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: GP20/2021

In the matter between:

SPECIAL INVESTIGATING UNIT	Applicant
PRO SERVE CONSULTING (PTY) LTD	First respondent
THENGA HOLDINGS (PTY) LTD	Second respondent
FIRST NATIONAL BANK LTD	Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL:	
GAUTENG DEPARTMENT OF HEALTH	Fourth Respondent
MEMBER OF THE EXECUTIVE COUNCIL:	
GAUTENG DEPARTMENT OF INFRASTRUCTURE	
DEVELOPMENT	Fifth Respondent

JUDGMENT IN THE RECONSIDERATION APPLICATION

Modiba J:

INTRODUCTION

[1] On 17 September 2021, I granted an order as sought by the Special Investigating Unit (SIU), preserving funds held by the First National Bank in the

names of the first and second respondents, Pro Serve Consulting (Pty) Ltd (Pro Serve) and Thenga Holdings (Pty) Ltd (Thenga), pending the final determination of a review application the SIU intends instituting against these respondents within 60 days of the granting of the preservation order.

[2] In this judgment, Pro Serve and Thenga are jointly referenced interchangeably by their names or as the opposing respondents. They seek a reconsideration of the preservation order. For various reasons dealt with below, Pro Serve and Thenga contend that the preservation order was wrongly granted as the SIU did not make out a proper case for it. The SIU insists that the preservation order was appropriately granted. Hence, it seeks confirmation of the preservation application.

[3] This judgment follows the following structure: a brief background to the project is outlined. Then the parties' main contentions are outlined, followed by an outline of the issues to be determined. A detailed analysis of the parties' respective allegations and contentions is undertaken and findings made. The issue of costs is then dealt with, followed by the order.

BACKGROUND

[4] On 20 April 2020, the Gauteng Department of Health (GDH) and the Gauteng Department of Infrastructure Development (GDID), jointly, the Departments, appointed several service providers, including Pro Serve and Thenga, to upgrade, improve and/ or refurbish the Western Levels Deep Hospital and

accommodation, situated on a mining property in Carletonville, Gauteng owned by Golden Core Trade and Invest (Pty) Ltd. The hospital is known as the AngloGold Ashanti Hospital (AGA Hospital).

[5] When the Department appointed the service providers, the AGA Hospital was not in use. The GDH intended using the hospital to accommodate seriously ill patients admitted for the treatment of Covid-19. The service providers would provide professional services and construction works on the AGA Hospital.

[6] Pro Serve was paid R17,733,690.40 for professional architect, health and safety and electrical, mechanical, civil, structural and clinical engineering services performed on the project. Thenga was paid R40,890,132.66 for mechanical and related works performed on the project.

[7] The SIU only sought a preservation of Pro Serve and Thenga's funds because when it investigated the status of the bank accounts of the other service providers, the bank accounts no longer held funds in deposit.

THE PARTIES' RESPECTIVE CASES AND ISSUES TO BE DETERMINED

[8] To the extent that new allegations are raised for the first time in Pro Serve and Thenga's heads of argument, these are disregarded, lest the SIU is prejudiced. The allegations ought to have been raised in the answering affidavit to allow the SIU an opportunity to reply thereto.

[9] The SIU alleges that the appointment of the service providers was irregular and unlawful for want of compliance with the applicable constitutional, statutory and regulatory procurement provisions. In reaching this conclusion, the SIU relied on:

9.1 its own investigation;

9.2 the expert report it received from Ezra Matlala Attorneys, compiled by SSC Quantity Surveyors (the experts). The experts assessed the value of the works undertaken by the service providers appointed on the AGA Hospital project;

9.3 the report by Ms. Lindiwe Alice Mwandla, an analyst employed by the Financial Intelligence Centre (FIC). Ms. Mwandla made several findings after analyzing Pro Serve and Thenga's bank accounts.

[10] The SIU advanced the following grounds in support of the allegation that Pro Serve and Thenga's appointment was unlawful and irregular:

10.1 the GDID did not follow an open and transparent tender process;

10.2 the Departments did not obtain Provincial Treasury approval to deviate from the applicable Treasury Regulations when procuring service providers for the AGA Hospital project;

10.3 Service Level Agreements (SLAs) were not concluded prior to the service providers commencing work. When the service providers were paid, SLAs were still not in place. Similarly, the scope of works and contract price were not agreed;

10.4 there was no approved budget for the project. Initially, the budget was estimated at R50 million and escalated ten times without a clear explanation for the escalation;

10.5 Pro Serve and Thenga overcharged the Departments;

10.6 wasteful expenditure has been incurred on the project because the AGA Hospital was not available for use during the first two waves of the Covid-19 pandemic.

[11] The SIU objects to the filing of Pro Serve's second supplementary answering affidavit on the basis that it largely deals with allegations set out in its founding affidavit and no reasons are advanced regarding why it did not deal with the relevant allegations in its answering affidavit. It also objects to the admission of Thenga's answering affidavit on the basis that it was filed late and no condonation application has been sought.

[12] Thenga takes issue with the qualification of SSC Quantity Surveyors as experts as well as the fact that their report was not filed under oath.

[13] Both respondents:

13.1 deny that the SIU met the requirements for urgency;

13.2 accuse the SIU of not displaying its utmost good faith by failing to disclose all pertinent facts to the Tribunal. They also accuse it or misrepresenting or suppressing material facts.

13.3 deny the allegations set out in paragraph 11 above. They also deny that they have conducted themselves unlawfully or irregularly in any manner in the procurement process.

13.4 contend that the SIU did not properly invoke Tribunal Rules 23 and 24.

[14] It follows that the following issues stand to be determined:

14.1 the SIU's objections to Pro Serve's second supplementary answering affidavit and Thenga's answering affidavit;

14.2 whether the expert report should be disregarded;

14.2 whether the SIU meets the requirements for urgency;

14.3 whether the SIU failed to disclose, misrepresented or suppressed material facts when it applied for the preservation order.

14.3 whether Pro Serve and Thenga's appointment to the AGA Hospital Project was unlawful and irregular.

14.4 the financial grounds (the alleged absence of a budget, overcharging and irregular and wasteful expenditure)

14.5 whether the SIU properly invoked Tribunal Rule 24, alternatively 23

[15] The onus lies with the SIU to establish *prima facie*, that the procurement process was irregular and unlawful and/ or that the appointment is vulnerable for review on the other grounds relied on by the SIU. For reasons set out in this judgment, I find that the preservation order was appropriately granted as the SIU made out a proper case for it. Consequently, the reconsideration application stands to be dismissed.

THE MERITS

The SIU's objections to Pro Serve's second supplementary answering affidavit and Thenga's answering affidavit

Pro Serve's second supplementary answering affidavit

[16] Pro Serve filed its answering affidavit dated 23 September 2021. Subsequently, Pro Serve filed a supplementary answering affidavit dated 27 September 2021. In it, Pro Serve corrects the error it made in its answering affidavit where it attached the SIU's founding affidavit when it intended attaching a copy of the 17 September 2021 preservation order, referred to in his answering affidavit as AA2. Pro Serve attached the preservation order as annexure SA1 to the supplementary answering affidavit. In the supplementary answering affidavit, Pro Serve does nothing more.

[17] Pro Serve went on to file a second supplementary answering affidavit dated 12 October 2021. It contends that the filing of this affidavit was rendered necessary by the SIU's reply to Thenga's Uniform Rule 35(12) notice, comprising of an

affidavit deposed to by the SIU investigator. The latter affidavit formed the basis for the SIU's preservation application. In this affidavit, Pro Serve addresses lack of urgency and the need for an *ex parte order*; the SIU's failure to satisfy the requirements of Rule 23(4), factually incorrect allegations in the SIU's founding affidavit, the SIU's prejudicial conduct towards Pro Serve and the prejudice that Pro Serve suffered 'resulting from the unfair process and order granted against it. (sic)

[18] While the second supplementary answering affidavit to some extent repeats what is stated in Pro Serve's answering affidavit, when read as a whole, it is clear that Pro Serve was only able to fully answer to the allegations in the founding affidavit once it has been served with the investigation affidavit. The repetitions mainly serve to provide context to Pro Serve's answer on the specific issues it is answering to, which it was only able to deal with substantially once it has been served with the investigation affidavit.

[19] Therefore, Pro Serve's second supplementary answering affidavit is admitted in the interests of justice.

Thenga's answering affidavit

[20] Thenga filed its answering affidavit a week out of time. It has not sought condonation for the late filing of its answering affidavit. The SIU objects to the late filing of Thenga's answering affidavit and pleads that it should be disregarded.

[21] The late filing of Thenga's answering affidavit has been prejudicial to the SIU. The answering affidavit is lengthy. It put the SIU under extreme pressure to file its reply and heads of argument timeously. To alleviate this pressure, the SIU filed its reply to Pro Serve's answering affidavit separately.

[22] Thenga has not tendered any explanation for the delay in filing its answering affidavit. It has also not requested an indulgence from the SIU and the Tribunal to file its answering affidavit out of time. When followed up by the SIU attorney, Thenga complained of illegible documents the SIU served on it in reply to its Rule 35(12) notice. When asked to specify the documents, Thenga only specified one page but still filed its answering affidavit a week late.

[23] It is just and equitable that Thenga's answering affidavit is considered as the SIU has replied to it. However, Thenga's disregard for Tribunal directives and discourteous conduct towards the SIU should not be tolerated. It requires serious deprecation by way of costs, particularly because the SIU was prejudiced by its conduct. It is therefore just and equitable that Thenga bears the cost of the SIU's second replying affidavit on a punitive scale.

Whether the evidence of the expert should be disregarded

[24] The expert report does not identify the experts who conducted the assessment and compiled the report. It is also not made under oath. It is trite that in urgent applications, the court has a wide discretion on how to dispose of a matter before it. I exercised a discretion in terms of Tribunal Rule 12(8) to nonetheless consider the expert report as filed for the following reasons:

24.1 the preservation application was brought under extreme urgent circumstances;

24.2 all that the SIU is required to establish at this stage is that it has prospects to succeed in the review, even though the prospects are open to doubt;[1]

24.3 the preservation order is interim in nature and only serves to preserve the relevant funds pending the determination of the review application;

24.4 the SIU intends relying on the expert report in the review application. At that stage, the report will have to be properly admitted into evidence.

[25] The SIU investigation into the appointment of the service providers is ongoing. So is the assessment by the experts. The opposing respondents have not seriously disputed this. Reference by one of the opposing respondents to 'final report' in the version of the expert report annexed to the founding affidavit, does not amount to a genuine dispute regarding the status of the investigation.

[1] See *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189

[26] None of the opposing respondents have filed a report by a counter-expert. Therefore, they are not in a position to challenge the experts' findings at this stage.

Urgency

[27] The SIU relied on the following grounds of urgency:

27.1 the notice the Financial Intelligent Centre issued in terms of section 34 of the Financial Intelligent Centre Act[2] (the FIC notice) would expire eminently;

27.2 Pro Serve and Thenga are dissipating funds;

27.3 Pro Serve and Thenga have transferred funds to various associated companies, raising a suspicion of money laundering.

[28] The opposing respondents dispute urgency. They complain about the unexplained 10-month delay by the SIU in bringing the application. They also deny that they are dissipating funds or that they have conducted themselves unlawfully in any manner.

[29] On the authority in *Mogalakwena Municipality*[3], I determine whether the SIU makes out a case for urgency by analyzing the SIU's case, taken together with

[2] Act 38 of 2001

[3] *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* [201] 4 All SA 67 (GP) at paragraphs 64 and 65.

the allegations by the respondents which the SIU does not dispute, bearing in mind the general discretion that the court has in urgent applications.

[30] The SIU instituted the preservation application 10 months after Pro Serve received payment from the GDH, 6 months after the SIU investigator was assigned to investigate Pro Serve and Thenga's appointment, armed with a legal opinion on the alleged procurement irregularities, and more than a month after the SIU investigator deposed to his affidavit in respect of the investigation.

[31] In its founding affidavit, indeed the SIU does not set out a detailed explanation why it took it almost ten months to bring the application. It only does so inappropriately in its replying affidavit. The explanation for the delay is a requirement in terms of Tribunal Rule 12. This omission is not fatal to the preservation application for these reasons:

31.1 it is trite that the haste with which urgent relief is sought is not the determinative requirement for urgency. The determinative requirement for urgency is whether the applicant will be denied substantive redress in due course if denied an urgent audience;[4]

31.2 there can be no question that the SIU meets the latter requirement. The opposing respondents do not deny that they are gradually dissipating the funds paid to them for the work performed on the project. Their averment that they use these funds to cover their business operating expenses constitutes an admission of the SIU's version. It is therefore incorrect, as stated in paragraph 12.4 of the second supplementary affidavit, that there

[4] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others [2011] ZAGPJHC 196 in paragraph 6.

is no risk of disposition. Only R1,706,301.60 remains in Pro Serve's bank account while R6,234,356.26 remains in Thenga's bank account;

31.3 the money laundering allegations are not substantiated by the SIU. it only expressed a suspicion of money laundering. Such a suspicion does not sustain the SIU case on urgency and on the merits and had no bearing on the granting of the preservation order;

31.4 the FIC had issued a notice in terms of section 10 of the Financial Intelligence Centre Act[5], preserving the funds for a period of 10 days. The notices would lapse on 17 September 2021, restoring the respondent entities' access to the funds and rendering the relief to be sought in the review application nugatory. In the review application, the SIU will either seek an order declaring the funds to be proceeds of unlawful activities and/ or just and equitable relief. The eminent expiry of the FIC notices, issued by an independent third party, constitutes new urgency. The SIU was not aware of the dissipation of the funds until it received Ms. Mwandla's affidavit.

[32] For these reasons, I find that the SIU meets the second requirement for urgency.

[5] Act 38 of 2001

Non-disclosure, suppression or misrepresentation of material facts

[33] In its founding affidavit, the SIU makes reference to the investigators affidavit. It explains that it did not attach it to the founding affidavit as the preservation application would be prolix. It expressed an intention to file it simultaneously with the preservation application. However, it did not do so. It only filed it after the preservation order was granted and in response to a Rule 35(12) notice filed by Thenga.

[34] If the SIU did not intend disclosing the investigators affidavit to the Tribunal as alleged by Thenga, it would not have made reference to it at all. It also would not have expressed an intention to file it. Its explanation that it inadvertently did not file it is reasonable in the circumstances. This affidavit is in excess of 700 pages. It does not only deal with the appointment of the opposing respondents. It deals with the appointment of over forty other service providers, which is irrelevant to the preservation application. The material allegations and findings the SIU relies on are summarized in the founding affidavit. The application was brought under extreme urgent circumstances on 15 September 2021. Given that the FIC notices were due to expire on 17 September 2021, the Tribunal's sole reliance on the founding affidavit and the annexures to it is justified under these circumstances.

[35] The pertinent question to be considered in this application is whether:

35.1 the investigator failed to disclose, suppressed or misrepresented any material facts;

35.2 if it had considered the investigation affidavit, the Tribunal would not have granted the preservation order.

[36] In the main, the information Pro Serve and Thenga accuse the SIU of misrepresenting or suppressing relates to the nuanced details of the work undertaken by Pro Serve and Thenga and their fees. As reasoned below, these details do not materially impact on the SIU case in the preservation application, save a misrepresentation in the founding affidavit that when Pro Serve and Thenga were appointed, the Departments had not been granted approval to deviate from standard procurement procedures. The deviation is annexed to the investigation affidavit. It is unclear why, at the very least, the SIU did not disclose this document to the Tribunal. It is also unclear why the SIU built its case on the non-approval of a deviation. Regrettably, Thenga raised this issue for the first time in its heads of argument, denying the SIU an opportunity to reply to it.

[37] Be that as it may, as will be apparent later in this judgment, the fact that a deviation was approved is not a valid ground of opposition for Thenga. As I find below, notwithstanding the approved deviation, the SIU has made a *prima facie* case that Thenga's appointment was irregular and unlawful.

[38] Pro Serve accuses the SIU of:

38.1 failing to distinguish between professional consultants and Pro Serve in light of their different roles;

38.2 incorrectly attributing allegations against professional consultants to Pro Serve.

[39] The SIU accurately specified Pro Serve's role in the AGA Hospital Project as set out in paragraph 21.3 of the second supplementary answering affidavit. its only omission is not specifying that Pro Serve only provided these services in stages 4, 5 and 6 of the project cycle in respect of package LAO1.

[40] The report of the expert, on which the SIU relies was attached to the founding affidavit, contrary to Pro Serve's contention that it was not. The expert concludes that the GDOH was charged by R62,6 million. This figure has since increased to R179,6 million of which R11,8 million is attributed to Thenga. It is clear from both the founding and replying affidavit that the assessment by the expert is still continuing. The expert report also reflects this.

[41] Paragraph 36 of the second supplementary answering affidavit references incorrect allegations in the investigation affidavit and not in the founding affidavit. It therefore does not sustain Pro Serve's non-disclosure complaint.

[42] The error referenced in paragraph 34.2 of the second supplementary affidavit is a typographical error. The relevant information is correctly referenced in Ms. Mwandla's affidavit, which was attached to the founding affidavit.

[43] The contradictions between the founding affidavit and the investigation affidavit, referenced in paragraph 4.7 of Thenga's answering affidavit are either not material to the grounds of review relied on by the SIU or do not constitute a valid ground of opposition for Thenga. For example, the fact that a request is recorded in a memorandum for major renovations to AGA Hospital and that GDOH has committed R50 million to the project provides no explanation or justification for the substantial escalation in the project costs and the reasons for the changes to the project costs.

[44] The allegations dealt with in paragraph 46 of this judgment do not sustain Pro Serve's non-disclosure, suppression or misrepresentation of material facts claim because it is clear that when making these allegations, the SIU relied on the documents the GDID furnished it with as well as its investigator's interpretation of those documents.

[45] For the above reasons, the non-disclosure, misrepresentation or suppression or material facts ground of opposition does not sustain Pro Serve and Thenga's case.

Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others (2008 (2) SA 481

See also, *Passenger Rail Agency of South Africa v Swifambo Rail Agency* (Pty) Ltd 2017 (6) SA 223 at paragraph 22-23 (GJ). This judgment was confirmed on appeal to the SCA in *Swifambo Rail Leasing (PTY) LTD v PRASA* 2020 (1) SA 76 (SCA).

State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23 (CC) at paragraph 54

Failure to follow an open and transparent tender process

[46] The SIU alleges that Pro Serve was appointed to a GDID panel on 17 January 2017 for a period of three years under RFP no: 10/09/2016. When Pro Serve was appointed to the AGA Hospital project, its membership of the panel was no longer valid, having expired on 16 January 2020. Therefore, its appointment to the AGA Hospital Project was irregular.

[47] Pro Serve denies these allegations and has controverted them, attaching documents to its answering affidavit to substantiate its response. The GDID appointed Pro Serve to the relevant panel on 20 February 2017. The appointment would endure for 36 months. The 36 months' period would have expired on 19 February 2020. On 11 February 2020, prior to the expiry of the 36 months' period, the GDID extended Pro Serve's appointment to 12 June 2020. Pro Serve did not attach a letter informing it of the extension but attached an internal memo recording a GDID resolution authorizing the extension.

[48] The approved deviation specifically authorized SCM to use the panel of approved service providers. Pro Serve falls within this ambit. For these reasons, the SIU has not made out a *prima facie* case that Pro Serve was unlawfully and irregularly appointed to the AGA Hospital project.

[49] According to Thenga, on 20 March 2020, the GDID invited interested parties to submit proposals for appointment to render various construction related

services to renovate and restore the AGA Hospital to a fully functional facility. The GDID informed Thenga in a letter dated 25 March 2020, that it intends to appoint it on an urgent basis to provide mechanical related services on the AGA Hospital project.

[50] The GDID confirmed Thenga's appointment on 3 April 2020. The GDID subsequently furnished Thenga with a purchase order setting out the applicable terms. The purchase order is dated 22 June 2020. It stipulated a contract price in the amount of R49,540,109.

[51] Thenga also contends that it was appointed under circumstances where National treasury had issued Procurement Instructions in terms of section 76(4)(g) of the PFMA to allow for the relaxation of supply management requirements during the period of national disaster occasioned by the Covid-19 pandemic, but fails to specifically reference the National Instruction it relies on and how it advances its opposition.

[52] For the reasons that follow, I find that the SIU has made out a *prima facie* case that a tender process was not followed when Thenga was appointed:

52.1 None of the government officials interviewed by the SIU investigator informed him that when it appointed Thenga, the GDID followed a tender process. The SIU investigator was specifically not furnished with:

52.1.1 the tender document, inviting bidders to bid for appointment;

52.1.2 the records of the bid and tender evaluation committee that evaluated the tender.

52.2 Thenga does not take the Tribunal into its confidence regarding how this invitation was advertised and how it became aware of it. Thenga has attached a document it purports is the tender document to its answering affidavit. It would have paid for the document after the bid was advertised. The document would have a tender number and closing date. The list of documents to be attached to Thenga's bid are not listed in AA3.

52.3 Parts of Thenga's tender document were left blank by Thenga, as a result of which Thenga's bid ought to have been disqualified. The document is not dated.

[53] Thenga's contention regarding the SIU's failure to file a record is one to be raised in the review. This omission does not avail a valid defence to Thenga in the reconsideration application. All that the SIU is required to establish at this stage is a *prima facie* case, even though open to doubt, that Thenga's appointment was irregular.

[54] For the above reasons, I find that the SIU's has prospects to establish in the review application that no valid tender process was followed to appoint Thenga and that the document Thenga put up as its tender document was belatedly compiled to clothe Thenga's appointment with legitimacy.

[55] Although, the SIU has not established a *prima facie* case that Pro Serve was not appointed pursuant to an invalid tender process, Pro Serve's appointment is vulnerable to be reviewed on the basis of the other grounds relied on by the SIU.

[56] The Gauteng Government has not acquired the AGA Hospital. Pro Serve and Thenga's appointment letters, specifically state that its appointment is subject to the ownership issues in respect of the AGA Hospital being resolved. None of the opposing respondents dispute that at the time of their appointment, this condition precedent had not been met.

[57] The framework for planning, design and execution of infrastructure projects (National Treasury Standard for Infrastructure Procurement and Delivery Management (FIDPM) (1 July 2016) was not followed. According to the SIU, the framework requires a 9-stage planning process and provide an opportunity for review by the relevant treasury at least three weeks prior to commencement. The framework was not complied with. This is not seriously disputed by both opposing respondents.

[58] I deal with the serious implications of non-compliance with the above condition precedent and the FIDPM later in this judgment.

[59] The financial grounds addressed from paragraph 64 of this judgment also render Pro Serve and Thenga's appointment vulnerable for review.

[60] Pro Serve and Thenga's contention that the SIU has not provided any admissible evidence that they have conducted themselves unlawfully during the procurement process is not a sustainable ground of opposition. On the authority

in *Millennium Waste*[6], in the event that the review application succeeds, the innocence of a tenderer is one of the factors the court seized with the review application may consider to determine just and equitable relief.[7] However, subsequent Constitutional Court decisions indicate that, weight is only attached to this factor in exceptional circumstances.[8] Therefore the innocence of a tenderer is not a sustainable ground of opposition in the present application. In any event, both opposing respondents have not advanced any persuasive reason why their innocence will be advantageous to them when just and equitable relief is considered in the review application.

Service Level Agreements and the scope of works

[61] Although the GDID signed an SLA with Pro Serve on 13 and 21 April 2020, the SLA was deficient in several respects. No work schedule and price was agreed at the time. An addendum was signed on 29 June 2020, to cap the fee payable to Pro Serve to 19% of the project value. Pro Serve has not seriously disputed these allegations. Given that the applicable fee is a percentage of the project value, no pursuasive reason is advanced as to why it was not agreed upon when Pro Serve was appointed and reflected in the SLA signed on 13 and 21

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[6] *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others* (2008 (2) SA 481

[7] See also, *Passenger Rail Agency of South Africa v Swifambo Rail Agency* (Pty) Ltd 2017 (6) SA 223 at paragraph 22-23 (GJ). This judgment was confirmed on appeal to the SCA in *Swifambo Rail Leasing (PTY) LTD v PRASA* 2020 (1) SA 76 (SCA).

[8] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) at paragraph 54

April 2020. The fact that the project value could only be determined at a later stage does not justify this defect.

[62] Pro Serve's contention that the work schedule, which includes the work stages and time frames is annexure B of the SLA and the payment schedule as annexure C of the SLA, does not controvert the SIU allegations regarding the SLA. *Prima facie*, the SLA put up by Pro Serve is not valid. Blank forms for these documents are attached to the SLA, evidencing that these documents were never completed. With Pro Serve having failed to attach these documents to its answering affidavits, the SIU has the prospect of successfully establishing in the review application that these documents do not exist.

[63] Having determined that *prima facie*, Thenga completed its tender document *ex post facto*, if this finding is confirmed in the review application, Thenga's reliance on the scope of works as set out in this document would not constitute a valid defence to the SIU's contention that the SLA concluded with Thenga did not set out the scope of works.

The financial grounds

Approved budget

[64] None of the opposing respondents seriously dispute the SIU allegation that there was no approved budget for the project. The fact that the full project costs could only be accurately determined sometime in the life of the project does not

justify the substantial escalation of the project costs as well as its unexplained subsequent two revisions.

[65] As at 12 May 2020, professional service providers had determined the overall pricing for the project to be R866,170,134.02, reduced twice to R647,6 million and latter to R588,5 based on a Government Gazette pricing. The Departments have not furnished the SIU with reasons for the substantial price reduction.

[66] Pro Serve's argument that it was only appointed to a specific role on this project and that there is no controversy about its fees is unsustainable. According to the experts, professional service providers' fees will be affected by changes in project costing. On Pro Serve's own version that its fees are determined `based on a percentage of the project value, if the total project value is exaggerated, it follows that Pro Serve's fees would also be exaggerated.

[67] At best for Pro Serve and Thenga, only the estimated budget may have been approved. They have not advanced any evidence that the amount of R588,5 was approved.

Alleged overcharging

[68] R11,8 million of the amount in respect of which the service providers have allegedly overcharged the Departments is attributed to Thenga. This preliminary finding of overcharging will be confirmed or dispelled in the final expert report. The scope of works and costing aspects of the project is still being reviewed by the experts. Ultimately, this issue will be determined in the review.

[69] The fact that the works have been completed and that the AGA Hospital has started admitting patients does not avail Pro Serve and Thenga a valid ground of opposition to the *ex parte* preservation order. Neither is the fact that the legal counsel who furnished GDID with an opinion recommended that the works be completed to avert a substantial waste of the costs incurred. Such an opinion is not binding on the SIU who brought the preservation application in its own right as empowered in terms of section 4(1)(c) and 5(5) of the Act.

[70] It is trite that the fact that the works have been completed does not disentitled the SIU to the disgorgement relief it intends seeking in the review application. If the SIU succeeds in having Pro Serve and Thenga's appointment reviewed and set aside, the jurisdictional basis for the disgorgement of profits will be established. Pro Serve and Thenga may not be entitled to retain profits earned from the AGA project. If the SIU proves that these respondents have overcharged the Departments, they will also not be entitled to retain funds in the amount by which they are proved to have overcharged the GDID.

Failure to heed Gauteng Treasury's warning against the Project

[71] As correctly argued on behalf of Thenga, Treasury Regulation 16A6.4 does not require treasury approval of the deviation. However, the Provincial Treasury involvement in the planning of the project is required in terms of the FIDPM.

[72] The opposing respondents have not genuinely disputed the SIU allegation that the Gauteng Treasury Department warned against the project for the following reasons:

72.1 the construction of new facilities and/ or major refurbishments are not a viable option in an emergency because under normal circumstances, such projects are never completed timeously. The project was subject to many delays as a result of which the AGA hospital was not ready for occupation during the first three waves of the Covid-19 pandemic. It only started admitting patients in August 2021. The fact that the delays were not caused by Pro Serve and Thenga is of no moment as it does not justify the alleged fruitful and wasteful expenditure occasioned by the delays in finalizing the project;

72.2 there is sufficient existing state infrastructure which ought to be used.

[73] The Gauteng Treasury Department's warning will be an important consideration in the review. The findings by the experts, regarding lack of a proper needs analysis and planning for the project, *prima facie*, the validity of Treasury Department's warning against this project.

[74] These factors, as well as the fact that:

74.1 the AGA Hospital is not owned by the State and that this issue was not resolved when the opposing respondents were appointed;

74.2 the AGA Hospital was not ready for occupation during the first two waves of the covid19 pandemic

- *prima facie*, establishes the SIU's fruitful and wasteful expenditure ground of review.

[75] The fact that the delays were not occasioned by the opposing respondents is not a sustainable ground of opposition. *Prima facie*, these factors render the AGA Hospital project not cost effective. Cost effectiveness is one of the requirements that a valid public procurement process ought to comply with in terms of section 217 of the Constitution.

Whether the SIU met the requirements in Rule 24, alternatively Rule 23 of the Tribunal Rules

[76] For the reasons that follow, the SIU has met the requirements in Tribunal Rule 24, alternatively 23.

76.1 the preservation application was brought on an *ex parte* basis;

76.2 in the review application it intends to bring, the SIU intends to claim all the profits Pro Serve and Thenga earned from their impugned appointments. It also intends recovering the amounts by which the opposing respondents allegedly overcharged the Departments. For the former claim, the SIU will rely on the just and equitable relief provision in section 172(1)(b) of the Constitution.

It is common cause that Pro Serve and Thenga acquired the preserved funds from the payments they received consequent upon their impugned appointment. They dispute the SIU entitlement to the disgorgement of profits. The amount by which the opposing respondents overcharged the Departments are also in dispute. Therefore, the preserved funds constitute disputed property as envisaged in Tribunal Rule 24 (1). This rule prohibits the respondents from dealing with and disposing of the preserved funds as envisaged in Tribunal Rule 23(1). The preserved funds are proceeds of alleged unlawful transactions and/ or contracts as envisaged in Tribunal Rules 23(2) and 24(2).

76.3 on the Supreme Court of Appeal's authority in Highveld Steel[9], applied with approval in *Hlatswayo*[10], the fact that the SIU was yet to institute the review application when it applied for the preservation order is not fatal to the preservation application. The assessment conducted by experts as well as the SIU investigation was still in progress when the SIU brought the preservation application. Under these circumstances, the present facts fall squarely within those in *Highveld Steel*.

76.3 as already found, *prima facie*, the SIU has established that:

76.3.1 the appointment of Thenga to the AGA Hospital project was irregular and unlawful;

76.3.1 the appointment of Pro Serve and Thenga is subject to be reviewed and set aside on the other grounds addressed above.

[9] *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 2 All SA 225 SCA.

[10] Special Investigating Unit v Hlatshwayo, an unreported Tribunal judgment handed down on 12 February 2020 under Case no: GP/20/2020

[77] The preservation order is the only practical means of preserving the funds. In the reconsideration application, both Proserve and Thenga do not dispute this. Hence, they have not attested to alternative means of preserving the funds. Instead, they are very clear that they intend to continue using the funds to cover their business operating expenses, thereby undermining the integrity of the review application.

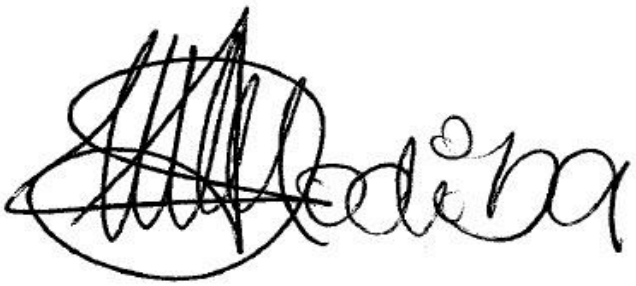
[78] The preservation order only preserves the impugned funds pending the determination of the review application. It does nothing more. To the extent that the relevant banks have interpreted the preservation order to Pro Serve and Thenga's prejudice, these respondents have not heeded the Tribunal's invitation, extended at the hearing of the reconsideration application, to submit a draft order on the basis of which I would revise the preservation order to address the prejudice. This invitation remains valid for the duration of the preservation order.

[79] Baring the costs dealt with in paragraph 23 above, it is just and equitable under the present circumstances that the costs of the reconsideration application stand over for determination in the review application.

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

ORDER

1. The reconsideration application is dismissed.
2. Thenga Holdings (Pty) Ltd shall pay the Special Investigating Unit's costs of filing the replying affidavit to its answering affidavit on the attorney and client scale. These costs are inclusive of the costs of two counsel where so employed.
3. The remaining costs of the reconsideration application shall stand over for determination in the review application.



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JUDGE L.T MODIBA
MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the applicant:	Adv. N. Arendse SC, assisted by Adv. S. Freese
Attorney the applicant:	Ms. S. Zondi, Office of the State Attorney, Pretoria
Counsel for the first respondent:	Adv. K. Tsatsawane SC, assisted by Adv.C. Marule
Attorney for the first respondent:	Mr. R. Baloyi, Mabuza Attorneys
Counsel for the second respondent:	Adv. L.T. Sibeko SC
Attorney for the second respondent	Mr. T. Moloi, Werkmans Attorneys
Date of hearing:	16 November 2021
Date of judgment:	21 January 2022

Mode of delivery: *this judgment is handed down by sending it by email to the parties' legal representatives and loading on Caselines. The date and time for delivery is deemed to be 10:00 am on 21 January 2022.*