

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

In the matter between:

CASE NO: 35149/2016

MEDI-CORE TECHNOLOGIES (PTY) LIMITED Applicant

and

THE DEPARTMENT OF NATIONAL TREASURY First Respondent

DIRECTOR GENERAL: NATIONAL DEPARTMENT OF HEALTH Second Respondent

MINISTER OF FINANCE Third Respondent

MINISTER OF HEALTH Fourth Respondent



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DATED at Sandton on this the 18th day of May 2016.

- Cypr Ang*
1. Shared Contract - Value depends on order, WC + G placed order
 2. Critical events: 1. Chronology 2. Aff 3. auth.
- 3 (1) direction 15/12
17/?
23/3.
7/4.

Content of direction is critical. Cypr wd. know tell A. ff what terms were p.453.

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C/O PRETORIUS LE ROUX
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 Pretoria

TO
 THE REGISTRAR OF THE ABOVE HONOURABLE COURT
PRETORIA

AND TO:
STATE ATTORNEY
 2nd and 4th Respondents' Attorney
 316 Thabo Sehume Street
 Pretoria
 Private Bag X91, Pretoria
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Received a copy hereof this _____ day
 of May 2016

 For: 2nd and 4th Respondents Attorney

AND TO:
STATE ATTORNEY
 1st and 3rd Respondents' Attorney
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 Ref: 2629/16/Z32
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Received a copy hereof this _____ day
 of May 2016

 For: 1st and 3rd Respondents Attorney

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION, PRETORIA)

In the matter between:



CASE NO: 55149/16

MEDI-CORE TECHNOLOGIES (PTY) LIMITED

Applicant

and

THE DEPARTMENT OF NATIONAL TREASURY

First Respondent

DIRECTOR GENERAL: NATIONAL DEPARTMENT OF HEALTH

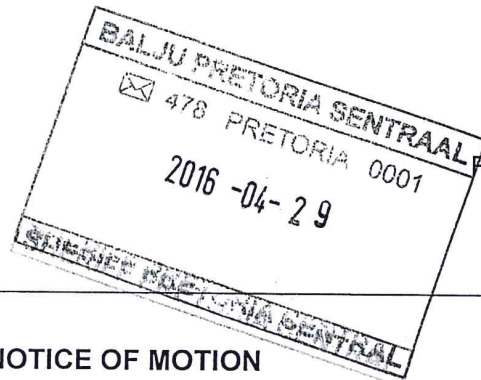
Second Respondent

MINISTER OF FINANCE

Third Respondent

MINISTER OF HEALTH

Fourth Respondent



NOTICE OF MOTION

TAKE NOTICE THAT the that the Applicant intends to make an application to the above Honourable Court on 31 MAY 2016 at 10h00 (or as soon thereafter as counsel may be heard) for the orders listed in Part A below:

PART A:

1. that the Applicant's non-compliance with the Rules of the above Honourable Court in regard to service and time limits be condoned and that this application

be heard as one of urgency in terms of the provisions of Rule 6(12);

2. pending the determination of the relief sought in Part B of the Notice of Motion:

*Appl:
Inappropriate
Dep will look at it
independently*

2.1. that the Second Respondent be interdicted and restrained from implementing the directive issued by the First Respondent to the National Department of Health on or about 17 March 2016 ("the Directive"), directing the National Department of Health to cancel the contract concluded between the Applicant and the National Department of Health on or about 12 June 2015 ("the Contract") and to restrict the Applicant as a supplier to the National Department of Health in terms of the Contract and any other contract concluded between the Applicant and the National Department of Health or any other tender submitted to it; and

?

2.2. that the Second Respondent be directed to uplift the 'suspension' of the Contract it has implemented as the result of the Directive referred to in paragraph 2.1 above (or any other directive received from the First Respondent), with immediate effect;

*no national basis:
+ not in admin memo to 15/12
p. 356 par 65.
+ p. 624 par 18.*

3. that the costs of the orders in Part A of this Notice of Motion be paid by those Respondents opposing the relief sought in Part A jointly and severally, the one paying the others to be absolved; and further and/or alternative relief.

*no basis for direction
we visit only 12/12
no conf. of 15/12
only necessary: p. 355 par 95.*

AND TAKE NOTICE FURTHER that the Applicant intends to make an application for the following orders set out in Part B:

PART B

to suspend admin on 15/12/15

1. 2. that the decision of the First Respondent to issue the Directive referred to in

paragraph 2 1 be reviewed and set aside;

2. that the failure by the Second Respondent to make a determination pursuant to the submissions made by the Applicant to it on or about 14 April 2016 be reviewed and the the Second Respondent be ordered to make a determination within a period of 10 days of the date of this order;

3. that the costs of the orders in Part B of this Notice of Motion be paid by those Respondents opposing the relief sought in Part B jointly and severally, the one paying the others to be absolved; and

4. further and / or alternative relief.

AND TAKE NOTICE FURTHER the accompanying affidavit of MOONILAL HANSRAJ SEOPURSAT, together with the annexures thereto, will be used in support thereof.

AND TAKE NOTICE FURTHER that the Applicant has appointed THOMSON WILKS INC as its attorneys, at which it will accept notice and service of all notice and processes in these proceedings.

AND TAKE NOTICE FURTHER that if you intend opposing the relief in Part A of this notice of motion you are required to:

(a) notify the Applicants' attorneys in writing on or before Wednesday, 4 May 2016;

Letts 12/3/16: Found guilty: 1.69 2 alleged conspirators know now no basis for them:

(b) file any answering affidavit/s, on or before close of business on 11 May 2016;

Letts agreed to Health + directed to Cancel. p.359 para 107. no basis for directive to suspend: only conduct initial. no para decision to Cancel yet.

(c) further appoint in such notification the address at which you will accept notice and service of all documents in these proceedings.

but right to admin action but right under contract. That's clear right

AND TAKE NOTICE FURTHER that if in any Respondent intends to oppose the relief in *fundamentally interfered with. p.403 para 259.1. no evidence* *impeachable harm: p.365: para 132, see p.179 Contract yet.*

19.1.1 re qualification extended.

Part B of this Notice of Motion, it is required to:

- (a) show cause why the decision referred to in paragraphs 1 and 2 of Part B above should not be reviewed and set aside *and further* to dispatch the record of the relevant decision referred to in paragraphs 1 and 2 under Part B above to the Registrar of this Court and inform the Applicant once this has been done, within 15 days of the receipt of service of this application;
- (b) within 15 days after receipt by them of the Notice of Motion to deliver notice to the Applicant that they intend to oppose and in such notice to appoint an address as prescribed in terms of Rule 6(5)(b); and
- (c) within 30 days after expiry of the time referred to in Rule 53(4) to deliver any affidavits in answer to the allegations made by the Applicant.

AND TAKE NOTICE FURTHER that if no such notice of intention to oppose be given in respect of the relief sought in Part B, the application will be made at 10h00 on 3rd June 2016 or so soon thereafter as counsel may be heard.

DATED AT JOHANNESBURG ON THIS THE 28th DAY OF APRIL 2016.

Balance of convenience: if granted state will get condoms + contract honored. State has all contractual rights: only risk is parallel front-amount. Fed is for goods received. If not granted plug is pulled will not return. p. 54-55. No basis for injunction: only suspicion: upheld contract pending.

Blachford: Namlike p. 26 p. 27 + John Case p. 346 (par 53) p. 102 Bundle.

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AND TO:

WB.
THE REGISTRAR OF THE ABOVE
HONOURABLE COURT, PRETORIA

Amended relief reflects what
p. 626 dep. says what it
wants to do; para 22.

AND TO:
THE DEPARTMENT OF NATIONAL
TREASURY

First Respondent
C/O The State Attorney,
Old Mutual Centre,
8th Floor, 167 Andries Street
Pretoria

Hassam: why no relief reduces in due
course? not heard.

no irreparable harm heard except

"sufficient Econ". get R15m.

AND TO:
DIRECTOR GENERAL:
DEPARTMENT OF HEALTH
Second Respondent

C/O The State Attorney,
Old Mutual Centre,
8th Floor, 167 Andries Street
Pretoria

NATIONAL

Balance of Conv: what happens if suspicion
is cond? - Appl. benefited as result of
fraud(?) If not granted Appl. can
delay full quota

AND TO:
THE MINISTER OF FINANCE
Third Respondent

C/O The State Attorney,
Old Mutual Centre,
8th Floor, 167 Andries Street
Pretoria

p. 15 para 37

why urgent: Appl. groups 2. says venue will take 3
yrs. p. 473 para 53.1 + p. 452

+ claim for damages

object to new Notice: not in F-off to

not advise director of Dec: p. 10.

no exp. why 1 month later a new Notice

not case come to meet. prejudicial.

discretion: fraud here (?).

2 Conf. off re 15/12: was reasonable suspicion
if I grant this will be obstructing
a fraud. Customs Dec. p. 575.

misrep re import from Malaysia
but new Tariff p. 586.

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION, PRETORIA)

In the matter between:

*it's material because listed by SATBS
these not from Treasury.
p-119: County of money - medals
re deposition -
delegation of Treasury*

CASE NO: 35149/16

MEDI-CORE TECHNOLOGIES (PTY) LIMITED

*Contracts: overseas Applicant
of Procurement -*

and

THE DEPARTMENT OF NATIONAL TREASURY

*Appl. could have used PTA.
your adv: investigate
can continue.* First Respondent

DIRECTOR GENERAL: NATIONAL DEPARTMENT OF HEALTH

Second Respondent

MINISTER OF FINANCE

if no fr: contract back in place. Third Respondent

MINISTER OF HEALTH

*de Lusitana.
adv: p-447: same adv.
+ form.* Fourth Respondent

FOUNDING AFFIDAVIT

*State off: new case was.
No challenge to dec. decreed*

I, the undersigned,

*see main relief: failure to take decision
overdisp.*

MOONILAL HANSRAJ SEOPURSAT

*re doctrine of march: not admin decision
is not final*

do hereby make oath and state that:

- I am the managing director and, as I shall explain below, one of the shareholders of the applicant. I am authorised to depose to this affidavit on behalf of the applicant, as appears from the resolution attached as Annexure "MHS1" hereto.

ZWA

2. The facts contained herein are within my personal knowledge, save where the context otherwise indicates or the contrary appears therefrom and are to the best of my belief both true and correct.

3. Where I make submissions of a legal nature, I do so on the advice of the applicant's legal representatives.

*McN: par 31 Vithay
WB. "detected" is suspicious but leads to investigation + not case.*

THE PARTIES

4. The applicant is **MEDI-CORE TECHNOLOGIES (PTY) LIMITED**, a limited liability company incorporated in terms of the Companies Act 71 of 2008, with its place of business at 19 Nyala Road, Canelands, Verulam, Durban. For ease of reference, in this affidavit I shall refer to the applicant as "**Medi-Core**".

5. The first respondent is the **DEPARTMENT OF NATIONAL TREASURY**, the national department:

*p. 51 pa 143: re Amendment
Mahn di case: refer to directive 15/12.*

5.1. established in terms of section 5 of the Public Finance Management Act 1 of 1999 ("the PFMA");

*it reduces relief:
fraud is non-remediable. p. 358 pa 105.*

5.2. acting, for the purposes of this application, through its Supply Chain Management: Governance, Monitoring and Compliance division ("**SCM**");

no intention to disrupt orders already placed: in case of fraud.

5.3. whose offices are situated at 40 Church Square, Pretoria, however, in terms of Rule 4(9) of the Uniform Rules of Court, the application will be served on the first respondent care of the office of the State Attorney, at Old Mutual Centre, 8th Floor, Andries Street, Pretoria.

re balance: State cannot suspend without reason

6. The second respondent is **THE DIRECTOR GENERAL: NATIONAL DEPARTMENT OF HEALTH:**

*cannot quantify amounts if no orders.
State can only investigate how: see Vithay
review of 15/2 cannot fail: no reasonable suspicion*

6.1. Dr Y Pillay, cited in his capacity as the Acting Director General, National Department of Health;

6.2. whose department was responsible for the issue of tender number HM01-2015;

6.3. whose offices are at the Civitas Building, Corner Thabo Sehume and Struben Streets, Pretoria; however, in terms of Rule 4(9) of the Uniform Rules of Court, the application will be served on the first respondent care of the office of the State Attorney, at Old Mutual Centre, 8th Floor, Andries Street, Pretoria.

7. The third respondent is the **MINISTER OF FINANCE**:

7.1. Mr Pravin Gordhan, cited in his capacity as the Minister of Finance, who is the head of and responsible for the operations of the National Treasury in terms of section 5 of the PFMA;

7.2. In terms of section 10(2)(d) of the PFMA, the Minister of Finance remains responsible for the exercise of delegated powers or performance of any assigned duty by the officials within the National Treasury, including the Chief Director of the SCM;

7.3. whose offices are at 2nd Floor, Old Reserve Bank Building, 40 WF Nkomo Street, Pretoria, however, in terms of Rule 4(9) of the Uniform Rules of Court, the application will be served on the first respondent care of the office of the State Attorney, at Old Mutual Centre, 8th Floor, Andries Street, Pretoria.

8. The fourth respondent is the **MINISTER OF HEALTH**:

8.1. Dr Aaron Motsoaledi, cited in his capacity as the Minister of Health;




- 8.2. who retains the overall oversight function over the activities of the second respondent;
- 8.3. whose offices are at 2nd Floor, Old Reserve Bank Building, 40 WF Nkomo Street, Pretoria; however, in terms of Rule 4(9) of the Uniform Rules of Court, the application will be served on the first respondent care of the office of the State Attorney, at Old Mutual Centre, 8th Floor, Andries Street, Pretoria.
9. No relief is sought against the third and fourth respondents herein (save in the event of their opposition) and they are cited only for the interest they may have in the matter.

INTRODUCTION AND PURPOSE OF THE APPLICATION

10. The purpose of this application is to obtain an order, in terms of Part A of the notice of motion:
- 10.1. interdicting the National Department of Health (“NDoH”) from implementing the decision of the Department of National Treasury to:
- 10.1.1. cancel the award to Medi-Core under tender reference number HM01-2015 in respect of the supply of male condoms and lubricants (“the tender”);
- 10.1.2. restrict Medi-Core as a supplier to the NDoH under the tender; or any other tender in terms of which Medi-Core is a successful tenderer;
- (“the Directive”) and
- 10.2. uplifing the ‘suspension’ of the contract concluded between Medi-

WDR

Core and the NDoH concluded pursuant to the tender process conducted in terms of the tender ("**the Contract**"), imposed by the National Treasury acting through its SCM division.

11. In effect, the purpose of the semi - urgent relief sought is to restore the *status quo* as between the parties to the Contract prior to the intervention by the National Treasury and pending the finalisation of the review proceedings. The reasons for this relief being sought on a semi – urgent basis are set out in detail in the concluding sections of this affidavit.

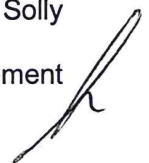
12. In terms of part B of the notice of motion, Medi-Core seeks to review and set aside:

12.1. the decision of the National Treasury, acting through its SCM division, to issue the Directive referred to above; on the basis contemplated in section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") which decision was taken on 17 March 2016; and

12.2. the failure on the part of the National Department of Health to make a decision, in terms of section 6(3) of PAJA, which has persisted since **20 April 2016**.

13. As I explain in some length below, the first decision was communicated in the letter dated 17 March 2016, which is attached as Annexure "**MHS2**" and to which I will refer extensively below.

14. As appears from Annexure "MHS2", the decision – maker in question is Mr Solly Tshitangano ("**Tshitangano**") acting in the position as Acting Chief Procurement Officer: SCM division of the National Treasury.




15. The second 'decision' to be reviewed is the failure on the part of the NDoH to take a decision in terms of clause 23 of the General Conditions of the Contract concluded between Medi-Core and the NDoH, alternatively Regulation 13 of the Preferential Procurement Regulations, 2011.

16. In terms of a letter dispatched by Medi-Core's attorneys on 14 April 2016 (it is dated 12 April 2016) attached hereto as Annexure "MHS3", Dr Pillay, the second respondent, was invited to make a decision on or before 20 April 2016, regarding:

16.1. the suspension of the Contract between Medi-Core and the NDoH;
and


16.2. the cancellation of the Contract between Medi-Core and the NDoH;
and

16.3. the 'restriction' of Medi-Core as a supplier to the NDoH.

17. Dr Pillay, the second respondent, has, as of the date of issue of this application, failed to respond to the invitation and there is no timeline prescribed in terms of any legislation which compels the NDoH to make the decision in question.

18. On 22 April 2016, Medi-Core's attorneys again wrote to the NDoH (and specifically Dr Pillay), noting the failure by the NDoH to make a decision within a reasonable time period, and requesting the undertkaing by NDoH that it would agree to reverting to the status quo ante (thus not further jeopardising Medi-Core's financial position and survival) pending the outcome of the review application. A copy of this letter is attached as Annexure "MHS3.1".

19. There has, as of the date of delivery of this application, been no response whatsoever to either of these two letters, either from the NDoH or from National

Treasury (which was at all times copied on all correspondence, as I shall explain below).

20. It is as the result of the NDoH's deafening silence that it has become necessary to launch this application.
21. In brief, the NDoH appears to have become paralysed and is incapable of making a decision regarding Medi-Core as its supplier. All of this is as a result of the strange and unjustified approach adopted by the National Treasury towards Medi-Core.
22. The National Treasury appears to have 'blackballed' Medi-Core as a supplier and has provided entirely fictitious reasons for doing so. It seems to be driving some undisclosed agenda. In the meantime, the NDoH appears to feel pressurised to react and has failed to explain to the National Treasury that it has its facts wrong. In the meantime, Medi-Core is being severely prejudiced because the orders already placed cannot be delivered and future orders are not being placed, despite the contractual provisions.
23. Currently, Medi-Core has not been paid some R15,484,565.34 in respect of the orders already placed. The overall contract value is in excess of R700 million over the period of three years. I explain below how this amount is computed, with reference to the provisions of the Contract.
24. As will become evident from what I say below, the NDoH has consistently acted in compliance with the directives received from the National Treasury. There is no reason to believe that it will *not* implement the Directive issued by the National Treasury (in terms of Annexure "MHS2") which will be devastatingly prejudicial to Medi-Core.
25. At present, the NDoH is simply keeping silent, whilst Medi-Core continues to be



unpaid in respect of orders duly placed and no additional orders are being placed, despite the provisions of the Contract, in circumstances where there is no justification for this conduct.

26. As will also appear from what I state below, each of the decisions constitutes administrative action as contemplated in PAJA in that both were decisions taken in the exercise of public power (or performance of a function in terms of national legislation) and both of the decisions have a direct external legal effect that will, unless reviewed and set aside, have a devastating effect on the rights of Medi-Core.
27. The failure on the part of NDoH to take a decision it is required to take timeously, is reviewable under section 6(3) of PAJA.
28. As I explain below, Pillay has "gone through the motions" of inviting Medi-Core to make representations regarding the instructions he has received from National Treasury, thus belatedly seeking to give effect to Medi-Core's *audi alteram partem* rights. I will make it clear, however, that neither Dr Pillay nor any other person within the NDoH has actually taken into account the submissions made by Medi-Core. If the submissions made have been considered, there is no indication as to whether they have been considered favourably or unfavourably: in fact, there is no indication at all forthcoming from the NDoH.
29. The first decision (of the National Treasury) appears to have been taken capriciously and with blatant disregard to any of Medi-Core's *audi alteram partem* rights. The second 'decision', which is in effect a failure to take a decision, appears to be the result of a complete paralysis on the part of the NDoH, which has blindly followed the directive issued to it by the National Treasury to date.

2004

30. The Court will note that the relief sought in Part A of the Notice of Motion is sought on a semi-urgent basis. As I have said, the semi - urgency in this regard is motivated in the concluding paragraphs of this affidavit.
31. The relief sought in Part B of the Notice of Motion is sought in the usual course. Nonetheless, the facts which deal with the relief sought in Part B of the Notice of Motion are pertinent also to the relief sought in Part A, on a semi - urgent basis. Insofar as Medi-Core is successful in respect of Part A, and the *status quo* as between Medi-Core and the National Department of Health is restored, the review of the decisions can comfortably proceed in the normal course.
32. I present this affidavit in the following sections:
- 32.1. in the first section, I deal with the sequence of events which has led to the delivery of this application;
- 32.2. in the second section, I deal with the matters pertinent to the relief sought in Part A of the notice of motion; and
- 32.3. in the third section, I deal with the matters pertinent to the relief sought in Part B of the notice of motion.

SECTION 1: AWARD OF THE TENDER AND BACKGROUND FACTS

The tender and the Contract

33. During the course of March 2015 the NDoH issued the tender (the "Invitation to Bid") for the supply of male and female condoms and lubricants, under reference number HM01-2015CNDM. The Invitation to Bid specified that the contract for the supply of condoms and lubricants would endure for a period of three years between 1 July 2015 and 30 June 2018.




34. So as not to unnecessarily burden this application, a complete copy of the Invitation to Bid is not attached, but will be made available to the Court at the hearing of the application if necessary. The first and second respondents are in possession of the Invitation to Bid document. The Invitation to Bid document is tendered to the third and fourth respondents insofar as they are not in possession of this document and require it for the purposes of this application.
35. Medi-Core responded to the Invitation to Bid and supplied to the National Department of Health all the necessary documentation called for in terms of the invitation to bid. These included, amongst others, the declaration of interest document (referred to as the "SBD4 document"). A complete copy of Medi-Core's entire response to the Invitation to Bid is attached as Annexure "MHS4".
36. On 12 June 2015, Medi-Core was awarded a portion of the tender pertaining to the supply of male condoms and lubricants. A copy of the Contract concluded between Medi-Core and the National Department of Health in this regard is attached as Annexure "MHS5".
37. As appears from Annexure "MHS5", Medi-Core was awarded the contract for the supply of the following quantities of male condoms and lubricants over the three year period between 1 July 2015 to 30 June 2018:

Item No:	Description	Quantity Awarded	Delivered Price	Lead Time (in days)
1	Male Condoms Natural Colour Masked (with vanilla scent), pack of 200	480 350	R75.0000	42
2	Male Condoms Purple Colour (with grape scent); pack of 200	485 578	R76.6700	42
3	Male Condoms Red Colour (with strawberry scent); pack of 200	488 923	R76.0400	42
4	Male Condoms Yellow Colour (with banana scent); pack of 200	485 535	R75.3600	42



5	Lubricant, Water-Based, Non-Irritant, 5ml sachets, pack of 100	18 000 000	R34.9900	42
---	--	------------	----------	----

38. I pause here to explain that if the above quantities of condoms and lubricants are multiplied by the contractual value per unit, the value of the three year Contract to Medi-Core is in excess of R700 million. The relevant calculations appear in Annexure "MHS5.1".

39. The Contract consists of the following documents:

- 39.1. Medi-Core's response to the Invitation to Bid, and specifically:
- 39.1.1. the Invitation to Bid ("SBD1");
 - 39.1.2. Tax Clearance Certificate ("SBD2");
 - 39.1.3. Declaration of Interest ("SBD4");
 - 39.1.4. the National Industrial Participation Programme ("SBD5");
 - 39.1.5. Preference claims for Broad – Based Black Economic Empowerment Status Level of Contribution in terms of the Preferential Procurement Regulations 2011 (SBD6.1);
 - 39.1.6. Declaration of Medi-Core's past SCM practices ("SBD8");
 - 39.1.7. Certificate of Independent Bid Determination ("SBD9");
- and
- 39.1.8. Special Conditions of Contract; and
- 39.2. General Conditions of Contract.




40. As appears from the Contract Circular (which forms an annexure to the Contract) Medi-Core was not the only bidder who was awarded the tender for the supply of male condoms and lubricants. In accordance with its own operational requirements, the National Department of Health split the tender and awarded portions of the tender to various suppliers, as is standard practice in relation to long – term contracts where it is necessary to ensure continuity of supply.

41. The names of the suppliers and the percentages of the overall tender (and quantities of each item awarded) appears in the Contract Circular. It is important, for the purposes of this application, only to note that Medi-Core was awarded between 12 and 13% of the supply of male condoms, and 30% of the supply of lubricant in terms of the overall tender.

42. In terms the Contract, the National Department of Health was to ensure that the various Provincial Departments of Health would place orders on Medi-Core over the duration of the Contract. The placement of orders is accordingly left to the provincial departments (referred to in the Contract as the “Participating Authorities”) who are to instruct Medi-Core on the quantities and the physical facilities to which deliveries are to be made.

43. This appears, inter alia, from clause 23.2 of the Specific Conditions, which prescribe as follows:

“Contractors will be required to maintain, for the duration of the contract, an in-country stock – holding of three months available for immediate distribution. This stock must be tested and certified. Stock levels should be estimated from the anticipated requirements of the Department as indicated in the contract award, unless otherwise instructed by the Department. The required levels for compliant product may be adjusted by the Department to respond to changing programmatic requirements.”



Suppliers will be expected to deliver condoms according to delivery schedules issued periodically by the Department of health against current compliant stock levels to any or all of 150 – 200 sites within the country. Delivery quantities shall generally range from 60 000 to 2 000 000 condoms per male condom site and 5 000 to 60 000 condoms per female condom site. Once the delivery sites and quantities are issued to suppliers, deliveries shall be made within ten working days. To the extent possible for male condoms, the procurer will serve sites utilising stock available in the nearest proximity.” (emphasis added)

44. As appears from the above, the obligation is on the supplier, such as Medi-Core, to maintain the required and tested stock levels. The testing is conducted in accordance with SABS standards. In its response to the Invitation to Bid, Medi-Core declared that it intends to source the products from a third party, a Malaysian supplier of condoms and lubricants by the name of Karex Industries SDN BHD. This declaration appears in Annexure “MHS3”, under the “PBD1” document.
45. Karex Industries has been certified by the SABS in accordance with the requirements of the Invitation to Bid, a copy of the certificate is attached as Annexure “**MHS6**”.

Orders received by Medi-Core

46. Pursuant to the conclusion of the Contract, Medi-Core received an order from the Gauteng Provincial Department of Health, which is attached as Annexure “**MHS7**” (“**the GP Order**”).
47. Although the order is dated 14 October 2015, it was received by Medi-Core only on 20 October 2015. The quantities in that order (which were significant) were discussed between Medi-Core’s Ms Nisha Singh (“**Singh**”) who is the operational



manager and a shareholder of Medi-Core and Ms Maletsatsi Matlhoko of the Gauteng Province Department of Health. During that telephonic conversation Ms Matlhoko explained that this was a 'bulk order' to be delivered over the period of 6 months.

48. Being a 'bulk order', the order was not accompanied with any **distribution lists** (ie, specification of the delivery sites) as required in terms of clause 23.2 of the Specific Conditions of Contract.

49. The first distribution list was then received by **Medi-Core on 2 November 2015**, only in respect of the 475 cases of male grape scented condoms. The delivery of the order then commenced straight away in November 2015 and was partially completed by the end of November 2015. Payment in the amount of R517 522.50 was received by Medi-Core in respect of this delivery only on 24 February 2016.

50. However, no **distribution lists have been received in respect** of the balance of this order to the value of **R13 513 770.84, to date**. Thus, **Medi-Core has** not been able to **deliver on this order** (for lack of distribution lists necessary for delivery) and the amount of R12 996 248.34 of the total order amount is, accordingly, still outstanding. I will expand on the reasons for this below.

51. On 3 August 2015, Medi-Core received a **6 month forecast** for condom orders from the Western Cape Province, as appears from Annexure "MHS8". Subsequently, three official orders (copies of which are attached as Annexures "MHS9" to "MHS11" respectively) were received on 19 October 2015 (although the orders are dated 8 October 2015). For ease of reference, I shall refer to these three orders collectively as the "WC Order".

52. The orders were not accompanied by any **distribution lists**. Ms Najjar of the



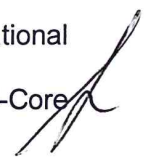
Western Cape Provincial Government advised Ms Singh that the distribution lists will follow, as appears from Annexure "MHS12", being an email addressed by Ms Najjar to Ms Singh, dated 21 October 2015, in which Ms Najjar confirmed that she "...will be in contact ... next month regarding distribution timelines and sites."

53. As appears from WC Order, the order is in the amount of R2,488,317.00 in respect of banana and vanilla flavoured condoms. For the reasons set out below, Medi-Core has been prevented from delivering in terms of this order, although it has imported and warehoused the stock since November 2015 in accordance with its contractual obligations.

Interactions with the National and Provincial Departments of Health and National Treasury

54. On 24 November 2015, Medi-Core received a letter from National Treasury's Mr Tshitangano. A copy of this letter is attached as Annexure "MHS13". As appears from the letter, Mr Tshitangano indicated that National Treasury was reviewing "the bidding process" and requested a meeting in which it wished to "clarify certain issues from the bidding process". The meeting was requested on an urgent basis and I, on behalf of Medi-Core, responded with alacrity. The meeting was set up and was held at the offices of the National Treasury on 30 November 2016.

55. I travelled from Durban to Pretoria for the purposes of this meeting. At the National Treasury offices I encountered the principal of another one of the successful bidders, Mr Joe Morris of Barrs Medical (as appears from the Circular to Contract, Barrs Medical is another one of the successful bidders). Although I know Mr Morris I did not discuss the purpose of the meeting with National Treasury with him. We simply greeted. It was clear, however, that Medi-Core



was not the only bidder summoned to the meeting with National Treasury in relation to the tender.

56. At the meeting, which lasted no more than half an hour, I was the only representative of Medi-Core and Mr Tshitangano and Mr Negovha represented National Treasury. My understanding is that Mr Negovha is also employed by the National Treasury's SCM Department and that he reports to Mr Tshitangano. There were no representatives from the National Department of Health present at this meeting.
57. During the meeting, Mr Tshitangano explained that the National Treasury was investigating the manner in which the NDoH handled the bid. He said that the bid was left in the 'hands of' the NDoH and that National Treasury was in the process of investigating whether the bids were 'handled properly'. This, coupled with the fact that another bidder was invited to a similar meeting, and the absence of any representatives from the Department of National Health sent a clear message that it was the National Department of Health, rather than Medi-Core (or any other bidder) that was being investigated.
58. I offered Medi-Core's full co-operation at the meeting and explained that I would assist as far as possible. I explained the bid process followed by Medi-Core. Mr Tshitangano was already in possession of a copy of Medi-Core's response to the Invitation to Bid. Mr Tshitangano asked questions about to whom the bid was submitted and whom Medi-Core liased with at the NDoH. I explained that Medi-Core had already received the GP Order and that the deliveries were in the process of being made. I also explained that the WC Order had been received, but that the distribution lists were not as yet to hand. Copies of the relevant orders and correspondence (as attached above) were handed to Mr Tshitangano.

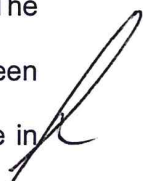



59. Mr Tshitangano also asked me about the premises from which Medi-Core operated. I explained that premises are leased from an entity by the name of Juli Properties CC under a formal lease agreement. Mr Tshitangano requested a copy of the lease agreement and proof of payments under the lease and I undertook to forward it to him upon my return to Durban. The lease was indeed forwarded the very next day on 1 December 2015, as appears from Annexure "MHS14".
60. I was also asked about my employment situation and whether I was employed by Medi-Core on a full time basis. I explained that I was in fact employed by Wupro Technologies on a full time basis as an operations manager. I explained that Medi-Core still did not have a sufficient profit margin to employ me on a full time basis but that, given that its business was ramping up, I was considering resigning from Wupro and dedicating all my time to Medi-Core. I advised that this was one of the matters to be discussed with the other shareholders of Medi-Core at the year –end shareholders' meeting, because the shareholders would have to approve my drawing salary from Medi-Core. This seemed to satisfy Mr Tshitangano. I pause to mention that I have since resigned from Medi-Core, in February 2016.
61. Mr Tshitangano then excused me from the meeting and advised that Medi-Core would be informed of the outcome of the investigation. There was never even a suggestion that Medi-Core was being investigated in respect of any irregularity. On the contrary, the message was, quite clearly, that the National Department of Health, and the manner in which *it* had handled the tender, was being investigated. I considered that all the other questions were being asked almost in passing.
62. On 9 December 2015, Mr Negovha responded with an acknowledgment of the




receipt of the lease agreement and requested proof of payment under the lease agreement by no later than 10 December 2015. A copy of that email is attached as Annexure "MHS15". Copies of proof of payment, which are made by electronic fund transfer were forwarded to Mr Negovha on 10 December 2015. Proof of payment from March 2015 was submitted in the form of bank statements, clearly indicating debits to Juli Properties, with those debits highlighted. A copy of the email and the bank statements which were enclosed to the email is attached as Annexure "MHS16".

63. During the course of 15 December 2015, Ms Singh was telephoned by Mr Negovha from the National Treasury. She was advised that National Treasury representatives were arriving at the offices of Medi-Core for a site inspection on 17 December 2015.
64. Medi-Core had, by that time, already shut down its operations for the year but I made myself available for this meeting with National Treasury.
65. Upon my arrival at Medi-Core's office, I met with Mr Negovha, whom I had previously met during the meeting at National Treasury's offices. Mr Negovha was very pleasant, and requested a 'walk through' the offices and the warehouse.
66. During the walk through, Mr Negovha asked me about the number of employees of Medi-Core and I explained that there were 30 employees, who had all by that time been released for the December holidays. Ms Singh was present at the offices, doing administrative work. Mr Negovha noted the packaging machine which Medi-Core uses for the purposes of packaging condoms for an organisation by the name of Population Services International ("PSI"). The condoms are supplied to Wupro Technologies by PSI, under a contract between Wupro Technologies and PSI. Wupro Technologies sub-contracts Medi-Core in



respect of the packaging of these condoms.

67. It is crucial however to understand that the condoms packaged for PSI are *not* the condoms delivered by Medi-Core for the purposes of the Contract. These are entirely different condoms under an entirely different brand name. The PSI condoms are branded 'Trust' and 'Lovers Plus'.
68. The condoms which are supplied to the NDoH under the Contract are condoms which are pre-packaged and fully imported from the certified supplier, Karex Industries, in accordance with Medi-Core's response to the Invitation to Bid and they are 'flavoured' condoms. No packaging at all happens in South Africa in respect of the condoms supplied under the Contract with the NDoH.
69. I did not anticipate that any confusion could possibly arise in respect of this other business carried on by Medi-Core because it is clear from the Contract that Medi-Core is obliged to supply condoms which are quality checked and certified in accordance with the Specific Conditions of Contract. Indeed, Medi-Core has only ever supplied fully packaged and fully imported condoms from Karex Industries, in accordance with the bid information.
70. During the walk – through I again provided Mr Negovha with the GP Order and again explained that WC Order was still short of delivery schedules.
71. Mr Negovha made no comments about this at all and thanked me for the walk-through prior to leaving. The site visit again lasted no more than 30 minutes. Although the interest now appeared to be related to Medi-Core, Mr Negovha did not say to me that he was investigating Medi-Core. Had he done so, I would have queried what precisely was being investigated and answered his specific questions and concerns. Had one of these concerns been about the packaging of condoms supplied under the Contract, I would have put an end to this




misunderstanding there and then.

72. However, I was still under the impression that National Treasury continued to investigate the NDoH, rather than Medi-Core itself. I suspected that the National Treasury was trying to determine whether any relationship exists between Medi-Core and anyone employed by the NDoH and felt entirely comfortable about this, because no such relationship exists.

73. Medi-Core's offices re-opened after the December holidays on 4 January 2016. Instructions regarding the delivery schedules in respect of the undelivered portion of the GP Order and the entire WC Order were still being awaited and Ms Singh was in telephonic contact with the representatives of the Participating Authorities (WC and GP Department of health), trying to enquire about when the delivery schedules might be to hand. In this regard, it is to be noted that no deliveries can be made by Medi-Core in absence of the delivery schedules issued by the relevant provincial authorities. Ms Singh's confirmatory affidavit is attached as Annexure "MHS17".

74. On 12 January 2016, Medi-Core received an email from Ms Nyandeni from the Gauteng Department of Health (Ms Nyandeni is the Deputy Director of HTA / STI / MMC / CONDOMS Department, as appears from her email signature). The email, a copy of which is attached as Annexure "MHS18" said simply the following:

"Compliments of the new year. You are requested Medi-Core Technologies Male Condom Supplier, to hold on delivering condoms to the Gauteng Department of Health until further notice. Your support in this regard will be highly appreciated."

75. This letter came as of a shock to me and Ms Singh. On 13 January 2016, Medi-Core addressed a letter to both the Gauteng and the National Departments of




Health, in which it requested a reason and a time limit for the notice received on 12 January 2016. Medi-Core recorded the following in the letter attached as Annexure "MHS19":

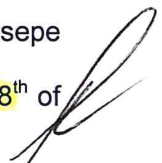
"This has come as a surprise to us as we have complied with all Special conditions of the HM01-2015CNDM contract and have stock allocated and arrangements in order to supply as per orders received... Please provide correspondence to support your request within the next 5 days as this has caused a negative impact on our business."

76. Ms Singh again tried to get hold of the relevant individuals telephonically in order to enquire about the reason for the notice of 12 January 2016. In a telephonic conversation with one of the representatives at the Gauteng depots, Ms Nomvula Nyandeni (with whom Ms Singh was previously corresponding regarding the successfully delivered portion of the GP Order), Ms Singh was advised that the instruction came from National Treasury to hold all the condom deliveries. Apparently the instruction came in form of a 'directive'. Ms Singh requested a copy of the directive, but this was never received.

77. On 14 January 2016, Ms Singh sent an email to, *inter alia*, Mr Motsepe of the National Department of Health, requesting a meeting. A copy of the email is attached as Annexure "MHS20". In the email the following is stated:

"Good morning all, Compliments of the season to you. We hereby request an appointment with you for the 28th January 2016, to discuss the allocation and distribution of orders for the HM01-2015CNDM contract. Please advise your availability."

78. The response, attached as Annexure "MHS21" was received from Mr Motsepe on 19 January 2016. Mr Motsepe advised that he could not meet on the 28th of



January (and would advise if he became free) and added:

"...but if not we will have to reschedule for some other time as it is important to have representation from both programmes Affordable Medicine and Prevention Strategies, they will be able to discuss contractual issues while we will handle the programme related ones."

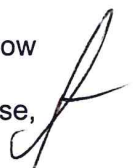
79. This letter too was difficult to understand, because the NDoH is the signatory to the Contract. It would have made sense for it to address what had clearly become a 'contractual issue' given that Medi-Core was requested by the Gauteng Department of Health to stop the deliveries on orders already issued.

80. On 21 January 2016, and having spoken to the PA to Ms Jamaloodien of the Directorate: Affordable Medicines in the National Department of Health, Ms Singh sent an email to Ms Jamaloodien's PA, Ms Daphney Malema. A copy of the email is attached as Annexure "MHS22", and in the email a meeting with Ms Jamaloodien was requested, again for the purpose of discussion regarding what was going on with the orders. The letter stated as follows:

"As per the telecon, the Director of Medi-Core would like to request a meeting with Ms K Jamaloodien regarding the attached letter which had been sent to the Department of Health on 13 January 2016. We have received no feedback relating to the HM01 tender deliveries and were notified by the provinces that all orders to Medi-Core have been suspended as per the NDOH request."

81. As appears from Annexure "MHS23" the email was acknowledged and Ms Malema undertook to revert with the details of the meeting 'soon'. However, she never did.

82. Ms Singh also wrote to Mr Negovha of the National Treasury, requesting a follow up meeting. Mr Negovha responded on 21 January 2016 and in his response,



attached as Annexure "MHS24" stated the following:

"Compliments for the new year!! First I would like to apologise for the late reply. Kindly note that I have informed my Director and my Chief Director of your request. Your request is getting attention. Please note that once my Director and Chief Director reviewed my report you will be afforded an opportunity to have a meeting with us."

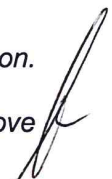
83. This communication for the first time revealed that a 'report' was prepared. I was unsure whether the report concerned Medi-Core (pursuant to Mr Negovha's site visit in December 2015) or whether it was a report concerning the manner in which the National Department of Health had handled the tender, as had been indicated in the meeting of 30 November 2015. Nothing was clear.

84. On the same day, Ms Singh responded to this email, requesting an estimated time frame in which Medi-Core would receive a response, as appears from Annexure "MHS25". Mr Negovha responded stating that *".. all will depend on when the review will be completed. Please be patient and allow the process to complete."* A copy of this correspondence is attached as Annexure "MHS26".

85. I was still unsure of what precisely the 'process' entailed.

86. On 25 January 2016, one Ms Chidarikire sent to Medi-Core (from a g-mail address) an email which was copied to, amongst others, Ms Moeketsi and various other representatives of the Gauteng and National Departments of Health. In that email, a copy of which is attached as Annexure "MHS27", Ms Chidirakire (notably, not from an official address) stated the following, in response to Medi-Core's letter of 13 January 2016:

"Dear Mr Seopursat, Apologies for the delayed response. Upon consultation. (sic) I was requested to refer you to the National Treasury regarding the above"



mentioned issue. Apologies again. Regards Thato”.

87. On 28 January 2016, and whilst still attempting to find out why the notice of 12 January 2016 was issued by the Gauteng Department of Health, Medi-Core received instructions regarding the WC Order from Ms Najjar of the Western Cape Department of Health. The email is attached as Annexure “**MHS28**” and in it Ms Najjar (now following up on the order which had already been issued in October 2015) provided the delivery sites and stated the following:
- “Thank you for being patient with us. Below is a summary of the delivery schedule for the two orders. The first order can be delivered next week and the second one during the week 22-26 Feb.”*
88. I saw this as a positive development and thought that, possibly, the National Treasury was investigating only the GP Order. However, later on the same day Ms Najjar again wrote to advise that these orders must also be stopped. A copy of the email is attached as Annexure “**MHS29**” – in it Ms Najjar stated:
- “Please put a hold on all these orders. We have been informed that your company has been suspended and thus cannot accept the deliveries until we receive more information from the national dept. (sic)”*
89. This was the first indication that Medi-Core, specifically, had been suspended. I was until then still under the impression that the National Treasury investigated the National Department of Health and not Medi-Core. I figured that the ‘directive’ received by the Gauteng Department of Health from National Treasury (a copy of which we never received, despite Ms Singh’s request) pertained to the entire tender, and not specifically to Medi-Core. This was therefore a great shock to me.
90. Following the receipt of this correspondence, I insisted on the meeting with Mr



Tshitangano at the National Treasury and with Mr Motsepe of the National Department of Health.

91. A meeting with Mr Ferreira (who is a Technical Adviser in the NDoH) and Mr Motsepe (responsible for the National Department of Health HIV Programme) was held on 10 February 2016. A copy of the minute of the meeting (sent to me by one Jacques Du Preez also of National Department of Health) is attached as Annexure "MHS30". As appears from the minute, at the meeting I enquired about the reasons for the suspension of the orders and explained that I had received no official communications in this regard either from NDoH nor from the National Treasury.
92. I also took the opportunity to explain the detrimental cash flow effects the National Treasury 'directive' was having on Medi-Core, all without any explanation being offered. Mr Ferreira indicated that, given that the directive originated from National Treasury the 'issue' must be taken up with National Treasury and I expressed my concern that the Contract was between NDoH and Medi-Core, and that it is therefore the NDoH that must handle the situation.
93. However, both Mr Ferreira and Mr Motsepe indicated that they were unsure what precisely the issue is. For his side, Mr Motsepe said that there was a desperate need for the delivery of condoms and that the "*sooner the matter could be sorted out with Treasury, the sooner the condoms could be distributed*". Mr Ferreira undertook to circulate the minute of the meeting to "responsible persons at Health" for their information. I pray that the entire minute be read as incorporated by reference.
94. A meeting was also finally scheduled with Mr Tshitangano at the National Treasury for 11 February 2016, and I again travelled from Durban to Pretoria. Present at this meeting were, again, Mr Tshitangano and Mr Negovha. Again,



there were no representatives from the NDoH. However, at this meeting, it was clear that Mr Tshitangano was more agitated than he was at the previous meeting on 30 November 2016. I requested an explanation of the 'directive' allegedly issued by National Treasury (and which I still had not seen) and the reasons therefore. I specifically asked whether Medi-Core was under investigation.

95. Mr Tshitangano had in his hands a letter (which he did not show me) but said that the letter in his possession indicated that various departments are spending public money on furniture, which amounted to wasteful expenditure, and that the National Treasury was investigating all such instances. The letter clearly did not have anything to do with Medi-Core but Mr Tshitangano referred to it many times in our discussion, emphasising that it was the role of National Treasury to curb wasteful expenditure.

96. Mr Tshitangano then asked various questions about the variation of prices in relation to the Contract (the price variations are permitted in terms of the Contract, given that the condoms are imported the price is sensitive to the exchange rate). This was all explained to Mr Tshitangano. Mr Negovha again asked about the number of employees of Medi-Core and I again said that Medi-Core employs 30 staff (including Ms Singh). I also undertook to furnish the relevant Department of Labour documentation in respect of the employee count.

97. For their side, Messrs Tshitangano and Negovha undertook to furnish me with an explanation regarding the 'directive' sent to the NDoH regarding the suspension of the orders. They would not give me any explanations there and then, at the meeting.

98. I was again excused from the meeting without either Mr Tshitangano or Mr Negovha providing me with Mr Negovha's report (which was mentioned in




correspondence to Ms Singh). I did not raise it, as I expected that the written explanation of National Treasury's 'directive' would shed light on the situation.

99. On 12 February 2016, Mr Negovha sent an email requesting a written explanation of the price fluctuations in respect of the Contract as well as Medi-Core's UIF and PAYE documentation. A copy of the email is attached as Annexure "MHS31". In that letter, Mr Negovha indicated that a 'formal letter' would be issued regarding the orders.

100. On 15 February 2016, I sent a letter explaining the price fluctuations, together with the supporting documents. The UIF and PAYE information was also attached. A copy of this correspondence is attached as Annexure "MHS32" and it speaks for itself. As I will explain below, the price fluctuation explanation appears to have been accepted and ultimately turned out to be a non – issue.

101. On the same day, Mr Negovha acknowledged receipt of these documents and advised that he was "...still awaiting a letter from [his] chief director [which is presumably a reference to Mr Tshitangano] for orders. As soon as he gives me the letter, I will pass it over to you." A copy of this correspondence is attached as Annexure "MHS33".

102. On 17 February 2016 I received a further letter from Mr Tshitangano. In it he advised that the "OCPO" (being the office of the chief procurement officer) issued a directive to the Department of Health on 15 December 2015, and that this directive (which was still not attached) "...would not have affected [Medi-Core's] orders if you delivered on time, 16 October 2015 and 6 November 2015."

103. This was yet again a big surprise to me, because both Mr Tshitangano and Mr Negovha were well aware of the fact that Medi-Core never received distribution lists in respect of the bulk of the GP Order and also never received any



distribution lists in respect of the WC Order. This was discussed during both meetings, on 30 November 2015 and 11 February 2016, and also during Mr Negovha's site visit in December 2015.

- 104. I accordingly immediately responded to this letter, yet again explaining the situation. A copy of my letter dated 17 February 2016 is attached as Annexure "MHS34". I took exception to the accusation that Medi-Core had failed to make deliveries on time, and stated as following in the letter (I pray that the entire letter be read as incorporated herein):

"We have no knowledge of and have not received the directive issued by National Treasury (as referred to in your letter) to suspend Medicores Technologies. We have no understanding whatsoever of the basis of any suspension. Please would you provide us with a full explanation in writing as to why Medicores Technologies have been suspended, what the conditions of suspension are and how long the suspension is for? Please also provide us with a copy of the written directive to that effect, issued to the Department of Health.

Upon receiving the purchase orders which are referred to in your letter under reply, we did not receive (as we had expected to) the distribution lists in relation thereto. Consequently, we deny that the directive did not affect the orders and deny that the orders, if that is the insinuation, should already have been delivered. We simply are unable to deliver the orders without suitable distribution lists...

Your decision to suspend Medicores has affected our normal operation. Medicores Technologies have scaled up its operations for the purposes of delivery on the tender and have incurred a significant cost in doing so. You have failed to provide any explanation at all as to the basis for the suspension and in the result Medicores Technologies stands to incur substantial losses. This is in addition to




the losses which we have already suffered owing to the unlawful suspension. The matter is made worse by the cryptic information we receive from your offices as well as the Department of Health from time to time.

We are loath to escalate this matter to a legal dispute, however should we not receive a reasonable response to our query concerning the details of the suspension, including the duration thereof, in order that we may obtain some clarity as to our obligations and your intentions on this tender, we intend to take legal advice and proceed as necessary."

105. There was **no response** to this letter but Mr Negovha again wrote on 25 February 2016, yet again asking for a list of employees together with their identity numbers. His correspondence is attached as Annexure "MHS35". Again, the requested information was sent on the same day as appears from Annexure "MHS36".

106. I then awaited the promised 'formal letter' regarding the orders from Mr Negovha or Mr Tshitangano. To my surprise, on 17 **March 2016** I received the letter already attached as Annexure "MHS2". In this crucial letter Mr Tshitangano advised as follows:

*"My letter dated 17 February 2016 and subsequent (sic) engagements on 11 February 2016 have reference. The review of your bid documents revealed that you made **false declaration** (sic) on your SBD4 document e.g you **did not disclose related companies information** required on paragraph 2.11.*

*You also made **false declaration** (sic) by claiming that your company has 30 employees whereas you have declared two **employees** from April 2015 to October 2015 to UIF, and further declared only one employee from November 2015 to January 2016.*



W. A.

The Department of Health will be directed to cancel this tender and restrict your company for making false declaration (sic).

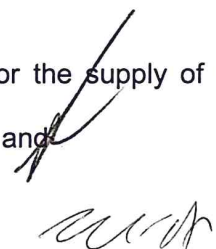
Do not hesitate to contact our office should you need further clarification.”

107. I was obviously very surprised and concerned when I received this letter. I immediately contacted Medi-Core’s attorney. A telephonic conference was held on an urgent basis with Medi-Core’s attorney during which I explained the sequence of events I have set out above. I explained that Medi-Core indeed does have 30 employees, but that the PAYE is not deducted in respect of all of them, in accordance with the applicable labour laws. UIF contributions are in fact deducted in respect of all of these employees, as had been confirmed in the documents already sent to the National Treasury. I also explained that Medi-Core has no ‘related companies’ and that the disclosure in the SBD4 document was completely honest and correct.

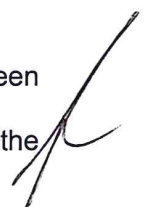
108. Following this telephonic consultation, on 18 March 2016 Medi-Core’s attorneys of record addressed the letter attached as Annexure “MHS37”. The letter is too long to quote verbatim and I pray that it be incorporated by reference in its entirety. It basically set out the sequence of events, explained that there had been no false representations made in some detail and requested the National Treasury to retract, in writing, the threat of instructing the NDoH to restrict Medi-Core. I pray that the entire letter be read as incorporated herein.

109. I pause here to explain that the Contract in issue in this application is not the only contract concluded between Medi-Core and the National Department of Health. Medi-Core was also a successful bidder in respect of:

109.1. tender number HP14-2015 (for the supply of medical bag, bottles, ointment containers and vials) and



- 109.2. tender number HM04-2015SS (for the supply of various medical sundries).
110. So as not to burden the papers unnecessarily, I enclose as Annexures "MHS38" and "MHS39" only the signature pages of the contracts which were concluded pursuant to these tenders. I emphasise that these contracts similarly consist of general terms (identical to those contained in the Contract) as well as specific terms which run into hundreds of pages. Copies of all these documents will be made available to the Court at the hearing of this application, if necessary.
111. It was for this reason that the following was recorded in the letter of 18 March 2016 from Medi-Core's attorneys to National Treasury, and an undertaking (which was requested to be provided by close of business on Tuesday, 22 March, Monday being a public holiday) that the restriction would not be imposed on the basis of the patently erroneous conclusions drawn by the National Treasury:
- "Of particular concern to our client is your oblique reference to the proposed 'restriction' of our client from making false declarations. As we have already stated, there is no truth to the allegations that our client made any false declarations whatsoever, as part of the tender process or otherwise. As you are also no doubt aware, our client is the successful bidder in respect of two other tenders issued by the National Department of Health. Whilst neither we nor our client understand the threat of 'restricting' our client, our client harbors a real and well – founded apprehension that your proposed 'restriction' will negatively impact on our client's ability to perform under the contracts concluded pursuant to those tenders."*
112. By close of business on 22 March 2016, the undertaking sought had not been received from Mr Tshitangano or anyone else at National Treasury, although the



National Trasury did acknowledge receipt of that letter, as appears from Annexure "MHS40".

113. I then drove up to Johannesburg again in order to consult with Medi-Core's attorneys of record and counsel. Following that consultation (which went on well into the afternoon) my attorneys prepared the letter which is attached as Annexure "MHS41". It was dispatched to National Treasury early in the morning of 24 March 2016 and recorded Medi-Core's intention to institute urgent application proceedings in order to interdict National Treasury from issuing its directive to the NDoH pending the review of the decision, made by the National Treasury, to so instruct the NDoH.

114. The following are the pertinent portions of the letter dated 24 March 2016, although I pray that the entire letter be read as incorporated by reference:

"Although we received an acknowledgment of receipt of our letter, we note that you have failed to provide us with the retraction letter as sought by our client... In the result our offices arranged a consultation with our client and counsel yesterday afternoon with a view to preparing an urgent application, the purpose of which will be to seek interdictory relief against the Department of National Treasury arising from the unlawful administrative action which it intends to take against our client, namely to issue the National Department of Health with a directive to restrict our client. It is obviously common cause that, prior to the decision being taken by the National Treasury the Department did not bother to follow any procedures specifically prescribed by the Proomotion of Administrative Justice Act and has, specifically, failed to afford our client its audi alteram partem rights despite the fact that such a decision will, to the knowledge of the Department of National Treasury, be devastatingly detrimental to our client."

115. The letter then went on to propose a time table for the exchange of the affidavits



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in the proposed urgent application and recorded further that "...we intend following the aforementioned timetable irrespective of whether or not you comply with our request to withhold your intended instruction to the National Department of Health. Insofar as you may nonetheless issue the instruction to restrict our client prior to the hearing of our client's application and notwithstanding our notice to you of same, such conduct would be mala fides and, in of itself, would constitute unlawful administrative action against our client whilst also demonstrating contempt of the Court process which is now to be initiated, with due notice having been given to you in terms of this letter."

116. However, unbeknown to me, the National Treasury had already, on 23 March 2016, issued yet another directive to the NDoH. The letter was, unsurprisingly, not copied to Medi-Core's attorneys of record. It was sent only to Ms Matsoso, the Director-General of the NDoH (who appears to have since been replaced by Dr Pillay, who is now the Acting Director General) as appears from Annexure "MHS42".

117. The Court will immediately notice that the instruction to the National Department of Health is far broader than the letter issued to Medi-Core (informing Medi-Core of the reasons for the purported cancellation and restriction). In the letter to the National Department of Health Mr Tshitangano recorded the following:

117.1. that I was and still am employed by Wupro Technologies (this was never in issue and was in fact disclosed to Mr Tshitangano as far back as 30 November 2015. The conclusion that I am still so employed is incorrect, as I in fact resigned from Wupro Technologies on 05 February 2016 as I indicated to Mr Tshitangano I was considering doing);

117.2. that Medi-Core is renting premises from Wupro Technologies (this is


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incorrect and National Treasury was already in possession of the lease agreement with Juli Propperties CC and proof of payment as far back as January 2016);

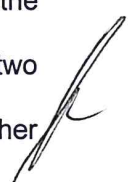
117.3. that Wupro Technologies is delivering condoms on behalf of Medi-Core (there is no truth whatsoever to this averment, the condoms are fully imported by Medi-Core in accordance with the terms of the tender);

117.4. that Wupro Technologies is packaging condoms for Medi-Core (again, there is no truth to this at all, and I can only imagine that Mr Negovha reported this as an erroneous conclusion on the basis of his walk – through visit during December 2015);

117.5. that my (alleged) “interest” in Wupro Technologies was not declared in paragraph 2.11 of the SBD4 document and that the information provided was accordingly not true and correct (in this regard, I confirm that I had no ‘interest’ to declare: I will return to this issue in the following section of this affidavit);

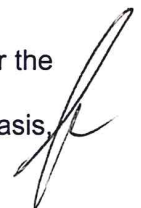
117.6. that Medi-Core declared in its response to the Invitation to Bid that no portion of the contract would be sub-contracted which is not true because the storage, packaging and delivery is provided by Wupro Technologies (none of this is true, and can only be as a result of Mr Negovha’s erroneous reporting on what he saw during his December 2015 walk-through. I will return to this issue below);

117.7. that I claimed that Medi-Core had 30 employees during the engagement with National Treasury whilst it declared only two employees from April 2015 to October 2015 to UIF and further



declared only one employee from November 2015 to January 2016.

118. The letter concluded that the NDoH is directed to implement the remedial actions in terms of paragraph 23 of the General Conditions of Contract and Regulation 13 of the Preferential Procurement Regulations, 2011.
119. Annexure "MHS42" was forwarded to Medi-Core's attorneys only in the mid-day on 29 March 2016. I am advised that the entire Saturday of the intervening long weekend had been spent by counsel in preparing papers for the urgent application on the basis of interdicting the National Treasury from issuing this instruction.
120. Naturally, once it came to light that the instruction had already been issued, Medi-Core and its attorneys and counsel had to re-think that strategy and consider what other steps must be taken. This resulted in further consultations between Medi-Core's attorneys and counsel. These discussions resulted in the letter dated 29 March 2016 being dispatched to both Ms Matsoso (Department of Health) and Mr Tshitangano. A copy of the letter is attached as Annexure "MHS43".
121. In this letter, which is also too lengthy to be traversed in detail (but which should be read as being incorporated by reference), both the National Treasury and the NDoH were advised that there is no truth in the allegations made in National Treasury's letter directing the NDoH to act in terms of clause 23 of the General Conditions of Contract, alternatively Regulation 12 of the Preferential Procurement Regulations, 2011 (which Mr Tshitangano indentified as being the relevant and applicable provisions).
122. In the letter Medi-Core's attorneys also answered the broadened reasons for the instruction issued to the NDoH. It did so on an a paragraph by paragraph basis.



demonstrating that there is no basis for the instruction to have been given at all, and demonstrating further that the evocation of Regulation 12 was inapplicable in the circumstances.

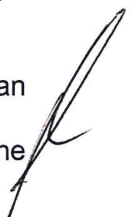
123. Medi-Core's attorneys also called upon the NdoH to exercise its own discretion in relation to the matter, and to do so with alacrity, given the prejudice which was being suffered (and is still suffered) by Medi-Core.

124. The NDoH was alerted to the responses provided by Medi-Core in the letter and was also invited to a meeting where Medi-Core could make submissions and make such further representations as may be necessary in order to enable the National Department of Health to reach the correct conclusions. It was proposed that such a meeting should take place by no later than Monday, 4 April 2016, so that the position can be clarified thus enabling Medi-Core to attend to the delivery of the existing orders.

125. It must be noted, in this regard, that there exists no legislative provision which compels the Department of Health to act within any stipulated time. It was not clear (and remains unclear) under which power the National Treasury was acting when it directed the NDoH to suspend the deliveries in terms of the Contract. I deal with this issue in further detail below, but it must be understood that Medi-Core called upon the NDoH to act with alacrity owing to the significant prejudice it was suffering as the result of the directive (which, to date, I have not seen) to suspend the deliveries in terms of the Contract.

126. By the evening of 4 April 2016 there was still no response from the NDoH. The letter of 29 March was simply ignored: to date there has been no response to it.

127. In the result, I instructed Medi-Core's attorneys to proceed with preparing an urgent application to interdict the Department of Health from giving effect to the



irrational decision of 17 March 2016 (this being the decision of the National Treasury to 'direct' the NDoH to cancel the contract and restrict Medi-Core) and to seek such other relief as may be appropriate in light of National Treasury's letter dated 23 March 2016 (this being Annexure "MHS42").

128. In the morning of 5 April 2016, I received a telephone call from Mr Negovha (of National Treasury) asking whether the NDoH had contacted me at all. I advised that no-one had contacted me at all, and that Medi-Core's attorneys were in the process of drafting an application. I requested him to discuss the matter with Medi-Core's attorneys and Mr Negovha did not comment further.

129. Only on 7 April 2016 Mr Negovha contacted Ms Julia Le Roux of Medi-Core's attorneys of record, querying whether she had received any communications from the Department of Health. When Ms Le Roux advised that she had not, Mr Negovha forwarded the email attached as Annexure "MHS44". In that email he advised that "... your 14 days therein is effective on the date of this email".

130. It is evident from the letter attached to the email that the National Department of Health has simply adopted portions of what was stated in the National Treasury's letter and copied and pasted it into its own letter. The height of the irony, however, is that the NDoH in fact never sent this letter either to Medi-Core or its attorneys. The letter (allegedly dated 31 March 2016) was in fact sent by Mr Negovha of the National Treasury and was never transmitted by any of the representatives from the NDoH to Medi-Core.

131. I emphasise this point only to underscore that the NDoH has throughout not acted independently of the National Treasury. It simply does the bidding of the National Treasury and in fact permits the National Treasury to act on its behalf. This demonstrates the fact that the Department of Health has completely (and unlawfully) abdicated its responsibilities in relation to Medi-Core, both as a



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National Department and as Medi-Core's contractual counterparty.

132. Ms Le Roux's confirmatory affidavit is attached as Annexure "MHS45".
133. In response to the letter in Annexure "MHS44", Medi-Core's attorneys dispatched a lengthy letter dated 12 April 2016 (but dispatched on 14 April) and which I have already attached as Annexure "MHS3".
134. I was advised by Medi-Core's attorneys of record that the letter inviting submissions on the part of Medi-Core in relation to the alleged 'findings' of the National Treasury was a belated attempt to give effect to Medi-Core's *audi alteram partem* rights. For this reason, the letter was taken in the most serious light and it was hoped that, provided that thorough submissions were made, the NDoH would see reason and re-instate the status quo in respect of the Contract. I was at all times aware that the NDoH is desirous of having the deliveries of condoms and lubricants duly effected and that it would grasp the nettle, realise that the National Treasury was acting unlawfully and that it must now make the decision in good time, restoring the status quo, because Medi-Core was simply not guilty of any of the accusations levelled against it by National Treasury.
135. The letter in "MHS3" is therefore of utmost importance: it places on record Medi-Core's submissions and explains that the 'findings' of National Treasury are entirely baseless. In an attempt to avoid burdening these papers I do not repeat this letter seriatim but I ask the Court to have regard to the letter in its entirety.
136. The following are, however, the pertinent contents of the letter:
- 136.1. the letter also recounted the sequence of events leading up to the dispatch of "MHS3" in considerable detail;
- 136.2. it then explained that it was evident from the sequence of events that



- National Treasury was conducting a witch hunt in relation to Medi-Core, without so much as identifying what precisely was being investigated, or under which legislative power;
- 136.3. it further recorded that since November 2015, the National Treasury has vacillated with respect to the 'reasons' for the suspension of Medi-Core's orders. First, queries were made regarding the tender process (at the meeting of 30 November 2015); then queries were made about the number of employees of Medi-Core (in Mr Negovha's correspondence); then further enquiries followed regarding the price increases under the Contract with the NDoH; and finally Medi-Core was accused of belatedly delivering on the orders issued;
- 136.4. it was evident therefore that the National Treasury was and remains desperate to identify reasons for the proposed cancellation of Medi-Core's contract and its restriction, for reasons to Medi-Core unknown, but which are clearly not legitimate reasons;
- 136.5. The reasons that National Treasury finally communicated in its instructions to the National Department of Health (on 23 March 2016) for the proposed cancellation of the Contract and restriction are manufactured and untrue, as is corroborated by documentary evidence;
- 136.6. the National Treasury has purposively and unlawfully excluded the NDoH from whatever processes and agendas it was (and is) conducting;
- 136.7. National Treasury purports to act for and on behalf the NDoH, even




insofar as it dispatches letters on its behalf;

136.8. the NDoH appears not to have acted independently of the National Treasury and appears to be acting under the instructions of National Treasury;

136.9. it is not clear under which authority the National Treasury issues directives to the NDoH, specifically in relation to NDoH's contractual obligations; and

136.10. Medi-Core had a well founded apprehension that the NDoH will not act independently in making the decision regarding the proposed cancellation of the Contract and the proposed restriction.

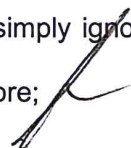
137. The letter in "MHS3" then went on to deal with the 'issues' identified in the letter purportedly penned by Dr Pillay, but which was in fact dispatched by Mr Negovha to Medi-Core's attorneys, on a paragraph by paragraph basis.

138. It was further recorded that:

138.1. with reference to the allegation that Medi-Core was renting its premises from Wupro Technologies:

138.1.1. this conclusion was patently incorrect, because the National Treasury was already in possession of a copy of the lease agreement concluded between Medi-Core and Juli Properties CC;

138.1.2. the lease agreement is an arms' length agreement, a fact that the National Treasury has elected to simply ignore, without any further discussions with Medi-Core;



138.1.3. it is inconceivable that the National Treasury could reach the conclusion that Medi-Core is renting premises from Wupro Technologies when direct evidence to the contrary was placed before it, which demonstrated the measure of antipathy that National Treasury has displayed towards Medi-Core; and

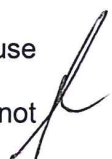
138.1.4. in any event, even if Medi-Core was leasing its premises from Wupro Technologies (or any other entity) this would not constitute a valid reason to direct the NDoH to cancel the Contract or restrict Medi-Core as contemplated in terms of the Preferential Procurement Regulations.

138.2. with reference to the allegation that Wupro Technologies is delivering and packaging condoms on behalf of Medi-Core:

138.2.1. that conclusion is also entirely baseless and contrary to the evidence already before National Treasury;

138.2.2. Wupro Technologies has nothing to do with the supply of the condoms under the Contract with the NDoH because Medi-Core imports the condoms from Malaysia, which has been fully and properly disclosed in the response to the invitation to bid and is thus well known to both the National Treasury and the NDoH. Indeed, it was on the basis of the confirmation by Medi-Core's supplier, Karex Industries, that the tender was awarded to Medi-Core;

138.2.3. this issue could have been investigated easily because Karex Industries is capable of confirming whether or not



the condoms delivered under the Contract with the NDoH are condoms it has produced and packaged. It is surprising that the National Treasury did not even attempt to engage in such fact finding before making such a spectacularly incorrect (yet very damaging and prejudicial) allegation;

138.2.4. it also beggars belief that, being in possession of these documents, the National Treasury could conclude on any *bona fide* and valid basis that Wupro Technologies supplies and packages the condoms on our client's behalf; and

138.2.5. on the most generous interpretation, this allegation could only have been made by the National Treasury as a result of the mistaken belief on the part of Mr Negovha who, during his December 2015 site visit, observed the condom packaging machine which our client uses on an entirely different project. Had Mr Negovha asked the relevant questions at that time, this would have been explained. However, Mr Negovha elected not to query what the packaging machine is for and instead erroneously formed his own conclusions. Such actions from any decision maker are simply not rational and do not amount to an 'investigation';

138.3. in relation to the allegation that my alleged 'interest' in Wupro Technologies had not been properly disclosed:

138.3.1. the "interest" referred to could only relate to my prior



- employment by Wupro Technologies, which was evident from the letter from National Treasury to the NDoH dated 24 March 2016;
- 138.3.2. the question about my employment was asked as long ago as December 2015 and candidly answered. This was therefore not a new fact for National Treasury; it has been known to it since December 2015;
- 138.3.3. I also advised during this discussion with Mr Negovha that I was considering resigning from his position in Wupro Technologies (provided that Medi-Core was financially stable);
- 138.3.4. further, if regard is had to the provisions of paragraph 2.11 of the SBD4 document, it is clear that employment of a shareholder by a different entity is not the "interest" contemplated therein. The question posed in paragraph 2.11 is formulated as follows:
- "Do you or any of the directors / trustees / shareholders / members of the company have any interest in any other related companies whether or not they are bidding for this contract"*
- 138.3.5. The term "related company" contemplates a relationship between the bidder company (ie, Medi-Core) and another company; which relationship (or interest) can only exist between the two companies by virtue of joint shareholding or directorship. The question is clearly aimed at the issue of control of another entity by the



same individuals: it cannot be aimed at an employment relationship in a company over which the person answering the questionnaire cannot exercise any control (being a mere employee and not a shareholder or director of that other entity). The letter then went on to provide examples of the definition of 'control' in various pieces of legislation;

138.3.6. the fact that I frankly answered this question when it was asked by Mr Negovha (as long ago as December 2015) evidences that there was no intent to withhold any relevant information. Therefore, there cannot have been any misrepresentation as alleged, or at all. The questionnaire was truthfully and properly completed, in that Medi-Core does not have any related companies (in that its shareholders and directors are not also shareholders and directors of any other company); and

138.3.7. Finally, the fact that the National Treasury did not act on this information since December 2015, but expressed the view that this amounted to a "misrepresentation" only in March 2016, confirms that this is used as an *ex post facto* fabricated reason to support the decision to cancel the Contract, whereas the decision was not motivated by this reason originally. Had my previous employment by Wupro Technologies been the reason for the proposed cancellation and restriction, the National Treasury would have acted much sooner than it did.

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138.4. With reference to the allegation that Wupro Technologies was providing storage, packaging and delivery under the Contract:

138.4.1. It is factually incorrect that any portion of the contract has been sub-contracted to Wupro Technologies or that it is packaging, storing or delivering the condoms under the Contract;

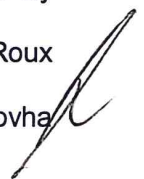
138.4.2. Wupro Technologies has nothing to do with the supply of the condoms by Medi-Core under the Contract, because the condoms are imported from Malaysia fully packaged and ready for delivery to the provinces;

138.4.3. The condoms, once received, are stored at Medi-Core premises, which are leased (on a fully arms' length basis) from Juli Properties CC. Medi-Core already provided to National Treasury both the written lease agreement and proof of payment of monthly rentals to Juli Properties CC.

138.4.4. In the event, the letter denied that Medi-Core incorrectly completed any portion of the SBD6.1 document and that it made any misrepresentations in this regard.

139. Finally, the letter implored the NDoH to make its decision timeously given the significant prejudice being suffered by Medi-Core.

140. The final matter which bears mention under this rubric is that, on 25 April 2016, Ms Le Roux of Medi-Core's attorneys received a call from Mr Negovha of the National Treasury. Mr Negovha commenced the telephone conversation by asking Ms Le Roux "what are you doing about Medi-Core?". Ms Le Roux answered that an application was in the process of being prepared. Mr Negovha



then asked whom he was speaking to and upon confirmation that he had telephoned Medi-Core's attorneys, he confirmed that he had dialled the wrong number and that he was in fact trying to get hold of someone within NDoH. He then advised Le Roux that Medi-Core would 'soon hear' from the NDoH.

141. I only mention this incident in order to again highlight that it is clear that the National Treasury is driving some sort of an agenda against Medi-Core, whilst the NDoH simply appears to be following its instructions, it being seemingly incapable of taking the decision on its own.

142. That state of affairs is unsatisfactory, and I will return to it below when I deal with the relief sought in Part B of the Notice of Motion. I now however turn to deal with the legal principles applicable to the relief in Part A of the Notice of Motion.

PART A OF THE NOTICE OF MOTION: INTERDICT AND / OR MANDAMUS AND URGENCY

143. The interdict is sought to prevent the NDoH from implementing the "Directive" issued by the National Treasury to the NDoH to cancel the Contract and restrict Medi-Core as a supplier. The corollary of that relief is that the status quo between the parties to the Contract, Medi-Core and NDoH, must be restored, pending the review of the decision by the National Treasury to issue the directive in question.

144. It must be understood that, despite repeated requests, neither I nor anyone else within Medi-Core has seen the directive in question. I do not know what it says or whether the National Treasury has ever provided any justification for such a directive being issued to the NDoH. Similarly, I do not know, and the National Treasury has despite repeated requests, refused to explain, under which legislative power it was acting when it issued the directive to the NDoH on 17

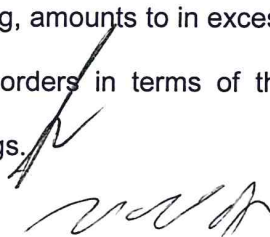



March 2016.

145. I suspect (and I am advised that my suspicion is well founded) that the directive was not issued pursuant to any legislative power vested in the National Treasury. On the contrary, National Treasury's subsequent actions (in which it directed the NDoH to act in terms of the general conditions of the Contract or the Preferential Procurement Regulations) confirms that the National Treasury's original 'directive' suspending performance in terms of the Contract was precipitous and unfounded.

146. I do not deny that the National Treasury probably has the right to investigate the manner in which public funds are expended in the course of the discharge of its duties, but I do deny that it can conduct such investigations in an entirely incompetent manner, and then insist that contractual relationships are 'suspended' pending such investigations. It certainly cannot insist that the NDoH must cancel the Contract and restrict Medi-Core on the basis of entirely invalid 'conclusions' the National Treasury has reached in the course of its alleged 'investigations'.

147. It is entirely possible that the relief sought in paragraph 1 of the Notice of Motion is the same as the relief sought in paragraph 2. The one may equate to the other. However, given that I do not know what the scope of the National Treasury directive is, it may not suffice to simply interdict the NDoH from giving effect to it. The relief must be broader: it must restore the status quo ante to what the position was prior to the issue of National Treasury's 'directive'. This entails of course that Medi-Core will receive payment in respect of the orders already received (which, it bears repeating, amounts to in excess of R20 million) and that it will also benefit from further orders in terms of the Contract, pending the outcome of the review proceedings.



148. The requirements for an interim interdict are well known: Medi-Core must demonstrate that it has a prima facie right; that there is a reasonable apprehension of imminent harm, that there is no alternative remedy available to it other than the interdict and that the balance of convenience favours it.

Protectable rights

149. In this regard, Medi-Core certainly enjoys the right to fair administrative action, which is a constitutionally enshrined right. It also has commercial rights and interests arising from the Contract: it has already been prejudiced by the fact that the NDoH has refused (as the result of the directive issued by National Treasury) to provide distribution lists and pay orders to the value of R15,484,565.34. The NDoH has also refused to issue further orders in terms of the Contract as the direct result of the National Treasury's 'directive'.

150. The right to fair administrative action and the contractual rights would be worth very little if they were not protected pending the review of the decision of the National Treasury to issue the directive, the details of which the National Treasury refuses to disclose. The rights will be worth nothing unless they are protected on a semi – urgent basis by way of an interdict *pendente lite*. Depending on the content of the directive, such an interdict may well amount to an order that the *status quo* ante must be restored by the NDoH pending the review of both administrative decisions.

151. However, it may also be that, depending on the content of the directive (which is to me still unknown), the NDoH may need to be ordered not only to not implement the decisions of the National Treasury in terms of the directive, but also to uplift the 'suspension' which has been put into place (presumably also by the National Treasury by way of its directive). Whether both orders are required in order to secure appropriate relief will only become evident when the National

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Treasury and the NDoH reveal the contents of the directive.

Reasonable apprehension of harm

152. The prejudice experienced by Medi-Core is not only economic: the actions taken by the National Treasury, and NDoH's failure to act threaten the **very survival of Medi-Core**. I will say more about this under the urgency rubric below, but I emphasise for the time being that, unless the **R15,484,565.34** is paid to Medi-Core soon, it will not be in the position to maintain its operations beyond the end of May 2016.
153. Medi-Core is indebted to its supplier, Karex, in respect of the condoms already delivered by it for the purposes of satisfying the GP Order and the WC Order. It has also paid vast amounts of money in respect of the import of the condoms and is now being forced to store the condoms which ought to have been delivered a long time ago, at its own cost.
154. The refusal on the part of NDoH to accept delivery of the Orders and its associated refusal to pay the amount of **R15,484,565.34** in respect of those orders has obviously negatively affected Medi-Core's cash flow. Medi-Core, as a relatively new company, has anticipated the possibility of its major customer, the government, making late payments. To this end, it has secured a loan from Sanlam, which is available 'on demand'. The loan is to the value of R3.5 million and has always been intended to 'tide over' Medi-Core's operations for a period of a few months, in the event of delayed payment by government. The relevant documentation is attached as Annexure "**MHS46**".
155. However, this loan (which has been drawn down and is very close to being fully exhausted, having now also had to be used to meet the significant legal costs incurred) was never intended to meet the possibility of the Contract being




suspended indefinitely. Indeed, it cannot be relied upon to cure the prospect of the R15,484,565.34 not being paid for a further period of 6 months. I am advised that the review application could take up to three years to finalise.

156. If the payments are not received by the end of May 2016, it will be impossible for Medi-Core to continue its business. Medi-Core simply cannot continue to incur overhead expenses without income and such income as it does receive from its other contracts is not sufficient to meet the monetary commitments in respect of this Project.

157. In the circumstances, there is not only the reasonable apprehension of harm, but a near certainty that Medi-Core will not survive if the status quo in respect of the Contract is not restored.

158. I find it difficult to understand why a company that I have created (and risked most of my life savings and a stable job to create) and the jobs of thirty people should be ruined, just because National Treasury has decided to pursue some sort of an unjustified agenda against Medi-Core.

159. I appreciate that the National Treasury appears to be doing this as the result of its dislike and antipathy towards Wupro Technologies and possibly under pressure to demonstrate publically that it is discharging its mandate properly. However, it must be understood that its antipathy towards Medi-Core is entirely misplaced and unjustified, as was demonstrated in the submission letter in "MHS3" above.

Balance of convenience

160. There is no doubt that, given the irrationality of the actions taken by the National Treasury (I have outlined above how it has flip-floped in its various attempts to find any excuse to order the NDoH to cancel Medi-Core's contract and restrict it)




that the balance of convenience favours Medi-Core.

161. All Medi-Core wants and intends to do is deliver the goods as prescribed by the Contract. There cannot be any harm to the NDoH, the National Treasury or anyone else in simple compliance with the contractual provisions. However, the suspension of the contractual obligations of NDoH, for no cogent reason whatsoever, is obviously to the great prejudice of Medi-Core, as I have outlined above.

162. In this regard, it is worthwhile mentioning also that the very tender and the subsequently signed Contract has its strategy in the national AIDS prevention policies implemented by the NDoH. That the National Treasury would be prepared to withhold these condoms from the people of South Africa, when they are (by the admission of NDoH itself) desperately needed, simply for the purpose of driving some undisclosed agenda, is unconscionable.

163. There would be no harm to any of the respondents if the status quo is restored. All it will mean is that the irrational decisions of the National Treasury will be put on hold, pending the judicial review.

164. The fact that the National Treasury has behaved irrationally is well demonstrated in "MHS3" canvassed above. Further, the fact that the NDoH has behaved impermissibly by simply following the National Treasury's directive in absence of any explanation is also well documented. I am advised that the NDoH is not entitled to simply disabuse itself of its contractual obligations because the National Treasury has decided to issue an irrational (and to date undisclosed) directive.

165. This is aggravated by the fact that there appears to be no basis in law for the National Treasury to have taken the steps it has taken. I am advised that it is not




entitled to simply usurp the role and functions of the NDoH as it has purported to do by making decisions and dispatching letters on its behalf. Despite numerous requests, the National Treasury has to date not revealed under which legislative provisions it purports to be acting. I return to this issue in the last section of this affidavit.

No alternative remedy

166. I have already explained that, unless the interdict (and / or the mandamus, depending on the contents of this 'directive') is granted, Medi-Core will undoubtedly become incapable of vindicating any of its rights.

167. This is because it will have been economically strangled by the actions of the National Treasury and the NDoH. It is cold comfort for Medi-Core to retain a contractual claim against the NDoH when it will have to pursue it over the course of the next three years in trial, without any resources to do so.

168. I submit that this is precisely what the National Treasury knows and that it is a part of its strategy to 'take out' Medi-Core. Why this is so and what drives the agenda of the National Treasury I do not know – it is entirely possible that it wishes to replace Medi-Core by another supplier. That, however, would be unlawful.

Urgency

169. It is clear from everything I have stated above that the actions taken by the National Treasury are unlawful. Such an **injustice** should not be permitted to continue. Neither the review in the usual course nor any action proceedings will be of any use to Medi-Core unless the status quo is restored and Medi-Core regains the ability to perform under the Contract urgently.

[Handwritten signature]

170. This is because it will simply take too long to finalise the review – by which time the Contract would in any event have come to an end. This is precisely what Medi-Core cannot afford to be subject to the irrational 'suspension' of the Contractual obligations indefinitely: doing so would mean a certain end of its business life and the end of employment of all of its staff.

171. Although the developments have unfolded over a course of several months, Medi-Core has attempted to avoid launching this application by engaging with the NDoH and the National Treasury in the manner I have described above. Only when it became absolutely clear that the NDoH will remain completely paralysed by the actions of the National Treasury indefinitely was the application launched.

172. I am advised that a litigant cannot be prejudiced by its efforts to resolve the impasse arising extra-curially. At all relevant times, Medi-Core has acted reasonably and has been responsive to all the queries raised by the National Treasury. It has offered its full co-operation throughout. It cannot be left without a remedy in circumstances where the National Treasury (and the NDoH, at the instance of National Treasury) has decided to simply keep the irrational 'suspension' in place indefinitely.

173. The application is launched timeously, and after all possible courses of action have been exhausted. I emphasise that in the letters written (none of which received any meaningful responses, as outline above) Medi-Core's attorneys have specifically requested information as to whether there is anything else to be done (or any internal appeals to be exhausted) prior to this application being launched. The deathly silence on the part of NDoH and the National Trasury speaks for itself.

174. The timelines proposed for the exchange of affidavits are reasonable, given the measure of urgency. Medi-Core has not rushed to Court with the attempt to

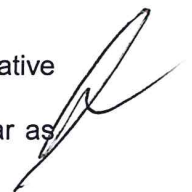



'jump the queue' over more urgent matters.

175. However, resolution in the ordinary course will simply not assist Medi-Core and it would be cold comfort to suggest that it should approach the Court in any manner other than the course it has adopted.
176. Against the above, I now turn to deal with the facts relevant to the relief sought under Part B of the Notice of Motion.

PART B OF THE NOTICE OF MOTION: REVIEW OF THE DECISION TO ISSUE THE 'DIRECTIVE' AND THE REVIEW OF NDoH'S FAILURE TO MAKE A DECISION

177. As I have already explained above, the National Treasury has not made it clear under which legislative provision it purported to act when it issued the mysterious 'directive' to the NDoH. It has refused to reveal what the terms of the directive are, although it has admitted that such a directive has been issued.
178. There is every reason to believe that there is no legislative provision that empowered the National Treasury to issue the directive suspending the contractual obligations of the NDoH. If that it so, the administrative action would have been unlawful because it is *ultra vires* the powers of the National Treasury and specifically Mr Tshitangano.
179. Further, it is clear from the correspondence thus far exchanged that Mr Tshitangano has indicated to the NDoH that *it* (the NDoH) must act in terms of the contractual provisions, alternatively the Preferential Procurement Regulations. As was explained in the correspondence exchanged, neither of these provisions could possibly find application in the matter.
180. What is more, the issue of the directive undoubtedly constituted administrative action. The directive was issued precipitously and without any basis (as far as



Medi-Core is concerned) but most importantly without offering Medi-Core any right to respond to the proposed action and thus in a complete violation of Medi-Core's *audi alteram partem* rights.

181. I submit, therefore, that the issue of any 'directive' by the National Treasury was unlawful on one or more of the following grounds:

181.1. it was not authorised by any empowering provision;

181.2. it was biased, insofar as other tenderers were not subjected to the same treatment;

181.3. it was procedurally unfair insofar as Medi-Core's *audi alteram partem* rights were completely ignored, until the National Treasury finally attempted to remedy this (but then the NDoH refused to act on Medi-Core's submissions and make its own decision in relation to the matter);

181.4. it was materially influenced by an error of law, insofar as the National Treasury considered itself empowered to issue the directive, when it appears not to have been empowered to do so at all;

181.5. the decision was taken for an ulterior purpose or motive to economically ruin Medi-Core, for no reason at all;

181.6. irrelevant considerations were taken into account and relevant considerations were not;

181.7. it was taken arbitrarily or capriciously (as is evidenced by National Treasury's consistent flip flopping in trying to find any reason to cancel the Contract and restrict Medi-Core);




- 181.8. the action is not rationally connected to any purpose;
- 181.9. it is so unreasonable that no reasonable decision maker would have taken it; and
- 181.10. it is otherwise unconstitutional or unlawful.
182. I pause to explain that, until the National Treasury delivers the record of the decision to issue the directive to cancel the Contract and restrict Medi-Core (and the preceding directive which was issued to the NDoH) I am constrained in my knowledge of what precisely has motivated its actions.
183. I am limited only to the correspondence thus far exchanged, which clearly demonstrates irrationality on the part of the National Treasury. I reserve Medi-Core's right to expand on the above once the record is delivered by the National Treasury in accordance with the Rules.
184. As far as the NDoH's failure to take a decision timeously, after the submission of "MHS3" and following the extensive correspondence outlined above, this is clearly reviewable under section 6(2)(g) of PAJA. The failure by the NDoH to make its own decision is impermissible and constitutes an abdication of its administrative powers, and also an abdication of its contractual responsibilities.
185. I pause to again state the obvious: the Contract has not been cancelled and remains binding. In those circumstances, it cannot be left open to the NDoH to simply postpone making its decision indefinitely, whilst at the same time giving effect to the National Treasury's irrational and unlawful directive which has had the effect of suspending obligations under the Contract.

In the circumstances, I humbly pray for the relief set out in the Notice of Motion to which this affidavit is attached.




[Signature]

Deponent

Signed and sworn to before me at DURBAN on this the 28 day of APRIL 2016, the deponent having acknowledged that he knows and understands the contents of this affidavit; has no objection to making the oath and considers the oath to be binding on his conscience.

[Signature]

Commissioner of Oaths

[Signature]
DEPONENT

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE/SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN TO BEFORE ME AT VERULAM SWS ON THIS THE 28 DAY OF APRIL 2016, THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO 3619 OF 21 JULY 1972 AND NO 1648 OF 19 AUGUST 1977 HAVING BEEN COMPLIED WITH.

[Signature]
COMMISSIONER OF OATHS

