish a *prima facie* case that Zeelwa was appointed based on a single quotation procedure. The directive regarding use of service providers contracted to supply hygiene services relates to how PPE suppliers were identified. It is common cause that DSD sourced quotations from Zeelwa. No evidence was led that more quotations were not sourced, evaluated and Zeelwa was recommended for appointment or the market was not responsive. In fact, Ms Sithole and Ms Masinga's evidence point to the contrary. According to them, DSD dealt with several service providers who supplied PPEs who were investigated for excessive pricing. The approved deviation in respect of the impugned transactions references three service providers inclusive of Zeelwa. Therefore, it is improbable that Zeelwa was appointed on a single quotation basis.

[18] Even more problematic for the SIU is its allegation that the Head of Department (HOD) for the DSD did not approve a deviation. He did. He approved two requests for deviations. The first is dated 7 April 2020. It obviously was issued after the impugned transactions were concluded. But later, on 28 March 2021, the HOD approved an *ex post facto* deviation extending the scope of services contracted under the hygiene services tender to three companies, Zeelwa being one of them. The impugned transactions are specifically referenced in the latter deviation.

Deviations of this nature are regulated by Treasury Regulation 16A6.4. It is not the SIU's case that the said deviation is unlawful.

[19] Further, although the SIU alleged that the PPE items Zeelwa supplied to the DSD do not meet the requirements approved by the National Department of Health (NDOH) as required in terms of TI8, again, the SIU led no evidence to sustain this allegation. Not even the evidence in respect of the request for quotation sent to Zeelwa when its quotation was solicited, specifying the requirements for the relevant PPEs was led.

[20] I therefore find that the SIU has failed to establish a *prima facie* case that when the impugned transactions were concluded, Zeelwa failed to follow the applicable procurement procedures.

Whether Zeelwa charged excessive pricing

[21] It is common cause that TI8 is dated 19 March 2020. It does not contain a retrospective clause. Therefore, TI8 is not applicable to the transaction that relate to the quotation dated 18 March 2020. On that date, there was no Treasury Instruction regulating prices for PPEs.

[22] TI8 was in operation when the transactions that relate to the quotations dated 23rd, 25th, and 26th March 2020 were concluded. Ms Sithole testified that the prices Zeelwa charged on these quotations exceed the prices set out in annexures to TI8. Under-cross examination, she conceded that TI8 contains different prices for the same items. In certain instances, it is unclear why different prices are allowed for the

same PPE items because the item description is the same. In other instances, different prices are charged for the same PPE items. She tried to get around this issue by testifying that she contacted Zeelwa's supplier to establish the prices at which Zeelwa sourced from it the PPE items it supplied to DSD. But even the resort to the supplier's prices does not assist her because the supplier's prices are irrelevant to the issue at hand. It is against the prices listed in T18 that the SIU ought to establish its case.

[23] Even more problematic for the SIU is the fact that the specifications of the PPE items Zeelwa supplied to DSD are not set out in its quotations. They are also not referenced in the sworn affidavit the supplier's official Mr Gustav furnished to Ms Sithole. It appears that Ms Sithole compared prices without reference to item specifications. Yet, T18 lists different prices for different specifications of each PPE item.

[24] When confronted with the flaws in her approach to comparing Zeelwa's prices to those set out in the Annexure to T18, and when specifically asked why Zeelwa ought to have charged prices set out in T18 in relation to one PPE item and not a price with the same or even different specifications in relation to the same PPE item, she testified that the SIU decided on the prices in T18 which should be used as a bench mark. But, this is contrary to T18. It does not give the SIU the authority to bench mark prices for PPE items in the manner testified by Ms Sithole. Further, the approach followed by the SIU to benchmark prices for PPEs supplied by Zeelwa without reference to the specifications renders the approach arbitrary.

[25] The authority in *Osmon*⁴ does not assist the SIU. The relevant paragraph is worth quoting:

“A Court must not evaluate a plaintiff’s case evidence at the absolution stage, but must accept the evidence as true. Nor should a court weigh up different possibility inferences. It must rather determine whether any one inference, from a range of possible reasonable inferences, might favour the plaintiff.”

[26] There is no inference to be drawn from Ms Sithole’s evidence. Her direct evidence that Zeelwa ought to have charged the prices the SIU alleges are maximum prices permitted for each PPE item in terms of TI8 is without a basis. *Osmon* is not authority for the proposition that the Tribunal ought to accept her evidence as true even where the evidence is unfounded. The Tribunal would not find for the SIU on the basis of the evidence presented by Ms Sithole in this regard. Consequently, at the end of its case, the SIU had not established *prima facie* evidence that Zeelwa charged excessive prices for PPE items.

COSTS

[27] The SIU’s conduct in this manner calls for serious deprecation by way of a punitive cost order. Its own investigator did not find irregularities in the manner in which the DSD transacted with Zeelwa. Yet, the SIU formulated a ground of review in this regard, only not to lead any evidence to establish *prima facie* that Zeelwa’s appointment was unlawful.

⁴ [2020] 3 All SA 73 (SCA) at paragraph 6

[28] The SIU also failed to discover key documents, namely the approved deviations as well as Ms Sithole investigative report. The SIU conducts litigation in terms of the SIU Act in the public interest. It is therefore paramount that it assists the Tribunal to render justice. This means bringing to the Tribunal's attention even documents that do not advance its case. It is unclear why the SIU failed to discover Ms Sithole's investigation report and the deviations. It is unlikely that Ms Sithole did not have access to the latter documents during the investigation. Ms Masinga brought them to court when she was called to testify. She had filed them with the payment pack for each payment made to Zeelwa.

[29] The SIU's mandate includes amongst others the investigation of dishonest conduct on the part of those implicated in procurement irregularities. It is important that the conduct of its officials is transparent and above reproach. When it conducts itself in the manner it has in this matter, the prejudice the SIU may cause those implicated in wrongdoing could be immense and irreparable. Zeelwa attested to the prejudice it has suffered as a result of this action when it opposed the postponement application. It has been hampered in doing further business with the State.

[30] It so happened that Zeelwa obtained access to the deviations. It would have found it impossible to rebut the SIU's case without these documents.

[31] Further, as stated in paragraph 22 above, the SIU's case on excessive prices emanated from the exercise of powers it does not have.

THE COST OF POSTPONING THE TRIAL SCHEDULE FOR 13-17 JUNE 2022

[32] The trial was postponed at the SIU's instance to afford it the opportunity to obtain a signed statement from Ms Masinga. Ms Masinga's evidence has not advanced its case. There is no reason why Zeelwa should be out-pocketed as a result of the postponement. Having set out reasons why the SIU ought to pay Zeelwa's costs of the trial on a punitive scale, it serves justice and equity to also order the SIU to pay Zeelwa's wasted costs occasioned by the postponement on a punitive scale. Such costs shall exclude the costs of Zeelwa's second witness. No witness statement was filed in respect of the said witness. Therefore, there is no basis on which to find that the witness had availed himself to testify.

ORDER

1. The first defendant's application for absolution from the instance succeeds with costs on a punitive scale.
2. The plaintiff shall pay the first defendant's wasted costs occasioned by the postponement of the trial schedule for 13-17 June on a punitive scale. Such costs shall include the first defendant's directors' costs of travelling to the seat of the Tribunal at Booyens, Johannesburg Gauteng and accommodation in Johannesburg.

JUDGE L.T. MODIBA
PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the applicant: Adv. S Zimema

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

Attorney for 1st respondent: Mr D. Mashego, Dima Mashego Attorneys

Date of hearing: 10-12 October 2022

Date of order: 13 October 2022

Date reasons were furnished: 17 March 2022