



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF
THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996**

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: GP13/2021

In the matter between:

SPECIAL INVESTIGATING UNIT	Applicant
and	
FIKILE MPOFANA (PTY) LTD	First Respondent
INSIMU CONSULTING (PTY) LTD	Second Respondent
INSIMU MEDICAL GROUP (PTY) LTD	Third Respondent
INSIMU PROJECTS (PTY) LTD	Fourth Respondent
LISONDALO (PTY) LTD	Fifth Respondent
MANGALISO PROJECTS (PTY) LTD	Sixth Respondent
ZENALDO CONSULTING (PTY) LTD	Seventh Respondent
CHACHULANI GROUP INVESTMENT HOLDINGS (PTY) LTD	Eighth Respondent
MUTA INVESTMENT HOLDINGS (PTY) LTD	Ninth Respondent

NETVISION ENERGY SAVERS (PTY) LTD	Tenth Respondent
PSYCHIN CONSULTING (PTY) LTD	Eleventh Respondent
HOME GROUND TRADING 1105 (PTY) LTD	Twelfth Respondent
MPALE INVESTMENTS HOLDINGS (PTY) LTD	Thirteenth Respondent
SIRORO TRADING	Fourteenth Respondent
FINDS ENERGY SUPPLIERS (PTY) LTD	Fifteenth Respondent
GIDIGIDI BUILDING CONSTRUCTION	Sixteenth Respondent
MR MEYER CLEANING (PTY) LTD	Seventeenth Respondent
KALAHARI INN (PTY) LTD	Eighteenth Respondent
HOBZIN 013 TRADING (PTY) LTD	Nineteenth Respondent
FAVOURED STREET PROPERTIES (PTY) LTD	Twentieth Respondent
MCLLENOLS HOLDINGS (PTY) LTD	Twenty-first Respondent
LIBAYI PROJECTS (PTY) LTD	Twenty-second Respondent
TONA TRADING ENTERPRISE	Twenty-third Respondent
RIAKONA GROUP	Twenty-fourth Respondent
KALAKO DEVELOPERS CIVIL AND SECURITY SERVICES (PTY) LTD	Twenty-fifth Respondent
MINQI PROJECTS (PTY) LTD	Twenty-sixth Respondent
INVESTED PROPERTY FUND	Twenty-seventh Respondent
INDUSTRIAL FAN ENGINEERING	Twenty-eighth Respondent
GRADE A HOLDINGS	Twenty-ninth Respondent
NEMBS PROJECTS (PTY) LTD	Thirtieth Respondent
KMM TRAVELS	Thirty-first Respondent
RATSHI PROPERTY DEVELOPMENT	Thirty-second Respondent
NDIROLMAK TRADING AND PROJECTS	Thirty-third Respondent
NGOBESE CHEMICAL SERVICES AND PROJECTS	Thirty-fourth Respondent
TOP SIX TRADING CC	Thirty-fifth Respondent

I CALL THE SHOTS (PTY) LTD	Thirty-sixth Respondent
IKATLISENG SOLUTIONS (PTY) LTD	Thirty-seventh Respondent
RONBUS TRADING AND PROJECTS (PTY) LTD	Thirty-eighth Respondent
MOZAMBULA GROUP (PTY) LTD	Thirty-ninth Respondent
MMMD AIR CONDITIONING AND REFRIGERATION (PTY) LTD	Fortieth Respondent
NOZIPHO HOLDINGS	Forty-first Respondent
LIMGROUP DIRECT ENERGY	Forty-second Respondent
LIM GROUP CONSULTING SERVICES	Forty-third Respondent
SEISHONI TRADING ENTERPRISE	Forty-fourth Respondent
IMANI PORTFOLIO HOLDINGS (PTY) LTD	Forty-fifth Respondent
TENDA ASSET AND TECHNICAL (PTY) LTD	Forty-sixth Respondent
TENDIWANGA INVESTMENTS (PTY) LTD	Forty-seventh Respondent
MELOKUHLE CONSTRUCTION AND PROJECTS (PTY) LTD	Forty-eighth Respondent
BHELETHA HOLDINGS (PTY) LTD	Forty-ninth Respondent
GAUTENG DEPARTMENT OF EDUCATION	Fiftieth Respondent
DIRECTOR: AUXILIARY SERVICES, GAUTENG DEPARTMENT OF EDUCATION	Fifty-first Respondent
CHIEF DIRECTOR: PHYSICAL RESOURCE PLANNING AND PROPERTY MANAGEMENT, GAUTENG DEPARTMENT OF EDUCATION	Fifty-second Respondent
HEAD OF DEPARTMENT, GAUTENG DEPARTMENT OF EDUCATION	Fifty-third Respondent
CHIEF DIRECTOR: SUPPLY CHAIN, GAUTENG DEPARTMENT OF EDUCATION	Fifty-fourth Respondent
THE MEC, GAUTENG DEPARTMENT OF EDUCATION	Fifty-fifth Respondent
SIGWILE BRIGHT MHLONGO	Fifty-sixth Respondent
LINDOKUHLE VUYISILE BRIDGET MKHIZE	Fifty-seventh Respondent

FIKILE EUGENIA MPOFANA	Fifty-eighth Respondent
NJABULO CHRISTIAN MABASO	Fifty-ninth Respondent
RICHARD THAMSANQA MWELI	Sixtieth Respondent
MADANGU FAMILY TRUST	Sixty-first Respondent
MARTIN SIFISO MSOMI N.O.	Sixty-second Respondent
SIGWILI BRIGHT MHLONGO N.O.	Sixty-third Respondent
SHUPHULA FAMILY TRUST	Sixty-fourth Respondent
OFNANI NEGOTA	Sixty-fifth Respondent
MUNSHEDZI IVY MOTAU	Sixty-sixth Respondent
GEORGE NEGOTA FAMILY TRUST	Sixty-seventh Respondent
TWIN CAM TRADING (PTY) LTD	Sixty-eighth Respondent
W NGOBESE	Sixty-ninth Respondent
NALEDZI INVESTMENT TRUST	Seventieth Respondent
KHANGALA NEGOTA N.O.	Seventy-first Respondent
MUNZHEDZI IVY MOTAU N.O.	Seventy-second Respondent
OFNANI NEGOTA N.O.	Seventy-third Respondent

JUDGMENT

MODIBA J:

INTRODUCTION

- [1] The Special Investigating Unit (SIU) seeks to review and set aside the decisions by the Gauteng Department Education (GDE) to appoint the first to forty-ninth respondents (the respondent entities) to clean, sanitize and decontaminate schools in the Gauteng Province (the review application). The SIU also seeks an

order against these respondent entities for the disgorgement of all profits that they acquired as a consequence of the impugned decision.

- [2] The SIU alleges that the procurement process that led to the appointment of the respondent entities was unlawful and unconstitutional in that it violated the applicable constitutional, statutory and regulatory provisions. The grounds of review relied on by the SIU are detailed further below.
- [3] The 1st, 7th and 56th to 64th respondents, together referred to as the Mporofana respondents; the 8th to 13th, 15th, 20th, 39th, 45th, 65th to 68th, 70th, 72nd and 73th respondents, together referred to as the Chachulani respondents; the 14th, 33rd, 46th and 47th respondents, together referred to as the Siroro Trading respondents; the 16th, 28th and 29th respondents, together referred to as the Gididi Building Construction respondents and the 19th respondent, referred to as Hobzin are opposing the application.
- [4] Libayi Projects, Riyakona Group, Ratshi Property Development, Ikatliseng Solutions (Pty) Ltd and MMD Air Conditioning and Refrigeration (Pty) Ltd cited as the 22nd, 24th, 32nd, 37th, and the 40th respondents, filed a notice to abide the Tribunal's decision.
- [5] The GDE together with its various officials cited as the 52nd to 55th respondents, did not enter the fray. Rather, the GDE commendably cooperated with the SIU in its investigation into the impugned decisions.

- [6] The 71st respondent, Khangala Negota (Khangala) seek a reconsideration of the preservation granted on 1 June 2021 under case number GP15/2021. He also seeks just and equitable relief.
- [7] This judgment follows the following configuration: the background to the review application is set out, followed by the grounds of review relied on by the SIU and a synopsis of the opposing respondents' response to the grounds of review. Then, I determine the respondents' points in limine. Then, I consider the merits of the review application with reference to the applicable legislative framework, followed by a determination of the relief sought by the SIU. A determination of the legal costs and the Tribunal's order conclude the judgment.

BACKGROUND

- [7] The background facts are largely common cause. On 15 March 2020, as a result of the outbreak of the Covid-19 global pandemic, President Cyril Ramaphosa declared a state of national disaster. Various measures were implemented in terms of the Disaster Management Regulations issued in terms of the Disaster Management Act¹, effectively, placing the country in lockdown. These measures include the closure of schools. From mid-April 2020, the government began easing lockdown restrictions. Schools started re-opening in early June 2020.

¹ Act 53 of 2005

- [8] In preparation for the opening of schools, the GDE adopted specific cleaning protocols. Under these protocols, if a Covid-19 case was reported at a school, the school would be shut down for decontamination, deep cleaning and sanitization. The GDE would procure a service provider to carry out the decontamination, deep cleaning and sanitization for the school(s) that have experienced a covid-19 case. The GDE would pay the procured service provider.
- [9] In order to meet the anticipated high demand for these services, Mr Baloyi, GDE's Chief Director: Physical Resource Planning and Property Management who is the fifty-second respondent in this review application, requested permission from Mr Mosuwe, the GDE Head of Department (HOD), to approve a deviation from the normal procurement processes for the appointment of service providers. Mr Mosuwe approved the deviation.
- [10] Subsequently, Mr Manggo, Director: Auxiliary Services, was tasked with assisting Mr Baloyi with the project to decontaminate, deep clean and sanitize GDE schools that have experienced a Covid-19 case. Mr Baloyi advised Mr Manggo to:
- 10.1 source service providers that were procured for a previous cleaning contract as the GDE Supply Chain Management (SCM) division was not available to assist with the procurement of service providers;
 - 10.2 proceed to appoint the service providers with appointment letters to be sent at a later stage; and
 - 10.3 offer service providers between R250 000 to R270 000 for primary schools, R250 000 to R290 000 for secondary schools and R250 000 to R300 000 for district offices.

- [11] Mr Manngo implemented this advice. When the demand for the decontamination, deep cleaning and sanitization service outstripped the number of service providers on the list of those who were appointed on a previous cleaning contract, Mr Manngo solicited the names and numbers of additional suppliers from two juniors in the SCM division, another senior official from another GDE division, and from service providers that he had sourced from the previous list of service providers. The information for some of the service providers was sent to Mr. Manngo by WhatsApp. Mr Manngo phoned these service providers and offered them work at particular schools for the fee determined by Mr Baloyi.
- [12] When Mr Manngo contacted service providers to solicit a quotation for the required services, the SCM division had not contacted them. Therefore, Mr Manngo was the service providers' first contact with the GDE regarding the impugned decisions. Mr Mhlophe, the GDE Chief Director: SCM confirmed to the SIU that the SCM Division did not play any role in the appointment of service providers for the project.
- [13] When Mr Manngo made contact with the service providers, he did not establish whether the service providers were registered on the Central Supplier Database (CSD) and/ or accredited to provide the required services.
- [14] Mr Manngo admits that the SCM processes were not followed in the procurement of service providers.

THE SIU'S GROUNDS OF REVIEW

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

- 15.1 The GDE's procurement process contravened the express provisions of the emergency deviation, granted in terms of Treasury Regulation 16A6.4;
- 15.2 the vast majority of the respondent entities were not accredited or registered on the CSD to supply the procured services;
- 15.3 the GDE SCM division did not source, vet or appoint the respondent entities;
- 15.4 the procurement process did not comply with National Treasury Instructions No. 5 of 2020/2021 (NT5) and No. 7 of 2020/2021 (NT7)²; and
- 15.5 the fees paid to the respondent entities were arbitrarily decided and bore no relation to the work done or the cost of materials.

[16] The respondent entities barely dispute the alleged procurement irregularities. Several respondents have raised the following points in limine:

- 16.1 the Mpofana and the Gididi Building Construction respondents sought to have several paragraphs in the SIU founding papers struck out on the basis that the relevant paragraphs constitute unconfirmed hearsay evidence;
- 16.2 the Mpofana respondents contest the SIU's locus standi to review the GDE's decisions. They also challenge the Tribunal's right to intervene in the decisions to appoint them.

² Both the NT5 and NT7 are titled "Preventative Measures in Response to the Covid-19 Pandemic that Resulted in the National State of Disaster".

16.3 the Chachulani respondents contest the Tribunal's jurisdiction to hear the review application;

16.4 the Gididi Building Construction respondents dispute the SIU's entitlement to a debatement of account. So do several other respondents.

[17] The Chachulani respondents concede the procurement irregularities. They contend that the Tribunal should not award just and equitable relief but should allow them to retain their profits. For different reasons, the Gididi Building Construction, Siroro and Mpofana respondents also take issue with the just and equitable relief sought by the SIU.

[18] The Gididi Building Construction respondents contend that:

18.1 had the services not been procured, the school system would have been brought to a halt to the prejudice of the learners;

18.2 due to the restrictions under which the respondents' rendered the service;

18.3 they incurred immeasurable expenses including expenses for special equipment for fumigation, special transportation and clothing for the staff.

[19] Impliedly, the above factors constitute exceptional circumstances that justify absolving the Gididi Building Construction respondents from the relief sought by the SIU.

[20] The Siroro respondents contend that the SIU has not placed any evidence before the Tribunal to determine what constitutes a 'market related' price for the service. So do the Mpofana respondents.

POINTS IN LIMINE

The Tribunal's Jurisdiction

[21] The Chachulani respondents contend that although the Tribunal has the power to review and set aside the GDE's decisions to appoint the respondent entities, it lacks jurisdiction to grant just and equitable relief, a discretionary relief derived from section 172(1)(b) of the Constitution. It contends that the power to grant such relief only vests in a court of law. Therefore, the SIU should have sought just and equitable relief from a court of law. According to the Chachulani respondents, the Tribunal is not a court for the following reasons:

21.1 it is not listed in section 166(e) of the Constitution;

21.2 section 34 of the Constitution draws a distinction between a court and another independent and impartial Tribunal;

21.3 the Special Investigating Unit and Special Tribunal's Act (SIU Act) does not confer on the Tribunal the status of a High Court;

21.4 the wording in section 4(1)(c), 4(1)(f), 5(5), 5(9)(a), 6(3)(f) and 12(1)(d) of the SIU Act clearly distinguishes the Tribunal from a court of law;

21.5 the Promotion of Administrative Justice Act³ excludes from the definition of administrative action the functions of a judicial officer referred to in section 166(e) of the Constitution.

[22] The Supreme Court of Appeal in *Nadasen*⁴ and this Tribunal in *Ledla*⁵ and *Caledon River*⁶ found that the Tribunal is a Court of law with the status of a High Court as envisaged in section 166(e) of the Constitution.

[23] The statutory provisions referenced in paragraph 21.4 of this judgment do not distinguish the Tribunal from a court of law. When read as a whole with reference to the context and purpose of the SIU Act, these provisions recognise the concurrent jurisdiction of the Tribunal and a Court of law, hence the words 'Tribunal' and 'Court' are referenced interchangeably. Consequently, these provisions afford the SIU a choice of forum. The notion that the jurisdiction of the Tribunal is limited by the inclusion of 'Courts' in these provisions is irrational as it is not consistent with other provisions in the SIU Act that sustain the conclusion that the Tribunal is not only a court but a court with a similar status as the High Court. These provisions are extensively discussed in *Caledon River*.

³ Act 3 of 2000

⁴ *Special Investigating Unit v Nadasen and Another* 2002 (4) SA 605 (SCA)

⁵ *Special Investigating Unit v Ledla Structural Development (Pty) Limited and 39 Others*, Special Tribunal Case No: GP07/2020. Unreported judgment delivered on 10 December 2020

⁶ *Special Investigating Unit and Another v Caledon Properties (Pty) Ltd and Another*, Special Tribunal Case No: GP17/2020. Unreported judgment delivered on 26 February 2021

[24] The Tribunal is not an administrative body. Its presiders do not perform an administrative function as defined in PAJA. Their adjudicative functions exercised in terms of the SIU Act are extensively dealt with in *Caledon River*. Its adjudicative functions distinguish it from an independent or other impartial tribunal as envisaged in section 34 of the Constitution and in *ITC 1806 68 SATC 117*.

[25] Therefore, this point *in limine* stands to be dismissed.

The SIU's Standing to Review the GDE's Decisions

[26] Section 5(5) read with section 4(1)(c) of the Act authorises the SIU to bring civil proceedings in its own name, seeking the relief to which the GDE is entitled. The review application falls within the rubric of civil proceedings as envisaged in section 5(5). It emanates from an investigation conducted by the SIU within its investigative mandate as set out in section 2(2) of the Act. The impugned decision relates to alleged unlawful and irregular acquisitive act or transaction as envisaged in section 2(2)(d) of the Act.

[27] Therefore, the SIU has standing to review the GDE's decision.

[28] In the premises, this point *in limine* stands to be dismissed.

The SIU's Entitlement to a Statement and Debatement of Account

- [29] Reliance by several respondents on *Moila*⁷ for the proposition that the SIU is not entitled to a statement and debatement of account is misplaced. In *Moila* the SCA considered a rate payer's right to receive a statement and debatement of account and found that section 95 and 102 of the Local Government Municipal Systems Act⁸ does not vest a rate payer with such a right. The facts here and the legal basis for the relief sought by the SIU renders *Moila* significantly distinguishable.
- [30] The same applies to the dictum in *Janse van Rensburg*.⁹
- [31] The Court's, and similarly this Tribunal's jurisdiction to order just and equitable relief is sufficiently wide to order the respondent entities to render statements and debatement of account to the SIU in order to give effect to the relief it seeks in these proceedings. This method of accounting for profits in similar matter has become trite.

⁷ *Moila v City of Tshwane* 2017 (SA) 701 (SCA)

⁸ Act 32 of 2000

⁹ *ABSA Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 SCA

The application to Strike Out

[32] The Mpofana respondents had contended that it was improper for Mr Nkuna to commission Mr Manggo and Mr Mhlophe's affidavits filed in these proceedings because, as a Chief Forensic Investigator for the SIU, Mr Nkuna has an interest in these proceedings. Therefore, these respondents had contended, by commissioning these affidavits, Mr Nkuna violated Regulation 7(1) of the Regulations governing the administration of an Oath. These respondents correctly abandoned this point because Mr Nkuna is exempted from the Regulation 7 prohibition since:

32.1 he is not an attorney;

32.2 his only interest in the matter arises out of his employment and in the course of his duty with the SIU.¹⁰

[33] Various respondents contend that it is not permissible for the SIU to attach the affidavits that were generated during its investigation to its founding affidavit as doing so violates the principle that facts set out in the founding affidavit must be set out simply, clearly and in chronological sequence.

[34] The SIU has not violated this principle. It has set out facts in the founding affidavit consistently with this principle. It has attached the affidavits by Messrs. Nkuna, Mosuwe, Manggo and Mhlophe as these confirm its version, set out in the founding affidavit as attested to by these officials.

¹⁰ See Regulation 7(2) read with the Schedule to the Regulations.

[35] The Mpofana respondents' complaint that all references to Baloyi in the founding affidavit stand to be struck out because Baloyi's confirmatory affidavit is not attached, lacks merit. References to Baloyi derive from Manngo's version in relation to the advices and/ or instructions he received from Baloyi and how he (Manngo) executed them. The probative value of this evidence depends on Manngo, whose confirmatory affidavit is attached to the SIU's founding affidavit.

[36] Therefore, this point *in limine* stands to be dismissed.

The Decision not to Litigate against all Service Providers

[37] A number of the respondent entities complain that the SIU's decision to target only the first to forty-ninth respondents in this review application, rather than all service providers appointed by the GDE, is arbitrary and irrational.

[38] The SIU's explanation in respect of this decision is that since it has limited resources, it chose to seek preservation orders against, and to review the appointment of those service providers who were paid the largest amounts by the GDE. This would allow the SIU to use its limited resources to obtain the greatest benefit for South Africans.

[39] The fact that the SIU only litigates against some and not all service providers does not avail to the respondent entities a valid defence.

[40] Therefore, this point *in limine* stands to be rejected.

THE APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY FRAMEWORK

[41] The legal principles relied on by the SIU are trite.

41.1 in terms of section 217(1) of the Constitution, the procurement of goods and services by organs of State and public entities must be implemented in accordance with a system which is fair, equitable, transparent, competitive and cost effective;¹¹

41.2 the requirements for a constitutionally compliant procurement process must be understood together with “*the basic values governing public administration in section 195(1)*”,¹² which include fairness, equitability, efficient, effective and economic use of resources, accountability, and transparency;

41.3 the Public Finance Management Act 1 of 1999 (PFMA),¹³ the Treasury Regulations and National Instructions promulgated in terms of it, establish the procurement system that complies with the constitutional principles set out in section 217 of the Constitution. It is for this reason that material procurement irregularities constitute an affront to section 217.¹⁴ To achieve the objectives set out in section 217, and to obtain the best public outcome in a procurement

¹¹ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* (“Allpay SCA”) 2013 (4) SA 557 (SCA) at para 20.

¹² *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) para 33 and 53.

¹³ s 51(1)(a)(iii) of the PFMA provides that the accounting authority of a public entity “*must ensure that the public entity ... has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective*”.

¹⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) (“All Pay (No 1)”) at para 22(a).

process, the applicable procedural and formal requirements must be complied with.¹⁵

41.4 None compliance with the applicable procedural and formal requirements constitutes an affront to section 217(1), rendering a procurement process vulnerable to be reviewed and set aside in terms of section 172(1) of the Constitution. This section provides that:

“When deciding a constitutional matter within its power, a court—
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including—
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[42] Treasury Regulation 16A6.4 permits an organ of state to procure goods and services without inviting competitive bids where it is impractical to do so. It provides that:

“If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.”

[43] Hence, a deviation from inviting competitive bids must be approved by the accounting authority of the State organ concerned who shall record reasons for the deviation.

¹⁵ *Allpay (No 1)* at para 24.

- [44] The Disaster Management Regulations issued in terms of the Disaster Management Act¹⁶ clarify that despite the emergency conditions precipitated by the Covid-19 pandemic, emergency public procurement is still subject to the PFMA and the applicable emergency provisions in the Regulations and National Instructions made under section 76 of the PFMA.
- [45] NT5 and NT7 prescribes a number of procurement control measures applicable to emergency procurement of Covid-19 related goods and services. NT5 took effect on 28 April 2020, while NT7 took effect from 1 June 2020. Therefore, NT5 and NT7 are applicable to the procurement under review.

THE MERITS

Non-compliance with the Deviation

- [46] The deviation authorized the GDE to conduct the procurement process without inviting competitive bids. The emergency created by the urgent need to appoint service providers to deep clean, decontaminate and sanitize schools exposed to Covid-19 justified an exemption from normal procurement procedures to the extent specified in the deviation.
- [47] Treasury Regulation 16A6.4 in terms of which a deviation was approved requires that the principles of fairness, equity, transparency, competitiveness and cost-effectiveness should still be maintained during the procurement process. As

¹⁶ Gazetted in Government Notice No. 318 of 18 March 2020.

determined below, the procurement failed to comply with the approved deviation in the following respects:

- 47.1 the GDE's SCM Division was not involved in the procurement process;
- 47.2 the respondent entities are not accredited on the CSD to provide the procured services;
- 47.3 the capacity of service providers to render the procured services was not assessed at the time of appointment;
- 47.4 the minimum price determined by Mr Baloyi and the total cost incurred by the GDE was astronomically higher than that for which approval was granted. The estimated cost of the service is R6,1 million. The GDE has spent R431 million in the procurement under review.

[48] Most of the respondents have not genuinely disputed the above irregularities.

[49] Reliance on the SCA judgment in *Engineered Systems Solutions*¹⁷ by Hobzin and the Siroro respondents is misplaced. The facts in that judgment are remarkably distinguishable from the present facts. There, the SCA considered whether non-registration of a bidder's personnel in terms of the PSIRA Act at the time of bidding constitutes an irregularity. The SCA also observed that PSIRA registration was

¹⁷ *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* Case no 216/2020 [2021] ZASCA 90 (25 June 2021), incorrectly cited in the Siroro heads of argument as 'Special Investigating Unit and Another v The Acting National Commissioner of Correctional Services representing The Correctional Services for the Republic of South Africa'.

not a tender requirement. Here, CDS registration and accreditation for the procured service was an express requirement of the approved deviation.

[50] It was irregular for Mr Manngo to have overlooked the requirements in 47.1 to 47.3 above when he solicited and appointed the respondent entities.

[51] Therefore, the selection and appointment of the respondent entities was done in a haphazard, unfair and inequitable manner contrary to the requirements in section 217 of the Constitution.

Lack of cost effectiveness or transparency

[52] For the reasons that follow, the determination and fixing of the same fee by Mr Baloyi to be paid for each school category or district office renders the procurement not cost-effective, transparent and not competitive as required in terms of section 217(1) of the Constitution:

52.1 compliance with these requirements ought to be the basis on which the respondent entities were appointed. None of the respondents have seriously disputed that they were not appointed in accordance with a system that is cost-effective and transparent;

52.2 the approved deviation did not authorize Mr Baloyi to fix a price for the procured service as he did;

52.3 prior to their appointment, the respondent entities did not submit a quotation to the GDE on the basis of which a fee that bears relation to the size of

the area to be cleaned, as well as the equipment, human resources and chemicals and labour hours employed was proposed by each respondent entity and accepted by the GDE;

52.4 job cards signed by several school principals and/ or district offices show that similar amounts were charged and paid to the respondent entities where the amount of work undertaken differed materially;

52.5 the GDE is not defending Baloyi's price structure, most probably because it is unable to justify it. The GDE and its relevant officials are party to these proceedings and have opted not to oppose the review application.

[53] The contention by various respondent entities that there is no evidence that the GDE did not receive full market value for the amounts that were paid does not refute these irregularities. This argument is also of no moment because, while fair market value may be one of the factors considered to determine cost effectiveness, it is not a determinative factor. It is improbable that if they had submitted quotations to the GDE, the respondent entities would have charged the same fee for the procured service regardless of the size of the area to be cleaned, equipment, human resources and chemicals and labour hours employed for each school and/ or district office for which they were appointed.

Contravention of National Treasury Instruction 5 and 7

- [54] None of the respondent entities seriously dispute the contravention of TN5 and TN7 by the GDE.
- [55] At paragraph 3.1, NT5 stipulates the additional procurement and expenditure measures that must be put in place by state institutions during the period of the national disaster. The SIU investigation found that the GDE materially flouted NT5 by failing to implement the following measures to mitigate the risk of irregular procurement and any possible resultant financial losses:
- 55.1 an internal system for financial control, risk management and reporting in order to account for the funds used for the COVID-19 disaster;
 - 55.2 ensuring that officials committing any expenditure are duly authorized or properly delegated. Manngo did not have the authority or delegation to commit expenditure. Only the GDE's SCM division does;
 - 55.3 internal audit functions did not conduct audit checks to proactively detect and prevent procurement irregularities;
 - 55.4 regular monitoring of expenditure and any risks that may arise and the production of frequent expenditure reports.
- [56] Contrary to NT7, the procurement of deep cleaning, decontamination and sanitization services was not referred to another relevant function within the GDE to conduct checks to prevent any possible irregular expenditure prior to generating a purchase order in relation to each respondent entity.

[57] As a result, the appointment of the respondent entities was not verified against the GDE's internal system for financial control and risk management. Hence, the irregularities that constitute the SIU's grounds of review were only detected during the SIU investigation.

[58] I therefore find that:

58.1 the procurement process was not undertaken in accordance with a system that complies with section 217(1) of the Constitution.

58.2 for the reasons set out in paragraph 51 to 53, the irregularities are material.

58.3 the SIU has made out a case for the appointment of the respondent entities to be declared irregular and unlawful and to be reviewed and set aside.

[59] Under these circumstances, there is no scope for resolution of the irregularities between the GDE and the respondent entities as contended on behalf of the Siroro respondents. The SIU acted well within its mandate in terms of section 5(5) read with sections 4(1)(c) and 2(2) of the SIU Act to institute the review application.

JUST AND EQUITABLE RELIEF

[60] The SIU seeks as just and equitable relief in terms of section 217(1)(b) of the Constitution and in line with the no profit principle as applied in *All Pay*, an order in terms of which the respondent entities are stripped off the profits they have acquired as a result of their impugned appointment. To give effect to this relief, the SIU seeks an order in terms of which the respondent entities are compelled to submit a statement and debatement of account in respect of their appointment, performance and payment by the GDE to determine their respective profits.

[61] Various respondent entities oppose this relief.

[62] The Chachulani respondents argued that the no-profit principle as applied in *All Pay* is incompetent in the present circumstances. They sought to distinguish the facts in this review application from those in *All Pay* on two bases:

62.1 they argued that the respondent entities have not assumed a constitutional obligation that required the continued rendering of the procured service pending the appointment of new service providers on the basis of a valid procurement process;

62.2 the respondent entities have fully performed in terms of their procurement contracts with the GDE. Therefore, the need for continued performance despite the contracts having been declared invalid, which would necessitate the suspension of the declaration of invalidity does not arise.

[63] This interpretation of the no-profit principle is incorrect. The no-profit principle is a principle of general application. It is not circumscribed to cases where the court

suspends the declaration of invalidity to ensure the continuation of the contract. This is how courts have consistently applied this principle, including in *Shabangu* where the court denied the applicants relief that would have allowed them to benefit from an unlawful contract. In *Shabangu*, the Constitutional Court would have entertained the relief to allow the applicant to benefit from an unlawful contract if the applicants' cause of action was founded on unjustified enrichment. Since it was not, the court denied the applicant relief.

- [64] For the reasons set out in paragraphs 52 to 53 above, the Chachulani respondents' argument that ordering the respondent entities to account for and restore the profits they have earned to the GDE would not be just and equitable because it would create an imbalance, as the GDE received full value for its money, lacks merit.
- [65] The fact that the Chachulani respondents were contracted for a price that falls within the National Treasury price guidelines and that they have been paid less than fair market value received by the GDE does not cure the lack of cost effectiveness and transparency in the procurement process.
- [66] The Chachulani respondents' reliance on *Absa Bank Ltd v Standard Bank Ltd*¹⁸ is misplaced. There, a supplier who was party to a blameworthy conduct was denied the defence of non-enrichment, and was found to be enriched to the full extent of the difference between the amount paid and the fair market value received. The SIU's cause of action is not based on unjust enrichment.

¹⁸ 1998 (1) SA 242 (SCA)

- [67] An exception to no profit principle was allowed in *Gijima* due to the peculiar facts of that case. There, the Constitutional Court ordered that despite a declaration of invalidity, to prevent an unjust outcome, *Gijima* should not be divested of the profits it would earn from the contract. *Gijima* had been induced to agree to the termination of a valid contract in exchange for an invalid contract. The Constitutional Court allowed *Gijima* to retain profits earned from the latter contract to compensate it for the loss it would have suffered as a result of the inducement.
- [68] In the present case, there are no exceptional circumstances that justify a departure from the no profit principle.
- [69] The innocence of the respondent entities is an irrelevant consideration for the application of the no-profit principle.
- [70] The fact that the procurement was approved under an emergency in terms of a deviation does not constitute exceptional circumstances as there was non-compliance with the terms of the deviation. Any prejudice suffered by the respondent entities as a result of rendering the service under severe restrictions as a result of the lockdown will be redressed by the just and equitable relief sought by the SIU.
- [71] The SIU request for the referral to arbitration under the AFSA rules of the determination of the quantum of the profits to be paid by the respondent entities falls to be refused. The SIU has not stated reasons why the Tribunal is not placed to adjudicate this issue. The Tribunal is well placed to adjudicate this issue should the need arise. The referral to arbitration will only prolong the matter and escalate legal costs.

[72] There is no provision in the SIU Act that confers jurisdiction on an arbitration forum over a dispute in terms of the SIU Act. No case was made out for a purposive interpretation of the Act to allow such a route.

KHANGALA NEGOTA'S REQUEST FOR AN AMENDMENT TO THE PRESERVATION ORDER

[73] The 71st respondent, Khangala Negota (Khangala) is one of the Trustees of the 67th respondent, the George Negota Family Trust (the GNF Trust).

[74] Khangala deposed to an answering affidavit where he explains that the GNFT is a 100% shareholder in the 68th respondent, Twin Cam Trading (Pty) Ltd (Twin Cam). Together with the 65th respondent, his brother Ofhani Khangala (Ofhani), was a director in Twin Cam until 20 October 2020 when he resigned. He was also a trustee in the 70th respondent, Naledzi Investment Trust. He resigned from this position on 25 July 2021.

[75] On 23 June 2021, the Tribunal granted an order preserving R800,000 and R1 million respectively held in Nedbank and First National Bank accounts in GNFT's name. On 01 June 2021, the Tribunal granted an order preserving all the funds held in an Investec Money Tracker Account held in Nedbank and First National Bank accounts in the name of Naledzi Investment Trust.

[76] Khangala further explains that prior to his resignation from the offices referenced above, he was not in any manner involved in any activities that are subject to the review application, nor did he sign any resolution authorising the relevant entities to participate in such activities. He also did not benefit financially from such activities. He would have opposed any such resolution being taken. Ofhani has not taken him into his confidence regarding such activities.

[77] Khangala whines that the preservation orders are constraining the Naledzi Investment Trust and Twin Cam from the conduct of their respective businesses.

[78] Khangala does not oppose the review application. He pleads for:

78.1 a just and equitable order against the 67th, 68th, 71st, 3rd, 4th and 9th respondent;

78.2 a reconsideration of the preservation order;

78.3 the Tribunal not to make a cost order against these respondents in the preservation application instituted under case number GP/15/2021 and in the present application.

[79] Khangala has not made out a case for these orders. His relationship with the 3rd, 4th, and 9th respondents is not explained. Therefore, he has not satisfied the Tribunal that he has the authority to represent these entities in these proceedings. He has similarly not established his authority to represent the 67th and 68th respondents in these proceedings as he is no longer their Trustee or Director as the case may be.

- [80] He fails to set out any basis for a conclusion that the preservation order was incorrectly granted. He has also not set out any reason why the relevant respondent entities should be absolved from the present application. His ignorance of the participation of the relevant entities in the activities subject to review does not absolve them from these proceedings. More importantly, some of these entities are opposing the review application on grounds that were found to be untenable.
- [81] Under these circumstances, there is no reason to absolve these respondents from costs orders in the preservation and review applications.

COSTS

- [79] The SIU prayed for costs against the GDE and the respondent entities, to be paid jointly and severally by these parties.
- [80] No convincing reason has been advanced as to why costs should not follow the course. This approach to costs is consistent with that followed in other cases where procurement processes have been successfully reviewed and set aside due to irregularities. Even where a finding that procurement process violates section 217 of the Constitution is made, courts, including the Constitutional Court have not applied the principle set out in *Affordable Medicines Trust*¹⁹ and *Biowatch*²⁰. Hobzin

¹⁹ *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 (3) SA 247 (CC) para 138

²⁰ *Biowatch Trust v Registrar, Genetic Resources & Others* 2009 (6) SA 232 (CC) paras 21-25

has not provided authority for the proposition that the principle should be applied here. This approach is appropriate as the respondents are not seeking to vindicate any of their constitutional rights.

[81] Therefore, the SIU is entitled to the costs of the review and preservation applications, inclusive of the costs of two counsel where so employed.

[82] In the premises, the following order is made:

ORDER

1. The fiftieth respondent's decisions to appoint the first to forty-ninth respondents to decontaminate, disinfect and sanitize schools in Gauteng are reviewed and set aside.
2. Each of the first to forty-ninth respondents shall, upon being called upon by the applicant to do so, submit a statement and debatement of account in respect of their appointment, performance and payment as a service provider by the fiftieth respondent, to determine the profits derived by the first to forty-ninth respondents therefrom.
3. If the accounting and the sum of profit determined is disputed by either the applicant or the respondent in question, these parties shall approach the Tribunal for an appropriate order on supplemented papers as necessary.

4. Upon the conclusion of the steps in 2 and 3, and upon the written demand by the applicant to pay to it the sum of the profits so derived, the relevant respondent shall pay the determined sum within 60 days thereof, together with interest a *tempore mora* as prescribed from time to time from date of determination of the payable sum until date of payment.
5. If the accounting and the sum of profits is not disputed or is agreed between the applicant and the relevant respondent, such profit shall be paid to the applicant within 15 days of such agreement, together with interest a *tempore mora* as prescribed from time to time from date of the agreement until date of payment.
6. The respondents who opposed this application, namely, the 1st, 7th, 8th, 13th, 14th, 15th, 16th, 19th, 20th, 28th, 29th, 33rd, 39th, 45th 46th, 47th 56th, 64th, 65th, 68th, 70th, 72nd and 73th respondents shall bear the costs of the application, jointly and severally. Such costs shall include the costs of two counsel where so employed.



JUDGE L.T MODIBA
MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the Applicant: Adv. M Chaskalson SC, assisted by Adv. E Webber

Attorney for the first Applicant: Ms. S Zondi, Office of the State Attorney, Pretoria

Counsel for the 1st – 7th and 56th -64th respondents: Adv. H Epstein SC, assisted by Adv. S Cohen

Attorney for the 1st – 7th and 56th -64th respondents: Mr. S Buthelezi, Buthelezi Vilakazi INC. Attorneys

Counsel for the 8th- 13th, 15th,20th,39th,45th,65th-68th,70th,72nd and 73rd Respondent
Adv. J Peter SC assisted by Adv. E Mkhawane

Attorney the 8th- 13th, 15th,20th,39th,45th,65th-68th,70th,72nd and 73rd Respondent: Ms L Oosthuizen, MBA Incorporated.

Counsel for the 16th, 28th, 29th Respondent: Adv. M Qofa, assisted by Adv. S Mfeka

Attorney for the 16th, 28th, 29thRespondent: Ms P Matsheka, Matsheka Attorneys

Counsel for the 14th,33rd,46th,47th Respondent: Adv. R Bvumbi

Attorney for the 14th,33rd,46th, 47th Respondent: T. Makhumbila Incorporated Attorneys

Counsel for the 19th respondent: Adv. W Maodi

Attorney for the 19th respondent: Ms P Matsheka, Matsheka Attorneys

Counsel for the 67th, 68th and 71st respondent: Adv. M Sebola

Attorney for the 67th, 68th and 71st respondent: Sebola Attorneys

Date of hearing: 24 November 2021

Date of Judgment: 10 February 2022

Mode of delivery: *this judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time of delivery is deemed to be 2pm on 10 February 2022.*