



**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 NUMBER: GP 19/2021

In the matter between:

<b>SPECIAL INVESTIGATING UNIT</b>	First Applicant
<b>NATIONAL HEALTH LABORATORY SERVICE</b>	Second Applicant
And	
<b>THABISO HAMILTON NDLOVU</b>	First Respondent
<b>ZAISAN KAIHATSU (PTY) LTD</b>	Second Respondent
<b>REGISTRAR OF DEEDS, PRETORIA</b>	Third Respondent
<b>BUGATTI SECURITY SERVICES AND PROJECTS (PTY) LTD</b>	Fourth Respondent
<b>VICTOR NKHWASHU ATTORNEYS INC</b>	Fifth Respondent
<b>ZAHEER CASSIM NO</b>	Sixth Respondent
<b>COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICES</b>	Seventh Respondent
<b>AKANNII TRADING AND PROJECTS (PTY) LTD</b>	Eighth Respondent

<b>HAMILTONN HOLDINGS (PTY) LTD</b>	Ninth Respondent
<b>HAMILTONN PROJECTS CC</b>	Tenth Respondent
<b>MOK PLUS ONE (PTY) LTD</b>	Eleventh Respondent
<b>ABOMPETHA (PTY) LTD</b>	Twelfth Respondent
<b>FELIHAM (PTY) LTD</b>	Thirteenth Respondent
<b>JORITANS LOGISTICS (PTY) LTD</b>	Fourteenth Respondent
<b>PERSTO (PTY) LTD</b>	Fifteenth Respondent
<b>KGODUMO MOKONE TRADING ENTERPRISE (PTY) LTD</b>	Sixteenth Respondent

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## JUDGMENT

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### Summary

**Procurement law** – review of procurement transactions and payments for the supply of personal protective equipment – non-compliance with emergency procurement procedures – remedy - *condictio ob turpem vel inustam causam* – forfeiture of preserved assets.

### INTRODUCTION

[1] The applicants, the Special Investigating Unit (**SIU**) and the National Health Laboratory Service (**NHLS**) have applied to review and set aside procurement transactions for the supply of personal protective equipment (**PPE**) between the NHLS and the fourth, ninth and eleventh to sixteenth respondents (**impugned transactions**) and payments made to these respondents in terms of the impugned transactions (**impugned payments**) on the basis that they are irregular and unlawful and therefore, unconstitutional. It also seeks consequential relief for the recovery of monies the respondents received in relation to the impugned payments.

[2] The first respondent Hamilton Ndlovu, the fourth respondent Bugatti, the ninth respondent HamiltonN Holdings, the tenth respondent Hamilton Projects, the eleventh respondent Mok Plus One, the twelfth respondent Abompetha, the thirteenth respondent, Feliham, the fourteenth respondent Joritans, the fifteenth respondent Persto and the sixteenth respondent Kgodumo are opposing the application. For convenience, I jointly refer to these respondents as the opposing respondents. I interchangeably refer to these respondents as required by the context, as fronting companies.

[3] Hamilton Ndlovu is jointly opposing the application with HamiltonN Holdings, Hamilton Projects and Feliham. For convenience, I jointly refer to these parties as Hamilton Ndlovu and the companies he represents. This reference includes Bugatti which was at all times controlled by Hamilton Ndlovu.

[4] The fifth respondent, Victor Nkhwashu Attorneys Inc (VNA Inc) abides the application and has filed an explanatory affidavit. I deal with it later in the judgment.

[5] Zaisan Kaihatsu and Akannii are not opposing the application. I deal with the case against these entities later in the judgment.

[6] Joritans is the only respondent who filed its answering affidavit timeously. Abompetha, Mok Plus One, Bugatti, Persto and Kgodumo seek condonation for the late filing of their answering affidavits. The applicants abide the Tribunal ruling on this request.

[7] Hamilton Ndlovu and the companies he represents filed their answering affidavit flagrantly late. They did not even apply for condonation. The applicants expressed a willingness to proceed regardless of the late filing of this answering affidavit. I agree that it is in the interest of justice that the application is determined on the basis of all the papers as filed.

[8] All the opposing respondents accept the applicants' version that when NHLS officials ordered PPEs supplies from the fronting companies, they failed to comply with the applicable procurement procedures. Although Hamilton Ndlovu and the companies he represents takes issue with what they allege is a delay in instituting the review application, ultimately they take no issue with the impugned transactions being reviewed and set aside for lack of compliance with the applicable prescripts. Although Hamilton Ndlovu did not answer to the allegations of fraud against him and the companies he represents *ad seriatim*, he largely denies the allegations. He also disputes as alleged by the applicants, that the impugned payments were without cause because no PPEs were delivered to the NHLS. He asserts the right to recover all the costs he and the companies he represents incurred when they supplied PPEs to the NLHS in accordance with the no profit no loss principle enunciated in *All Pay*.<sup>1</sup>

[9] The rest of the fronting companies have tendered repayment of the amounts retained or Hamilton Ndlovu paid them from funds deriving from the impugned payments. They plead that they should not be held liable to the HNLs for the full amount the applicants seek to recover in these proceedings jointly and severally with Hamilton Ndlovu and the companies he represents.

[10] I start by outlining the background facts. I deal with the question whether the applicants unreasonably delayed to bring this application. I then deal with the merits of the review application and the consequential relief, drawing guidance from the applicable legal principles and authorities. I make findings as appropriate. I conclude the judgment by making an appropriate order.

## **BACKGROUND FACTS**

[11] In early 2020, the NHLS adopted emergency procurement procedures in response to the outbreak of the Covid-19 pandemic. It centralized the procurement of PPE supplies to its Head Office. The approved emergency procurement process

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<sup>1</sup> See *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC), *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC).

entailed an RFQ procedure in terms of which the NHLS head office-based buyers contacted suppliers requesting competing quotations for the required PPE supplies.

[12] The opposing respondents submitted quotations to supply PPEs to the NHLS pursuant to which the NHLS issued purchase orders and purchased PPE from the fronting companies. Between 31 March 2020 and 29 June 2020, the NHLS made impugned payments to the fronting companies in the amount of R172 742 175.00.

[13] Some of the proceeds from the impugned payments and the assets acquired with them are subject to the interdicts granted by the Tribunal. Prior to the granting of the interdicts, SARS obtained an order in the High Court, preserving assets of Hamilton Ndlovu, HamiltonN Holdings, HamiltonN Projects, Feliham, Mok Plus One and Abompetha that all derived from the impugned transactions. The applicants have included these assets in the scope of the interdicts granted by the Tribunal. None of the respondents opposed the interdicts.

#### **DELAY IN INSTITUTING THE REVIEW APPLICATION**

[14] Although on the one hand Hamilton Ndlovu has conceded the review, on the other hand, he complains about the unreasonable delay in the institution of the review application, contending that it is fatal to the application. He complains of prejudice in the delay but has not set out the manner in the companies he represents and he have been prejudiced. In the event that the Tribunal does not uphold this point, he contends that it ought to consider it when formulating an appropriate remedy. However, he does not state what effect the purported delay ought to have on the just and equitable remedy.

[15] The review application was initiated on 06 October 2021, approximately one year and five months after the respondents were awarded the impugned transactions. It was preceded by an extensive investigation involving all the NHLS staff who effected the impugned transactions, the opposing respondents and other persons and entities who benefited from funds deriving from the impugned payments. Three interdicts to preserve assets and funds acquired from the impugned transactions and payments were obtained prior to instituting the review application.

[16] I find that the applicants did not unreasonably delay to institute the review application. Therefore, this grounds of opposition falls to be dismissed.

## **THE MERITS**

[17] Section 217(1) of the Constitution requires organs of state to contract for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The Public Finance Management Act (**PFMA**) and various procurement regulations developed in terms of section 76 of the PMFA were promulgated to give effect to section 217(1) of the Constitution.

[18] Treasury Regulation 16A6.4, regulates the procurement of goods and services in an emergency. It is resorted to when, due to an emergency, it is impractical to invite competitive bids and the accounting authority has approved a deviation from specified normal procurement processes and requirements. When approving a deviation, the accounting authority is required to record the deviation and reasons therefore. Even when procuring in terms of an approved deviation, the procurement process must still be fair, equitable, transparent and cost effective.

[19] The SIU alleges that the impugned transactions stem from an egregious abuse of the NHLS emergency procurement procedures and that the impugned transactions were carried out by fraud. Although Hamilton Ndlovu accepts the SIU's version in relation to the process followed by NHLS officials when they ordered and purchased PPE supplies from him and the fronting companies. He contends that the impugned transactions fall to be reviewed solely on the conduct of the NHLS employees. He seeks to evade accountability on the basis that he has no knowledge of internal NLHS procurement procedures. For the reasons I set out later in this judgment, I find that the emergency procurement procedures adopted by the NHLS to procure PPE to combat the Covid-19 emergency were fraudulently exploited by Hamilton Ndlovu and the fronting companies. Therefore, not only are the impugned transactions liable for review on account of non-compliance with the prescribed procurement procedures by NHLS officials, I also find culpability on the part of Hamilton Ndlovu and the fronting companies.

## **THE REMEDY**

[20] The applicants seek relief against the respondents on an alternative basis.

[21] In the event that the impugned transactions are set aside, the applicants allege that since the NHLS was impoverished and the opposing respondents enriched thereby, they are liable to the NHLS jointly and severally, in the full quantum of the impugned payments on the basis of the *condictio ob turpem vel inustam causam*, alternatively, the *condictio sine causa*, alternatively the *condictio indebiti*.

[22] The applicants contend that it is incumbent upon the opposing respondents to allege and prove the defence of non-enrichment to contradict the SIU's findings that goods corresponding to the value of the amounts paid were never received by the NHLS.

[23] In the alternative, the applicants seek an order that it is just and equitable for the respondents to repay to the NHLS the profits gained from the impugned transactions, made up of the difference between the impugned payments and the amounts they expended to acquire PPE supplies for the NHLS. Hamilton Ndlovu and the companies he represents also seek such an order. Although not specifically pleaded, it was contended on their behalf during oral argument that they ought to be afforded an opportunity to submit a statement and debatement of account. The applicants opposed this request, contending that these respondents ought to have made out a case for recovery of their input expenses in their answering affidavit. They failed to do so.

## **THE CONDICIO OB TURPEM VEL INUSTAM CAUSAM**

[24] The *condictios* relied on by the applicants are enrichment claims. To succeed under these claims, the applicants must prove that payment of money was made to the respondents, the impugned transactions and payments were either unlawful or without a cause and that the respondents were enriched.

[25] To succeed under the *condictio ob turpem vel inustam causam*, the applicants must allege and prove that the impugned transactions and payments are not only

unlawful due to non-compliance with the applicable constitutional, statutory and regulatory requirements, but that there is turpitude on the part of the opposing respondents or they are in possession of funds deriving from the impugned payments with knowledge of the turpitude.<sup>2</sup>

[26] It is common cause that the impugned payments were made. All the respondents dispute that there is turpitude on their part.

[27] Abompetha, Mok Plus One, Persto and Kgodumo have tendered the amounts that they retained or Hamilton Ndlovu paid to them after they received the impugned payments from the NHLS. Ostensibly, they concede that they were enriched by these amounts. They contend that they should not be held jointly and severally liable with Hamilton Ndlovu for the full amount claimed.

[28] Bugatti was established by Hamilton Ndlovu. He subsequently resigned as a director in Bugatti and appointed Theo Karabo Kgame (**Kgame**) whom he had mentored and later became his employee in HamiltonN Holdings. Apart from his salary as an employee in HamiltonN Holdings, Kgame did not receive any benefit from funds deriving from the impugned payments NHLS made to Bugatti.

[29] Hamilton Ndlovu has not seriously disputed the allegations of turpitude against him and the companies he represents. He has offered a long explanation regarding how he became involved in procurement for PPE supplies. It bears no relevance to the applicants' claims against him and the companies he represents.

[30] Hamilton Ndlovu was the director of HamiltonN Holdings, and his wife was the director of Feliham. He used the fronting companies to procure PPE supplies to the NHLS. Although he barely denies making false representations to any NHLS officials regarding his involvement in the fronting companies, on his own version and on the version of the fronting companies, they were dormant. He actively marketed them.

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<sup>2</sup> *First National Bank v Perry N.O.* [2001] 3 All SA 33 (A) at [25].

None of the fronting companies were in the business of or had any track record in PPE supplies. NHLS officials bent the rules to favour the fronting companies. According to NHLS officials who offered explanations regarding how these unqualified companies came to supply PPEs to NHLS, in each of the cases of the opposing respondents, an unidentified person was said to have dropped off a business card on an unspecified date and on the basis of this introduction” was invited to quote and orders placed with the fronting companies. There is no evidence anywhere on the record that the NHLS officials invited quotations or granted contracts to any other supplier on the basis of them simply dropping off a business card.

[31] On the version of Bugatti, Mok Plus One, Persto and Kgodumo, none of them submitted quotations to the NLHS or were in any way involved in the procurement of PPE supplies to the NLHS. Hamilton promised to procure tenders on their behalf. It was for that reason that they gave him control of their companies. Therefore, the directors of the fronting companies allowed Hamilton Ndlovu to use their companies as a front to do business with the NHLS. He submitted quotations on behalf of the companies. When orders were placed, he supplied PPEs on their behalf. Since he was not a director or employee of the fronting companies, he intentionally concealed his involvement in the companies. It is under these circumstances that NLHS approved the quotations submitted by these companies and issued them with purchase orders. He emptied the bank accounts of the fronting companies as soon as NHLS made the impugned payments to these companies. He has not disputed this version.

[32] HamiltonN Holdings was ostensibly invited to quote telephonically instead of by email. Its quotation was approved prior to the closing date. The impugned transactions with Joritans and Kgodumo were effected without any other bidders being invited to quote. PPEs were procured from Feliham while on the restricted suppliers’ list.

[33] On Hamilton Ndlovu’s version, his company, HamiltonN Holdings sourced PPEs and was the onward selling entity to the other opposing respondents. Therefore, Hamilton Ndlovu traded PPEs between the fronting companies as a result of which they supplied PPEs to the NHLS at excessive prices when the same goods were available from other supplies at a much lower price.

[34] Kgodumo supplied to the NHLS gloves bought from Mok Plus One for R5.10. The same gloves were available from other suppliers at R0.95c. Other bidders had not been invited to quote. There was no instruction to buyers to procure the latex gloves bought from Abompetha for R4.99. The gloves were available from another supplier at R0.70c. Gloves were purchased from Bugatti for R4.95 without comparative quotations, when they were available from another supplier for R0.70c.

[35] On the authority in *Swifambo Rail Leasing*<sup>3</sup>, these inexplicable actions by NHLS officials to benefit Hamilton Ndlovu through HamiltonN and the fronting companies justify an inference of corruption. This inference is further supported by the fact that almost 90% of the funds acquired through the impugned payments made its way to accounts held or controlled by Hamilton Ndlovu or members of his family and the bulk of the funds was spent on acquiring assets and on luxurious consumption. The SIU investigation revealed that in just a few months, Hamilton Ndlovu spent tens of millions of Rands of the funds deriving from the impugned payments on cars (R18 million), houses (R38 million), furniture and fittings for the houses (R5.8 million). He placed approximately R50m in investment accounts. He withdrew approximately R16 million as cash.

[36] While the applicants allege that the payments were made *sine causa* in that the respondents were paid without delivering PPE supplies to the NLHS, they also allege that there are delivery notes reflecting unidentifiable signatures, quantities not matching and different quantities reflected on delivery notes bearing the same reference number. They allege that there is no evidence from any of the fronting companies establishing that PPE was delivered to the NHLS in the quantities specified in the purchase orders. As a result of the corrupt involvement of NHLS officials no reliance can be placed on delivery notes signed by NHLS' officials purportedly confirming delivery of PPE supplies.

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<sup>3</sup> *Swifambo Rail Leasing (Pty) Ltd v PRASA 2020 (1) SA 76 (SCA) [23]- [24]*.

[37] Hamilton Ndlovu contends that PPE items were delivered to the NHLS. He places reliance on the finding made following an arbitration involving the NHLS Chief Financial Officer, that the impugned payments were only made after PPEs were delivered to the NLHs. The rule in *Hollington v Hewthorn*<sup>4</sup> may not be applicable under these circumstances, rendering this evidence admissible in these proceedings.<sup>5</sup>

[38] What the applicants are effectively placing in issue is whether the PPE was delivered to the NHLS in the quantities specified in the purchase orders. They should have placed evidence to this effect, showing discrepancies between what was purportedly delivered and what was actually delivered. I am unable to find on their version that there was no delivery of the PPE supplies at all. Their investigations have unearthed from the respondents' bank account payments for sourcing PPE supplies in the amount of R13 891 253.87. They have thus not established that the respondents have been enriched by this amount as on their version, this amount did not benefit the respondents. It therefore falls to be deducted from the amounts the respondents are held liable for.<sup>6</sup>

*Deal with joint and several liability of the other respondents*

[39] The SIU seeks an order holding Hamilton Ndlovu, the companies he represents, Abompeta, Mok Plus One, Bugatti, Kgodumo, Persto, and Joritans jointly and severally liable to the NLHS for the amount of R172 742 175.00. Although the payments the NHLS made to Abompeta, Mok Plus one, Kgodumo, Persto, and Joritans are undisputed, the applicants have not established that these entities were enriched by this amount. With the exception of Joritans, on their version, which the applicants do not dispute, these companies have only been enriched to the extent of the amounts they retained or Hamilton Ndlovu paid them from the impugned payments NHLS made to them. Therefore, the liability of these companies stands to be limited to the respective amounts, which they have tendered to repay to the NLHS.

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<sup>4</sup> *Hollington v F Hewthorn and Company Ltd* 1943 ALL ER 35.

<sup>5</sup> *The Law Society of the Cape of Good Hope and Heinrich Nel* (054/11) [2011] ZASCA 200 (23 November 2011) at paragraph 11.

<sup>6</sup> See Perry N.O. at fn 2.

[40] However as far as Hamilton Ndlovu and the companies he represents are concerned, the applicants have established a basis to hold them jointly and severally liable for the amount of R172, 742, 175.00, less the cost of sourcing the PPEs and less the amounts retained by Abompeta, Mok Plus One, Persto and Kgodumo. Hamilton Ndlovu controls the companies he represents (including Bugatti) and channeled funds through them for his benefit and that of his family members.

### *Joritans*

[41] Joritans was established by Mr. Mbewe with the assistance of his daughter and consultants on 01 February 2016. Its main object is to export South African products to neighbouring countries. In 2018, Mr. Lizo Maxwell Lowa (**Mr Lowa**) and Mr. Luiborn Dorn Ndlovu (**Dorn**) were appointed as Directors of Joritans. Since Mr. Mbewe and Mr Lowa are in fulltime employment with third party companies, they authorised Dorn to manage Joritans' business affairs. He also controls its bank account. To their knowledge, Joritan was not profitable. Mbewe only became aware that Dorn colluded with Hamilton Ndlovu to use Joritans to supply PPEs to the NHLS in September 2020. Dorn's conduct was therefore fraudulent and malicious on Joritans. He opened another bank account into which the impugned payments to Joritans were made. He transferred the funds into an account held in the name of Hamilton Projects.

[42] The SIU has not disputed these allegations. It has therefore not established that Joritans has been enriched as a result of the impugned payment NHLS made to it.

[43] For these reasons, Joritans is not found liable for the repayment to NHLS of the impugned payment it made to it in the amount of approximately R7 million.

*Just and equitable relief*

[44] Having found that the applicants have succeeded in establishing the liability of Hamilton Ndlovu, the companies he represents and Mok Plus One, Persto and Kgodumo on the basis of the enrichment claim, it is not necessary to enquire into the relief they seek in the alternative. Hamilton Ndlovu and the companies he represents have failed to establish that they have not been enriched. This is the case the applicants demanded them to answer in respect of the *condictio*. Under these circumstances, they are not entitled to just and equitable relief as pleaded in their answering affidavit.

**FORFEITURE OF THE PRESERVED ASSETS***The Preserved assets*

[46] The applicants have applied for the consolidation of the applications pursuant to which the interdicts referenced in paragraph 10 of the judgment were granted and the review application. None of the respondents have opposed the request. It falls to be granted.

[47] Assets currently preserved in terms of the Tribunal's interdicts include:

47.1 immovable properties registered to Zaisan Kaihatsu, a company under the control of Hamilton Ndlovu who is the real or beneficial owner of the preserved properties;

47.2 Scania Trucks registered to Akannii. The trucks were acquired by Akannii with funds paid into it by Shinjiro Group (Pty) Ltd, of which Hamilton Ndlovu is the sole shareholder. Shinjiro Group in turn received R4.77m of the total funds paid to Bugatti by the NHLS. The sole director of Akannii is Kuhlehonke Manthathi Kubheka, who was a salaried employee of HamiltonN Holdings. Akannii is thus a further fronting company. Despite ostensibly being under the control of persons unrelated to Hamilton Ndlovu, Akannii is in fact related to and controlled by him.

[48] All the respondents in the applications for interdicts have not opposed the interdicts. In terms of the interdict including the assets preserved by SARS in the scope of the Tribunal's interdict, the difference between the amounts derived from the proceeds of the assets preserved in terms of the SARS order and the amount the

relevant respondents are found liable to SARS for in respect of tax will remain preserved at the applicants' instance.

[49] The applicants have also applied to have all the assets and funds preserved under the interdicts declared forfeit to the State in terms of Tribunal Rule 26. It provides as follows:

“At the conclusion of the proceedings and on final determination of the dispute, depending on the outcome on the unlawful activities of the respondent or the defendant, as the case may be, the Tribunal may make a final order for forfeiture to the State, of the property held under a preservation order or the interdict order where the respondent has been found to have participated in unlawful activities.”

[50] Rule 26 simply regulates the procedure for declaring forfeit to the State assets preserved under a Tribunal's order. The Tribunal derives the power to grant such an order from section 8(2) of its enabling statute. It provides that:

“A Special Tribunal shall have jurisdiction to adjudicate upon any civil dispute brought before it by a Special Investigating Unit or any interested party as defined by the regulations, emanating from the investigation by such Special Investigating Unit, including the power to-

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

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

[51] The applicants preserved the relevant funds and assets to recover the amounts the relevant parties are found liable to the NLHS for in these proceedings. Having found that Hamilton Ndlovu, the companies he represents and the other fronting companies are liable to the NHLS on the basis of the *condictio ob turpem vel inustam causam*, with the exception to the funds held in the VNI trust account which I deal with below, the preserved assets and funds fall to be declared forfeit to the NLHS in terms of section 8(2) read with Rule 26.

*Victor Nkwachu Inc*

[52] VNI is an incorporated firm of attorneys. The preservation order incorporates R10 million held in the NVI trust account. VNI is not opposing the application. It filed an explanatory note on account of which the applicants no longer persist in the order they sought against VNI.

[53] The funds VNI received into its trust account, with the exception of an amount of R43 184.34, was expended on legal fees and disbursements in the defence of various matters for Hamilton Ndlovu and the companies he represents. VNA wishes to apply the remaining amount to outstanding legal fees owed to it by Hamilton Ndlovu and the companies he represents in the amount of R636 328.06. The SIU acquiesce the request.

## **PROHIBITION FROM TRADING WITH THE STATE**

[54] Abuse of the public procurement system can only be effectively abated when the infracting parties are restricted from trading with the State. On the basis of the findings made against Hamilton Ndlovu, the companies he represents, Mok Plus One, Persto, Kgodumo and Luiborn Dorn Ndlovu in his capacity as a director in Joritans in these proceedings, the NHLS is urged to invoke section 15 of the Preferential Procurement Policy Framework Act<sup>7</sup> to list these entities, their directors and shareholders on the database of restricted supplies.

## **COSTS**

[55] The applicants should not be out of pocket as a result of the legal costs they incurred to preserve assets and to recover the losses to the State as a result of the impugned transactions and payment. Given the abuse of corporate entities, tender fronting and fraud that has taken place a punitive costs order is warranted against Hamilton Ndlovu and the companies he represents. He master minded the fraudulent procurement scheme and challenged funds deriving from the impugned payments

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<sup>7</sup> Act 5 of 2000.

through these companies. They are to pay the legal costs jointly and severally on a scale as between attorney and client. Such costs should include the costs of three counsel where employed. The employment of three counsel was justified by the volume of the evidence in the matter, the complexity of the issues (particularly as regards the interim interdicts) and the number of respondents opposing the application.

## ORDER

1. In terms of Rule 28 of the Special Tribunal rules read with Rule 11 of the Uniform Rules of Court, this application is consolidated with the interim interdict application dated 24 August 2021, as supplemented by the supplementary application dated 29 September 2021 and second supplementary application dated 19 November 2021, under case number GP 19/2021.
  
2. The following decisions and related contracts between the Second Applicant (“**the NHLS**”) with the Fourth, Ninth, eleventh to Sixteenth Respondents are declared unconstitutional, unlawful and invalid and are set aside:
  - 2.1. Purchase order no. (“**PO**”) 1488970 issued to the Ninth Respondent dated 25 March 2020 for a quantity of “5000 Consumables – Direct Production” in the amount of R6 274 500.00 (R7 215 675.00 inclusive of value-added tax).
  
  - 2.2. PO 1489270 issued to the Fourteenth Respondent dated 26 March 2020 for 100 000 disposable lab coats in the amount of R6 999 000.00.
  
  - 2.3. PO 1491036 issued to the Fifteenth Respondent dated 31 March 2020 for 15 000 hair safety cap nets in the amount of R2 040 000.00.
  
  - 2.4. PO 1493290 issued to the Fifteenth Respondent dated 9 April 2020 for 2 500 000 disposable shoe covers in the amount of R13 025 000.00.

- 2.5. PO 1492408 issued to the Sixteenth Respondent dated 6 April 2020 for 25 000 lab coats white small press stud (5 in pack) in the amount of R8 000 000.00.
- 2.6. PO 1492412 issued to the Sixteenth Respondent dated 6 April 2020 for 25 000 lab coats white medium press stud (5 in pack) in the amount of R8 575 000.00.
- 2.7. PO 1492416 issued to the Sixteenth Respondent dated 6 April 2020 for 25 000 lab coats white large press stud (5 in pack) in the amount of R9 250 000.00.
- 2.8. PO 1492421 issued to the Sixteenth Respondent dated 6 April 2020 for 25 000 lab coats white extra-large press stud (5 in pack) in the amount of R9 800 000.00.
- 2.9. PO 1493387 issued to the Thirteenth Respondent dated 10 April 2020 for 1 250 000 disposable shoe covers in the amount of R7 237 500.00.
- 2.10. PO 1493667 issued to the Thirteenth Respondent dated 14 April 2020 for 1 250 000 disposable shoe covers in the amount of R7 237 500.00.
- 2.11. PO 1494196 issued to the Fourth Respondent dated 17 April 2020 for 1 750 000 powder free latex gloves in the amount of R8 732 500.00.
- 2.12. PO 1494201 issued to the Fourth Respondent dated 17 April 2020 for 1 750 000 powder free latex gloves in the amount of R8 732 500.00.
- 2.13. PO 1497020 issued to the Fourth Respondent dated 5 May 2020 for 2 000 000 powder free medical examination latex gloves in the amount of R9 900 000.00.

- 2.14. PO 1498248 issued to the Fourth Respondent dated 8 May 2020 for 2 500 000 powder free medical examination latex gloves in the amount of R12 375 000.00.
  - 2.15. PO 1498255 issued to the Fourth Respondent dated 8 May 2020 for 2 500 000 powder free medical examination latex gloves in the amount of R12 375 000.00.
  - 2.16. PO 1494297 issued to the Twelfth Respondent 17 April 2020 for 1 750 000 powder free latex gloves in the amount of R8 732 500.00.
  - 2.17. PO 1494303 issued to the Twelfth Respondent dated 17 April 2020 for 1 750 000 powder free latex gloves in the amount of R8 732 500.00.
  - 2.18. PO 1494560 issued to the Eleventh Respondent dated 20 April 2020 for 1 750 000 Nitral gloves in the amount of R8 925 000.00.
  - 2.19. PO 1494561 issued to the Eleventh Respondent dated 20 April 2020 for 1 750 000 Nitral gloves in the amount of R8 925 000.00.
3. The first, fourth, ninth, tenth and thirteenth respondent is declared liable to the NHLS to repay, and directed to pay, the sum of R172 742 175.00, less R13 891 253.87 = R158 850 921.13, including interest at the prescribed rate calculated from the date the NHLS made payment for the orders in paragraph 2, *less (i) the amounts recovered by the NHLS from each of the eleventh, twelfth, fifteenth and sixteenth respondent in terms of paragraph 4 below, and (ii) the proceeds from sale in execution of the assets forfeited to the State (after any execution steps, review or appeal proceedings) in terms of paragraphs 5 and 6 below.*
  4. The eleventh, twelfth, fifteenth and sixteenth respondent is declared liable to the NHLS to repay, and directed to pay the respective amounts adjacent to their names

in the column below, being the amounts by which they have been enriched, deriving from the payments the NHLS made to them.

Debtor Respondent	Debt Amount (Rand)
Eleventh Respondent	R157,198
Twelfth Respondent	R5,000
Fifteenth Respondent	R20,000
Sixteenth Respondent	R122,720

5. The following assets are declared forfeited to the State (“**the forfeited assets**”):

5.1. The properties and funds held by the First, Second and Fourth Respondents set out in Annexure A to the interim interdict order of the Special Tribunal of 31 August 2021 attached hereto at “A”, with the exception of item 5 of Annexure A;

5.2. The vehicles held by the Eighth Respondent set out in Annexure B to the interim interdict order of the Special Tribunal of 4 October 2021 attached hereto as “B”; and

5.3. The assets and funds held by the First and Ninth to Thirteenth Respondents set out in the interim interdict order of the Special Tribunal of 3 February 2022 attached hereto as “C”.

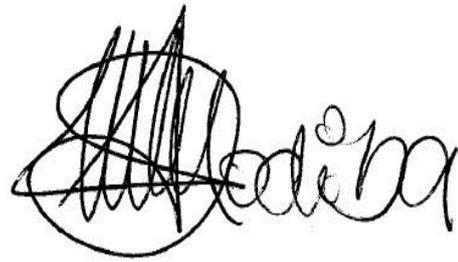
6. The Applicants must immediately take steps to realise the forfeited assets and pay the proceeds to the NHLS, to which the following orders apply:

- 6.1. The First Applicant is authorised to take all necessary steps to give effect to the order, including without limitation, signing any documents on behalf of the First, Second, Fourth, eighth to Thirteenth Respondents, necessary for, ancillary and/or incidental to transferring the forfeited assets to Mr Zaheer Cassim, who is hereby appointed as the *curator bonis* or a bank account of the NHLS, as the case may be.
- 6.2. The First, Second, Fourth, and Eighth to Thirteenth Respondents are ordered to surrender forthwith the forfeited assets (including (i) all items necessary for, ancillary and/or incidental to, the exclusive possession, control, access to and disposal of such forfeited assets and (ii) all information disclosing the exact whereabouts of such forfeited assets, if applicable) into the custody of *curator bonis* who is authorised to perform all the powers and functions prescribed by applicable law and in whom ownership of the forfeited assets solely vests on behalf of the State.
- 6.3. The forfeited assets (including all items necessary for, ancillary and/or incidental to, the exclusive possession, control, access to and disposal of such properties), shall be released, transferred to and vest in the *curator bonis* who is authorised and directed to perform all the powers and functions prescribed by applicable law, including the following:
  - 6.3.1. as soon as practically possible but not later than 120 court days after the granting of this order, sell the properties by public auction or private treaty at market price and disburse the net sale proceeds to a bank account designated by the NHLS;
  - 6.3.2. in respect of the immoveable properties with tenants, collect all rentals between the date of this order and the date on which the properties are transferred to a third party purchaser and disburse the net rental proceeds to a bank account designated by the NHLS;

- 6.3.3. any function necessary for, ancillary and/or incidental to giving effect to this order, acting reasonably; and
    - 6.3.4. upon fully implementing this order, deduct the fees and disbursements associated with performing the function of *curator bonis* from the proceeds of realizing the forfeited assets.
7. The NHLS is urged to invoke section 15 of the Preferential Procurement Policy Framework Act<sup>8</sup> to list the fourth, ninth, tenth, eleventh, twelfth, thirteenth, fifteenth and sixteenth respondents, their directors and shareholders and Luiborn Dorn Ndlovu in his capacity as a director in the fourteenth respondent on the database of restricted supplies.
8. R636 328.06 held in the trust account of Victor Nkwachu Inc (VNI) preserved in terms of the 31 August 2021 order is released back to VNI.
9. The costs of this application, including the costs reserved in respect of the orders of the Special Tribunal of 31 August 2021, 4 October 2021 and 3 February 2022, each under case number GP 19/2021, are to be paid by the first, fourth, ninth, tenth and thirteenth respondents jointly and severally (the one paying the other to be absolved) on a scale as between attorney and client including the costs of three counsel.

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<sup>8</sup> Act 5 of 2000.



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**JUDGE L.T. MODIBA**  
**PRESIDENT OF THE SPECIAL TRIBUNAL**

**APPEARANCES**

Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> applicants: Adv. B Roux SC, assisted by Adv I Currie and Adv. J Singh

Attorney for the applicant: Mr R Moodley, Cliffe Dekker Hofmeyr INC

Counsel for 1<sup>st</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> respondents: Adv. ME Manala

Attorney for 1<sup>st</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> respondents: Manala CO. Incorporated, Mr T Manala.

Counsel for 14<sup>th</sup> respondent: Adv. MG Makhoebe.

Attorney for 14<sup>th</sup> respondent: MJ Seemela Attorneys, Ms MJ Seemela

Counsel for 4<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 15<sup>th</sup> respondents: Adv. M Qofa

Attorney for 4<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 15<sup>th</sup> respondents: Ntanga Nkuhlu Incorporated, Mr M Ntanga

**Date of hearing:** 8 March 2022

**Date of judgment:** 7 June 2022

**Mode of delivery:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, uploading on Caselines and publishing on Saflii. The date and time of delivery is deemed to be 10am.