IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE SPECIAL INVESTIGATING UNITS AND SPECIAL TRIBUNALS ACT 74 OF 1996 (REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: FS01/2022

In the matter between:

SPECIAL INVESTIGATING UNIT	APPLICANT
AND	
C SQUARED CONSUMER CONNECTEDNESS (PTY) LIMITED	1ST RESPONDENT
K2013138175 (SOUTH AFRICA) (PTY) LIMITED	2ND RESPONDENT
ECKO GREEN ENVIRONMENTAL CONSULTING (PTY) LTD	3RD RESPONDENT
MISTRALOG (PTY) LIMITED	4TH RESPONDENT
PUBLIC PROTECTOR	5TH RESPONDENT

MINISTER OF TRANSPORT 6TH RESPONDENT

JUDGMENT

Summary:

Administrative law – legality review – whether public procurement contracts were awarded irregularly - consequential relief in terms of s8(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996 – whether circumstances warrant costs on a punitive scale.

MODIBA J:

INTRODUCTION

[1] The Special Investigating Unit ("SIU") seeks to review and set aside contracts for the supply of various personal protective equipment ("PPE") the Department of Transport ("DOT") concluded with C Squared Consumer Connectedness (Pty) Limited ("C Squared"), Ecko Green Environmental Consulting (Pty) Limited ("Ecko Green"), alternatively K2013138175 (South Africa) ("K Company"), and Mistralog (Pty) Limited ("Mistralog"), ("impugned contracts"; collectively, "the respondents"). If it obtains the review relief, it also seeks consequential relief. I conveniently refer to this application as the review application.

[2] To the extent necessary, the SIU also seeks an order reviewing and setting aside the Report the Public Protector ("PP Report") [1] published in May 2021 following an investigation the Public Protector conducted in respect of the impugned contracts. She found that there were no irregularities in the procurement process that led to the conclusion of the impugned contracts. Lastly, the SIU seeks condonation for bringing this

[1] Report 5 of 2021/22 by the Public Protector of 26 May 2021 titled "Closing Report on an Investigation in Connection with The Awarding of a Contract To C-Squared Consumer Connectedness (Pty) Ltd and Other Service Providers for The Supply of Personal Protective Equipment (PPE) By the National Department of Transport, As Well As Conflict of Interest Arising from the Contract".

application late. Ecko Green and K Company seek condonation for the late filing of their answering affidavits and heads of argument. I conveniently refer to the condonation applications as such. When necessary, I distinguish the condonation applications by prefixing the application with the relevant parties' name.

[3] C Squared, Ecko Green and K Company oppose the application. The latter two entities do so as joint respondents. Unless the context indicates otherwise, where I need to refer to these respondents jointly, I simply refer to Ecko Green. Where I need to distinguish K Company from Ecko Green, I refer to it by name. I conveniently refer to all opposing respondents as the respondents.

[4] Initially, Mistralog also opposed the application. It settled the SIU's claim on the eve of the hearing. The Public Protector did not enter the fray. DOT initially filed a notice to abide. It subsequently filed an explanatory affidavit which this Tribunal found extremely valuable in resolving the issues that arise in the review application.

[5] The SIU alleges that when DOT concluded the impugned contracts, it failed to comply with the applicable procurement regulatory provisions. It also makes allegations of malfeasance on the part of the sole director in Ecko Green and K Company, Ms Bhimjee.

[6] Ecko Green contends that DOT did not award any contract to K Company. Therefore, no case is made out against K Company. Since the SIU does not dispute this, I find that the contract sought to be reviewed is that DOT awarded to Ecko Green. Ecko Green denies the allegation of malfeasance on Ms Bhimjee's part. It also contends that the emergency created by the Covid-19 pandemic justified any alleged non-compliance with the applicable regulations by DOT officials. Further, since Ms Bhimjee was oblivious to DOT's non-compliance with the applicable procurement requirements, no culpability should be ascribed to Ecko Green.

[7] C Squared contends that the review application ought to be dismissed because the SIU inordinately delayed bringing it and fails to provide a full explanation for the delay. It also contends that the SIU relies on hearsay evidence of weak probative value, makes no case for its admissibility in terms of the Law of Evidence Amendment Act[2] and its case against C Squared is weak.

[2] 45 of 1998

[8] The Public Protector is an institution established under Chapter 9 of the Constitution of the Republic of South Africa[3] ("Constitution") to investigate, among others, maladministration in state institutions. On 26 May 2021, following an investigation into allegations by anonymous DOT staff concerning the procurement process that led to the conclusion of the impugned contracts, the Public Protector published the PP Report, dismissing the allegations. The SIU correctly contends that the PP Report does not prevent this Tribunal from reviewing the impugned contracts as it is not bound by the Public Protector's findings and can make its own findings on the legality of the impugned contracts. The SIU only applies to review and set aside the PP Report to the extent necessary and out of an abundance of caution.

[9] Having found that the stance the SIU takes regarding the status of the Public Protector's findings *vis a vis* the present proceedings is correct, it is not necessary for this Tribunal to consider the SIU's application for the reviewing and setting aside of the PP Report. However, it is important to express doubt whether in terms of the Special Investigating Units and Special Tribunals Act[4] ("the Act"), this Tribunal has jurisdiction over such an application.

[10] I describe the rest of the parties (excluding the Public Protector, having described her in paragraph 8 above), and briefly set out the background facts. Then, I determine condonation applications by the SIU and Ecko Green. I outline the parties' respective grounds of review and opposition. I then set out the statutory and regulatory provisions the SIU relies upon. I consider the parties' respective grounds of review and opposition against the applicable laws, regulations, and authorities, and make findings. I consider the consequential relief sought by the SIU and liability for costs. An order concludes the judgment.

THE PARTIES AND THE BACKGROUND FACTS

[11] The SIU, is a statutory body with juristic personality established in terms of s2(1)(a)(i) of the Act read with Proclamation No. R. 118 of 2001.[5] When authorised by the

[3] 108 of 1996.
[4] 74 of 1996.
[5] Published in Government Gazette 22531 of 31 July 2001.

President of the Republic of South Africa ("the President") by way of a Proclamation, it is mandated to investigate amongst others, serious maladministration in connection with the affairs of any state institution, improper or unlawful conduct by employees of any state institution, unlawful appropriation or expenditure of public money or property, unlawful, irregular, or unapproved acquisitive acts, transactions, measures, or practices having a bearing upon state property, and intentional or negligent loss of public money or damage to public property. Consequent upon such investigation, the SIU may institute civil proceedings for any relief to which a state institution is entitled.[6]

[12] C Squared, Ecko Green, Mistralog and the K Company are for-profit entities incorporated in terms of the company laws of the Republic of South Africa.

[13] The Minister of Transport ("Minister"), is cited in his official capacity as the Minister, political head, and executive authority of the DOT as envisaged in the Public Finance Management Act[7] ("PFMA").

[14] DOT concluded the impugned contracts described below:

14.1 Contracts concluded with C Squared, collectively "C Squared contracts":

14.1.1 Purchase Order No. AI–236275, valued at R 12 149 000.00, concluded on 31 March 2020.

14.1.2 Purchase Order No. AI–236277, valued at R 3 149 000.00, concluded on 3 April 2020; and

14.1.3 Purchase Order No. AI–236297, valued at R 268 515.11, concluded on 5 May 2020.

14.2 Contract concluded with Ecko Green on 3 April 2020, under Purchase Order No. AI–236278 valued at R 8 072 000.00 ("Ecko Green contract").

14.3 Contract concluded with Mistralog (Pty) on 3 April 2020, under Purchase Order No. AI–236279 valued at R 1 368 000.00 ("Mistralog contract").

[15] On 23 July 2020, the President, by way of Proclamation No. R.23 of 2020 ("Proclamation R.23"),[8] authorised the SIU to investigate allegations of impropriety which took place between 1 January 2020 and 23 July 2020 which are relevant to the

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[6] S2(1)(a)(ii) read with s4(1)(c) and s5(5) of the Act.

[7] 1 of 1999.

[8] Published in the Government Gazette 43546.

procurement of, among other things, PPEs by state institutions in terms of s2(1)(a)(ii) of the Act. The SIU investigated allegations of impropriety in the conclusion of the impugned contracts. It contends that the impugned contracts fall to be reviewed and set aside because the procurement process leading to their conclusion is fraught with irregularities. It brings this application in its right and name in terms of s4(1)(c), s5(5) and s8(2) of the Act, seeking relief to which DOT is entitled.

[16] An order by consent between the SIU and Mistralog has since been granted. In terms of the order, the Mistralog contract is reviewed and set aside. Mistralog is repaying R340,000 to DOT in monthly instalments of R29,000. This amount represents the profits it earned from the Mistralog contract as determined by agreement between Mistralog and the SIU.

CONDONATION

The SIU's condonation application

[17] The SIU instituted these proceedings 25 months after Proclamation R.23 was gazetted. It seeks condonation for the delay in bringing the application. It relies on the following factors:

17.1 The SIU investigator was assigned to investigate various other investigations together with the investigation into the impugned contracts. As a result, he did not conduct the investigation into the impugned contract on a full-time basis.

17.2 The investigation took several months. The SIU conducted it during the Covid-19 pandemic period. The investigator interviewed various DOT officials who were involved in the procurement process, obtained affidavits, procured forensic reports, and corresponded with various organs of state such as the Public Protector and Auditor General of South Africa ("AGSA"). Numerous issues arose which required the SIU to procure further evidence and undertake further investigation.

[18] C-Squared opposes the condonation application for reasons articulated in paragraph 7 above.

[19] Whether an applicant delayed bringing a review application involves a two-stage enquiry.[9] The first stage is an enquiry into the unreasonableness of the delay. If the delay was unreasonable, the court proceeds to the second stage of the enquiry to determine whether it should nonetheless exercise its discretion to overlook the delay.[10]

[20] The first stage involves a factual enquiry upon which a value judgment is made, having regard to all the circumstances of the matter. Whether the delay is reasonable is assessed on, among others, the explanation offered for the delay. Where the delay can be explained and justified, then it is reasonable. The explanation must cover the entire period of the delay. Where there is no explanation for the delay, the delay will necessarily be unreasonable.[11]

[21] Whether an unreasonable delay should be overlooked, is a flexible enquiry. It involves an evaluation of a number of factors including the nature of the impugned decision, the possible consequences of setting aside the impugned decision and whether such consequences may be ameliorated by the court's power to grant a just and equitable remedy, potential prejudice to affected parties,[12] as well as the court's duty in terms of s172(1) of the Constitution to declare conduct which is inconsistent with the Constitution unconstitutional to the extent of its inconsistency. I deal with the Tribunal's powers analogous to those superior courts enjoy in terms of s172(1) of the Constitution later in this judgment. In essence, the enquiry requires a consideration of the merits of the review application.[13]

[22] The SIU's failure to provide a full explanation for the delay in bringing the application prevents me from properly enquiring into the reasonableness of the delay. It is unclear why, regardless of all the investigator did to investigate this matter, despite the investigation taking place during the Covid-19 period, it took the SIU more than two years

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[9] *Gqwetha v Transkei Development Corporations Ltd and Others* which was adopted in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).
[10] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* (CCT91/17) [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 48.
[11] *Ibid* para 52.
[12] *Ibid* para 54.
[13] *Ibid* para 55.

to institute the application. Therefore, the SIU has not established a proper basis for this Tribunal to find that the delay was reasonable.

[23] Factors that justify the exercise of my judicial discretion to overlook the delay are present. For reasons that appear in this judgment, I make a finding of malfeasance against Ecko Green during the impugned procurement process. These findings render the Ecko Green contract reviewable. Procurement-related malfeasance constitutes a serious threat to our constitutional democracy. It often implicates the public procurement values of equity, fairness, transparency, and competitiveness entrenched in s217 of the Constitution. Procurement contracts that are awarded contrary to these values may not survive a legality review. To allow such a contract to survive a legality review would make the rule of law in this nation a mockery.

[24] Although I find that the SIU fails to make a proper case for the relief it seeks against C Squared, since that enquiry required that I traverse the case against this respondent on the merits, it is practical that I do not condone the delay against Ecko Green but condone it in respect of C Squared. It is for that reason that I determine the case against C Squared on the merits. Otherwise, I would not have overlooked the SIU's delay in bringing the application against this respondent.

Ecko Green's condonation application

[25] Ecko Green's request for condonation is unopposed. The SIU has replied to Ecko Green's answering affidavit. The review application is ripe for hearing. No party has been prejudiced by Ecko Green's late filing of its answering affidavit and heads of argument. It is in the interests of justice that the review application is considered based on all the papers filed. Ecko Green's request for condonation stands to be granted.

GROUNDS OF REVIEW AND OPPOSITION

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

26.1 non-compliance with Treasury Instruction Note 8 of 2019/2020 ("TIN 8/2019/20") and Treasury Regulation 16A4.6.4 in the following respects:

26.1.1 DOT failed to procure PPEs from suppliers listed in Annexure A to TIN 8/2019/20.

26.1.2 DOT failed to ensure that suppliers who are not listed in Annexure Ameet the following requirements prescribed in terms of TIN 8/2019/20.

(a) supply goods that comply with the National Department of Health's specifications.

(b) charge prices that are equal or lower than the prices in Annexure A, and

(c) CSD registration.

26.2 When procuring from suppliers who are not listed in Annexure A, DOT failed to ensure that the following emergency procurement requirements are followed: (a) as many competitive bids as possible are invited, (b) when circumstances do not permit the invitation of competitive bids, the accounting officers may deviate from this requirement, and (c) if an item that is not listed in Annexure A is procured, the procurement must be reported to National Treasury and in some cases, AGSA within 30 days.

26.3 The SIU further contends that DOT's decision to award the impugned contracts was irrational because:

26.3.1 DOT's Director General's discretion to award the contract to C Squared was not properly exercised since DOT appointed it notwithstanding that it has a history of failing to adequately discharge its obligations to a government department.

26.3.2 The suppliers lacked the requisite authority to supply the procured goods as they were not licenced with the South African Health Products Regulatory Authority ("SAHPRA").

26.3.3 The quotations provided by the suppliers could not be compared as they had quoted for different goods.

26.3.4 C Squared was appointed based on a recommendation for items it did not quote DOT for. Ecko Green was appointed notwithstanding that it was not recommended for appointment.

26.3.5 C Squared was not registered on CDS to supply PPEs. Therefore, when the procurement decision was made, DOT could not have satisfied itself of its capacity to supply PPEs.

26.4 The procurement decision was induced by fraud because:

26.4.1 Mr Buthelezi, the CEO of the South African National Taxi Council ("SANTACO") failed to disclose his conflict of interest in relation to Ecko Green.

26.4.2 Ecko Green misrepresented that hand sanitisers were taxi disinfectants and as a result, did not supply DOT with taxi disinfectants as ordered.

26.4.3 Ulterior motive and bad faith ought to be inferred from the wide-ranging illegalities in the appointment of the suppliers orchestrated to benefit certain members of SANTACO and its CEO.

APPLICABLE LAWS AND REGULATIONS

[27] The SIU brings this application based on the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), alternatively the principle of legality. As correctly pointed out by the opposing respondents, on basis of the Gijima principle, a PAJA review is incompetent under these circumstances.[14] I therefore determine this application based on the principle of legality in terms of s8(2) of the Act and on the authority in *Ledla*.[15] In *Ledla,*[16] the Constitutional Court held that the powers this Tribunal derives from s8(2) are wide enough to include legality reviews. Thus, non-compliance with the applicable procurement, statutory and regulatory provisions may sustain a finding that the impugned contracts were unlawfully and irregularly awarded, trump public procurement values in

[14] *State Information Technology Agency Soc Ltd V Gijima Holdings* (PTY) LTD 2018 (2) SA 23 (CC).
[15] *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* ("Ledla") (CCT 319/21) [2023] ZACC. 8; 2023 (6) BCLR 709 (CC); 2023 (2) SACR 1 (CC) (10 March 2023).
[16] *Ledla* at paragraph 64-68.

terms of s217 of the Constitution and in appropriate circumstances, may justify the setting aside of the impugned contracts and the award of appropriate consequential relief.

[28] The SIU alleges non-compliance with the following laws and regulations when the impugned contracts were concluded:

28.1 the Constitution.

28.2 the PFMA.

28.3 the Treasury Regulations.[17]

28.4 the Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA"), read with the following PPPFA Regulations ("PPPFA Regulations"):[18]

28.4.1 Treasury Regulation 16A.6.4.

28.4.2 TIN 8 of 2019/20.

The Constitution

[29] The SIU cited s195(1) of the Constitution but ultimately did not place specific reliance on this provision. S195 deals with the principles and democratic values that underpin public administration.

[30] S216(1) of the Constitution provides as follows:

> "National legislation must establish a National Treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing—
>
> (a) generally recognised accounting practice
>
> (b) uniform expenditure classifications; and
>
> (c) uniform treasury norms and standards."

[17] GN R225 published in Government Gazette 27388 of 15 March 2005.

[18] Published under Government Notice No. R. 32 of 2017 in Government Gazette No. 40553 dated 20 January 2017.

[31] S217 set out the constitutional framework for public procurement. S217(1) provides that when an organ of state in the national, provincial, or local sphere of government contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective. The below legislation and regulations make provision for such a system, thus, facilitating compliance with s217.

The PFMA

[32] The PFMA is an expansive legislation, enacted to regulate financial management in national and provincial governments; to ensure that all revenue, expenditure, assets, and liabilities of government departments are managed efficiently and effectively. It provides for the responsibilities of persons entrusted with financial management in government departments. It also provides for other related matters. Its objective is to secure transparency, accountability, and sound management of the revenue, expenditure, assets, and liabilities of government departments to which the PFMA applies.

[33] Since DOT is a government department, in terms of s3(1)(a) of the PFMA, this legislation applies to it.

[34] The SIU relies on two PFMA provisions; s76 and the definition of irregular expenditure in s1.

[35] S76 empowers National Treasury to issue regulations and instructions on how to comply with the PFMA. The SIU contends that the alleged irregularities that ground this application arise from non-compliance with the treasury regulations referenced in paragraph 28.4 above.

[36] S1 defines irregular expenditure as follows:

"'irregular expenditure' means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including—

(a) this Act [PFMA]; or…"

[37] As defined in s1, this Act includes any regulations and instructions in terms of ss69, 76, 85 or 91.

[38] Notably, ultimately, the SIU made out no case based on irregular expenditure.

The Treasury Regulations

[39] Although in its founding papers, the SIU alleged non-compliance with several Instructions issued by National Treasury, in the end, it only placed reliance on TIN 8/2019/20 read with Treasury Practice Note 8 of 2007 ("TPN 8/2007"). The latter regulates procurement in emergency situations. TIN 8/2019/20 amplifies procurement in emergency situations occasioned by the Covid-19 pandemic. The national state of disaster occasioned by the Covid-19 pandemic was declared on 15 March 2020. TIN 8/2019/20 was promulgated on 19 March 2020. It was therefore operative when the impugned contracts were concluded.

[40] Although the SIU does not rely on its provisions, I reference Treasury Regulation 16A.6.4 in 2005 Treasury Regulations because according to Ms de Villiers, the impugned procurement was based on a deviation authorised and approved in terms of this treasury regulation. The treasury regulation introduced the notion of deviating from normal procurement processes in the event of an emergency. It authorises the DOT accounting officer to deviate from standard procurement requirements in certain circumstances. 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."

Treasury Instruction Note 8 of 2019/20

[41] TIN 8/2019/20 was enacted to prevent the abuse of the supply chain management system. The mandatory nature of its provisions and the extent to which DOT failed to comply with them is highly contested in this application.

[42] The SIU has premised the review on an incorrect reading of TIN 8/2019/20. I interpret this Treasury Instruction as expounded by the Supreme Court of Appeal ("SCA") in *Endumeni Municipality*.[19]

[43] TIN 8/2019/20 was proclaimed to facilitate emergency procurement and to prevent abuse of the supply chain management system during the period of National Disaster declared because of the Covid-19 pandemic. Government departments were required to procure PPEs to manage the possible exposure of employees to the Covid-19 causing corona virus. The cost of these items would be defrayed from the department's budget allocations. When procuring PPEs, government departments were required to comply with the PFMA and the applicable emergency procurement requirements. TIN 8/2019/20 recognised that PPEs will be in high demand, leading to uncompetitive and inflated prices. To prevent this, National Treasury implemented the following measures:

43.1 It engaged Transversal Contract Suppliers ("TCSs") to prevent rogue and panic buying by ensuring continuity of supplies and negotiated prices for PPEs as set out in Annexure A: Table 1 to TIN 8/2019/20 ("Annexure A.1").

43.2 In respect of items that are not on transversal contracts ("TCs"), it sourced quotations on behalf of departments from suppliers as set out in Annexure A: Table 2 to TIN 8/2019/20 ("Annexure A.2").

43.3 Institutions that participate in TC may continue placing orders as usual.

43.4 An accounting officer of an institution that does not participate in TCs may procure items listed in Annexure A.1 from TCs without obtaining participation approval from the National Treasury Transversal Contracting Unit.

43.5 An accounting officer of an institution may order an item that are not on TCs with suppliers listed on Annexure A.2.

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[19] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

43.6 If an accounting officer sought to order an item that is not listed in Annexures A.1 and A.2, they may deviate from inviting competitive bids in cases of emergency without obtaining National Treasury approval in terms of paragraph 8.1 and 8.2 of Treasury Instruction Note 3 of 2016/17 ("TIN 3/2016/17").

43.7 The requirement in paragraph 9.2 of TIN 3/2016/17 is waived. It provides for National Treasury approval for the procurement of goods more than 15% of 15 million.

43.8 All Covid-19 related emergency procurement must be reported to National Treasury within 30 [days?] giving a description of the item, name of supplier, unit price, quantity, total price, saving when compared to Annexure A, and setting forth reasons for deviating from the items listed in Annexure A.

43.9 Where more than one supplier is listed per item, institutions may procure from any supplier that has available stock. Where an institution or provincial treasury has contract(s) in place for the same item listed in Annexure A, the institution must honour the contract and continue to procure under that contract.

43.10 Institutions must not pay for prices more than prices in Annexure A. If it experiences any challenge with ordering the required items listed in Annexure A, it must immediately seek the intervention of National Treasury's Transversal Contracting Unit.

43.11 Institutions may procure from any other supplier on condition that:

43.11.1 The items meet the specifications determined by the National Department of Health.

43.11.2 The prices are equal or lower to the prices in Annexure A.

43.11.3 The supplier is registered on the CSD.

ANALYSIS

Procurement from suppliers not listed in Annexure A

[44] It is common cause that none of the respondents are listed on Annexure A. The SIU's contention that procurement from suppliers listed in Annexure A is the default rule is not supported by the clear wording in TIN 8/2019/20. From the wording used, the requirement is not peremptory. The use of the word 'may' indicate possibility or probability.[20] This interpretation is supported by the conditions imposed when items are procured from a supplier not listed in Annexure A. Contrary to the contention by the SIU, TIN 8/2019/20 also does not require a department to first approach suppliers listed in Annexure before it resorts to procuring from suppliers not listed in Annexure A.

[45] DOT officials who were interviewed by the SIU gave conflicting reasons why DOT procured from suppliers not listed in Annexure A. According to the DOT's Director General ("DG"), DOT SCM officials struggled to procure from these suppliers due to lack of supplies. Meanwhile DOT was inundated with calls, approaches, walk-ins, and referrals from suppliers who had stock. Officials in the DG's office forwarded the details of these suppliers to SCM officials as directed by the DG. In the DOT'S explanatory affidavit, Ms De Villiers explained that suppliers listed in Annexure A were not approached because unlike the respondents, they could not supply the required PPEs within 3 to 5 days. Thus, there was no point in approaching suppliers in Annexure A. This contradiction is immaterial because contrary to the SIU's contention, approaching suppliers listed in Annexure A was not peremptory.

[46] The SIU complains that the suppliers listed in Annexure A could deliver suppliers to DOT faster than the suppliers it procured from. The SIU also complains that at most, the respondents could only provide supplies to DOT within 48 hours of order. Ecko Green did not specify its turn-around time. The respondents did not have stock when they bid for the impugned contracts. They only procured PPEs after they were awarded the impugned contracts. Ultimately, some of these suppliers delivered later than the period indicated by the companies listed in Annexure A.

[47] SIU provided no evidence, that the suppliers listed in Annexure A could have supplied PPEs between three and twenty-one days of order. The fact that this is the

[20] Merriam-Webster online dictionary.

undertaking the suppliers made to National Treasury when it engaged the suppliers does not mean that the suppliers were able to meet the undertaking when DOT ordered the PPEs.

[48] The SIU disputes that Ecko Green delayed delivering the PPEs because DOT had not informed it where to deliver the items on the basis that Ecko Green did not inform DOT when it would deliver the goods. The SIU probably only relies on Ecko Green's quotation for this assertion. It has not investigated whether Ecko Green's assertion is wrong. It did not seek a response to this assertion from any DOT official and, if it did, it did not reference it in its founding affidavit, thus failing to lay a proper basis for this allegation. Therefore, the SIU is not able to dispute Ecko Green's assertion. I accept Ecko Green's assertion based on the Plascon Evans Rule. In any event, the fact that the suppliers only supplied the procured goods after approximately three weeks of the goods being ordered is not fatal to the impugned contracts. At best, it could sustain an allegation that Ecko Green breached its contract with DOT. This allegation would not render the Ecko Green contract reviewable. A similar allegation against C Squared suffers the same weakness.

[49] According to Ms De Villiers, when it awarded the impugned contracts, DOT had no reason to believe that the respondents would delay delivering the PPEs.

[50] The fact that the suppliers only sourced PPEs after they were awarded the impugned contracts is not irregular. The SIU has not provided any authority for the requirement it seeks to impute on the respondents; that they ought to have had the PPEs in stock when they bid for the impugned contracts.

[51] The SIU's contention that C Squared supplied gloves at R511.75 when the maximum price per unit is R49.86 is unsustainable. It has provided no basis for this comparison. It simply makes this assertion without reference to product specifications and description of what constitutes a unit. In *Zeelwa*,[21] this Tribunal held that a comparison without reference to product descriptions and specifications does not sustain an allegation that DOT acquired PPEs at prices more than the maximum prices set out in Annexure A.

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

CSD Registration

[52] The SIU alleges that DOT did not source from any of the suppliers registered on CSD. Although C Squared was registered on CSD, it was not registered to supply PPEs. C Squared only added PPEs to its product offerings in June 2020.

[53] Thus, the core question that arises is whether TIN 8/2019/20 specifically required companies to be registered on CSD as PPE suppliers. TIN 8/2019/20 did not specifically require suppliers to be registered on CSD to supply PPEs. Suppliers could unilaterally update their CSD profiles to reflect that they supply PPEs. C Squared did so at various times between 22 March and June 2020. There is no basis that it was irregular for DOT to have procured from it under these circumstances.

[54] Therefore, when it awarded the contracts to C Squared, this entity was registered on CSD as required in terms of TIN 8/2019/20.

[55] The SIU alleges that when it was appointed to supply PPEs to DOT on 3 April 2020, Ecko Green was not registered on CSD. It was only registered on 22 May 2020. The company DOT found on CSD when it searched for Ecko Green is Company K. SIU alleges that Ms Bhimjee fraudulently amended the profile of Company K on CSD, misrepresenting it for that of Ecko Green. According to Ms De Villiers, when it bid, Ecko Green submitted *prima facie* proper CSD registration report. There is no way DOT could have discerned that Ecko Green manipulated the CSD as alleged in this application, to reflect that it was duly registered.

[56] Ecko Green's version is that it was approached to supply PPEs to DOT. It was subsequently awarded the Ecko Green contract, delivered adequately in terms of the contract, and accordingly paid. During March and April 2020, confusion arose regarding whether Ecko Green or K Company was registered on CSD because of administrative issues beyond the control of these entities. On the advice of National Treasury officials, changes were made to the CSD to clear the administrative confusion.

[57] In an affidavit deposed to on 17 February 2020, Ms Bhimjee alleges that she registered K Company on CSD on 27 March 2020. On 1 April 2020, she edited K Company's name on CSD and changed it to Ecko Green. On 22 May 2020, she

registered Ecko Green on CSD under a different profile. On an unspecified date in May 2020, she again edited Ecko Green's previous registration on CSD and restored it to K Company.

[58] On 30 June 2022, Ms Bhimjee deposed to a second affidavit for the purpose of clarifying what she stated in her first affidavit. There, she alleges that on 6 June 2013, she requested First National Bank ("FNB") to register a company on her behalf with the name Ecko Green Environmental Consulting. FNB accordingly registered the company with registration number 2013/093647/07. On 27 March 2020, she registered this company on CSD. On 1 April 2020, she noted that CSD was not accepting Ecko Green's registration. It indicated that the provided banking details were not matching the company name.

[59] When she enquired about this error with FNB, it transpired that when FNB registered Ecko Green, it also registered K Company. The account number issued to her as that of Ecko Green, was assigned to K Company. The bank subsequently, opened a new bank account for Ecko Green with a different account number. When she entered this account number on CSD, Ecko Green was successfully registered on CSD. Ms Bhimjee seeks to rely on an email from a FNB official which she attached as Annexure AA12 to Ecko Green's answering affidavit. The email constitutes inadmissible hearsay evidence as its author has not deposed to a confirmatory affidavit. The contents of this email also fail to satisfactorily clear the contradictions in Ms Bhimjee's first and second affidavits to the SIU.

[60] Ms Bhimjee clearly made contradictory versions under oath. In her first affidavit, she vaguely refers to administrative issues between Ecko Green and K Company as the reason why she initially struggled to register Ecko Green on CSD. However, she failed to take the SIU into her confidence regarding what those issues were. Contrary to the impression she creates in her second affidavit, she was aware of K Company's existence since 2013. It was registered on CSD. Hence, on 1 April 2020, she changed its details on CSD and replaced them with Ecko Green's. She then used this CSD registration when she submitted the quotation that led to the conclusion of the Ecko Green contract.

[61] The bank could not have registered K Company inadvertently. If it did, Ms Bhimjee would have only become aware of its existence in 2020 when she made enquiries with

FNB. Ms Bhimjee could not have been K Company's sole director since 2013. She would not have transacted on its bank account before April 2020. The bank statement she attached as annexure AA8 to Ecko Green's answering affidavit shows that on 1 February 2020, Ms Bhimjee made a scheduled payment of R1,000 from Ecko Greens' bank account to K Company. Interestingly, she also does not take the Tribunal into her confidence by disclosing the details of the account into which this scheduled payment was made. Ecko Green clearly had its own bank account when this scheduled payment was made. So, it being assigned K Company's bank account details by FNB can not be the reason why she edited K Company's CSD registration.

[62] To her answering affidavit she has attached letters purportedly issued by FNB attesting to her version that the bank account ending with number 481 is K Company's. But these letters do not reliably support her version. They do not show the position prior to April 2020 when the alleged reason for editing K Company's CDS registration arose. The letters are inconsistent with the Ecko Green's February 2020 bank statement. This statement reflects that in February 2020, FNB account with number ending 481 was held by Ecko Green. Therefore, the reason advanced by Ms Bhimjee for editing K Company's CDS registration cannot be true.

[63] Ms Bhimjee's business partner, Mr Shivambu admits that he and Ms Bhimjee edited K Company's profile on CSD in April 2020 and only registered Ecko Green on CSD on 22 May 2022. He gave no reason for the change. He therefore does not expressly support Ms Bhimjee's version.

[64] In her second affidavit to the SIU, Ms Bhimjee alleged that she edited K Company's CSD registration on the advice of National Treasury. In her answering affidavit, she alleged that the registration was edited by Tumelo Ntlabe, a National Treasury official. The only evidence to this is the use of a National Treasury email address on Annexure AA16. The email address appears to be a communal email address. It does not appear to be Mr Nltabe's dedicated email address. Mr Ntlabe's confirmatory affidavit is not attached.

[65] Ms Bhimjee provides no explanation why it became necessary to restore K Company's name on CSD and register Ecko Green when the alleged problem that led to

her editing K Company's retails on CSD had been resolved. She could have only edited K Company's details in the first place to misrepresent Ecko Green's registration on CSD. Ms Bhimjee's version is so far-fetched that no reasonable court may rely on it. I determine this question on the SIU's version.

[66] I therefore find that:

66.1 Ms Bhimjee was aware of K Company's existence when she made the electronic funds transfer referred to in paragraph 61 above. She was also aware that the FNB account number ending 481 was Ecko Green's and not Company K's.

66.2 By editing K Company's registration on CSD in April 2020 to replace it with that of Ecko Green, Ms Bhimjee misrepresented to DOT that Ecko Green was registered on CSD when this was not the case.

66.3 Mr Bhimjee's attempt to blame these contradictions on the fact that the first affidavit was prepared by the SIU investigator and based on incorrect facts is of no moment. Her second affidavit is not corroborated by documents of other persons who were purportedly involved.

66.4 When it was awarded the Ecko Green contract on 3 April 2020, Ecko Green was not registered on CSD. It was only registered in May 2020. Between 27 March and 3 April 2020, Ms Bhimjee edited K Company's CSD registration to misrepresent that Ecko Green was registered on CSD.

66.5 Clause 3.7.6 of TIN 8/2019/20 disqualified Ecko Green from being awarded the impugned contract.

66.6 The awarding of the Ecko Green contract was induced by misrepresenting that it is registered on CSD.

SAHPRA registration and compliance with NDOH specifications

[67] The SIU case regarding lack of SAHPRA registration is poorly formulated in its founding affidavit. It alleges that:

> "118 At no point did Ms de Villiers or the DG consider whether the respondent companies were registered with the South African Health Products Authorities ("SAHPRA") or licensed to supply PPE commodities that met the Department of Health's specifications.
>
> "172.1 None of the suppliers are registered with SAHPRA to provide health products. The Department could not have known that the products supplied by the suppliers complied with the National Health Department's specifications. In fact, one of the commodities, the gloves provided by C-Squared, were not fit for medical purposes."

[68] SIU repeats the latter assertion at paragraph 220.1 of its founding affidavit.

[69] The SIU conflates the National Department of Health ("NDOH") specification requirement with SAHPRA registration. It asserts that none of the suppliers were registered with SAHPRA. But this is not a TIN 8/2019/20 requirement. It also asserts that DOT could not have known that the products supplied by the respondents complied with NDOH specifications. It does not assert the basis for this assertion. It has not specified the NDOH specifications. It has not set out the specifications for the PPEs supplied by the respondents. It has also not alleged in what respect do PPEs supplied by the respondents fail to meet the NDOH specifications.

[70] In its heads of argument, the SIU inappropriately makes a completely different case regarding the respondents' alleged lack of SAHPRA registration. It contends that the NDOH specification requirement ought to be read with the Medicines and Related Substances Act 101 of 1965 ("Medicines Act") and its regulations. The Medicines Act defines a "medical device" in s1 as any instrument, apparatus, implement, machine, appliance, implant, reagent for in vitro use, software, material or other similar or related article, intended by the manufacturer to be used, alone or in combination, for humans or animals, for diagnosis, prevention, monitoring, treatment, or alleviation of disease. Therefore, PPEs are medical devices as defined.

[71] PPE is a nomenclature used to broadly refer to PPEs. PPEs ordered in terms of the impugned contracts include disinfectant sprayers, 3-ply facial masks, pendo-fog machines, sanitiser 1 Litre bottles, 3-ply surgical masks, taxi disinfectant sprayers, latex

gloves, disinfectant refill for sprayers and coveralls. In *MEC for Treasury Free State,*[22] this Tribunal held that surgical gowns are not medical devices as defined in the Medicines Act. The SIU sought the facts in that judgment distinguished from the present facts by arguing that in *MEC for Treasury Free State*, the Tribunal did not consider whether the Regulations the Minister of Health issued in June 2020 excluding certain handrubs from specified provisions of the Medicines Act[23] ("Exclusion Notice") amended the law as it hitherto applied to PPEs. It sought to rely on the Exclusion Notice to persuade the Tribunal that its decision in *MEC for Treasury Free State* was wrong and that PPEs are medical devices as defined in the Medicines Act.

[72] The SIU's reliance on the Exclusion Notice is misplaced. The Exclusion Notice excludes certain handrubs from the scope of s14 of the Medicines Act. S14 deals with registration requirements for medicines. It does not deal with registration requirements for medical devices. The SIU's case is premised on PPEs being medical devices and not medicines. Therefore, the Exclusion Notes does not support the conclusion the SIU seeks drawn.

Failure to declare conflict of interest

[73] In her explanation regarding the payment of R220, 000 that has been traced to a company associated with SANTACO's Mr Buthelezi, Ms Bhimjee claims no association to Mr Buthelezi. Her explanation is that she made this payment on Mr Shivambu's request because a company associated with Mr Buthelezi had rendered advisory services to him, and he had to pay it. He therefore used his compensation from the funds received from DOT under the Ecko Green contract for that purpose.

[74] This coincidence is far-fetched, particularly given that Mr Buthelezi is the one who provided DOT with the list of companies to be invited to provide quotations for PPEs. That a company that is on the list of suppliers SANTACO provided to DOT is awarded the tender and makes a payment to a company associated with Mr Buthelezi is a rather far-

[22] *Special Investigating Unit v MEC for Treasury Free State Province and Others* (FS01/2020) [2022] ZAST 2.
[23] Exclusion of Certain Alcohol-Based Hand-Rubs from the Operation of Specified Provisions of the Act Published under GN R721 in *GG* 43484 of 26 June 2020 (**Exclusion Notice**).

fetched version. I therefore reject Ms Bhimjee's version. In any event, this conflict of interest ought to have been disclosed to DOT when Ecko Green submitted its quotation. It was not disclosed. This omission supports a reasonable inference that had the conflict of interest been disclosed to DOT, Ecko Green would have been excluded from the bidding process.

[75] The SIU contends that Ecko Green supplied DOT with incorrect PPEs. Whereas DOT ordered taxi disinfectants, Ecko Green supplied hand sanitisers. The basis for this allegation is not set out. Ms Bhimjee insists that Ecko Green supplied taxi disinfectants to DOT as ordered. The invoice from its suppliers incorrectly reflects the product supplied. DOT never complained that Ecko Green supplied it with the wrong product. It accepted delivery without any complaint. Ms Bhimjee challenged the SIU to inspect the samples of the product it supplied which is still in its possession. The SIU did not take up the offer. The SIU clearly failed to properly investigate this issue. Ms Bhimjee's explanation is not far-fetch. I therefore accept her version.

Reporting to National Treasury

[76] According to Ms De Villiers, the impugned contracts were reported to National Treasury on 3 and 8 April 2020 and 3 June 2020 by email. She was later informed that the relevant emails reflect incorrect email addresses and were not received. This error seems to be *bona fide* and does not render the contracts impugned irregular. The emails were resent to National Treasury on 29 January 2021 and 9 February 2021. The SIU does not explain why under these circumstances the Tribunal should find that there was non-compliance with the TIN08/2019/20 reporting requirements. It does not seem to have investigated whether National Treasury accepted the DOT's belated compliance with the TIN08/2019/20 reporting requirement.

Exclusion from recommendations

[77] The SIU alleges that C Squared was appointed based on a recommendation for items it did not quote DOT for. Ecko Green was appointed notwithstanding that it was not recommended for appointment. Ms De Villers disputes this. She points to errors in the memorandum she prepared in round 2 of the procurement that could have created this impression. However, when the memorandum is read as a whole, the PPEs supplied by C Squared and Ecko Green as set out in the table of suppliers are reflected on this memorandum and correspond to the purchase orders issued in respect of the impugned contracts. The SIU does not dispute this.

Prices not properly compared

[78] Ms De Villiers explains the basis on which the prices were compared in paragraph 76 to 78 of the DOT explanatory affidavit. Several bidders were invited to bid. Ultimately, a decision to award the bids to multiple suppliers was made and approved in terms of a deviation as authorised in terms of Regulation 16A4.6.4. The SIU has not set out a proper basis on which to sustain its allegation that the deviation was irregularly approved.

Rationality

[79] The SIU alleges that the appointment of the respondents was irrational because:

79.1 they were not registered with SAHPRA.
79.2 the prices they offered were compared using incomparable factors.
79.3 Buthelezi and Ecko Green were involved in a corrupt relationship.

[80] Having found that SAHPRA registration was not prescribed, lack of SAHPRA registration does not sustain the rationality ground of review.

[81] The allegation that DOT could not have ensured that the prices offered are competitive because it compared the prices using incomparable factors is badly made without reference to the bids that served before DOT when the decision to appoint the

respondents was made. She does not even refer to the respondents' quotations. It is not this Tribunal's duty to trawl through annexures to the SIU's founding affidavit to figure out the basis for the SIU's case. The SIU's investigator has no personal knowledge of these facts as he was not involved in the bidding process. He does not seem to have interviewed DOT's officials to question them on the process followed to compare the respondents' quotation. If he did, he fails to reference their affidavits where these allegations are made The SIU also fails to meet the legal requirements for the admissibility of hearsay evidence.

[82] Earlier in this judgment, I accepted the DOT's explanation regarding the allegation that C Squared was appointed for items that it did not quote DOT and that Ecko Green was appointed when it was not recommended for appointment. These allegations are also baldly made without reference to the bids that served before DOT when the decision to appoint the respondents was made. The allegations are not substantiated. Therefore, a proper case is not made for them.

[83] The SIU's contention that it was irrational for the DG to have approved the appointment of C Squared given that he was not satisfied with its performance when it was appointed to supply goods to the office of the Premier: Free State does not render C Squared's appointment irrational. As contended by C Squared, it relates to events that occurred in 2011/2012. It does not relate to the supply of PPEs. The allegation is based on the DG's subjective views. It is not the SIU's case that C Squared is prohibited from trading with the state because of inadequate performance in a previous contract. Therefore, even if I accepted the SIU's allegation that C Squared performed inadequately in a previous contract, it does not render its appointment in terms of the C Squared contracts reviewable.

[84] Ecko Green contends that the SIU's failure to cite Buthelezi is fatal to its corruption allegations. The SIU denies this. It contends that given the nature of the relief sought, it was not necessary to cite Buthelezi. Ecko Green has put up a version regarding the corruption allegations. It must stand or fall by its version on this issue. Ecko Green's failure to disclose Ms Bhimjee's business associate's relationship with Mr Buthelezi is grossly irregular.

[85] For reasons set out above, the contract procurement process that led to the awarding of the Ecko Green contract is declared irregular and unlawful.

CONSEQUENTIAL RELIEF

[86] I proceed to determine consequential relief. On the authority in *Ledla,* this Tribunal enjoys wide powers to conduct legality reviews. The Tribunal's powers in terms of s8(2) are wide enough to include consequential relief akin to just and equitable relief which courts with constitutional jurisdiction enjoy in terms of s172(1) of the Constitution. Therefore, when determining consequential relief in terms of s8(2), I am guided by judicial authorities in respect of s172(1) of the Constitution.

[87] In *Steenkamp NO v Provincial Tender Board of the Eastern Cape*[24] the Constitutional Court explained the basis for just and equitable relief as follows:

"[29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief.27 In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances, the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."

[88] Concerning the purpose of just and equitable relief, the Constitutional Court in *Bengwenyama*[25] stated that: *"The apparent rigour of declaring conduct in conflict with the Constitution … and unlawful is ameliorated … by providing for a just and equitable remedy in its wake."*

[89] The fact that Ecko Green was awarded the contract when it was not registered on CSD as well as the fact that it failed to disclose a conflict of interest trumps the values of

[24] 2007 (3) SA 121 (CC) at paragraph 29.
[25] *Bengwenyama Minerals (Pty) Ltd and Others v General Resources (Pty) Ltd and Others* (CCT 2011 (4) SA 113 (CC).

transparency, fairness and equity set out in s217 of the Constitution. Ecko was not vetted and approved to conduct business with the state. It is highly unlikely that DOT would have contracted with it had it been aware that it was not registered on CSD. Manipulation of the CSD system to misrepresent that a bidder is registered on the CSD when it is not, and failure to disclose a conflict of interest is a serious misdemeanour that threatens to undermine the procurement system designed to promote the values in s217 of the Constitution.

[90] Allowing the Ecko Green contract to stand will undermine state efforts to curb maladministration in public procurement. It falls to be reviewed and set aside.

[91] The SIU seeks an order in terms of which Ecko Green repays the full amount DOT paid to it in terms of the Ecko Green contract. It has set out no legal basis for this relief. Ecko Green performed in terms of the Ecko Green contract. DOT is not entitled to benefit from the Ecko Green contract without due consideration simply because the Ecko Green contract falls to be declared unlawful and set aside.

[92] In the alternative, the SIU seeks an order in terms of which Ecko Green is ordered to pay to the DOT profits it earned from the Ecko Green contract in the amount of R 1 701 000.00 based on the no profit no loss principle enunciated in *All Pay 2.*[26] On the authority in *Phomella,*[27] Ecko Green disputes that in *All Pay 2*, the Constitutional Court developed the no profit no loss principle as a default principle when determining just and equitable relief. It accepts that an entity may be divested of its profits and that when exercising its discretion to do so, this Tribunal should consider the facts in each case. Notably, Ecko Green selectively relies on *Phomella*. It fails to refer this Tribunal to paragraph 24 of that judgment where the SCA observed with reference to the judgment in *Central Energy Fund,*[28] that courts have distinguished between innocent parties and parties against whom a finding of malfeasance has been made. In *Central Energy Fund*, the SCA went on to say:

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[26] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC).

[27] *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* [2023] ZASCA 45.

[28] C*entral Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2022 (5) SA 56 (SCA) ([2022] 2 All SA 626; [2022] ZASCA 54) (*Central Energy Fund*) para 43.

"The category into which a party falls has a significant impact on the appropriate just and equitable remedy that a court may grant. Parties who are complicit in maladministration, impropriety or corruption are not only precluded from profiting from an unlawful tender, but they may also be required to suffer losses."[29]

[93] The factors considered in paragraph 89 above locate Ecko Green in the category referenced in the above quotation. Ecko Green has not advanced persuasive reasons why considering these findings, it should be allowed to benefit from the profits earned from the Ecko Green contract. The findings made against Ms Bhimjee in this judgment dispel Ecko Green's contention that it is an innocent party. The fact that the Ecko Green contract was awarded more than three years ago and that it has expensed the funds it earned from the Ecko Green contract is not persuasive. It is not Ecko Green's case that the SIU's claim has prescribed.

[94] Ecko Green would have been disqualified from quoting for the Ecko Green contract as it was not registered on CSD. It is equally inappropriate for Ecko Green to have used funds earned from the Ekco Green contract for the benefit of Mr Buthelezi under circumstances were the conflict of interest between Mr Buthelezi and an Ecko Green associate's is extant. Ms Bhimjee in her capacity as the sole Director in Ecko Green ought to have declared the conflict to DOT as soon as she became aware of it. she failed in that duty.

[95] The appropriate consequential relief is one that remedies breach of implicated constitutional values. Putting the parties in the position they would have been in if Ecko Green's CSD registration was not misrepresented and the probable consequence if the conflict of interest was disclosed is the appropriate way of redressing breach of the implicated constitutional values. Without being registered on CSD, Ekco Green would not have been awarded the Ecko Green contract and would have consequently not profited from it. It is inappropriate to speculate how DOT would have reacted to Ekco Green's disclosure of the conflict of interest of its associate.

[29] At paragraph 42.

[96] In the premises, the consequential relief claimed by the SIU in the alternative stands to be granted.

COSTS

[97] The adverse findings against Ms Bhimjee and Ecko Green justify costs against this entity on a punitive scale. C Squared has not made out a persuasive case for a punitive cost order against the SIU in the event the review application against it is dismissed.

[98] In the premises the following order is made:

ORDER

1. The Special Investigating Unit's delay in bringing this application is overlooked.
2. The application for condonation by Ecko Green Environmental Consulting (Pty) Ltd ("Ecko Green") succeeds with costs.
3. The review application against C Squared Consumer Connectedness (Pty) Ltd is dismissed with costs.
4. The review application against Ecko Green succeeds.
5. The costs referred to in paragraph 2 and 3 of this order are granted on the attorney and client scale.
6. All costs granted in terms of this order shall include the costs of two counsel were so employed.
7. Ecko Green shall pay to the Department of Transport an amount of R 1 701 000.00, representing the profit earned from the Ecko Green contract, together with interest at the rate of interest prescribed in terms of s 80(1)(b) of the Public Finance Management Act 1 of 1999 as read with Regulation 11.5 of the Treasury Regulations; alternatively calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, from date of this order until the date of final payment.
8. The amount to be paid to the Department in terms of paragraph 7 above shall be paid within 30 days of this order.

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JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARENCE:

Counsel for the Applicant: Adv. N Arendse SC assisted by E Cohen

Instructed by: Ms S Zondi, Office of the State Attorney, Pretoria

Counsel for the first respondent: Adv. S Grobler SC

Instructed by: Ms L Le Riche, Pieter Skein Attorneys

Counsel for the 2nd and 3rd respondent: Adv. P Smith assisted by Adv. M Sethaba

Instructed by: Ms N Kumalo Nam- Fort Incorporated

Date of judgment: 25 October 2023

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