



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 2025-206281

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
20 OCTOBER 2026	
DATE	SIGNATURE

In the consolidated matters between

HETERO DRUGS SOUTH AFRICA (PTY) LTD

Applicant

and

THE MINISTER OF HEALTH

First Respondent

DIRECTOR-GENERAL: NATIONAL DEPARTMENT

OF HEALTH

Second Respondent

EMCURE PHARMACEUTICALS SOUTH AFRICA (PTY) LTD Third Respondent

MACLEODS PHARMACEUTICALS SA (PTY) LTD Fourth Respondent

INNOVATA PHARMACEUTICALS (PTY) LTD Fifth Respondent

VIATRIS HEALTHCARE (PTY) LTD Sixth Respondent

BARRS PHARMACEUTICALS INDUSTRIES (PTY) LTD Seventh Respondent

AUROBINDO PHARMA (PTY) LTD Eighth Respondent

PHARMACARE LIMITED Ninth Respondent

PHARMA DYNAMICS (PTY) LTD Tenth Respondent

(the Hetero application)

and

CIPLA MEDPRO MANUFACTURING (PTY) LTD Applicant

and

THE MINISTER OF HEALTH First Respondent

THE DIRECTOR-GENERAL: NATIONAL DEPARTMENT

OF HEALTH Second Respondent

EMCURE PHARMACEUTICALS SOUTH AFRICA (PTY) LTD Third Respondent

MACLEODS PHARMACEUTICALS SA (PTY) LTD Fourth Respondent

INNOVATA PHARMACEUTICALS (PTY) LTD Fifth Respondent

VIATRIS HEALTHCARE (PTY) LTD Sixth Respondent

BARRS PHARMACEUTICALS INDUSTRIES (PTY) LTD Seventh Respondent

AUROBINDO PHARMA (PTY) LTD Eighth Respondent

PHARMACARE LIMITED Ninth Respondent

PHARMA DYNAMICS (PTY) LTD Tenth Respondent

HETERO DRUGS SOUTH AFRICA (PTY) LTD Eleventh Respondent

SONKE PHARMACEUTICALS (PTY) LTD Twelfth Respondent

Q-SOL PHARMA (PTY) LTD

Thirteenth Respondent

PHARMA-Q (PTY) LTD

Fourteenth Respondent

(the Cipla application)

JUDGMENT

GW Girdwood AJ

Introduction

- 1 This matter concerns two consolidated review applications that were heard under case number 2025-206281: the application brought by Hetero Drugs South Africa (Pty) Ltd (the Hetero application) and the application brought by Cipla Medpro Manufacturing (Pty) Ltd (the Cipla application). The two matters were consolidated for the delivery of papers and the hearing, and were heard together over 21 to 23 September 2026.

Background : The underlying tender

- 2 Both applications arise from the same procurement process. The National Department of Health (DoH) published Tender HP13-2025ARV for the supply and delivery of anti-retroviral medicines to the DoH, seeking to secure, over a three-year period, the medicines required by the national HIV treatment programme in the necessary volumes and without interruption. The Tender's requirements addressed not only price but also regulatory compliance, local production, manufacturing capacity, past performance and security of supply.

- 3 The Tender was published on 12 July 2024. The two items in dispute in both applications are Item 13 and Item 23, being different pack sizes of the fixed dose combination of dolutegravir 50 mg, lamivudine 300 mg and tenofovir 300 mg (Item 13 being 32,310,618 estimated units of the 84/90-tablet pack size and Item 23 being 121,463,657 estimated units of the 28/30-tablet pack size). The Tender closed on 9 September 2024, by which date Cipla had submitted a bid for both items.

- 4 It is common cause that the Tender is one of the largest and most significant tenders of its kind in South Africa, central to the national anti-retroviral treatment programme and to the continuity of HIV/AIDS treatment for millions of patients dependent on the public health system. The Tender's scale, and the public interest in the uninterrupted supply of anti-retroviral medicines that it serves, is a consideration common to both applications and bears materially on the approach to be taken to remedy.

- 5 The scale of what was ultimately at stake, and the scale of what Cipla was ultimately awarded, is best appreciated from the Bid Adjudication Committee's (BAC) final recommendation for award. The BAC's recommendation, approved on 18 July 2025, records that the Tender as a whole comprised 37 items, comprising 55 line items, with a combined value exceeding R15.5 billion. Of that enormous sum, the BAC recommended that Cipla receive only 3 awards, with a combined value of R214,700,363.84, despite Cipla being a longstanding local manufacturer of anti-retroviral medicines with the demonstrated ability to supply more than half of the estimated demand for Item 13 and nearly half of the estimated demand for Item 23.

- 6 By contrast, the BAC's recommendation records significantly larger allocations to other successful bidders across the Tender as a whole: Viatris received 20 awards valued at R2,999,065,766.65; Emcure received 5 awards valued at R2,404,613,234.20; Macleods received 6 awards valued at R1,870,657,261.94; Barrs received 2 awards valued at R1,861,519,367.61; Aurobindo received 5 awards valued at R1,845,703,439.86; Pharmacare received 2 awards valued at R1,780,061,275.50; Pharma Dynamics received 1 award valued at R1,023,654,872.68; Innovata received 1 award valued at R788,994,707.16; Hetero received 5 awards valued at R678,677,173.98; Adcock Ingram received 4 awards valued at R50,823,810.94; and Sonke received 1 award valued at R5,264,885.78. On no view can Cipla's allocation, representing approximately 1.4% of the Tender's total value, be regarded as reflecting its participation and local manufacturing status across the Tender as a whole. This context informs, without determining, the Court's approach below to the materiality of the established irregularities and to the appropriate remedy.
- 7 The license relied upon by Viatris Healthcare (Pty) Ltd (Viatris) and Innovata Pharmaceuticals (Pty) Ltd (Innovata) for local manufacturer preference in respect of the Mylan Isando manufacturing site had expired on 16 July 2024, prior to bid closure. This fact, and its treatment during the evaluation process, features in the background common to both applications. At the first Bid Evaluation Committee (BEC) meeting on 15 and 16 October 2024, Viatris and Innovata were treated as relying on the Mylan Isando site notwithstanding the expiry of that license, and were given 10 working days from that meeting to submit a renewed license, failing which they would be disqualified from

consideration for local manufacturer preference. An updated license was issued by the South African Health Products Regulatory Authority (SAHPRA) on 30 October 2024 and furnished to the DoH only on 5 November 2024, well outside that 10-working-day window. At the third BEC meeting on 28 November 2024, the BEC recorded that the updated license had been submitted late, with the consequence that Viatris and Innovata did not qualify for local manufacturer preference and were not to be negotiated with as local manufacturers for the affected items. The BAC subsequently reversed that determination on 12 March 2025 and directed that Viatris be treated as a local manufacturer. Innovata was also treated as benefiting by virtue of its use of the same manufacturing site. As appears below, the Court treats the clause 6.1 licensing requirement as anterior to, and distinct from, the clause 8 local manufacturer preference regime that the BEC and BAC were addressing. On that approach, the BEC's own conclusion that the late license disqualified Viatris and Innovata from preference is consistent with, and reinforces, the Court's finding that their bids were in fact not responsive at all.

- 8 Two documents recur throughout this judgment and require brief explanation. The first is the Special Requirements and Conditions of Contract: HP13-2025ARV (the SRCC), which is the Tender's own governing document: it was published as part of the Invitation to Bid, sets out the mandatory and evaluative requirements with which every bid had to comply (including the phased evaluation process, the licensing and local-manufacturer requirements in clauses 6.1 and 8, the definition of a locally produced product in clause 3(10), and the split and multiple award mechanism in clause 21.1),

and is binding on the DoH and on bidders alike as the instrument constituting the Tender.

- 9 The second is the Evaluation Principles and Rules for Pharmaceutical and Related Items Bids (the Rules), which is a separate, internal document adopted by the DoH to structure how the BEC and BAC exercise the evaluative and recommendatory functions the SRCC and the Preferential Procurement Policy Framework Act, 5 of 2000 (PPPFA) confer on them. The Rules record, in their own stated background and purpose, that the BEC evaluates bids received on pharmaceutical tenders based on the criteria and specifications defined in the SRCC, that it has no discretionary power to amend or relax any evaluation requirement stated in the SRCC, and that the purpose of the Rules is to outline how the received bids are to be evaluated against those requirements. The Rules accordingly operationalise the SRCC: they are the mechanism by which generally stated SRCC requirements, such as the preference considerations in clause 8 and the split and multiple award criteria in clause 21.1, are applied in practice by the BEC and BAC, including the price-negotiation thresholds in Rules 2.3 and 3.2, the due diligence circumstances in Rule 10.1, and the split-award considerations in Rule 9.3 addressed in detail below. Proceeding on the basis that the Rules were of application to the Tender, it is against both documents, read together, that the BEC and BAC's conduct of the evaluation falls to be assessed.
- 10 It is convenient, before turning to the five grounds of review, to record what the Tender documents mean by "*local production*", and what the record establishes as to which bidders in substance qualified for that status. Clause 8 of the SRCC provides that preference is considered for locally produced

products where, among other things, a valid license to manufacture (issued under section 22C(1)(b) of the “*Medicines Act*”¹) for the local manufacturing site is submitted, that site is listed on the Medicine Registration Certificate (the MRC) issued by SAHPRA as being located in the Republic, the published Single Exit Price is not exceeded, the local manufacturer has demonstrated capacity to supply the required volumes, previous supplier performance is acceptable, and the bidder otherwise complies with the SRCC. Absent the necessary documentation, *“the bid will not qualify for preference as a locally produced product”*. Clause 3(10) of the SRCC defines a “*locally produced product*” more precisely, as one whose formulation and conversion processes occur within the Republic, expressly excluding the fill, finish and packaging of dosage forms.

- 11 Applying that definition, the record establishes materially different positions for each of the bidders said to enjoy local manufacturer status. Cipla itself manufactures Items 13 and 23 in their entirety, including formulation and conversion, at its own licensed facility in KwaZulu-Natal, and its qualification as a local manufacturer in terms of clause 8 is not in dispute. Viatris's position requires particular attention: its PBD1 Authorisation Declaration answered ‘No’ to the question whether it was sourcing the tendered products from a third party, yet its bid also included correspondence from Mylan Laboratories Limited, India, addressing the supply of the same products, and Viatris in fact relied on the Mylan Isando site, a facility within the same corporate group, for the local manufacturing component of its Item 13 and Item 23 offer, in

¹ Defined as such in clause 3(16) of the SRCC as the Medicines and Related Substances Control Act, 1965.

circumstances where the manufacturing license for that site had expired before bid closure, as set out below under Ground One. Innovata relied on the same Mylan Isando site, and the same license chronology as Viatris, but its own PBD1 Authorisation Declaration answered 'Yes' to third-party sourcing, identifying both Mylan Pharmaceuticals (Pty) Ltd (the Isando entity) and Mylan Laboratories Limited, India, as manufacturer and packer of the relevant products. Aurobindo, by contrast, relied on WRAPSA as a third-party South African contract manufacturer performing formulation and conversion under contract. Barrs relied on an arrangement involving Emcure and a subsequently varied regulatory registration reflecting the addition of Barrs' own Ndabeni facility as a manufacturing site.

- 12 Whether each of Barrs and Aurobindo actually qualified for local manufacturer status by reference to the clause 8 and clause 3(10) definitions, rather than merely having submitted the required documentary checklist, is addressed under Ground Three below. Viatris and Innovata's position is addressed separately under Ground One below, on the narrower basis that neither held a valid manufacturing license for the Mylan Isando site at bid closure. For the reasons given there, it is unnecessary, and on the papers not possible, to resolve the further and disputed question whether the manufacturing activity performed at that site would otherwise have satisfied the clause 3(10) definition.
- 13 Following further BEC and BAC meetings between April and July 2025, the DoH issued a Contract Circular on 20 August 2025 announcing multiple awards of Items 13 and 23 among several suppliers, being the third to tenth respondents in the Cipla application. No award was made to Cipla in respect

of either item, and Hetero was excluded from the award in respect of both items.

- 14 The successful bidders and their respective allocations under the Contract Circular may be summarised as follows. In respect of Item 13, awards were made to Emcure, Macleods, Viatris, Innovata, Barrs, Aurobindo, and Pharmicare, in proportions determined by the SRCC clause 21.1 split formula applied to their respective final scores, Emcure and Macleods ranking as the two highest-scoring bidders. In respect of Item 23, awards were made on a similar multi-way split among the same entities, including Pharma Dynamics, with the volumes and proportions again determined by application of the clause 21.1 formula to each bidder's final score, subject to the adjustment reducing Innovata's volume to reflect its recorded poor (prior) performance. Cipla, by contrast, was awarded no volume under either item, despite being recognised as a local manufacturer and engaged in price negotiations. The reason proffered was that Cipla's final price after price negotiations was, in respect of both items, more than 10% higher than that of the highest-scoring bidder, and the DoH treated that 10% differential as placing Cipla outside the pool eligible for inclusion in the clause 21.1 split altogether, rather than as one factor among the several the clause itself identifies. Accordingly, Cipla was excluded from the application of clause 21.1. As explained later, this was a material error: the DoH's approach conflated the 10% figure used elsewhere as a price-negotiation target for local manufacturers with an undocumented, self-standing threshold for exclusion from the split-award pool, a conflation addressed in detail under the heading "*the local manufacturing/production issue*" below.

Post-award developments common to both applications

15 Implementation of the Tender took effect on 1 December 2025. Shortly thereafter, on 10 December 2025, Innovata and Barrs Pharmaceuticals Industries (Pty) Ltd (Barrs) entered business rescue. On 12 December 2025, the DoH announced that Barrs was out of stock in respect of Items 13 and 23 and approved the supply of an alternative product until March 2026. On 23 January 2026 a press report indicated that Avacare South Africa and its subsidiaries, including Barrs and Innovata, had failed to notify the DoH of their business rescue proceedings and were unable to meet their tender obligations. Innovata's evidence is that it exited business rescue on 23 February 2026 and was therefore no longer under business rescue by the time this matter was heard in September 2026. Innovata attributes the temporary supply disruption between December 2025 and mid-February 2026 to its upstream supplier's annual factory shutdown rather than to the business rescue itself, and records that it communicated proactively with the DoH about the supply position throughout that period. Barrs' business rescue, by contrast, concluded only on 27 August 2026, when a notice of substantial implementation was registered, terminating its business rescue shortly before the hearing. These post-award events form part of the factual matrix common to both applications, in particular insofar as they bear on the security-of-supply considerations.

The Hetero application

16 Hetero launched a two-part urgent application on 3 November 2025, comprising a two-part challenge to the Tender and the subsequent award. In

Part B of its application, Hetero sought, among other relief, to review and set aside the DoH's decision to exclude it from the award in respect of Items 13 and 23, together with an order remitting the bids for those items for re-evaluation.

- 17 Following the launch of the Hetero application, a case management meeting was scheduled for 20 November 2025 to discuss its further conduct. Cipla, which had by then indicated its intention to launch its own review application, was granted leave to attend that case management meeting, which was held before Potterill ADJP. At that meeting, timelines were agreed for delivery of the record of the impugned decision by the State respondents, and for the date by which Cipla was to launch its own review application following receipt of the record.
- 18 Hetero subsequently delivered a notice of set down in respect of its review application, in accordance with the applicable directive, but it has not substantively prosecuted that application. The application was opposed by the Hetero respondents. Hetero's attorney appeared at the commencement of the hearing on 21 September 2026, tentatively suggesting that counsel might be *en route*. In the event, there was no appearance by counsel for Hetero at any stage during the hearing from 21 to 23 September 2026.

The Cipla application

- 19 The State respondents failed to deliver the Rule 53 record of the impugned decision by the deadline agreed at the 20 November 2025 case management meeting, and a further case management meeting was convened before Davis ADJP on 3 February 2026. At that meeting, Cipla was directed to issue

its own review application using Hetero's case number, and the Hetero and Cipla applications were consolidated, both for the delivery of papers and for the hearing. A confidentiality regime was also agreed at that meeting, under which the confidential record could not be disclosed beyond the parties' legal representatives and independent experts without further directions of the Court.

- 20 Cipla instituted its review application on 12 February 2026. By its notice of motion, Cipla sought an order, among other things, declaring unlawful, irrational, unreasonable and/or unconstitutional, and invalid, the DoH's decision to award Items 13 and 23 to the third to tenth respondents and to exclude Cipla (the impugned decision); reviewing and setting aside the impugned decision; and remitting the impugned decision to the DoH for re-evaluation. Cipla's application is brought primarily under the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) and, in the alternative, under the principle of legality.
- 21 Cipla's founding affidavit identifies Cipla as a longstanding local manufacturer of pharmaceutical products, including anti-retroviral medicines, with a record of substantial domestic investment in manufacturing capacity, and situates its complaint within a broader theme: that bidders relying on materially different, and in places internally inconsistent, manufacturing and sourcing arrangements were not evaluated against a single, consistently applied standard for local manufacturer status.
- 22 Cipla's underlying grievance is that despite being a long-standing local manufacturer of anti-retroviral medicines with an established record of reliable

supply to the public sector, it was excluded altogether from the awards of Items 13 and 23, while bidders whose local-manufacturing status was, on Cipla's case, erroneously or inconsistently conferred, and whose own performance and security-of-supply records were markedly less favourable, were included in the multiple awards for both items.

Grounds of review

- 23 Cipla's founding and supplementary founding affidavits traversed a wide range of complaints concerning the conduct of the Tender, framing the ultimate constitution of the Item 13 and Item 23 split-award pools as irrational. It is sufficient to identify the five discrete grounds of review that remained live at the conclusion of argument, and to determine each in turn. Cipla's complaint about the overall constitution of the split-award pools is not treated as a further, independent ground, but as the cumulative consequence said to follow from the five grounds below: if one or more of those grounds is established, the pools constituted on the basis of the resulting scores and classifications cannot stand to that extent, and the appropriate remedy is addressed once each ground has been determined.
- 24 The five grounds of review that remained in dispute are as follows: first, that Viatris and Innovata's bids were non-responsive and ought to have been disqualified for non-compliance with the peremptory requirement in clause 6.1 of the SRCC to submit a *valid license to manufacture or import medicine* by bid closure; second, that Innovata ought to have been excluded from consideration for the Item 23 award on account of its poor past performance; third, that the conferral of local manufacturing status on Barrs and Aurobindo

was irregular; fourth, that Innovata and Barrs failed properly to substantiate the historically disadvantaged individual (HDI) empowerment points awarded to them; and fifth, that the DoH failed to investigate whether Barrs and Innovata prepared their bids independently of one another. Each of these grounds is addressed below, together with the ground or grounds of review under section 6 of PAJA on which it is said to be reviewable, mindful that where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative.²

Basis of opposition in the Cipla application

- 25 The Cipla application was opposed by the State respondents, Macleods, Innovata, Viatris, Aurobindo and Pharma Dynamics. In broad terms, the State respondents contend that Cipla's five grounds of review disclose no reviewable irregularity that was material to the outcome, and that the local-manufacturer treatment of Viatris, Innovata and Aurobindo conferred no legally cognisable advantage capable of impugning the award, save that Innovata was erroneously afforded preference in respect of Item 13, an error they contend was immaterial because Innovata would in any event have outscored Cipla.
- 26 Innovata's position is that its bid complied with the tender requirements and was properly scored and awarded, and that the manufacturing chain, regulatory status, ownership structure and related enterprises which Cipla

² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), par 27

contents were not before the DoH were in fact disclosed in its bid and considered before award. Innovata further contends that Cipla no longer alleges collusion with Barrs, that it outscored Cipla independently of the matters raised in the review, and that, if any error is found, the just and equitable remedy is to preserve the awards to maintain uninterrupted supply.

- 27 Viatris contends that its bid was responsive notwithstanding the expiry, before bid closure, of the manufacturing license for the Mylan Isando site: the expired license and the pending renewal were disclosed in the bid, the DoH sought and obtained further regulatory information, and the tender's clause 6.1 licensing requirement for local manufacture is, on a proper interpretation, relevant only to local-manufacturer preference rather than to threshold responsiveness. Viatris further contends that the DoH's treatment of the license chronology was rational and consistently applied, and that, even if a discrete irregularity is found, it does not warrant setting aside its awards given the absence of a causal link and the public interest in continuity of supply.
- 28 Aurobindo does not address the merits of Cipla's grounds of review, confining its opposition to remedy. It contends that, even if invalidity is established, the Court should decline to set aside the existing awards, or in the alternative should carefully tailor any relief, having regard to the public interest in uninterrupted anti-retroviral supply, the extensive implementation of the tender since 1 December 2025, and Aurobindo's reliance and prejudice as an innocent successful tenderer that has committed manufacturing capacity, stock and long-term supply arrangements to performance of the award.

- 29 Pharma Dynamics, whose opposition was confined to the Item 23 award, contends that Viatris' submission of an expired local manufacturing license did not render its bid non-responsive because, on a proper interpretation of clauses 6.1 and 8 of the SRCC, a valid local manufacturing license bears only on entitlement to local-manufacturer preference and not on threshold responsiveness. It further contends that local manufacturer status carried only a limited benefit, being an invitation to price negotiations, and that it did not otherwise affect bidder selection or the split of the Item 23 award, such that any established irregularity was immaterial to the outcome and the award should not be set aside or should be remitted only on a narrow basis. In respect of the local manufacturing status of Barrs and Aurobindo, and the HDI points awarded to Barrs, Pharma Dynamics does not dispute that the DoH was required to apply the same substantive standard to each bidder's manufacturing arrangement, but contends that the DoH did so, and that in any event any resulting irregularity would be immaterial to the outcome and capable of correction by a narrow remittal confined to the recalculation of the Item 23 split.
- 30 Macleods contends that none of Cipla's grounds of review identifies any irregularity in the evaluation, negotiation or inclusion of Macleods' own bid, and that Macleods is accordingly an innocent tenderer. It contends that Cipla has not shown any alleged irregularity concerning Innovata, Barrs, Viatris or Aurobindo to be material, and that even if such an irregularity were established, it would not have altered Cipla's own ranking on either item, since Cipla remained the highest-priced and lowest-ranked bidder among those considered. Macleods further contends that, if the Court nonetheless finds the

awards constitutionally invalid, the balance of convenience and the public interest in uninterrupted anti-retroviral supply favour a just and equitable remedy under section 172(1)(b) of the Constitution that preserves its unimpugned award.

The local manufacturing/production issue

31 The statutory preference-point system under the PPPFA³ allocates points only for price and for the specific goals identified under section 2(1)(d) of the Act. It does not allocate any points for "*local production*", and none were allocated for that purpose in the Tender. The real question is a different one:

³ Section 2 reads:

2 Framework for implementation of preferential procurement policy

(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) A preference point system must be followed;

(b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;

(c) any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;

(d) the specific goals may include-

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* 16085 dated 23 November 1994;

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and

(g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.

(2) Any goals contemplated in subsection (1) (e) must be measurable, quantifiable and monitored for compliance.

(emphasis added)

whether the multiple awards made in respect of Items 13 and 23, and the BEC and BAC's approach to local manufacturers under clause 21.1 of the SRCC and Rule 9.3 of the Rules, were a lawful and rational exercise of the discretion conferred by section 2(1)(f) of the PPPFA to award to a tenderer other than (or in addition to) the highest scorer on "*objective criteria*". Cipla raise this point, contending that the DoH did not apply the same substantive standard across bidders in determining entitlement to local-manufacturer treatment and that the record does not disclose an authorised, coherent and consistently applied basis for the preference accorded. For the detailed reasons that follow, I find that the BEC and BAC did not consistently keep the section 2(1)(f) objective-criteria discretion analytically distinct from the (non-existent) local-production points claim, and that Rules 2.3 and 3.2, to the extent they were treated as themselves conferring a preference going beyond the price-negotiation mechanism described below, strayed beyond what section 2(1)(f) of the PPPFA permits.

The statutory framework

- 32 The framework begins with section 217 of the Constitution. Section 217(1) provides that when an organ of state contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Section 217(2) provides that subsection (1) does not prevent organs of state from implementing a procurement policy that provides for categories of preference in the allocation of contracts and for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. Section 217(3) then provides that national legislation must prescribe a framework within which the policy

referred to in section 217(2) must be implemented. That national legislation is the PPPFA.

- 33 The PPPFA's long title records that it is intended to give effect to section 217(3) of the Constitution by providing a framework for implementing the procurement policy contemplated in section 217(2). Section 2(1) of the PPPFA provides that an organ of state must determine its own preferential procurement policy and implement it within the framework set out in that section.

Section 2(1) of the PPPFA: the points system

- 34 Section 2(1) of the PPPFA provides that an organ of state must determine its preferential procurement policy and implement it within a prescribed framework, and that a preference point system must be followed. Section 2(1)(b)(i) provides that for contracts with a Rand value above the prescribed amount, a maximum of 10 points may be allocated for specific goals contemplated in sub-section (d), provided that the lowest acceptable tender scores 90 points for price. Section 2(1)(b)(ii) provides the converse for contracts at or below the prescribed amount: a maximum of 20 points for specific goals, provided that the lowest acceptable tender scores 80 points for price. Section 2(1)(c) requires that other acceptable tenders which are higher in price score fewer points on a pro rata basis, calculated in accordance with a prescribed formula. Clause 7.3 of the SRCC confirms that the 90/10 preference point system will be applied in the Tender.
- 35 Section 2(1)(d) then defines what the "*specific goals*" may be: contracting with persons, or categories of persons, historically disadvantaged by unfair

discrimination on the basis of race, gender or disability; or implementing the programmes of the Reconstruction and Development Programme (RDP) as published in Government Gazette No. 16085 dated 23 November 1994. Section 2(1)(e) requires that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender, and that it be measurable, quantifiable and monitored for compliance. This is not an abstract requirement in the Tender: the invitation to tender itself, in the SRCC, specifies only two claimable specific goals: (1) HDI empowerment (with claimable points for franchise history, gender and disability) and (2) the *"promotion of South African owned enterprises (Ownership held by South Africans in bidding enterprise)"* as the selected RDP goal, and sets out the claimable points for each in a table under the heading *"HDI AND RDP GOAL POINTS CLAIMABLE FOR THIS TENDER"*. *"Local production"*, as such, does not appear anywhere in that specific-goals table, confirming that it is not a category for which points were, or lawfully could have been, allocated under section 2(1)(d) in the Tender. The points system is therefore overwhelmingly weighted to price, at 90% in a contract of this size, with the residual 10% available only for the two specified goals actually recorded in the invitation to tender.

- 36 Section 2(1)(f) is the critical provision for present purposes: the contract must be awarded to the tenderer who scores the highest points, unless objective criteria, in addition to those contemplated in paragraphs (d) and (e), justify awarding it to another tenderer. This is the only textual basis in the PPPFA for departing from a strict points-ranking award, and it operates on *"objective*

criteria" that, by definition, are other than the specific goals for which points are scored.

The 2022 Preferential Procurement Regulations and the applicable point system

- 37 Regulation 5 of the Preferential Procurement Regulations, 2022, made under section 5 of the PPPFA, prescribes the 90/10 preference point system for the acquisition of goods or services with a Rand value above R50 million. Given that the estimated value of the Tender is in the order of R15 billion, materially above that threshold, the 90/10 system prescribed by regulation 5, and not the 80/20 system applicable only to contracts at or below R50 million, confirms what section 2(1)(b)(i) of the PPPFA already establishes: price counts for 90 of the available 100 points, with no more than 10 points available for the specific goal specified for the Tender.

No points for local production

- 38 It follows from the statutory scheme itself that the debate about the extent of any "*preference*" for local manufacturing cannot be a debate about the allocation of points, because no points were, or lawfully could have been, allocated under section 2(1)(d) for local production as a specific goal in the Tender. On the record, the advantage extended to bidders classified as local manufacturers took the form of an invitation to participate in price negotiations aimed at bringing their price within 10% of the highest-scoring bidder, not a separate award of preference points. Pharma Dynamics submit that the only potential benefit enjoyed by a local manufacturer in selection for award was indirect, derived from the invitation to negotiate on price, and that if a local manufacturer reduced its price the resulting increase in its price score (and

not any separate preference) fed into the final points on which selection for award was based. I accept that description of the mechanism of Rules 2.3 and 3.2, under which Rule 2.3 recommends award to a local manufacturer only where its offer does not exceed 10% of the price of the highest scoring bidder, and Rule 3.2 recommends price negotiations with local manufacturers with the same 10% goal: both operate on price, which is scored under section 2(1)(b) and (c) of the PPPFA, not on a separate preference-point allocation under section 2(1)(d). It would, however, be wrong to treat that mechanism as if it were itself the source of a lawful local-manufacturer preference independent of section 2(1)(f). Rules 2.3 and 3.2 are internal guidelines. They cannot themselves create a power to prefer local manufacturers that the PPPFA does not confer. Their only lawful operation is as a practical mechanism for inviting local manufacturers to negotiate price, the outcome of which then feeds into the ordinary price score under section 2(1)(b) and (c). To the extent the BEC or BAC treated the Rules as conferring any additional or free-standing preference beyond that price-negotiation mechanism, that would not be sourced in, and would go beyond, the objective-criteria discretion in section 2(1)(f) of the PPPFA.

- 39 Local manufacturing status becomes relevant at a further, distinct stage: how a split or multiple award is divided between successful bidders once they have already been selected for award on the basis of their final scores. This is a further application of the same section 2(1)(f) objective-criteria discretion at a later stage of the same evaluation, extending to a structured allocation among several tenderers where objective criteria additional to the points-based specific goals justify it. Clause 21.1 of the SRCC is the Tender's articulation

of that discretion for the split-award context, and local manufacturing status is capable of forming part of that objective-criteria assessment, through the price mechanism and through the clause 21.1 factors of capacity, security of supply and past performance, without displacing or constraining the discretion itself. Pharma Dynamics argue that this is evident from the minutes of the BEC's fifth meeting and the Final Recommendation for Award, which show the recommended Item 23 split was based on the clause 21.1 formula, with an adjustment to reduce Innovata's volume "*due to its poor performance*", and that local manufacturing was by contrast taken into account as a separate consideration only for Items 4, 16 and 42, which are not at issue in the Cipla application. That stage is governed by clause 21.1 of the SRCC and by Rule 9.3, addressed below, and is analytically distinct from the section 2(1)(d) points system for the reasons given above.

Clause 21.1 of the SRCC as the section 2(1)(f) "*objective criteria*"

40 Clause 21.1 of the SRCC ("*Split and Multiple Awards*") records that the DoH reserves the right to issue split or multiple awards, where necessary, to facilitate security of supply, and identifies the following considerations to be taken into account when contemplating a split or multiple award:

- Source of API and manufacturing site;
- Capacity to meet expected demand as per published estimates in the Bid Response Document;
- Estimated volume to be supplied;
- Risk to public health if the item is not available;
- Past compliance of the bidder with contractual obligations; and
- The Minimum Order Quantity (MOQ) for split or multiple awards will be negotiated and aligned to the smallest acceptable value.

- 41 These are precisely the character of criteria that section 2(1)(f) of the PPPFA contemplates: they are objective, they are additional to the specific goals contemplated in subsections (d) and (e), and they are capable of justifying an award structure (here, a split or multiple award, and the proportions of such a split) that departs from a simple award of the whole contract to the single highest-scoring tenderer. Clause 21.1 further prescribes the mechanics of the split: a fixed percentage-split table applies where two bidders share an award, calibrated to the difference in points scored between them, and, where a split of three or more bidders is contemplated, a formula is applied to the bidders' total scores ($\% \text{ Split} = T1/(T1+T2+T3)$, where T1, T2 and T3 are the scores of the highest, second-highest and third-highest scoring bidders respectively). The formula does not adjust or re-weight a bidder's underlying score: T1, T2 and T3 are simply the final scores, as already calculated under the section 2(1)(b) to (d) points system, of the bidders selected for the split, and the formula allocates the volume of the award between those bidders rather than altering their scores.
- 42 On this analysis, clause 21.1 is not an alternative or supplementary preference mechanism operating outside the PPPFA. It is the tender document's articulation of the section 2(1)(f) discretion, giving the BEC and BAC an objective, pre-specified basis on which to structure an award other than a single award to the highest scorer, where security of supply and the other listed factors warrant it. Were the formula instead to operate by adjusting bidders' underlying points or scores, that would be *ultra vires* the PPPFA, since section 2(1)(f) permits a departure from an award based on ranking, not a recalculation of the points on which that ranking rests. A local

manufacturer accordingly benefits within the formula only indirectly, through the price reduction it achieves under Rules 2.3 and 3.2, which raises its price score and therefore its T-value. The formula itself draws no distinction between a local and a non-local bidder. Where the BEC instead wishes to depart from the formula's arithmetical outcome in favour of a local manufacturer, Rule 9.3.3 supplies the mechanism: it permits the BEC to recommend a percentage split in preference for the local manufacturer and an alternative bidder without applying the formula at all, confirming that such a departure is itself an exercise of the section 2(1)(f) discretion, not a recalculation of scores.

- 43 The status of the Rules requires comment. The State respondents and Viatrix contend that the Rules, as a document said to be extraneous to Cipla's inclusion in the Rule 53 record, do not bind the DoH, and that their status is at best persuasive rather than legally determinative of how the BEC and BAC were obliged to act. I do not accept that the Rules can simply be put to one side on that basis. The adoption of policy guidelines by state organs to assist decision-makers in the exercise of discretionary powers has long been accepted as legally permissible and eminently sensible, particularly where the decision in question is complex and requires the balancing of competing interests, the only limitations on the application of such a guideline are that it must be compatible with the enabling legislation, must not be applied rigidly and inflexibly, and that those affected by it should be aware of it.⁴ The question here, however, is not whether the bidders were aware of the Rules,

⁴ *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA) at para 19

but whether the BEC and BAC, as the decision-makers who adopted and relied on the Rules to structure their own discretion, were bound to apply them consistently. The respondents do not dispute that the Rules were in fact adopted and applied by the BEC in reaching its recommendations, and it is on that basis, rather than by reference to bidder awareness, that the Rules are treated below as applicable to the BEC and BAC's conduct.

- 44 Applying that guidance, and proceeding on the basis that the Rules applied to the Tender, the Rules are, in substance, a set of internal guidelines adopted by the BEC and BAC to structure the exercise of the evaluation and award discretion conferred by the SRCC and by section 2(1)(f) of the PPPFA. They are not themselves a separate source of binding legal obligation independent of the Tender documents, and nothing in the Rules can extend the DoH's powers beyond what the SRCC and the PPPFA permit. Properly applied, however, they are a legitimate aid to interpreting how the BEC and BAC in fact exercised the SRCC discretion, including under clause 21.1 and Rule 9.3, and the DoH could not depart from them arbitrarily or apply them inconsistently between similarly placed bidders, as the factual findings in Grounds One, Two and Three illustrate.

Rule 9.3.1 : "and/" or "and/or" debate

The text

- 45 Rule 9.3 of the Rules provides, under the heading "*Where it is agreed to split the award*": (9.3.1) "*the highest scoring bidders and/ local manufacturers will be considered for award*"; (9.3.2) in cases where the percentage split is 90/10 or 80/20 the BEC may recommend a percentage split of 70/30 or any other

ratio to ensure security of supply; and (9.3.3) to give preference to the local manufacturer, the BEC may recommend a percentage split in preference of the local manufacturer and alternative bidder without applying the formula. Cipla argues for a conjunctive reading in 9.3.1 that the BEC could consider both the highest-scoring bidders and local manufacturers, and recommend a percentage split favouring a local manufacturer without applying the ordinary formula.

- 46 During argument, counsel for Pharma Dynamics submitted that the words "*and*" in Rule 9.3.1 should properly be read as "*and/or*", such that the highest scoring bidder(s) and/or local manufacturers are considered for a split award, rather than the highest scoring bidder(s) and local manufacturers necessarily and cumulatively. This involves an inquiry as to what these words mean, properly interpreted.

Applying the unitary interpretive method

- 47 Applying the process of interpretation as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) to Rule 9.3.1 yields only one sensible outcome: "*and*/" must be read as "*and/or*":
- 48 Text: The typography of Rule 9.3.1 "*and*/" immediately followed by "*local manufacturers*" is, on the face of it, an incomplete familiar grammatical conjunction. "*And/or*" is a standard drafting tool precisely because it signals that either or both of the stated alternatives may apply. A truncation to "*and*/", without the trailing "*or*", bears every hallmark of a typographical omission rather than a deliberate drafting choice to impose a conjunctive, all-or-nothing requirement.

- 49 Context: Rule 9.3.1 does not stand alone. It is immediately followed by Rule 9.3.2, which addresses adjusting the percentage split (from 90/10 or 80/20 to 70/30 or another ratio) "*to ensure security of supply*", and Rule 9.3.3, which permits the BEC to recommend a split "*in preference of the Local Manufacturer and alternative bidder without applying the formula*" "*to give preference to the Local Manufacturer*". That structure presupposes that the highest scoring bidder and the local manufacturer may, in a given case, be different tenderers, and that the BEC retains a discretion either to split the award between them (9.3.1 and 9.3.3) or to adjust the ratio for supply security (9.3.2). A conjunctive reading of "*and*" in 9.3.1 requiring that the highest scoring bidders and local manufacturers always be considered together, cumulatively, for every split award would collapse this structure. It would mean that a split award could never be made to the highest scoring bidders alone, even where none of them is a local manufacturer and no local manufacturer is in contention, which is contrary to the plain meaning of clause 21.1 of the SRCC and to the BEC's practice, reflected in the Item 184 BEC deliberation record, of splitting the Item 23 award between the successful bidders by reference to their scores under the clause 21.1 formula, initially excluding Innovata (despite it being the highest-scoring bidder) and proceeding with a seven-way split among the remaining recommended bidders.
- 50 Purpose: The purpose of Rule 9.3, read against section 2(1)(f) of the PPPFA, is to give the BEC an objective, rule-based mechanism for departing from an award based purely on ranked scores, in the same way that clause 21.1 of the SRCC does. Section 2(1)(f) permits an award to a tenderer other than the

highest scorer only where objective criteria "*in addition to*" the specific goals justify it. It does not contemplate, much less require, that every award additionally and cumulatively favour a category of bidder (local manufacturers) that receives no points under section 2(1)(d) in the first place. Reading "*and/*" as a true conjunctive "*and*" would mean that no split award could ever be made unless a local manufacturer was included in it, regardless of that local manufacturer's score, its price, or the section 2(1)(f) objective criteria in clause 21.1, effectively converting local manufacturing into a mandatory precondition for any split award, a status the PPPFA does not give it and which the specific goals provisions of section 2(1)(d) do not extend to it, and which is contradicted by the invitation to tender's own specific-goals table discussed above, which never mentions local production. That would produce an outcome the legislative framework plainly does not intend: a guaranteed allocation for local manufacturers, achieved outside the section 2(1)(d) specific-goals mechanism and without compliance with section 2(1)(e)'s requirement that any such goal be clearly specified, in the invitation to tender, as a goal for which points are awarded.

Application to the item 23 split award

- 51 On the record, the split of the Item 23 award was calculated after the pool of successful bidders had already been determined by reference to their final scores (excluding Cipla), using the formula in clause 21.1 of the SRCC, with an adjustment made to reduce the volume allocated to Innovata because of its prior poor performance of its contractual obligations (a factor expressly listed as a clause 21.1 consideration). The record confirms this sequence in detail: the BEC initially maintained its position not to award Item 23 to

Innovata, despite Innovata being the highest-scoring bidder, citing Innovata's poor performance, including the cancellation of an existing contract, and proceeded instead with a seven-way split among the remaining recommended suppliers. The BAC subsequently noted Innovata's poor performance and the BEC's stance, but also noted that there was no clear evidence that Innovata was prohibited or restricted from doing business on that account, and requested the BEC to consider including Innovata for Item 23 as the highest-scoring bidder while allocating it a lesser quantity because of its poor performance. This is consistent with the ultimate resolution recorded in the BAC's decision, that Innovata should be included with its allocated volume reduced on account of its poor performance.

- 52 On the "*and/or*" reading of Rule 9.3.1 developed above, this approach was rational and lawful. The BEC/BAC applied the clause 21.1 formula, which operationalises the section 2(1)(f) objective criteria, to divide the award among the successful bidders by reference to their scores. It then exercised the discretion recognised by clause 21.1's "*past compliance of the bidder with contractual obligations*" factor to adjust Innovata's allocation downward in light of its poor track record, rather than to displace the highest scoring bidders in favour of local manufacturers as such. The evidence indicates that local manufacturing status affected the Item 23 split only indirectly, through the price reductions some local manufacturers achieved during price negotiations, which in turn increased their scores and hence their share under the clause 21.1 formula, and not through any separate or additional preference layered on top of the formula.

Cipla's proposed reading-in of the words "*included/acceptable*" on the split formula

- 53 The clause 21.1 formula for a three-or-more-bidder split expresses the percentage allocation to the highest scoring bidder as $\% \text{ Split} = T1/(T1+T2+T3)$, where T1, T2 and T3 are defined simply as the scores of the highest, second-highest and third-highest scoring bidders. The submission advanced on behalf of Cipla during argument that the words "*included/acceptable*" must be read into this formula between the words "*Scoring*" and "*Bidder*", does not survive the same unitary interpretive scrutiny applied above to Rule 9.3.1.
- 54 First, on the text, the formula as recorded in clause 21.1 is a closed, internally defined mathematical expression: T1, T2 and T3 are each defined by direct cross-reference to a bidder's score, without qualification. Reading-in additional words that do not appear in the clause, and are not required to give the formula a workable and coherent meaning.
- 55 Second, on purpose and context, section 2(1)(f) of PPPFA already performs the gatekeeping function Cipla's reading-in seeks to achieve: only tenderers who submit an "*acceptable tender*" are scored and ranked at all, and only successful, compliant bidders are carried through to the split-award stage under clause 21.1 in the first place. Reading "*included/acceptable*" into the T1/T2/T3 formula is therefore unnecessary to exclude non-responsive or unsuccessful bidders from the calculation because that work is already done upstream, by the acceptable-tender and award-selection stages that precede the application of clause 21.1. Importing the qualification into the formula itself strains the language of a provision that is, on its face, complete and workable,

and does so without any textual support in clause 21.1 or in Rule 9.3 to justify the addition.

- 56 A further matter requires comment, concerning the basis on which the DoH explained (to Hetero) how the splits between successful bidders would be allocated, namely (a) by applying the formula outlined in clause 21.1 of the SRCC, and (b) by the recommendation of the evaluation committee, having regard to bidders' capacity to supply and, in certain cases, the preference for locally produced products.
- 57 On that explanation, the basis for a split award is accordingly a composite one: the clause 21.1 formula applied to bidders' scores, informed by considerations of capacity to supply and, where applicable, local manufacturer status. That basis cannot readily be reconciled with the State respondents' separate contention, advanced in defending the exclusion of Cipla going forward, that a bidder whose score places it more than 10% above the highest-scoring bidder's price falls to be excluded from a split award on that basis alone. If capacity to supply, locally produced status and the clause 21.1 factors (source of API and manufacturing site, capacity to meet demand, estimated volume, risk to public health, and past compliance) are, on the DoH's own account, integral to how a split is struck, a fixed 10% price differential cannot simultaneously operate as an automatic, threshold disqualifying factor for participation in that same split, without collapsing the very multi-factor enquiry the DoH says it undertakes. Nor is such a threshold consistent with the legislative scheme: section 2(1)(f) of the PPPFA, addressed earlier in this judgment, expressly permits an award to a tenderer other than the highest-scoring tenderer where objective criteria, additional to

the specific goals in paragraphs (d) and (e), justify that award. It does not condition that discretion on the other tenderer's price falling within any particular percentage of the highest scorer's price. For these reasons, the BEC and BAC's decision to exclude Cipla from the Item 13 and Item 23 split-award pools for that reason alone, without regard to the clause 21.1 criteria the DoH elsewhere says govern the split, was not rationally connected to the purpose of clause 21.1 or to the information before it, and is reviewable under section 6(2)(f)(ii) of PAJA. It was, in addition, arbitrary within the meaning of section 6(2)(e)(vi) of PAJA, since no criterion in the SRCC or the Rules identifies the 10% figure as a threshold for exclusion from the split-award pool itself, as opposed to its established role as a price-negotiation target under Rules 2.3 and 3.2.

- 58 I have been unable to identify any provision of the Tender conditions, the SRCC or the Rules that states, in terms, that a bidder is disqualified from consideration for a split or multiple award solely because its price, or its resulting score, places it more than 10% above the highest-scoring bidder. The 10% figure appears in the Rules only in the different context of the price negotiation process (Rule 2.3 and Rule 3.2, discussed above), where it operates as a target for bringing a local manufacturer's price closer to that of the highest-scoring bidder, not as an announced cut-off below which a bidder is excluded from the split-award pool altogether. Absent an identified textual basis for treating the 10% figure as a disqualifying threshold for split-award purposes, the exclusion of Cipla from the pool on that basis alone, without regard to the clause 21.1 factors that the DoH elsewhere says govern the split, appears to be an arbitrary and irrational distinction, and the DoH should,

on reconsideration, explain and apply a consistent basis for excluding or including any bidder from the Item 13 and Item 23 split, by reference to the clause 21.1 criteria actually identified in the SRCC, rather than by reference to an undocumented percentage cut-off.

Ground One: non-compliance with peremptory requirements: the Viatris and Innovata license

- 59 Cipla's contention is that Viatris' (and, by extension, Innovata's) bid was non-responsive and ought to have been disqualified because it did not submit a valid license to manufacture or import medicine by bid closure.
- 60 The Tender prescribed a structured, phased evaluation process. Phase I addressed mandatory administrative and legal requirements; Phase II addressed mandatory product, technical and regulatory requirements, including the clause 6.1 licensing requirements at issue in this application; Phase III addressed price and the 90/10 preference-point evaluation described above; and Phase IV addressed recommendation and award, including the clause 21.1 split and multiple award mechanism. A bidder that failed to satisfy the mandatory requirements of Phase I or Phase II was excluded from further evaluation. Only bidders that cleared both phases proceeded to have their price and preference points considered, and ultimately to be considered for recommendation and award under Phase IV.

Clause 6.1 and Clause 8 of the SRCC

- 61 Clause 6.1 of the SRCC, under the heading "*Phase II: Product Technical and Legal Requirements*" and the sub-heading "*Licensing Requirements*",

provides that the bidder offering a medicine manufactured locally must be the holder of a valid manufacturing license issued by SAHPRA in respect of the relevant manufacturing site, and must additionally submit that valid manufacturing license, including its annexures, as part of its bid. Clause 8, by contrast, addresses the separate question of the local manufacturing preference itself: it sets out the criteria by which the DoH determines whether a bidder qualifies for local-manufacturer status for the purposes of the clause 21.1 split and multiple award mechanism, including whether the bidder holds a valid manufacturing license, the extent of local manufacturing capacity, and the single exit price publication. The two clauses are not interchangeable. Clause 6.1 imposes a mandatory, Phase II eligibility requirement going to the responsiveness of the bid as a whole; clause 8 operates further downstream, at the award-allocation stage, and presupposes that the bidder has already satisfied the Phase II requirements, including clause 6.1, before its claim to local-manufacturer status falls to be assessed under clause 8 at all.

- 62 That reading is reinforced by clause 5.2.1 of the SRCC, which deals with consortium and joint-venture bidders and requires each member of a consortium or joint venture to independently satisfy the relevant mandatory requirements, including the Phase II product and technical requirements, before the consortium or joint venture as a whole can be treated as responsive. The same logic applies with equal force, by parity of reasoning, to an individual bidder relying on a local manufacturing site under clause 6.1: just as a consortium cannot rely on one compliant member to cure another member's non-compliance with a mandatory Phase II requirement, an individual bidder cannot treat the existence of an application for renewal, or a

formerly valid license, as satisfying the mandatory requirement to hold and submit a valid license at the time prescribed by the Tender. Clause 6.1's placement within Phase II, among the mandatory product and technical requirements that must be satisfied before a bidder's price and preference points are even considered, confirms that it was intended to operate as a threshold responsiveness requirement, not merely as one input into the clause 8 local-manufacturer preference assessment.

Viатris' and Innovata's local manufacturing license

- 63 It is common cause that the manufacturing license relied upon by Viатris and Innovata for the Mylan Isando site had expired on 16 July 2024, before the Tender's bid closure date, and that the renewed license was only submitted to the DoH after bid closure, during the course of the DoH's evaluation. Viатris contends that this did not render its bid non-responsive because the expiry and pending renewal were disclosed in the bid, the DoH sought and received the renewed license during evaluation, and the delay in renewal was attributable to processing time at SAHPRA rather than to any fault on Viатris' part. It is notable that Viатris's own answering affidavit frames its defence substantially in these terms: it describes the dispute as being, "*in substance, a local manufacturer preference and timing issue*", records that the BEC's initial exclusion of Viатris turned on whether the renewed license fell inside or outside a 7 to 10 working day period, and defends the BAC's reversal of that position as a correction of an unduly rigid timing consequence.
- 64 Beyond the timing defence, Viатris also advances a substantive case that the Mylan Isando site was, independently of the license-renewal chronology, a

genuine local manufacturing site for Items 13 and 23. Viatri's evidence is that the Isando facility held a SAHPRA *"License to Manufacture Medicines"* authorising, among other things, non-sterile manufacture of tablets and capsules, from 16 July 2019 until its expiry on 16 July 2024. Viatri's states that it spent more than R100 million upgrading the Isando facility after its acquisition from Ascendis in 2019 to a tablet manufacturing facility for ACRIPTEGA *"from premix stage, including blending premix with lubricant, compression and coating"*. Viatri's accepts that the renewed license issued on 24 April 2024, before the Isando site license fully expired, was described as a *"License to Manufacture Medicines – Contract Packer & Testing Laboratory Only"*, and so did not, in that form, authorise tablet manufacture. Viatri's evidence is that SAHPRA inspected the Isando facility between 27 and 29 August 2024, before the Tender's closing date of 9 September 2024, for the specific purpose of a *"license amendment to include tablet manufacturing"*, that Viatri's disclosed this inspection and its purpose to the DoH on 8 October 2024, and that SAHPRA subsequently issued an amended license, dated 30 October 2024, authorising non-sterile manufacture of tablets, which Viatri's forwarded to the DoH on 5 November 2024.

- 65 Cipla disputes that this evidence establishes that the Isando site performed the *"formulation and conversion"* of Items 13 and 23 within South Africa, as clause 3(10) of the SRCC requires for a product to qualify as locally produced, pointing to the Medicine Registration Certificate's designation of Mylan Laboratories Limited, India as the products' primary manufacturer and packer, and to Viatri's own PBD1 Authorisation Declaration and bid pricing schedule, which identify Mylan Laboratories Limited, India as a manufacturing

participant. Viatris denies that these documents are inconsistent with genuine local manufacture, submitting that they must be read against the bid documents as a whole, the evaluation actually undertaken, and the DoH's own evaluation matrix, which recorded both "*Mylan, Madhya Pradesh India*" and "*Local Mylan*" as features of the same bid. This is accordingly a genuine, *bona fide* dispute on the papers as to whether the Isando site's activities, considered together with the role played by Mylan Laboratories Limited, India, satisfy the substantive "*locally produced product*" definition in clause 3(10) of the SRCC, independently of the license-timing question addressed above.

- 66 Where final relief is sought on motion and a genuine, *bona fide* dispute of fact arises on the papers, the matter falls to be decided on the respondent's version, together with those facts alleged by the applicant that the respondent admits, unless the respondent's version is so far-fetched or clearly untenable that it can properly be rejected on the papers.⁵ Viatris's version of the Isando site's manufacturing activities, supported as it is by documentary evidence of the SAHPRA licensing and inspection history and by the DoH's own evaluation records, cannot be dismissed as far-fetched or clearly untenable on the papers. It follows that the substantive dispute as to whether the Isando site's activities meet the clause 3(10) definition of a locally produced product cannot be, and need not be, resolved in these proceedings on the affidavits as they stand.

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 and 27 applying *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 55

- 67 That conclusion does not, however, assist Viatris or Innovata in resisting Ground One. The non-responsiveness finding that follows below rests on a narrower and, on the papers, undisputed footing. Whatever the ultimate answer to the clause 3(10) question, it is common cause that no valid manufacturing license for the Isando site existed at bid closure, and that the license on which Viatris and Innovata ultimately relied for local-manufacturer treatment was only issued, and only submitted to the DoH, after bid closure. Clause 6.1 of the SRCC required a valid license to be held and submitted as at bid closure. That is a factual and documentary threshold, not a merits question on which the parties' versions diverge, and it is unaffected by the outcome of the separate, unresolved dispute about whether the Isando site's activities would otherwise have qualified Viatris and Innovata for local-manufacturer preference. Ground One is accordingly decided on that narrower basis, and I say nothing further about, and make no finding on, whether the Isando site's manufacturing activities do or do not satisfy the clause 3(10) definition.
- 68 Returning to Viatris's timing defence, that contention cannot be accepted. The distinction the law draws is between permissibly clarifying an ambiguity in a bid that has already been submitted, and impermissibly allowing a bidder to supplement, correct or augment its bid after the closing date so as to render compliant what was, on closing date, a non-compliant bid. As was held in *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) at 647A-B, quoting *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 (SCA), “[i]t may in given circumstances be fair to ask a

tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness." But it is a very different matter to permit a tenderer, after the closing date, to supply new material that was absent from the tender as submitted. The submission of a current, valid manufacturing license under clause 6.1 is not an ambiguity capable of clarification: a license that has expired is not, and was not on bid closure date, a valid license, and the subsequent submission of a renewed license did not clarify what Viatris had already said. It supplied, for the first time after the closing date, the very compliance that clause 6.1 required to exist at the time of submission.

- 69 Clause 10⁶ of the SRCC, headed "*Submission of Bids*", does not take the matter further. Clause 10 accordingly allowed the DoH to request updated mandatory documents after bid closure. It did not say, and cannot be read as saying, that a bidder could establish after bid closure an entitlement that did

⁶ "All bid documents must be sorted, filed, and submitted in the exact compilation sequence as indicated in the bid document checklist and Annexure A attached to the bid pack.

Submission of bid documents is compulsory unless a document is not applicable and indicated as such in the "N/A" column in the Bid Document Check List.

All bid documents must be signed in black ink in the spaces provided within the document.

All bid documents must be initialed [sic] at the bottom of each page in black ink in the space provided "Bidder's Signature...."

Where certified copies of original documents are submitted, bidders must ensure that the certification is original and signed and dated by the Commissioner of Oaths.

*Where applicable, all bid documents must be witnessed in black ink. **The NDoH will not accept updated mandatory bid documents after bid closure unless called for by the Department.***

Bidders not complying with any of the requirements may be deemed to be non-responsive and may not be considered for evaluation." (emphasis added)

not exist when bids closed. This was not the correction of a formal defect in an existing document. Instead, the valid license had not yet been issued.

- 70 The requirement in clause 6.1 that a bidder relying on local manufacture be the holder of, and submit, a valid manufacturing license as at bid closure was peremptory and not merely directory. Clause 6.1 is couched in unqualified, imperative terms, requiring that the bidder "*must*" hold and "*must*" submit a valid license. Clause 6.1's placement within Phase II of the Tender's structured, sequential evaluation process, among the mandatory product and technical requirements that a bid had to satisfy before its price and preference points were even considered, confirms that it was intended to operate as a threshold condition of responsiveness, not a mere formality capable of relaxation. The requirement also serves the public interest: it ensures that, before a bidder is treated as holding the manufacturing/importation status that bears on the award of medicines central to the national HIV treatment programme, the bidder in fact holds current regulatory authorisation to manufacture/import.
- 71 An administrative authority has no inherent power to condone non-compliance with a peremptory requirement. Any such power had to be found in the Tender or another empowering provision.⁷ Whether it has been so afforded is entirely a matter of construction of the empowering document. Neither the SRCC nor the Rules confer any discretion on the DoH, the BEC or the BAC to condone a bidder's failure to hold or submit a valid

⁷ *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA), para 31. *Dr JS Moroka Municipality v Betram (Pty) Limited* 2013 JDR 2728 (SCA), para 12.

manufacturing license as at bid closure. Clause 10 of the SRCC, considered above, permits the DoH to request updated mandatory documents - it does not purport to authorise the DoH to treat a license that did not exist at bid closure as if it had existed, nor to excuse the absence of the peremptory clause 6.1 requirement.

- 72 Counsel for Viatris submitted that this conclusion goes too far. Relying on *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* [2018] ZASCA 50, counsel submitted that *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) remains good authority for the proposition that an administrative body may condone non-compliance with a peremptory requirement, provided a discretion to do so is conferred by the tender documents, and that *Dr JS Moroka*⁸ did not overrule *Millennium* in its entirety, since *Overstrand* found it unnecessary to resolve the apparent differences between the two and *recorded that* the debate between them still stands. On that footing, counsel submitted that *Dr JS Moroka*'s disapproval was confined to the narrower dictum in *Millennium* paragraph 17, that public interest alone, untethered to any conferred discretion, can justify condonation, and that *Millennium*'s broader holding, that a body afforded a discretion by an enabling provision may condone non-compliance, survives. Counsel submitted that "*the clear structure of these provisions*" (presumably clauses 10 and 16⁹ of

⁸ Id

⁹ "16. COMMUNICATION

The NDoH may communicate with bidders where clarity is sought after the closing date and time of the bid and prior to the award of the contract or to extend the validity period of the bid, if necessary. Any communication to any government official or a person acting in an advisory capacity for the NDoH regarding this bid between the closing date and the bid award by the bidder is discouraged. All communication between the bidder and the NDoH must be done in writing."

the SRCC, as counsel for Innovata had argued), together with the DoH's practice of requesting updated documents and extending validity periods, conferred the necessary discretion, so that requesting and accepting the renewed Isando license after bid closure fell within, rather than outside, the DoH's lawful powers.

- 73 Counsel for Cipla submitted that *Dr JS Moroka*, having considered *Millennium* and distinguished the authority on which it relied (*SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A)), concluded that the *Millennium* dictum does not support condoning non-compliance with a peremptory tender requirement merely because condonation is not inconsistent with public policy, and that, insofar as *Millennium* might be construed as accepting that a peremptory requirement may be condoned by a functionary who considers condonation to be in the public interest, it should be regarded as incorrect. Counsel illustrated the condonation *Dr JS Moroka* does permit by reference to its own facts: the respondent there had submitted a certified copy, rather than the original, of a tax clearance certificate that had always existed, a defect the SCA treated as curable in principle, subject only to an identified discretion to condone it, which, on those facts, there was not. Viatrix and Innovata's position differs in kind, counsel submitted, because what occurred here was not the production of a copy of a document that already existed, but the submission, after bid closure, of a license that had not yet come into existence at bid closure, to the prejudice of bidders who had complied and those who had declined to bid because they could not meet the requirement.

- 74 I agree with Cipla's submissions on the condonation point, for three reasons. First, *Overstrand* itself does not assist Viatrix: the Court there expressly

declined to resolve the apparent tension between *Millennium* and *Dr JS Moroka*, deciding the case before it instead on the narrower, alternative footing that the non-compliance was not trivial or minor and the tender accordingly not an acceptable one. A decision that declines to resolve a debate cannot be read as deciding it in either direction. Second, and decisively, *Dr JS Moroka* itself does not support the narrower reading for which Viatris contends. Having held that the proposition in *Millennium*, that condonation of non-compliance with a peremptory requirement is permissible where it is not incompatible with the public interest and is granted by the body in whose benefit the provision was enacted, is inconsistent with *Pepper Bay* and offends the principle of legality, the Court in *Dr JS Moroka* concluded, without qualification, that "*insofar as the judgment in Millennium Waste Management may be construed as accepting that a failure to comply with the peremptory requirement of a tender may be condoned by a municipal functionary who is of the view that it would be in the public interest for such tender to be accepted, it should be regarded as incorrect*"¹⁰, rejecting the public-interest rationale itself as a basis for condonation, irrespective of any discretion conferred elsewhere. The subsequent decision of the Supreme Court of Appeal in *WDR Earthmoving Enterprises and Another v The Joe Gqabi District Municipality and Others* [2018] ZASCA 72 (30 May 2018), delivered after *Overstrand*, confirms this reading, recording in terms¹¹ that the *Millennium* dictum was disapproved in *Dr JS Moroka*, both as inconsistent with *Pepper Bay* and as offending the principle of legality. Third, and in any

¹⁰ Para 18

¹¹ Para 32

event, even on Viatris's own narrower reading, the submission still depends on identifying a provision of the SRCC that confers the necessary discretion, and, for the reasons already given in relation to clause 10, no such provision exists: a power to request updated mandatory documents is not a power to treat a license that did not exist at bid closure as if it had existed. The distinction drawn by counsel for Cipla, between a document that already existed in some imperfect form and one that did not exist at all until after bid closure, mirrors the distinction *Dr JS Moroka* itself drew in finding, even on the hypothesis that a discretion to condone existed, that the respondent there had failed to establish one, and is consistent with the authorities on clarification versus impermissible augmentation considered above. Absent an identified source of power, the DoH had no authority to condone Viatris and Innovata's non-compliance with clause 6.1, whether under *Millennium* as Viatris would have it construed, or otherwise.

- 75 Even if some residual condonation power were nonetheless found to exist, it could not avail Viatris and Innovata here, because the non-compliance in question is not of a trivial or minor nature. The obligation in clause 6.1 was not to hold a license of some description, nor merely to hold a license that had once been valid. It was to hold, and to submit, a *valid* manufacturing license, current as at bid closure. A manufacturing license that had expired almost two months before the Tender closed is the antithesis of compliance with that requirement, not a minor or technical shortfall from it. The distinction drawn in the authorities between minor deviations that do not materially alter or depart from a tender's requirements, which may be overlooked, and non-compliance that goes to the substance of a mandatory and material condition, which may

not, falls on the latter side of the line here. A valid, current manufacturing license is not an incidental formality. It is the regulatory foundation on which a bidder's claim to be manufacturing medicines locally, lawfully and reliably rests, and its absence at bid closure cannot be treated as trivial in a tender of this scale and public importance.

- 76 On this basis, Viatris and Innovata's bids were not responsive within the meaning of clause 6.1, and the DoH's acceptance of the post-closure renewed license, and its consequent treatment of Viatris and Innovata as compliant local manufacturers for the purposes of the Item 13 and Item 23 awards, was not rationally connected to the information before the DoH at the relevant time, nor to the purpose of clause 6.1. This renders the award decisions in respect of Items 13 and 23 reviewable under sections 6(2)(b), 6(2)(c), 6(2)(d), 6(2)(e)(iii), 6(2)(f)(ii) and 6(2)(i) of PAJA: section 6(2)(b), because the DoH did not comply with the mandatory and material condition in clause 6.1 that a valid manufacturing license be held and submitted as at bid closure; section 6(2)(c), because the DoH did not demonstrate that the opportunity to cure the license defect through later-issued documentation was applied on the same terms to all bidders, compromising the even-handed application of the Tender's mandatory requirements; section 6(2)(d), because the DoH treated an immaterial error as if it were material to the correct application of clause 6.1, and conversely failed to appreciate that compliance with that clause had to exist at bid closure; section 6(2)(e)(iii), because the DoH failed to take into account the mandatory, threshold character of the clause 6.1 requirement before accepting the post-closure license; section 6(2)(f)(ii), because the decision to treat the post-closure renewal as

restorative was not rationally connected to the license information before the DoH at bid closure or to the purpose of clause 6.1; and section 6(2)(i), because the decision was otherwise unconstitutional and unlawful having regard to the obligations imposed by section 217 of the Constitution.

- 77 There is a further, and distinct, legal consequence of the non-compliance established above that has not yet been addressed. A bid that does not, in all respects, comply with a peremptory and material requirement of the tender documents is not an "*acceptable tender*" within the meaning of the PPPFA, and falls to be excluded from scoring and ranking altogether, rather than merely scored at a disadvantage or left to be weighed against other factors. That consequence follows independently of, and in addition to, the PAJA grounds of review identified above. It is not simply that the DoH's evaluation of Viatris and Innovata's bids was flawed in its reasoning, but that those bids ought never to have been carried forward beyond Phase II at all. It follows that Viatris and Innovata's bids fall to be treated, for the purposes of the Item 13 and Item 23 awards, as if they had been excluded at Phase II, and any scores, rankings or allocations subsequently attributed to them must be set aside and recalculated without them, as reflected in the order below.

Cipla's new alternative argument on the second bullet of clause 6.1

- 78 In replying argument Cipla advanced a further argument on the interpretation of clause 6.1, which it expressly described as new, advanced in the alternative to its primary argument on the first bullet, and without abandoning that primary argument. Cipla accepted, for purposes of this alternative argument, that the first bullet of clause 6.1 permits a bidder to hold either a license to

manufacture or a license to import, and directed its new argument instead at the second bullet of clause 6.1. Cipla's new argument was that the second bullet, properly construed, contemplates two distinct instruments: a section 22C(1)(b) license to manufacture, and the MRC issued under section 15(3)(a) of the Medicines Act, and that a bidder offering a locally produced product, as Viatris did, was obliged to hold both, with the manufacturing license reflecting the manufacturing sites listed on the MRC. Since it was common cause that Viatris's manufacturing license for the Mylan Isando site did not itself reflect the manufacturing sites, while the MRC did, Cipla contends that Viatris had not satisfied the second bullet, and that its bid was, for that further and independent reason, non-responsive in its entirety. This is a materially different proposition from Cipla's pleaded case on Ground One, which was that the expired Mylan Isando manufacturing license rendered Viatris's (and, by extension, Innovata's) bid non-responsive because a license that had lapsed before bid closure was not a valid license at the time required. The new argument does not depend on the expiry of the license at all - it depends on an asserted mismatch between what the manufacturing license records and what the MRC records, said to flow from a free-standing, independent requirement in the second bullet that was not previously relied upon as a source of whole-bid invalidity.

- 79 This new argument cannot be entertained. It falls outside the case Cipla pleaded in its founding and supplementary founding affidavits. Nowhere in the founding or supplementary founding papers did Cipla plead that the second bullet of clause 6.1 operates as a free-standing, independent threshold requirement whose breach renders an entire bid non-responsive irrespective

of compliance with the first bullet, nor did it plead the discrete factual premise on which the new argument depends, namely that Viatris's manufacturing license does not itself reflect the manufacturing sites recorded on the MRC. A party seeking to review a decision must identify clearly both the facts and the legal basis for its challenge at the outset, and courts do not permit new grounds of review to be raised in replying affidavits or from the bar during argument.¹²

Ground Two: Innovata's past performance and the Item 23 award

80 The second ground of review is Cipla's contention that Innovata ought to have been excluded from consideration for the Item 23 award because of its poor past performance under a preceding contract.

81 Prior performance was an express part of the Tender framework. Clause 8 made acceptable previous performance a condition of local manufacturer preference, and clause 21.1 separately required the DoH to consider past compliance with contractual obligations when deciding whether and how to divide an item among several suppliers. Those provisions reflected the broader object of ensuring reliable and continuous supply of essential medicines. Under a previous contract, Innovata was unable to supply Myteladov while an agreement with the Medicines Patent Pool remained unresolved, and it asked the DoH to cancel its Item 20 contract and

¹² *Nwafor v The Minister of Home Affairs and Others* [2021] ZASCA 58 at para 39, citing *Bato Star*, supra at par 37 and *Tao Ying Metal Industry (Pty) Ltd v Pooe N.O. and Others* [2007] ZASCA 54 at para 98, and *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-363B.

outstanding back orders "*so as to not further compromise*" patients dependent on the medicine.

- 82 The BEC treated that history as materially relevant to Item 23. Its recommendation recorded Innovata's poor supplier performance, repeated requests to supply alternative products, two non-compliance letters, and its request to cancel the earlier contract after a third failed supply request. Innovata was therefore passed over despite being the highest-scoring bidder, and the BEC maintained that position when the BAC requested reconsideration, recording that the same approach had been followed in comparable contracts and that changing course for Innovata would undermine the integrity of the performance evaluation process. The BAC approached the matter differently: it noted the performance concerns but focused on the absence of evidence that Innovata had been prohibited or restricted from doing business with the State or listed as a restricted supplier or tender defaulter, and on that basis directed that Innovata be considered for Item 23 with reduced volumes, ultimately receiving an 11.38% allocation.
- 83 The DoH's attempt to justify this outcome by reference to an unparticularised allegation that Cipla had a comparable history of performance-related concerns cannot be accepted. The DoH does not identify the contracts or products concerned, the nature or seriousness of the alleged failures, the notices issued, or any resulting cancellation, inability to supply, or need for alternative products, nor does it explain how any such history was comparable to the specific, documented performance record on which the BEC relied when it excluded Innovata. Nor does the DoH's reliance on the fact that Innovata had delivered 121% of its allocated volume by the time the previous

contract was cancelled answer the BEC's concern: cumulative volume supplied does not establish that Innovata performed the contract consistently or could continue supplying the contracted product when required, and the DoH does not explain how that figure relates to the timing of orders, outstanding supply obligations, the repeated substitution requests, or Innovata's inability to continue supplying the contracted product.

- 84 The DoH was entitled to reach a different conclusion from the BEC on Innovata's past performance. It was nevertheless required to apply the Tender's performance and security-of-supply criteria, consider the information material to that enquiry, and record a rational connection between the identified risk and the allocation chosen. Neither the cumulative 121% figure nor the unsubstantiated comparison with Cipla supplies that reasoning. Put simply, the Tender required the BAC to assess whether Innovata's documented history of supply failures created an unacceptable risk of recurrence if it was awarded a share of Item 23, and the BAC instead asked only whether Innovata had been formally debarred or blacklisted, which is a different and narrower question that does not answer the one the Tender posed. Formal debarment is reserved for the most serious cases of established wrongdoing and is not a precondition for, nor a proxy for, an assessment of ordinary supply-performance risk under clause 8 and clause 21.1. I am accordingly satisfied that the BAC's decision to include Innovata in the Item 23 award at a reduced allocation, by reference to the absence of formal debarment rather than to the substance of the performance risk the Tender required it to assess, is reviewable. The error was material: Innovata was the highest-scoring bidder for Item 23, and its reinstatement changed the

BEC's proposed seven-way split into an eight-way award, with Innovata receiving 11.38% of the available volume, altering both the identity of the successful suppliers and the division of a strategically important item.

- 85 The decision is reviewable under the following provisions of PAJA: section 6(2)(d), because the BAC materially misconstrued the applicable standard by treating the absence of formal restriction or blacklisting as the answer to a Tender requirement concerned with acceptable prior performance and supply risk; section 6(2)(e)(iii), because the record does not show proper consideration of the causes and consequences of Innovata's earlier inability to supply, its dependence on third parties, the repeated alternative-product requests, the non-compliance letters, the requested cancellation, the risk of recurrence, or the adequacy of the reduced allocation; section 6(2)(e)(vi), because Innovata was restored to the pool under a criterion not prescribed by the Tender, and without a recorded methodology explaining the volume selected to manage the risk; section 6(2)(f)(ii), because the decision was not shown to be rationally connected to the Tender's purpose of protecting continuous supply, the prior-performance information before the Department, or contemporaneous reasons demonstrating why 11.38% was an adequate mitigation; and section 6(2)(h), because, in the context of essential medicines and national volumes, no reasonable administrator could replace the required performance-risk assessment with the narrower question of formal debarment and then allocate a substantial volume without explaining how the known risk was addressed.
- 86 This finding is not in tension with the earlier conclusion, in considering the "and/or" reading of Rule 9.3.1, that the BEC/BAC's chosen mechanism for

dividing the Item 23 award was rational and lawful. That earlier finding addressed a different question: whether the BEC/BAC was entitled to divide Item 23 among several bidders by applying the clause 21.1 formula and adjusting Innovata's allocation downward for poor performance, rather than being required to displace the highest-scoring bidder in favour of local manufacturers as such. It did not address, and did not endorse, the substantive standard the BAC in fact applied when assessing whether Innovata's performance history warranted inclusion at all. It is that anterior question, namely whether formal debarment was the correct test for performance risk under clause 8 and clause 21.1, that is addressed, and answered adversely to the DoH, on Ground Two.

Ground Three: the local manufacturing status of Barrs and Aurobindo

- 87 The third ground of review is Cipla's contention that the conferral of local manufacturing status on Barrs and Aurobindo was irregular.
- 88 Clause 8 of the SRCC made local preference conditional upon the license, MRC, capacity, prior performance and general compliance requirements described above, and clause 3(10) of the SRCC defines a locally produced product as one whose formulation and conversion processes occur within the Republic of South Africa, expressly excluding the fill, finish and packaging of solid, liquid and semi-solid dosage forms. Cipla met that threshold in its own right, manufacturing Items 13 and 23 at its licensed KwaZulu-Natal facility, and challenges whether the same published standard was applied to the successful bidders whose manufacturing and licensing arrangements differed materially. The manufacturing models of Barrs and Aurobindo, in particular,

differed significantly from one another and from Cipla's own vertically integrated local manufacture: Barrs relied on an arrangement involving Emcure and its South African facility, while Aurobindo relied on WRAPSA as its South African contract manufacturer.

- 89 The question raised by this ground is not whether local manufacture guaranteed an award (it did not), but whether the DoH applied a single, consistent and properly reasoned standard in determining whether the manufacturing steps actually performed in South Africa by each of Barrs and Aurobindo amounted to formulation and conversion within the Tender's definition, as distinct from the excluded activities of filling, finishing or packaging. That enquiry could not be answered identically for every bidder, because the manufacturing models differed materially, and the record had to demonstrate how the DoH applied the Tender's definition to each arrangement, identifying the manufacturing steps performed in South Africa, distinguishing formulation and conversion from the excluded activities, verifying the sites and licenses on which the claim depended, and explaining why the evidence submitted met the required standard.
- 90 On the record, the DoH's and the affected bidders' explanations do not establish that this occurred. The DoH and Barrs rely principally on the disclosure, in Barrs' bid, of an arrangement with Emcure, and on Barrs' MRC, the variation material concerning the addition of a local site and trial-batch evidence to support its local classification. Aurobindo relies on its disclosed third-party sourcing model and on WRAPSA's performance of formulation and conversion under a contract manufacturing arrangement. Those explanations may support different conclusions for different bidders, but they do not show

that the DoH itself identified the relevant manufacturing steps at the time of evaluation, tested them against the Tender's definition of a locally produced product, and reached a reasoned conclusion before according local manufacturer treatment to each of Barrs and Aurobindo. The record does not disclose a consistent, comparative assessment of the different manufacturing models. It does not explain how the DoH distinguished local formulation and conversion from packing or finishing in the case of Barrs' and Aurobindo's particular arrangements, what proof it required of the manufacturing activities undertaken at each site, whether site visits were carried out, or why the relevant licenses and MRC material were considered to establish entitlement to the preference in each case.

- 91 Pharma Dynamics submits that the DoH did apply the same standard to each bidder's manufacturing arrangement, by reference to the documents each bidder was required to submit under clause 8, including the manufacturing license, the MRC and the bid response data, and that those documents contained sufficient information for the DoH to determine whether each bidder constituted a local manufacturer. I am not persuaded that this answers Cipla's complaint. The existence of a documentary checklist that was applied uniformly does not, without more, establish that the DoH engaged with the substance of each bidder's particular manufacturing model and reached a reasoned, bidder-specific conclusion as to whether the steps actually performed in South Africa amounted to formulation and conversion, as opposed to the excluded activities. That omission was material because the classification affected more than a notional preference: it affected which bidders were invited to negotiate as local manufacturers, and, in the case of

Barrs and Aurobindo, it affected their price scores and, in consequence, their share of the Item 13 and Item 23 split awards calculated under clause 21.1.

- 92 Cipla identify a further, specific difficulty with the record that I accept. Cipla submits that clause 15 of the SRCC empowered the DoH to undertake a due diligence exercise to verify a bidder's manufacturing status and capacity, and that Rule 10.1 gave specific content to that power, providing that a due diligence assessment would be conducted in identified circumstances, including where an eligible bidder claimed local manufacturer status and the DoH had to determine whether the product was produced in South Africa and whether the facility had sufficient capacity. Cipla submits that the record contains no evidence that the required verification was undertaken in respect of the local manufacturer claims it challenges, and that the record had to demonstrate how the DoH applied the Tender's definition to each bidder's arrangement, such as identifying the manufacturing steps performed in South Africa, distinguishing formulation and conversion from the excluded activities, verifying the sites and licenses on which the claim depended, and explaining why the evidence submitted by each bidder met the required standard. I accept this submission. As Cipla correctly submit, the record must show that the authorised decision-maker considered the material information and reached the required satisfaction on reasonable grounds. A bare assertion that the decision-maker was satisfied, or an unexplained recommendation by another official, is insufficient, applying *Walele v City of Cape Town* 2008 (6) SA 129 (CC) paras 60-63.

- 93 The decision to accord local manufacturer status to Barrs and Aurobindo is accordingly reviewable under the following provisions of PAJA: section

6(2)(b), because the record does not establish compliance with the material license, MRC and evidential conditions attached to the preference in respect of each of Barrs and Aurobindo's particular manufacturing arrangements; section 6(2)(c), because the record does not demonstrate that materially different manufacturing arrangements were tested under the same disclosed standard; section 6(2)(e)(iii), because the DoH was required to consider the actual manufacturing activities, sites, licenses, capacity and performance evidence relevant to each claim; section 6(2)(e)(vi), insofar as local status was conferred without a consistently applied methodology or recorded explanation; and section 6(2)(f)(ii), because the classifications are not shown to be rationally connected to the Tender's substantive definition, the evidence before the DoH or contemporaneous reasons.

Ground Four: Innovata and Barrs' substantiation of HDI points

- 94 The fourth ground of review is Cipla's contention that Innovata and Barrs failed to substantiate properly the HDI points awarded to them. This ground is confined, on the papers, to Innovata and Barrs, which relied on the same indirect ownership structure.
- 95 SBD6.1 required bidders claiming HDI points to substantiate their ownership claims through certified identification documents, share certificates, share registers and other evidence establishing the ownership relied upon, so as to permit the DoH to verify the full chain through which the claimed specific goal points were derived. Innovata and Barrs relied on the same indirect ownership structure, tracing ownership through Avacare South Africa to Cintopix (Pty) Ltd and then to two natural person shareholders, each said to hold an effective

11.38% interest in Avacare (and, in consequence, in Barrs and Innovata), calculated by multiplying their 22.22% shareholding in Cintopix by Cintopix's 51.22% shareholding in Avacare.

96 The DoH's answer is that the ownership documents before it, including organograms, share registers and identity documents, provided a sufficient evidentiary basis for the computation described above, and that its calculation correctly reflected the cascading ownership structure. I am not satisfied that this answers the substance of Cipla's complaint. Cipla's point is a narrower and more precise one: that the record does not contain evidence substantiating Cintopix's own shareholding in Avacare South Africa, which is the necessary link connecting the ultimate HDI shareholders to the two bidders and without which the 51.22% figure, and the resulting 11.38% effective interest, cannot be verified. An organogram depicting the asserted structure, without the underlying share certificate or share register evidence establishing the Cintopix-to-Avacare shareholding itself, cannot substitute for the supporting ownership evidence that SBD6.1 required. The DoH was required to obtain and assess proof of that specific link before awarding the points, applying the same evidential standard it applied to other bidders' claims, some of which were reduced or rejected for want of sufficient supporting evidence.¹³

97 The deficiency was material. The 3.21 points awarded to each of Innovata and Barrs formed part of their total scores for Items 13 and 23, and therefore

¹³ In this regard Barrs' answering affidavit (CaseLines 029-114, paras 264-267) records that Cipla's own empowerment claim was only partially recognised, that Strides and Adcock Ingram had points refused in certain categories for deficient share-certificate evidence, and that Macleods was recorded as having submitted insufficient evidence for its preference claim. See also Cipla's non-confidential supplementary founding affidavit, CaseLines 03-36 to 03-39, paras 112-123.

affected their comparative rankings and their position in the pool of bidders considered for a split or multiple award.¹⁴ An unsubstantiated ownership link cannot be permitted to inflate the comparative position of a bidder relative to others, including Cipla, whose own claims were scrutinised on the same evidential standard.

- 98 The allocation of HDI points to Innovata and Barrs is accordingly reviewable under PAJA: section 6(2)(b), because the record does not establish compliance with the material evidential requirements governing HDI claims; section 6(2)(c), because Innovata and Barrs were each awarded full points despite an unsubstantiated ownership link while other claims were reduced or rejected for insufficient evidence; section 6(2)(e)(iii), because the DoH failed to consider whether the missing evidence prevented verification of the claimed ownership chain; section 6(2)(e)(vi), because the points were awarded without a demonstrated and consistently applied evidential standard; and section 6(2)(f)(ii), because the points are not shown to be rationally connected to the supporting ownership evidence or to contemporaneous reasons.

Ground Five: the failure to investigate the independence of the Barrs and Innovata bids

- 99 The fifth and final ground of review is Cipla's contention that the DoH failed to investigate whether Barrs and Innovata prepared their bids independently of one another.

¹⁴ Barrs' answering affidavit (CaseLines 029-108, para 236) recording the 3.21-point total, stating "[t]he claim depended upon an indirect or cascading ownership structure".

100 SBD4 imposed two related obligations on every bidder: first, to disclose whether it, its directors, shareholders or persons with a controlling interest had an interest in any related enterprise, whether or not that enterprise was also bidding; and second, to certify that it had arrived at its bid independently and without consultation, communication, agreement or arrangement with a competitor. Those requirements served different purposes: disclosure placed the relevant relationships before the DoH, while the independent-bid certification addressed whether the competing offers had in fact been prepared separately.

101 The relationship between Innovata and Barrs was substantial. Both were, at the relevant time, related entities within the same corporate group, and Cipla identified a close relationship between Innovata's and Barrs' prices for Item 13, with the two bidders' final prices differing by approximately R1.50 (R168.99 and R170.49 respectively). That proximity, combined with the common ownership, was sufficient to call for a reasoned assessment by the DoH of whether the two bids had in fact been prepared independently, as SBD4 required.

102 The DoH's answer, advanced by the State respondents, is that there was no overlapping directorship between Innovata and Barrs at bid closure, that the two natural person shareholders in Cintopix did not hold a controlling interest in Cintopix, Avacare, Barrs or Innovata within the meaning of the Companies Act, and that Innovata's bid was prepared by named individuals without any exchange of prices, quantities or strategy with Barrs. I accept that those facts may explain why the DoH did not conclude, as a matter of company law, that Innovata and Barrs were disqualified as related bidders in the formal sense.

They do not, however, answer the distinct and narrower question raised by this ground: whether the DoH, confronted with common ultimate ownership, mirrored beneficial interests, shared administrative features and a disclosed relationship between the two bidders, undertook and recorded a rational assessment of whether their bids had in fact been prepared independently, as SBD4 required them separately to certify. The absence of a common director, and the absence of direct evidence of collusion, do not resolve whether the commonly owned bidders maintained the separation their certifications required, nor does the fact that the DoH identified no overlapping directorship exclude the need to assess the objective indicators of common control before awarding substantial volumes to both bidders.

- 103 The record does not disclose such an assessment. It does not identify the official or structure that considered the relationship between Innovata and Barrs for the specific purpose of testing the independent-bid certification, the information sought from either bidder or from Avacare on that question, whether access to pricing or bid information was investigated, the standard applied, or the reasons why the indicators of common ownership were considered insufficient to warrant further scrutiny before both bidders were included in the award. The omission is especially material because the DoH applied strict scrutiny to comparable relationship and communication indicators elsewhere in the same evaluation: Activo and Sonke were disqualified where common directors appeared and both companies bid on the same items, and Hetero, Q-Sol and Pharma-Q were disqualified or referred to the Competition Commission where the record showed communication concerning prices. While the circumstances of Innovata and

Barrs were not identical to those of Activo and Sonke or the Hetero group, the DoH's treatment of those other bidders confirms that common control and price-related communications were treated as material to the integrity of the evaluation. The record therefore had to show how the DoH assessed the indicators relating to Innovata and Barrs, what standard it applied, and why it concluded that no further scrutiny was required. That omission was material: Innovata and Barrs together received a substantial combined share of the Item 13 and Item 23 awards, and a competitive process in which two commonly owned bidders both receive awards without the DoH first satisfying itself, on a rational and recorded basis, that their bids were genuinely independent, does not vindicate the integrity the Tender's independent-bidding requirement was designed to protect.

- 104 The decision to accept both the Innovata and the Barrs bids as independently prepared, and to make awards to both, is accordingly reviewable under PAJA: section 6(2)(c), because the DoH did not demonstrate an even-handed application of the standards used to protect independent competition, in circumstances where relationship indicators led to disqualification or referral elsewhere but were not shown to have triggered a reasoned enquiry into Innovata and Barrs; section 6(2)(e)(iii), because the common ownership, beneficial interests, shared administrative features, pricing indicators and independent-bid certifications were relevant considerations which the DoH had to assess before accepting both bids as independently competitive; section 6(2)(e)(vi), because the DoH accepted both bids without the record disclosing a standard or process capable of explaining why the objective indicators required no further investigation; section 6(2)(f)(ii), because the

acceptance of both bids is not shown to be rationally connected to SBD4's purpose, the requirement of genuine competition in terms of section 217 of the Constitution, the information before the DoH, or the contemporaneous reasons furnished; and section 6(2)(h), because no reasonable administrator, having treated comparable relationship and price-communication concerns as material elsewhere in the same evaluation, could award substantial volumes to two commonly owned bidders without demonstrating that their bids had been independently prepared.

Just and equitable remedy

105 The difficulty with granting Cipla a substitutionary or broadly remedial order, setting aside the Item 13 and Item 23 awards in their entirety and remitting the whole of each award for fresh evaluation, is that such an order would disturb the position not only of Viatris and Innovata, whose inclusion as local manufacturers and whose inclusion in the Item 23 award I have found to be unlawful, and Barrs, whose local manufacturing status and HDI points I have found to have been irregularly conferred, and Aurobindo, whose local manufacturing status alone I have found to have been irregularly conferred, but also of Macleods, Emcure, PharmaCare and Pharma Dynamics, none of whom is shown to have been implicated in any irregularity, and all of whom have been supplying anti-retroviral medicines under the Tender since implementation took effect on 1 December 2025, as set out above. A just and equitable remedy under section 172(1)(b) of the Constitution must have regard to the public interest in the continuity of anti-retroviral supply, a matter of exceptional public importance given the scale and purpose of the Tender described above and the stark disparity between the scale of the Tender and

Cipla's own allocation under it, the prejudice that a wholesale setting-aside would visit on innocent, unimpugned bidders, and the practical reality that re-opening the entire Item 13 and Item 23 awards for re-evaluation would risk disrupting the supply chain for a class of medicines on which the public health system depends.

106 At the outset, it is necessary to set out the principles that are applicable to the court's determination of a just and equitable remedy. In this regard, the following principles are relevant:

106.1 The Court has wide remedial powers to ensure effective relief for a breach of a constitutional right (including the right to just administrative action).¹⁵

106.2 In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act.¹⁶

106.3 A just and equitable remedy must be tailored to the particular facts of each case and to correct the particular defect in question.¹⁷

¹⁵ *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* 2014 (4) SA 179 (CC) ("**Allpay II**") at para 71; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) ("**Steenkamp**") at para 30; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC), paras 82-83.

¹⁶ *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA), para 28.

¹⁷ See *Steenkamp* at para 29:

"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. ... The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function.... 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."

See also *AllPay II*, at para 29:

"The emphasis on correction and reversal of invalid administrative action is clearly grounded in s 172(1)(b) of the Constitution, where it is stated that an order of suspension of a declaration of invalidity may be made 'to allow the competent authority to correct the defect'."

106.4 The remedy must not be overly-broad or over-inclusive.¹⁸

107 Applying those principles, it would not be just and equitable, in the circumstances of this matter, to make a bare declaration of invalidity and leave the consequences of that declaration to be worked out without remittal to the DoH. None of the factors that would justify substitution, still less an unstructured declaration leaving the parties to their own devices, is present here. The DoH, acting through the BEC and BAC, retains institutional expertise, access to the full tender record, and direct engagement with each bidder's capacity, pricing, manufacturing arrangements and performance history, none of which this Court is as well placed to evaluate or re-weigh as the administrator itself. The decision that must now be taken, recalculating the clause 21.1 split for Items 13 and 23 once Viatrix and Innovata are excluded and the Barrs and Aurobindo local-manufacturing-status corrections and the Barrs HDI correction directed by this order are applied, is not a foregone conclusion: it is a multi-factor, polycentric evaluation involving the capacity, performance and manufacturing status of a number of bidders, precisely the kind of specialised, discretionary assessment that clause 21.1 commits to the BEC and BAC in the first place, and not a mechanical recalculation with only one possible answer. A bare declaration of invalidity, without remittal, would leave the DoH, the successful bidders and the public health system without any mechanism for resolving how the corrected pool of bidders is to share in the Item 13 and Item 23 awards, which would itself be

¹⁸ See *Allpay II* at para 45:

"Hence, the answer to the separation-of-powers argument lies in the express provisions of s 172(1) of the Constitution. The corrective principle embodied there allows correction to the extent of the constitutional inconsistency, in this case an invalid award of the tender for five years."

destructive of the security-of-supply objective that the Tender is designed to serve. Remittal, on the terms set out in the order below, is accordingly the just and equitable remedy.

- 108 A related point concerns the status, at the time of reconsideration, of bidders that were placed under business rescue after the award. As recorded in the introduction, both Innovata and Barrs entered business rescue on 10 December 2025, shortly after implementation of the Tender took effect, and the DoH subsequently recorded that Barrs was out of stock in respect of Items 13 and 23. Barrs' evidence is that it had not commenced business rescue proceedings at the time the Tender was published or at bid closure, and that the proceedings in respect of its then holding structure commenced only on 10 December 2025, with a notice of substantial implementation registered on 27 August 2026, bringing that business rescue to an end before the hearing of this matter. The question whether a bidder's business rescue history, and its conduct and performance while under business rescue, affects its current capacity to perform is not, however, a matter this Court needs to resolve. Clause 21.1 of the SRCC expressly identifies "*capacity to meet expected demand*" and "*past compliance of the bidder with contractual obligations*" as factors relevant to a split or multiple award, and those factors necessarily require the administrator, on the reconsideration directed by the order in this judgment, to take into account each affected bidder's current capacity to supply, including the consequences (if any) of having been under business rescue and of its performance of its existing allocation during that period, as a matter properly falling within the evaluation to be undertaken on remittal, rather than one to be pre-judged by this Court.

109 Weighing those considerations, and having regard to the various draft structured orders I requested of the parties in the event the Court were to order a remittal, I am satisfied that the just and equitable remedy is a declaration of unconstitutionality and invalidity of the Item 13 and Item 23 awards, the setting aside of the Item 13 and Item 23 awards, and a reconsideration of the Item 13 and Item 23 split, without re-evaluating the scores of bidders who are not affected by any of the five grounds, with the setting aside of the awards suspended until ninety days after that reconsideration has taken place, as the operative order at the conclusion of this judgment provides.

110 A number of further points bear on how the DoH should approach the reconsideration directed by this order, and it is convenient to address them together. First, it has been suggested that excluding bidders who were awarded allocations, and directing a reconsideration of the split, risks encroaching on the DoH's prerogative to structure a multi-award. It does not. Clause 21.1 of the SRCC records that the DoH "*reserves the right to issue split or multiple awards, where necessary, to facilitate security of supply*", and the evident purpose of a multi-way award of the kind made for Items 13 and 23, spreading the required volumes among as many qualifying bidders as the clause 21.1 factors reasonably support, was to maximise security of supply for medicines central to the national HIV treatment programme. The order made in this judgment leaves that prerogative entirely intact: it does not dictate how many bidders the administrator must include, nor does it direct that Cipla, or any other particular bidder, must receive any specific allocation. It is recorded, however, that Cipla's own unchallenged evidence is that it has

the capacity to supply more than half of the estimated demand for Item 13 and nearly half of the estimated demand for Item 23; that capacity is a matter the administrator is entitled, and indeed required by clause 21.1, to weigh in the reconsideration, but it does not pre-determine the outcome of that reconsideration.

- 111 Second, it should be made clear, for the avoidance of doubt, that nothing in the PPPFA read with the SRCC and the Rules confines a multi-way split award to the highest-scoring bidder alone. Section 2(1)(f) of the PPPFA, addressed earlier in this judgment, expressly permits an award to a tenderer other than the highest scorer where objective criteria, additional to the points-based specific goals, justify it, and clause 21.1 of the SRCC gives content to that discretion by identifying source of API and manufacturing site, capacity to meet demand, estimated volume, risk to public health, past compliance, and minimum order quantity as the objective criteria relevant to a split or multiple award. As already explained, the clause 21.1 formula for a three-or-more-bidder split allocates volume by reference to each bidder's already-calculated score, without adjusting those scores. It follows that the fact that a bidder's price, and consequently its score, is a certain percentage higher than that of the highest-scoring bidder is not, without more, a sufficient basis to exclude it from a split award. What matters is whether, applying the clause 21.1 criteria to the pool of bidders under consideration, an award to that bidder (whether alone, or as one of several bidders sharing the item) is rationally justified by the objective criteria the SRCC identifies. To treat a fixed price differential as an automatic cut-off, without regard to those criteria, is inconsistent with the multi-factor evaluation that clause 21.1 and section

2(1)(f) contemplate, for the reasons already given above in relation to the 10% threshold.

112 Third, the order directs that the reconsideration proceed from the point immediately following Phase III (price and preference-point evaluation) of the Tender's four-phase process, rather than requiring the DoH to reopen price negotiations or to repeat the price and preference-point scoring exercise from the outset. That approach is, in my view, the fair and rational course in the circumstances of this matter. The bidders' prices, while treated as confidential during the evaluation process, have now necessarily entered the public domain, at least to the extent reflected in the record placed before this Court and now a matter of record in these proceedings. Requiring a fresh round of price negotiations at this stage would expose the process to a material risk that bidders could tailor revised pricing with knowledge, whether direct or inferred, of their competitors' previous positions, undermining rather than protecting the integrity of the competitive process the Tender exists to preserve. There is also a live risk, raised during argument and not seriously disputed, that revisiting price negotiations afresh at this stage would increase, rather than reduce, the risk of price collusion among the remaining bidders, a risk the DoH is independently obliged to guard against. Confining the reconsideration to the application of the existing clause 21.1 split formula and criteria to the corrected pool of bidders, using the scores and prices already established as at the end of Phase III, avoids that risk while still giving full effect to the corrections directed by this judgment.

113 Fourth, it should also be recorded that a split or multiple award for Items 13 and 23 was contemplated from an early stage of the evaluation process, and

was not an afterthought introduced only once irregularities emerged. The BEC's deliberations from at least its fourth meeting onward proceeded on the basis that Items 13 and 23 would be divided among several qualifying bidders by reference to the clause 21.1 formula, a position that was carried through, with the adjustments described above in relation to Innovata's past performance, into the final recommendation for award and the Contract Circular issued on 20 August 2025. The reconsideration directed by this order accordingly does not introduce a new or unforeseen approach to the Item 13 and Item 23 awards. It corrects the application of an approach, namely a multi-way split award governed by clause 21.1, that was contemplated from an early stage and carried through to the award actually made.

- 114 Fifth, the setting aside of the Item 13 and Item 23 awards is suspended until ninety days after the reconsidered split and award is finalised, or, if the DoH elects not to make an award, until ninety days after that election is communicated to the parties. This suspension is necessary because an immediate setting aside, taking effect before the reconsidered split and award has been finalised, would leave a period during which there is no award in place at all in respect of Items 13 and 23, two items concerning the supply of first-line anti-retroviral medicines central to the national HIV treatment programme. The successful bidders currently supplying under the Item 13 and Item 23 Awards have, as illustrated by Aurobindo's answering affidavit, entered into downstream contract-manufacturing, procurement and distribution arrangements for the purposes of the Tender, including the procurement of active pharmaceutical ingredients and packaging materials, contract-manufacturing arrangements with third-party facilities, and logistics

and distribution arrangements with South African distributors. An immediate, unsuspended setting aside would require those arrangements to be unwound or renegotiated before any replacement award could be finalised, creating a real risk of a supply interruption for medicines on which patients depend, contrary to the public interest considerations addressed in this section. Suspending the setting aside of the Item 13 and 23 awards until the reconsidered split and award is finalised allows the current arrangements to continue operating without interruption while the DoH completes the reconsideration directed by this order, and allows the bidders affected by that reconsideration, together with the DoH, an orderly opportunity to restructure their respective arrangements with manufacturers, suppliers and other third parties to align with the outcome of the reconsideration once it is known, rather than having to do so twice, or under the pressure of an immediate supply gap.

- 115 The order is to operate prospectively. During the period for which the setting aside of the awards on Item 13 and Item 23 is suspended, the awards as they presently stand, remain of full force and effect, and the successful bidders under those awards, including Viatris and Innovata pending their exclusion taking effect, remain entitled to perform, and to be paid for, their existing contractual obligations, and the DoH remains entitled to enforce those obligations, in the ordinary course. The suspension accordingly preserves the parties' existing contractual rights and obligations for so long as it operates, and it is only once that period has run its course, and the setting aside takes effect, that the awards on Item 13 and Item 23 fall away.

116 It is appropriate to record, for the parties' benefit, the practical consequence that the exclusions and corrections directed by this order are likely to have on the pool of successful bidders. Macleods, Emcure, PharmaCare and Pharma Dynamics are, on the findings made above, innocent successful bidders: no ground of review has been upheld against the evaluation, negotiation or inclusion of any of their own bids, and, as illustrated by Aurobindo's own evidence referred to above, bidders in this position have altered their positions in reliance on their awards by entering into downstream manufacturing, procurement and distribution arrangements. Once Viatris and Innovata are excluded from the Item 13 and Item 23 awards going forward, as directed below, the volumes previously allocated to them will fall to be redistributed under the clause 21.1 formula among the remaining qualifying bidders for each item. That "*shrinkage*" in the pool of successful bidders means that Macleods, Emcure, PharmaCare and Pharma Dynamics, together with Barrs (if it remains qualified once its local manufacturing status and HDI points have been reconsidered) and Aurobindo (if it remains qualified once its local manufacturing status has been reconsidered), are unlikely to receive less than they were allocated under the awards now set aside. If anything, the redistribution of the volumes previously allocated to Viatris and Innovata among a reduced pool of qualifying bidders makes it likely that the innocent bidders will receive a larger allocation than before. This consideration supports the conclusion that the just and equitable remedy identified above imposes no unfair burden on the innocent bidders, and may in fact improve their position.

117 This conclusion is reinforced by the State respondents' own proposed order, which, on the premise that the Item 13 and Item 23 awards are declared invalid and set aside, itself proposed that any resulting award be made, and that the Department be directed to complete the resulting evaluation, within 120 days of the order, the same period adopted in the order below. Had the State respondents considered that a reconsideration of this kind presented any material difficulty or risk of disruption to supply that could not be managed within that timeframe, one would have expected them to propose a materially longer period. Their own proposal of 120 days is accordingly a further indication that a reconsideration confined to the exclusions and corrections directed by this order, applying the existing clause 21.1 formula and criteria to the corrected pool of bidders, is a task the DoH can properly be expected to complete within that period without disruption to the continuity of anti-retroviral supply.

118 For the assistance of the DoH in complying with this order, the findings material to its reconsideration of the Item 13 and Item 23 split and multiple awards may be summarised as follows: Viatris and Innovata did not hold a valid local manufacturing license at bid closure and are excluded from the award on both items going forward; Barrs and Aurobindo's entitlement to local manufacturer preference, and the price benefit flowing from it, must be re-examined against the clause 8 and clause 3(10) definitions by reference to the actual manufacturing steps performed at their respective sites; the 3.21 HDI points awarded on the strength of the unsubstantiated Cintopix-to-Avacare ownership link must be removed from Barrs' score pending substantiation; the independence of the Innovata and Barrs bids must be

investigated and, if a reasonable suspicion of collusion is found, acted upon; the bidders' current capacity to supply, including any effects of having been under business rescue, is a relevant clause 21.1 consideration for each affected bidder; and the reconsideration is to proceed from the scores and prices already established at the end of Phase III, applying the clause 21.1 formula and criteria afresh to the corrected pool of bidders, without reopening price negotiations or re-scoring bidders unaffected by these findings. The DoH is reminded that, as set out above, section 2(1)(f) of the PPPFA and clause 21.1 of the SRCC confer a discretion to structure the split award by reference to the objective criteria clause 21.1 identifies, including the local manufacturing status of a bidder whose entitlement to that status survives the reconsideration directed above, and that discretion is not confined to awarding strictly in order of score. For the avoidance of doubt, Cipla is not disqualified from this reconsideration. Cipla's score, established at the end of Phase III, remains part of the corrected pool of bidders to which the clause 21.1 formula and criteria fall to be applied.

Costs of the Cipla application

119 Cipla has been substantially successful in the Cipla application. It has established each of the five grounds of review it pursued: Ground One (the Viartis and Innovata licensing non-responsiveness), Ground Two (Innovata's past performance), Ground Three (the local manufacturing status of Barrs and Aurobindo), Ground Four (Innovata and Barrs' unsubstantiated HDI points) and Ground Five (the failure to investigate the independence of the Barrs and Innovata bids). The result is that the Item 13 and Item 23 Awards fall to be declared invalid and set aside, and the split and award of each item remitted

for reconsideration on the terms set out below. Costs ordinarily follow that result. The ordinary rule is that costs follow the result, and nothing in this judgment displaces that rule in Cipla's favour against the State respondents, who were responsible for the conduct of the evaluation found to be reviewable on each of the five grounds. The costs of the Cipla application are addressed further in the order below.

The Hetero application

120 Hetero's review in Part B seeks an order reviewing and setting aside the DoH's decision not to consider Hetero for award in respect of Items 13 and 23, declaring that decision unlawful, irrational and procedurally unfair (alternatively reviewable under the principle of legality), and remitting the evaluation of Hetero's own bids for those Items to the DoH for re-evaluation. Hetero does not seek to disturb the awards made to any successful bidder, including the third to tenth respondents, and does not seek substitution or a direct award to itself. Hetero's founding affidavit, deposed to on 31 October 2025, was not thereafter supplemented, notwithstanding that the DoH furnished the Rule 53 record and that Hetero's own notice of motion expressly reserved the right to do so once that record was produced. Hetero filed no replying affidavit to any of the answering affidavits delivered by the State respondents, Macleods, Viatris or Pharma Dynamics, and filed no heads of argument.

121 Hetero's review is founded principally on sections 3(2)(b), 6(2)(b), 6(2)(c), 6(2)(e)(iii), 6(2)(f)(ii)(cc), 6(2)(h) and 6(2)(i) of PAJA, read through the constitutional lens of legality, rationality and the procurement guarantees in

section 217 of the Constitution. Hetero's founding affidavit distils its complaint into five grounds. First, that the DoH's exclusion of Hetero from further evaluation of Items 13 and 23, and the referral of the matter to the Competition Commission under section 4(1)(b)(iii) of the Competition Act 89 of 1998, rested on a reasonable suspicion of collusive bidding between Hetero and its associated entities that lacked any evidential foundation, and that Hetero was denied a fair hearing before that exclusion and referral were decided upon. Second, that the DoH misapplied clause 21.4 of the SRCC (which reserves the DoH's right to negotiate price, minimum order quantities and volumes with bidders prior to award) and failed to exercise its discretion to negotiate price lawfully, by declining to invite Hetero to price negotiations. Third, that the DoH failed properly to investigate the suspected collusion that led to the Competition Commission referral. Fourth, that the DoH's evaluation methodology for Item 23, which compared 28-day and 30-day dispensing pack sizes directly without applying a conversion factor, was irrational and inconsistent with the tender specifications and with the cost-effectiveness requirement of section 217 of the Constitution. Fifth, that Hetero's exclusion contravened the Public Finance Management Act 1 of 1999 (PFMA), which obliges accounting officers to ensure value for money and accountability in the expenditure of public funds. On this basis, Hetero seeks an order reviewing and setting aside the DoH's decision to exclude it from award in respect of Items 13 and 23, and remitting the evaluation of its own bids for those Items to the DoH for re-evaluation.

Basis of opposition in the Hetero application

122 The Hetero application was opposed by the first and second respondents (the Minister of Health and the Director-General: National Department of Health), the fourth respondent (Macleods), the sixth respondent (Viatris) and the tenth respondent (Pharma Dynamics). In broad terms, the opposing respondents contend that the DoH had a reasonable, factually founded basis to suspect collusive bidding between Hetero and its associated entities, Hetero Labs Limited India (Hetero India), Q-Sol and Pharma-Q; that Hetero was afforded a fair opportunity to address that concern before the decision was taken and did not do so fully or accurately; that the DoH's decision not to negotiate price with an already-excluded bidder involved no misapplication of clause 21.4 of the SRCC; and that, on a proper construction of the tender documents, none of Hetero's remaining grounds discloses a reviewable irregularity material to the outcome.

123 The State respondents' case is that Hetero's bid was excluded from further evaluation under phase I of the SRCC's four-phase evaluation process on account of a reasonable, factually founded suspicion of collusive bidding between Hetero and its associated companies, a suspicion the DoH was entitled, and indeed obliged, to form and act upon under section 217 of the Constitution and section 2 of the PFMA. The suspicion rested on a constellation of contemporaneous facts: that Hetero is a wholly owned subsidiary of Hetero India; that Q-Sol's bid incorporated the medicine registration certificate issued to Hetero, submitted with Hetero India's consent pursuant to a technology-transfer agreement; that the technology-transfer agreement was signed on behalf of Hetero India by Mr BB Shah, who was

simultaneously a director of Hetero; that a letter dated 10 October 2024, signed by Mr Anand Mehta as managing director of Pharma-Q (a separate bidder that, like Q-Sol, Mr Mehta served as managing director of) and sent to the Department in response to a query about Pharma-Q's own bid, confirmed that Hetero India had appointed Q-Sol as its agent to submit the bid and that Q-Sol's pricing had been supplied by Hetero India and incorporated into Q-Sol's bid without any changes; and that Hetero's own SBD4 Bidder's Disclosure had answered "no" to the question whether it had any interest in another related enterprise.

- 124 Macleods, an unimpugned successful bidder on both Items, contends that none of Hetero's five grounds of review identifies any irregularity in the evaluation, negotiation or inclusion of Macleods' own bid, such that Macleods is an innocent tenderer which has altered its position in reliance on its award, procuring and holding stock currently valued at some R237 million and committing to forward supply orders valued at some R559 million.
- 125 Viatris contends that the Tender framework, in particular clauses 14 and 15 of the SRCC, entitled the DoH to investigate and act on procurement-integrity concerns before price and negotiation became determinative, and that the contemporaneous Rule 53 record gave the DoH a rational, cumulative basis to cease considering Hetero's bids for Items 13 and 23.
- 126 Pharma Dynamics, which opposes only the Item 23 award, contends that each of Hetero's five grounds is untenable, for the reasons substantially recorded in its heads of argument on the suspicion of collusion, procedural

fairness, the pack-size ground, and the discretion (rather than obligation) to negotiate under clause 21.4 of the SRCC.

The outcome of the Hetero application

127 For the reasons which follow, Hetero's application in Part B falls to be dismissed. On the central ground, the cumulative, contemporaneous material before the DoH (Hetero's wholly owned subsidiary relationship to Hetero India, the technology-transfer and manufacturing agreement with Q-Sol, Q-Sol's own account of having incorporated Hetero India's pricing without change, Mr Mehta's materially consistent account given in his capacity at Pharma-Q, the overlapping directorship, and Hetero's own incomplete SBD4 disclosure) was plainly capable of founding a reasonable, rational suspicion of collusive bidding sufficient to justify the DoH's confined decision not to continue considering Hetero for Items 13 and 23, applying the standard for a reasonable suspicion as articulated in *Viking Pony Africa Pumps (Pty) Ltd t/as Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) at paras 31 and 34, and the review is not the occasion to determine, conclusively, whether Hetero in fact colluded, a matter reserved exclusively to the Competition Commission and, if applicable, the Competition Tribunal. Hetero was, moreover, afforded a materially fair opportunity to address the DoH's concern before the decision was taken, having been asked in April 2025 to disclose precisely the category of association later relied upon, and having answered that inquiry without disclosing the full extent of the relationships subsequently revealed by the record. On that basis, no breach of section 3(2)(b) of PAJA is established.

128 The referral of the matter to the Competition Commission does not itself constitute administrative action or a punitive sanction requiring a prior hearing, and is analytically distinct from the confined procurement decision under review. Hetero's remaining grounds, concerning the Item 23 pack-size evaluation and the DoH's exercise of its discretion not to negotiate price under clause 21.4 of the SRCC, do not independently establish a reviewable irregularity: Hetero's bid was excluded at phase I, before price or pack size fell to be considered at all, and clause 21.4 in any event confers a discretion rather than an obligation to negotiate. Finally, even had Hetero established a reviewable irregularity, the relief it seeks is narrow, extending only to the re-evaluation of its own bids, and a just and equitable remedy under section 172(1)(b) of the Constitution would have had to account for the reliance interests of innocent successful bidders such as Macleods, and for the public interest in uninterrupted anti-retroviral supply.

129 It is appropriate to deal separately, and in somewhat fuller terms, with the question of costs. The ordinary rule in constitutional litigation, as established in *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC), is that an unsuccessful private litigant in proceedings against the state raising a genuine constitutional issue should not, as a general rule, be ordered to pay the state's costs, so as not to deter litigants of modest means from testing the legitimacy of state conduct. That default position does not assist Hetero. As already recorded in the introduction to this judgment, Hetero is not a public-interest litigant vindicating constitutional rights, but a commercial enterprise pursuing its own competitive position in a valuable public tender, and the fact that its application invokes section 217 of the

Constitution does not of itself displace the ordinary rule that costs follow the result.

130 The facts of this matter in any event warrant a departure from the *Biowatch* default, independently of that characterisation. As recorded in the introduction, Hetero's attorney appeared only at the commencement of the hearing on 21 September 2026, tentatively suggesting that counsel might be *en route*, and thereafter there was no appearance whatsoever for Hetero at any stage of the hearing from 21 to 23 September 2026, notwithstanding that Hetero had delivered a notice of set down and had not withdrawn or sought a postponement of its own application. Hetero filed no replying affidavit, filed no heads of argument, and did not appear to argue its own review. That conduct, considered together with Hetero's status as a commercial litigant, takes this case outside the scope of the protection *Biowatch* affords and justifies an adverse costs order against Hetero.

131 A further, aggravating consideration is that Hetero's conduct unnecessarily burdened the Court and the opposing parties. Notwithstanding that it did not prosecute its application, file heads of argument, or appear at the hearing, Hetero did not withdraw Part B or otherwise narrow the issues before the hearing. The respondents were left to prepare, and the Court was left to read, full opposing papers and record material addressing all grounds of Hetero's review, and the matter proceeded to a three-day consolidated hearing, only for Hetero neither to appear nor to advance any argument in support of its case. That course imposed excessive and unnecessary reading and preparation on the Court and the respondents, which were put to the cost of meeting a case that was never argued.

132 In these circumstances, a costs order on the ordinary scale would not adequately mark the Court's disapproval of Hetero's conduct. The principle recognised in *In re Alluvial Creek Ltd* 1929 CPD 532, that a party may be ordered to pay costs on the attorney and client scale where its conduct has put the other side to unnecessary trouble and expense which it ought not to bear, applies squarely here. Costs for both Part A (an unmeritorious urgent application for interim interdictory relief, which was, in the event, not pursued) and Part B are accordingly awarded against Hetero on the attorney and client scale, including the costs of two counsel where employed.

Condonation applications in the Hetero application

133 One respondent in the Hetero application filed a condonation application, namely the tenth respondent, Pharma Dynamics (Pty) Ltd, which sought condonation for the late filing of its heads of argument, filed eleven court days out of time. Pharma Dynamics explained the delay by reference to its attorney's repeated attempts to ascertain Hetero's intentions regarding the further prosecution of its application: Hetero's attorney had indicated on 3 September 2026 that he believed Hetero would withdraw the matter but required instructions, and had still not confirmed a notice of withdrawal or postponement by 9 September 2026, notwithstanding Hetero's practice note of 8 September 2026 suggesting that the hearing should not proceed on the allocated dates. Pharma Dynamics contended that it would suffer prejudice if its heads of argument were not accepted, that Hetero would suffer no prejudice from their late filing since Hetero had itself filed no heads of argument, and that it was in the interests of justice for the Court to have the benefit of Pharma Dynamics' submissions in determining the application.

134 Pharma Dynamics' application for condonation falls to be upheld, and the costs of that application shall be costs in the main application (ie Part B).

Condonation applications in the Cipla application

135 Two respondents in the Cipla application sought condonation. The sixth respondent (Viatris) sought condonation for filing its answering affidavit a few days late. There was no opposition to Viatris's application. The seventh respondent (Barrs) sought condonation for the late filing of both its notice of intention to oppose the application and its answering affidavit, both of which were delivered shortly before the hearing. At the hearing, the seventh respondent tendered Cipla's costs occasioned by its condonation application and Cipla's replying affidavit to the seventh respondent's answering affidavit. Both condonation applications are granted, subject to the costs orders set out below.

Order

136 In the Hetero application:

136.1 The tenth respondent's application to condone the late filing of its heads of argument is granted, the costs of which are costs in the main application (Part B).

136.2 Part B of the applicant's application is dismissed.

136.3 The applicant is ordered to pay the opposing respondents' costs of Parts A and B, including those of two counsel where so employed, on the scale as between attorney and client.

137 In the Cipla application:

137.1 The sixth respondent's application to condone the late filing of its answering affidavit is granted, with no order as to costs.

137.2 The seventh respondent's application to condone the late filing of its notice of intention to oppose the application and its answering affidavit is granted. The seventh respondent's answering affidavit, together with Cipla's replying affidavit thereto, is admitted into evidence. The seventh respondent is directed to pay Cipla's costs, including those of two counsel on scale C, in relation to (i) the application for condonation and (ii) Cipla's replying affidavit to the seventh respondent's answering affidavit.

137.3 It is declared that the decision of the National Department of Health in the multiple award in respect of items 13 and 23 of Tender HP13-2025ARV "*Supply and Delivery of Anti-Retroviral Medicines to the Department of Health for the period 1 July 2025 to 30 June 2028*" (the Item 13 and Item 23 Awards) is unconstitutional, and accordingly invalid.

137.4 The Item 13 and Item 23 Awards are set aside.

137.5 The bids of the fifth respondent (Innovata) and sixth respondent (Viatris) are to be excluded from reconsideration of any awards made in respect of items 13 and 23.

137.6 The final bid prices of the seventh (ie Barrs) and eighth (ie Aurobindo) respondents are to be restored to their pre-negotiation prices

inasmuch as they do not qualify for the local manufacturing preference in clause 8 of the SRCC, and their scores are to be re-adjusted accordingly.

137.7 The scores of the fifth respondent (Innovata) and seventh respondent (Barrs) are each to be adjusted by the deduction of 3.21 points, being the HDI points that each was erroneously granted without adequate substantiation of the Cintopix-to-Avacare ownership link.

137.8 The National Department of Health is directed to conduct an investigation to determine whether the fifth respondent (Innovata) and seventh respondent (Barrs) prepared their bids for item 13 and item 23 independently of one another, and, having done so, to reconsider the bid of the seventh respondent (the fifth respondent, Innovata, already having been excluded in terms of paragraph 137.5 above) in light of the findings of that investigation. If, following that investigation, the Department disqualifies the bid of the seventh respondent on the basis that it has a reasonable suspicion of collusion, that bid is to be excluded from the relevant awards.

137.9 Save as set out in paragraphs 137.5 to 137.8 above, and save in respect of the eleventh, twelfth, thirteenth and fourteenth respondents, who were (and are to remain) disqualified, the remainder of the bids considered for item 13 and item 23 are not to be re-evaluated, and the scores of the bidders who progressed to Phase III of the tender evaluation process are to remain unchanged.

137.10 The split and award of each of item 13 and item 23 is to be reconsidered by the National Department of Health, in accordance with clause 21.1 of the SRCC and having regard to its discretion under section 2(1)(f) of the PPPFA to structure the award by reference to the objective criteria identified in clause 21.1 rather than strictly by reference to score, taking into account, collectively and together, the exclusions and adjustments directed in paragraphs 137.5 to 137.8 above.

137.11 The National Department of Health is to finalise the reconsidered split and award of each of item 13 and item 23 within one hundred and twenty (120) days of the date of this order.

137.12 Should the National Department of Health consider that it will be unable to comply with the direction in paragraph 137.11 above, it shall file an affidavit with the Court within thirty (30) days of the date of this order setting out the reasons therefor, as well as the date by which it will be able to comply.

137.13 The remaining bidders shall be entitled to file affidavits in reply within fifteen (15) days of service of the National Department of Health's affidavit referred to in paragraph 137.12 above.

137.14 The Court shall give such directions as it deems fit in relation to any variation of the time period in paragraph 137.11 above.

137.15 The order in paragraph 137.4 above is suspended until ninety (90) days after the split and award of items 13 and 23 is finalised,

alternatively, and if the Department elects not to make an award, until ninety (90) days after the date of such election being communicated to the parties.

137.16 This order shall operate prospectively only.

137.17 The first and second respondents are ordered jointly and severally to pay the applicant's costs, including those of two counsel, according to scale C.



GW GIRDWOOD

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 21-23 September 2026

This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 October 2026.

Appearances

Attorney for the applicant in the

Hetero application:

Ngcingwana Inc

per: S Ngcingwana

Counsel for the applicant in the

Cipla application:

Adv I Jamie SC

Adv P Maharaj-Pillay

Instructed by:

Webber Wentzel

per: R Africa / D Jonker / J Killick

Counsel for the first and second respondents

in the Hetero and Cipla applications:

Adv A R Ramaweale SC

Adv B Gededger

Instructed by

:

State Attorney of Pretoria

Counsel for the fourth respondent in the Hetero and Cipla applications: Instructed by:	per: P Sithebe Adv D Gess SC Springer-Nel Attorneys per: A Nel
Counsel for the fifth respondent in the Hetero and Cipla applications: Instructed by:	Adv G Rome SC Adv B Bester HJW Attorneys and Conveyancers per: R Wands / A van Eegem / Z Boshoff
Counsel for the sixth respondent in the Hetero and Cipla applications: Instructed by:	Adv JG Wasserman SC Adv N Ndlovu Cliffe Dekker Hofmeyr Inc per: I Mahomed / T Smit / S Hariram
Counsel for the seventh respondent in the Hetero and Cipla applications: Instructed by:	Adv S Myburgh SC Adv T Mabuya Ngcingwana Inc per: S Ngcingwana
Counsel for the eighth respondent in the Hetero and Cipla applications: Instructed by:	Adv C Kruyer Cliffe Dekker Hofmeyr Inc per: J Feris / I Abdullah / C Green
Counsel for the tenth respondent in the Hetero and Cipla applications: Instructed by:	Adv E Webber Matthew Wilson Attorney per: M Wilson
Attorney for the thirteenth and fourteenth Respondents in the Hetero and Cipla applications:	Tugendhaft Wapnick Banchetti &Partners per: J-C Atouguia