

# Case 1 Open Contracts

The Health Justice Initiative

versus

The Minister of Health; Information Officer, National Department of Health

This case is essentially about vaccine procurement secrecy and the public's right to access information in a pandemic.

Updated Version: October 2022

## Context:

By February 2022, at least 30.5 million vaccines were administered in South Africa.

South Africa has received several millions of vaccine doses by directly buying from pharmaceutical companies, or through the COVAX facility or by receiving donations.

Those vaccines have been procured at great cost – we do not know how much exactly, but the 2021 National Budget alone allocated an amount of R10-billion for the purchase of Covid-19 vaccines.

The public does not know the content of these agreements or the complete details of the contracting parties.

## What is the case about?

- The Health Justice Initiative (HJI) is aware that the South African government, likely acting through the National Department of Health entered into agreements with private manufacturers and/or suppliers for the supply of Covid-19 vaccines. We filed access to information requests (using the Promotion of Access to Information Act or PAIA) to obtain copies, which were refused.
- Because there has been no public disclosure of the contracting parties HJI cannot determine them with certainty because of the multiple parties involved. We also tried to get the contracting parties' identities, but our requests were ignored/ refused.

For this reason, the HJI filed legal papers against the South African Minister of Health and the National Department of Health's Information Officer. ***This case is essentially about vaccine procurement secrecy and the public's right to access information in a pandemic.***

## The HJI argues that:

### The lack of vaccine procurement and contracting transparency-

- violates the Constitutional principle that the public administration must be accountable. The National Department of Health must foster transparency by providing the public with timely, accessible, and accurate information.
- undermines the public's Constitutional right to information and places the National Department of Health in breach of its duty to procure goods through a process that is fair, equitable and transparent.

We hope that this case will ensure that a clear precedent is set so that in future pandemics, this information is automatically placed in the public domain.

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# Why is this going to court now?

Since mid-2021, HJI asked the Department of Health to disclose copies of all vaccine contracts and agreements using PAIA. In July 2021, the Director General even requested additional time from HJI to respond, which HJI agreed to.

## The Director General said:

*'[The Department of Health notified] the vaccine manufacturers and distributors of HJI's request to disclose the Vaccine Acquisition Agreements'. '[We] invited the vaccine manufacturers and distributors to make written or oral representations as to whether the request for access should be granted or refused (in whole or in part).'*

The HJI extended the deadline to accommodate the Director General, and after receiving no further information, the HJI lodged an internal appeal under PAIA. This was also refused, leaving the HJI with no choice but to seek legal recourse from the courts.

## Why is information about Covid-19 vaccine contracts important?

- Covid-19 vaccines mitigate the consequences of Covid-19, by preventing death and controlling the spread of the virus. Vaccines are essential in the global response to Covid-19 and by February 2022 more than 10 billion vaccine doses had been administered worldwide.
- To foster trust in vaccine programmes and to encourage public participation in these, it is vital that government can show that it can reliably purchase the necessary vaccines and roll these out effectively.
- When key components of vaccines contracts are withheld from public scrutiny, it makes the public suspicious and contributes towards vaccine hesitancy and distrust in government.
- Public procurement of public goods requires contractual transparency. HJI has argued that it is in the public interest to know what our government agreed to, when and with whom, at what price, and of course, why.
- Disclosure is even more important following serious allegations that corruption has diverted millions of rands away from Covid-19 relief measures.

*Secrecy and the lack of transparency on decision-making during the Covid-19 crisis undermines the robust management of the pandemic.*

## On whose behalf is the HJI acting?

The HJI has brought this case in its own interest, as an organisation directly involved in the health sector, and in promoting equitable access to medicines and other medical technologies.

The HJI has also brought this case on **behalf of the public**, and in the **public interest** because:

- Information about vaccine procurement will **empower** people to know how the decisions that affect them are made and how public funds are being used in a pandemic.
- There is a heightened need for **transparency and accountability** during a national disaster, where a number of the usual checks and balances are limited. Life-saving vaccines have been procured, at great public cost and on an urgent basis – this deserves additional scrutiny.
- The public must be given access to information that is required to ensure accountability and to **monitor compliance**.

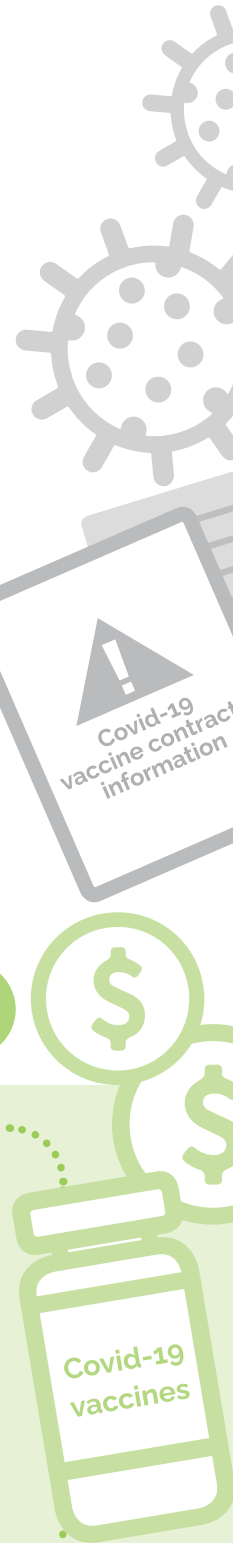


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# What is the HJI arguing in its court papers?

The HJI has argued in its legal papers that the public has a right to know what the terms and conditions of each contract are. In addition, disclosure is necessary as media and other reports have also shown that:

- 1 South Africa may be paying comparatively inflated rates for Covid-19 vaccines;
- 2 The South African government had to grant a **broad indemnification** against all claims of liability to benefit vaccine manufacturers;
- 3 South Africa was prevented from **imposing export restrictions for vaccines filled and finished here** by certain vaccine companies.

## \*\*Update (October 2022)

In August 2022 the Department of Health filed its Answering Affidavit in response to HJI's case.

The affidavit and the single annexure attached to it, is available in full here: <https://healthjusticeinitiative.org.za/wp-content/uploads/2022/02/10009-22-Contracts-Answering-Affidavit-with-annexure.pdf>

None of the vaccine procurement contracts were disclosed.

The Department of Health stated that:

*Para 38: '... the procurement contracts, were negotiated in good faith and in the best interests of the country under the prevailing circumstances. The department had signed the agreements, which contained confidentiality clauses regarding non-disclosure of the procurement agreements'*

*Para 39: 'The vaccine manufacturers equally have negotiated in good faith and signed a non-disclosure clause in the agreements. The agreements signed with the manufacturers ... contained confidentiality clauses. These clauses prohibit any disclosure to the procurements without the consent of other manufacturers. Any disclosure will constitute a breach of the agreement'*

*Para 40: 'If the NDoH provides access to these contracts, the department will be in breach of the terms of the confidentiality clauses, and the disclosure will prejudice the respondents and the vaccine manufacturers in future engagements ...'*

*Para 47: 'The information relating to the contracts of procurement, agreements, and negotiations are governed by different principles and cannot be made available to the members of the public, due to the ethical and legal restrictions ...'*

In a **Business Day** article dated 10 April 2022 the Deputy Director General for the Department of Health also stated that:

**"The government was contractually bound to keep details of the contracts confidential and risked being sued for breach of contract by the vaccine manufacturers if it published them..."**

In October 2022 the HJI filed its Replying Affidavit.

The full version with annexures is available here:

<https://healthjusticeinitiative.org.za/wp-content/uploads/2022/02/220928-PSIHJ-202120-Replying-Affidavit.pdf>

  
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## The HJI replied that:

- The Department of Health admitted that it held a series of negotiations with various different counterparties from July 2020 until at least March 2021 and that it concluded vaccine supply agreements or signed term sheets with at least 5 different entities (identified as Serum II, Johnson and Johnson, Pfizer, Moderna and COVAX). Yet, it failed to disclose a single record of such negotiations, or a single clause of any of those agreements, or even to identify the actual entities with whom negotiations were held. Nor did it file any confirmatory affidavits from the personnel it says were involved in the negotiations or party to the conclusion of the agreements. And it failed to provide any evidence whatsoever that it has engaged with any of the manufacturers and/or suppliers to procure their consent to disclosure (para 5).
- The Department of Health has not raised a lawful ground of refusal.
- The Department of Health has not presented evidence that proves that if they disclose the requested records, that there are reasonable grounds to expect that they (or the vaccine manufacturers) will be at a disadvantage in contractual or other negotiations or be prejudiced in commercial competition.
- While the Department of Health claimed that all the agreements include confidentiality clauses that prohibit their disclosure, they have not proven the existence of even one confidentiality clause included in any of the agreements. Nor have they provided any details about any of the confidentiality clauses. The mere existence of such a clause cannot justify a blanket refusal to provide any records at all. Our courts have made it clear that parties cannot hide behind confidentiality clauses to justify the non-disclosure of information.
- The Department's own conduct undercuts their claim that there is a complete contractual ban on disclosure – it has selectively reported on some aspects of the context of negotiations and/or agreements to Parliament. That it has done so suggests that disclosure is permissible and lawful.
- Disclosure is also lawful with the consent of the relevant manufacturer/supplier and/or in the public interest. But the Department of Health provided no evidence that consent was sought, nor shared any of the responses that it may have received.

The HJI will now set the matter down for hearing. The Application could be argued in the first half of 2023.

## What is the HJI asking the court to decide on?

The HJI is seeking the disclosure of copies of all Covid-19 vaccine procurement contracts, agreements, and negotiation meeting outcomes / minutes. The HJI believes that at the very least, contracts must have at least been entered into with Johnson & Johnson and Pfizer as these are the vaccines South Africa is administering in the national vaccine roll out programme.

**Ultimately, the HJI is asking our courts to direct the Minister of Health to publicly disclose and supply:**

- 1 Copies of all Covid-19 vaccine procurement contracts, and memoranda of understanding, and agreements.
- 2 Copies of all Covid-19 vaccine negotiation meeting outcomes and/or minutes, and correspondence.

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# Why is transparency important?

There is a heightened need for transparency and accountability during a national disaster, where several of the usual checks and balances are limited.

Media reports indicate that the South African government may have been forced to overpay for vaccines, or to accept extremely onerous procurement terms.

The contracts will hopefully tell whether in this pandemic:

- we are paying more for the same vaccine than other countries, and how much we paid
- we are allowed to donate or sell on the vaccines to other countries
- we are prevented from having export restrictions on vaccines filled or manufactured here
- we are issuing full indemnity against all forms of liability to pharmaceutical companies
- we have recourse against late or no delivery of supplies



## Why has the HJI not also served legal papers on the pharmaceutical companies, vaccine manufacturers and licensees and any other contracting party involved?

In December 2021, HJI's pro bono legal representatives, requested the National Department of Health and relevant vaccine manufacturers to confirm all contracting party details, to also cite them as respondents in the litigation.

- We received two responses only (National Department of Health and Pfizer) both indicating that the information was 'confidential'. They therefore refused to provide that information.

The contracting parties details are therefore unknown to the public.

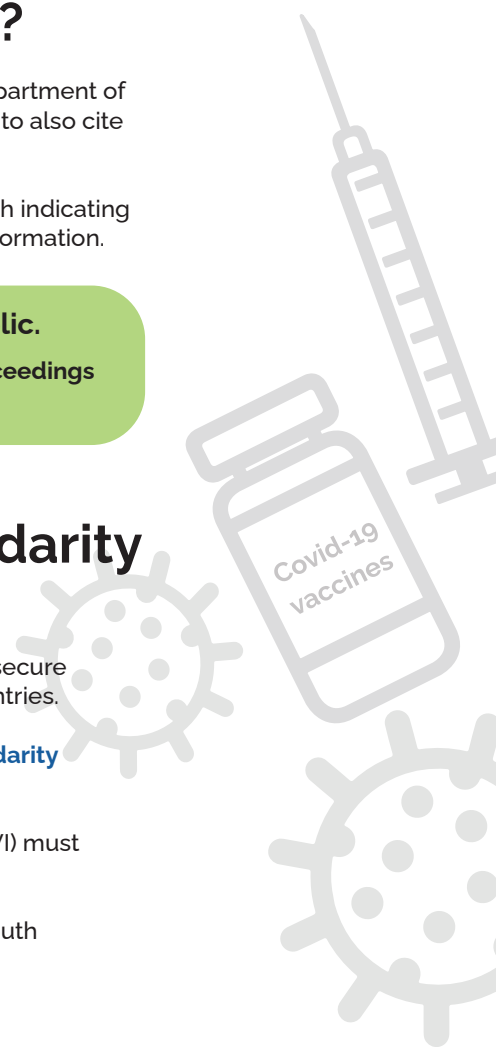
HJI has therefore argued and submitted that the duty to join them to these proceedings falls on the Department of Health.

## Why are COVAX, the African Vaccine Acquisition Trust (AVAT) and the Solidarity Fund also relevant?

The **COVAX Facility via GAVI** negotiates with vaccine manufacturers to potentially secure access to vaccines when they become available, especially for less resourced countries.

South Africa is participating in the COVAX initiative and in December 2020, the **Solidarity Fund** paid R283 million as a down payment to COVAX for South Africa.

- An agreement between the National Department of Health and COVAX (via GAVI) must exist, but it is not in the public domain.
- So far, we know that only about **1.3 million vaccines (Pfizer)** were supplied to South Africa from COVAX.



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- **We do not know what terms govern the:**

- remainder of deliveries (if any),
- the price per dose,
- the rules for 'vaccine swopping',
- consequences for late or no delivery;
- suspension of the contract;
- indemnification and liability undertakings,
- the number of doses to be received,
- the delivery schedule, re-sale conditions, donation conditions and breach provisions.

Similar to COVAX, a regional mechanism called the **African Vaccine Acquisition Task Team (AVATT)** was established to help African countries procure vaccines through the **African Vaccine Acquisition Trust (AVAT) in partnership with UNICEF**.

It is not clear whether South Africa has opted out of this mechanism and in our court papers we ask the Minister of Health to provide relevant details.

*About AVATT*

*'The African Vaccine Acquisition Task Team (AVATT), a 10-member team drawn from across the continent, was established in August 2020 to ensure that the African continent would be able to secure sufficient COVID-19 vaccine doses to achieve herd immunity. The AVATT is a key component in support of the Africa Vaccine Strategy that was endorsed by the African Union (AU) Bureau of Heads of State and Government. It is chaired by Cyril Ramaphosa, President of South Africa and includes Chairperson Moussa Faki Mahamat, Dr. Zweli Lawrence Mkhize, Mr. Strive Masiyiwa, Dr. Donald Kaberuka, Professor Benedict Oramah, H.E Amira Elfadi, Dr. John Nkengasong and others, as to be nominated by the Chair of the African Union and the Chairperson of the Commission'*

## Why must the HJI litigate to get access to these contracts?

The HJI believes that litigation should always be a last resort. And we hope that the South African government through the National Department of Health will publish all relevant vaccine contracts immediately – as it is a matter of grave public importance.

## Can I access the HJI's court papers?

Yes: See <https://healthjusticeinitiative.org.za/pandemic-transparency/>

In this case, HJI is represented by pro bono lawyers: Power Singh Inc.

Acting for HJI as Counsel are: Adv Wim Tregrove; Adv Isabel Goodman SC; and Adv Sagwadi Mabunda.

## More about the Health Justice Initiative (HJI)

The **HJI** is a not-for-profit organisation and a dedicated public health and law initiative.

Our mandate is to address inequities in access to healthcare through research, advocacy, and legal action. We work to ensure a more inclusive and equitable public health system that includes access to lifesaving diagnostics, treatment, and vaccines.

**Advocating for accountability, transparency and openness are cornerstones of our work.**

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