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: GP19/2021

In the stay application between:

THABISO HAMILTON NDLOVU	First Applicant
HAMILTON HOLDINGS (PTY) LTD	Second Applicant
HAMILTON PROJECTS CC	Third Applicant
FELIHAM (PTY) LTD	Fourth Applicant

and

SPECIAL INVESTIGATING UNIT	First Respondent
NATIONAL HEALTH LABORATORY SERVICE	Second Respondent
ZAHEER CASSIM N.O.	Third Respondent
ZAISAN KAIHATSU (PTY) LTD	Fourth Respondent
REGISTRAR OF DEEDS, PRETORIA	Fifth Respondent
BUGATTI SECURITY SERVICES AND PROJECTS (PTY) LTD	Sixth Respondent
VICTOR NKHWASHU ATTORNEYS INC	Seventh Respondent
COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICES HOLDINGS (PTY) LTD	Eighth Respondent

AKANNII TRADING AND PROJECTS (PTY) LTD	Ninth Respondent
MOK PLUS ONE (PTY) LTD	Tenth Respondent
ABOMPETHA (PTY) LTD	Eleventh Respondent
JORITANS LOGISTICS (PTY) LTD	Twelfth Respondent
PERSTO (PTY) LTD	Thirteenth Respondent
KGODUMO MOKONE TRADING ENTERPRISE (PTY) LTD	Fourteenth Respondent

In the Review Application between:

SPECIAL INVESTIGATING UNIT	First Applicant
NATIONAL HEALTH LABORATORY SERVICE	Second Applicant

and

THABISO HAMILTON NDLOVU	First Respondent
ZAISAN KAIHATSU (PTY) LTD	Second Respondent
REGISTRAR OF DEEDS, PRETORIA	Third Respondent
BUGATTI SECURITY SERVICES AND PROJECTS (PTY) LTD	Fourth Respondent
VICTOR NKHWASHU ATTORNEYS INC	Fifth Respondent
ZAHEER CASSIM N.O.	Sixth Respondent
COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICES HOLDINGS (PTY) LTD	Seventh Respondent
AKANNII TRADING AND PROJECTS (PTY) LTD	Eighth Respondent
HAMILTON HOLDINGS (PTY) LTD	Ninth Respondent
HAMILTON PROJECTS CC	Tenth Respondent
MOK PLUS ONE (PTY) LTD	Eleventh Respondent
ABOMPETHA (PTY) LTD	Twelfth Respondent
FELIHAM (PTY) LTD	Thirteenth Respondent
JORITANS LOGISTICS (PTY) LTD	Fourteenth Respondent

PERSTO (PTY) LTD Fifteenth Respondent

KGODUMO MOKONE TRADING ENTERPRISE (PTY) LTD Sixteenth Respondent

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JUDGMENT

MODIBA J:

[1] This is an application for the stay of the review application instituted against the applicants and other allegedly associated respondent entities by the Special Investigation Unit (SIU) and the National Health Laboratory Service (NHLS), pending the determination of an application the applicants intend instituting in the Gauteng Division of the High Court, Pretoria for the variation of the SARS final preservation order, granted on 1 March 2021. The applicants also seek costs against the respondents who oppose the stay application.

[2] Hamilton Ndlovu (Mr Ndlovu) is the sole director in the second applicant, Hamilton Ndlovu Holdings (Pty) Ltd, and the third applicant, Hamilton Projects CC. His wife, Felicia Sekete (Ms Sekete) is the sole director in the fourth applicant, Feliham (Pty) Ltd. For convenience, I refer to Mr Ndlovu and these entities collectively as the applicants. Where I only need to reference the three applicant entities, I refer to them as such.

[3] Mr Ndlovu deposed to the affidavits filed in the stay application on behalf of all the applicants.

[4] The SIU and the NHLS oppose the stay application. For convenience, I refer to these parties as the opposing respondents. The other respondents in the stay application are cited as respondents in the review application. SARS filed a notice to abide the Tribunal's decision. So did the 6th, 10th, 11th, 13th and 14th respondents.

[5] In the review application, instituted on 6 October 2021, the opposing respondents as joint applicants seek to review and set aside the contracts the NHLS awarded to the applicant entities and other allegedly associated entities. They also seek consequential relief.

[6] On 15 October 2021, the applicants filed a notice of intention to oppose the review application. At a Judicial Case Management Meeting held on 28 October 2021 in terms of Rule 19 of the Tribunal Rules, I determined the following time frames for the filing of papers and the hearing of the review application:

6.1 the applicants to file their answering affidavit on 14 January 2022;
6.2 the opposing respondents to file their replying affidavit on 28 January 2022;
6.3 the applicants to file their heads of argument on 14 February 2022. The opposing respondents to file theirs on 28 February 2022.
6.4 the review application is enrolled for hearing on 10 and 11 March 2022.

[7] On 22 November 2021, I convened a second Judicial Case Management meeting at the applicants' instance. At the meeting, the applicants informally sought a stay of the review application pending an application for the variation of the SARS preservation order to access additional funds for legal fees to resist the review application. The applicants have determined the additional amount to be

approximately R700,000. Nazeer Cassim N.O., the curator appointed in terms of the SARS preservation order to control all the applicants' funds and assets held under that order (the Curator), has capped the amount he will avail for that purpose at R800,000 inclusive of VAT.

[8] The opposing respondents opposed the applicants' informal request for a stay of the review application. In the absence of full sworn facts in support of the request, as well as the opposing respondents' sworn answer thereto, I was not in a position to consider the request judicially. It is for that reason that I directed that:

8.1 a formal stay application be filed;

8.2 the timeframes determined at the first Judicial Case Management meeting remain operative pending the determination of the stay application.

[9] It is common cause that since the SARS preservation order places the applicants' realisable assets under preservation in terms of section 163 of the Tax Administration Act (TAA)[1], effectively, the rights, title and interests in all these assets vests in the Curator. In addition, the Curator is vested with the power to control all the applicants, bank accounts and investments.

[10] On 31 August 2021, the Tribunal granted an interim order prohibiting Mr Ndlovu and the other cited respondents from dealing in any manner with the assets listed in Annexure A of that order.

[1] Act 28 of 2011

[11] The applicants allege that as a result of the SARS preservation order and the Tribunal's interim order, they do not have access to all their funds and assets. On grounds to be dealt with shortly, the opposing respondents dispute this.

[12] The applicants complain that the amount that the Curator is willing to make available to them is woefully inadequate, that the Curator thumbed sucked the cap on their legal fees and that his decision is irrational and in breach of his duty to act in their best interests.

[13] The applicants further allege that it is important that they access additional funds preserved under the SARS preservation order to fully and properly prepare and present their opposition to the review application. They contend that given that the amount that the Curator is willing to release to them is inadequate to cover the costs of preparing and filing the applicants' answering affidavit, it is appropriate that they bring the stay application.

[14] The applicants further allege that given that the applicants' assets are preserved in terms of the SARS preservation order and the Tribunal's interim order, the only prejudice that the opposing respondents stand to suffer if the review application is stayed is a delay in securing a declaration that the preserved assets are forfeited to the State. This prejudice is far outweighed by the affront to the applicants' constitutional right of access to the courts that will result from their inability to oppose the review application and the substantial assets they stand to lose if they do not oppose the review application. Therefore, it is in the interests of justice to grant the stay application.

[15] The opposing respondents oppose the stay application on the basis that:

15.1 the applicants have failed to make full disclosure of their financial means to the Tribunal, and as such have not shown that they need to procure funds held under the SARS preservation order to properly and fully oppose the review application;

15.2 the applicants do not have a right under the TAA to procure funds from assets that have been frozen to satisfy tax debts in order to fund their opposition to the review application;

15.3 the stay application is brought with the ulterior purpose of delaying the review application.

15.4 the SIU will be prejudiced by a delay in the finalisation of the review application as it will allow the first applicant to further dissipate funds that have not been preserved.

[16] Any new factual averments and/ or evidence the applicants make and/ or rely on in their replying affidavit violate the trite principle that a party should make out their case in their founding affidavit. By failing to do so, the applicants deny the respondents an opportunity to answer to the allegations out in reply. Thus, the averments and/ or evidence set out in the following paragraphs of the applicants replying affidavit stand to be disregarded as contended for by the opposing respondents:

16.1 evidence in connection with the contempt application and related correspondence;[2] and

16.2 evidence in connection with the personal, legal and medical expenses of Mr Ndlovu and supporting documents.[3]

Similarly, any written argument based on this evidence also stand to be disregarded.

[17] This Tribunal derives inherent jurisdiction to grant any order in matters falling within its jurisdiction from section 8(2) of the Special Investigation Units and the Special Tribunals Act[4]. Section 8(2) empowers the Tribunal to make any order to give effect to any ruling or decision it has made.[5]

[18] The applicants primarily rely on the authority in *Spier Properties*[6] where the court held that:

"[A] stay can be granted by the court in the exercise of its inherent jurisdiction to avoid injustice and inequality but in this enquiry courts do not act on abstract ideas of justice and equity. They must act on principle. Accordingly, where there is such an application for a stay on the grounds of prejudice, such prejudice and harm must not be 'problematical, hypothetical and speculative.'"

[2] Replying affidavit, p E264-269
[3] Replying affidavit, p E399-403
[4] Act 74 of 1996
[5] See also this Tribunal's judgment in *Special Investigating Units and Another* v *Caledon River Properties (Pty) Ltd and Another*, an unreported Tribunal judgment handed down by Modiba J on 26 February 2021 at paragraph 47.
[6] *Spier Properties (Pty) Ltd and another v Chairman of the Wine and Spirit Board and others* 1999 (3) SA 832 (C) at 834B

[19] The applicants also accept that, in addition, they must demonstrate that the stay application is *bona fide* and is not vexatious or frivolous[7] and that the overriding consideration, is that of the interests of justice. What the interests of justice dictate, depends on the circumstances of each case.[8]

[20] The applicants have barely denied the opposing respondents' allegations that they have failed to make full disclosure of their financial means and that they may have other independent means to finance the review application.

[21] They were paid R172,7 million under the contracts awarded to them by the NHLS. In the application for the interim order, a *prima facie* case is made out that approximately R152 million flowed to Mr Ndlovu for his personal use. Only R103m is preserved under the SARS preservation order and the interim order. Approximately R50 million remains unaccounted for by Mr Ndlovu. This includes R15 million withdrawn in cash through tellers and ATMs.

[22] In addition, Mr Ndlovu makes reference to third party financial sources to cover his living expenses. At the second Case Management meeting, his counsel mentioned that Mr Ndlovu was making arrangements to source the additional money he requires to finance his legal fees from third party sources. In the stay application, Mr Ndlovu is silent on what became of these efforts.

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[7] *New Reclamation Group (Pty) Ltd v Chicks Scrap Metal (Pty) Ltd and Others* (2602/11) [2012] ZAKZDHC 80 (16 November 2012) at paragraph 6

[8] *Mokone v Tassos Properties* 2017 (5) SA 456 (CC) at paragraphs 67-8.

[23] When quizzed by the opposing respondents in their answering affidavit about his failure to disclose these third party sources to the Tribunal, Mr Ndlovu adopts the attitude that he has no duty to disclose the details of these sources to the Tribunal. It is an utter lack of *bona fides* on Mr Ndlovu's part to selectively rely on financial assistance from these sources and refuse to disclose to the Tribunal, the details of these sources. In light of allegations regarding Mr Ndlovu's propensity to use associated third-party companies to conceal the source and flow of money derived from tenders allegedly irregularly awarded, his failure to disclose the third party sources is disconcerting. The inference the opposing respondents draw, that funds sourced from third party sources is such funds, is not be far-fetched.

[24] Any express or tacit acceptance of the disclosures the applicants made to the Curator is not binding on this Tribunal, especially in the context of the applicants' paltry response to the opposing respondents' allegation that the R50 million referred to above remains accounted for by Mr Ndlovu. It is not the applicant's case that the disclosures they purportedly made to the Curator include such an account. For the purpose of the stay application, it is to the Tribunal that the applicants owe a duty to candidly place facts before it to justify the exercise of a discretion in their favour to stay the review application. They have failed in this regard.

[25] Although section 163(9) is silent on the tax payer's duty to make full disclosure of his financial means, given that section 163(7) imposes this requirement when the

court granting the preservation order exercises a discretion to make provision for the tax payer's living expenses, it would be absurd if this requirement becomes an irrelevant consideration when a variation of the preservation order is sought on the basis that the tax payer will suffer undue hardship if he is not permitted to access more money from the preserved funds.

[26] In the absence of full disclosure of the applicants' financial means, including assistance from independent third party sources and the R50 million referred to above, I am not satisfied that the applicants have prospects of success in establishing that they will suffer undue hardship as envisaged in section 163(9) of the TAA – even on the broad definition of this concept that they contend for - if the Curator does not make additional money available to them to oppose the review application.[9]

[27] I am disinclined to delve into the appropriate interpretation of section 163(9) of the TAA as that is the matter for the court that will be seized with the application for the variation of the preservation order.

[28] By contending that the opposing respondents will not suffer any prejudice if the review application is stayed because the applicants' assets are under

[9] Section 163(9) of the Tax Administration Act provides that:
"The court which made a preservation order may on application by a person affected by that order vary or rescind the order or an order authorising the seizure of the assets concerned or other ancillary order if it is satisfied that - (a) the operation of the order concerned will cause the applicant undue hardship; and (b) the hardship that the applicant will suffer as a result of the order outweighs the risk that the assets concerned may be destroyed, lost, damaged, concealed or transferred."

preservation and that, in the event that the applicants succeed in the review application, the opposing respondents are only entitled to the preserved funds and nothing more, the applicants display a superficial understanding and appreciation of the nature and extent of the relief sought in the review application.

[29] Primarily, in the event that the impugned contracts are set aside, the opposing respondent seeks a judgment debt in the amount of R172,7 million against the applicants jointly and severally with the other cited allegedly associated respondent entities. The difference between this amount and the value of the assets preserved under the interim order, in respect of which the opposing respondents seek an order forfeiting the assets and funds to the state, is approximately R130m. This is a substantial amount which stands to be satisfied out of (a) the R50 million unaccounted for, (b) any difference remaining from the funds preserved under the SARS preservation order in the event that SARS succeeds in establishing the applicants tax liability and use the funds to satisfy it (c) any other assets belonging to the applicants that are not preserved under the SARS preservation order and the interim order.

[30] It is therefore in the interest of justice that the review application is finalized without delay for the opposing respondents to resort to post-judgment execution processes. Such processes may include an application for a provisional order placing the applicants under provisional sequestration and liquidation as appropriate, for a full investigation into their undisclosed assets.

[31] Therefore, the funds that have not been accounted for remain under significant risk of dissipation. The review application is replete with allegations of Mr Ndlovu's disposition to quickly dissipate funds and channel them through associated third party companies to avoid detection. The dissipation of R10m in legal fees through Mr Ndlovu's erstwhile attorneys in just seven months, which is common course in this application, is evidence of Mr Ndlovu's such disposition.

[32] In the event that the allegations against the applicants are established in the review application, it is not in the public interest that they continue to conduct business with the State. The setting aside of the impugned contracts may justify the placement of the applicants on the register of tender defaulters, prohibiting them from conducting business with the State.

[33] Therefore, granting a stay under these circumstances is a great disservice to the public interest. It will also undermine the principle on which the Tribunal is founded, to expeditiously dispose of Tribunal proceedings. The Tribunal Rules were drafted to promote this objective.[10] In terms of Tribunal Rule 19(1), the primary objective of the Tribunal Rules is to ensure the expeditious and cost-effective disposal of matters before the Tribunal which may, in a fitting case, include the abandonment of the application of any rules of evidence in accordance with section 9(3) of the Act.

[10] In terms of Section 9(1)(a) of the Special Investigation Units and Special Tribunals Act the Tribunal President may make rules to regulate the conduct of proceedings in such Special Tribunal, including the process by which proceedings are brought before the Special Tribunal and the form and content of that process.

[34] Worse so, the applicants have not defined the period for which they seek a stay of the review application. It appears that they intend bringing the variation application in the ordinary course. In that case, given that they only intend issuing the variation application within 15 days of the delivery of this judgment, it is highly probable that the application will only be enrolled for hearing in the third term 2022. The order in that application may be subjected to an appeal, resulting in the review application pending for a much longer period.

[35] It is ironic that the applicants may be employing legal fees in a litany of interlocutory applications under circumstances were they allege that they have access to limited funds to oppose the review application, where far-reaching relief is sought against them. They have not taken the Tribunal into their confidence regarding how they are financing the stay application and how they intend financing the variation application. The effort and resources put into these interlocutory applications should prudently be used to oppose the review application to ensure that it is disposed of expeditiously.

[36] For these reasons,

36.1 The applicants' claim that the refusal of the stay application will violate their constitutional right of access to the courts is unsustainable.

36.2 The stay application is not *bona fide*.

36.3 The applicants have failed to establish that it is in the interest of justice that the review application is stayed.

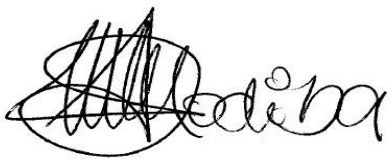
[37] No reason has been advanced as to why costs should not follow the course. The opposing respondents have not specifically argued that in the event that the stay application is dismissed with costs, such costs should include the costs of three counsel. The costs of two counsel is unquestionably justified by the complex and voluminous character of the review application.

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

ORDER

1. The application for the stay of the review application instituted by the Special Investigating Unit and the National Health Laboratory Services in the Tribunal under the above case number is dismissed with costs, including the costs of two counsel where so employed.

2. The dates for the filling of opposing papers and the hearing of the review application as determined at the Judicial Case Management Meeting held on 28 October 2021 remain binding on the parties.



JUDGE LT MODIBA
MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the Applicants: Adv. S Miller

Attorney for the Applicants: A Butler, Schindlers Attorneys

Counsel for the 1st and 2nd Respondents: Adv. B Roux SC, assisted by Adv. I Currie and Adv. J Singh

Attorney for the 1st and 2nd Respondents: R Moodley, Cliffe Dekker Hofmeyr Inc.

Date of hearing:	Not applicable. Application determined on written submissions. Last date for filing heads of argument: 17 December 2021
Date of judgment:	21 December 2021

Mode of delivery: *this judgment was handed down electronically circulated to the parties' legal representatives by email and uploading on Caselines. The date and time for handing down the judgment is deemed to be 10am on 21 December 2021.*