IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE SPECIAL INVESTIGATIONS UNIT AND SPECIAL TRIBUNALS ACT 74 OF 1999

(REPUBLIC OF SOUTH AFRICA)

CASE NO: GP15/2021

In the matter between:

SPECIAL INVESTIGATING UNIT	Applicant
And	
CHACHULANI GROUP INVESTMENT HOLDINGS	First Respondent
MUTA INVESTMENT HOLDINGS	Second Respondent
NETVISION ENERGY SAVERS	Third Respondent
PSYCHIN CONSULTING	Fourth Respondent
HOME GROUND TRADING 1105 (PTY) LTD	Fifth Respondent

MPALE INVESTMENTS HOLDINGS (PTY) LTD	Sixth Respondent
NALEDZI INVESTMENT TRUST	Seventh Respondent
NEDBANK LIMITED	Eighth Respondent
FIRST NATIONAL BANK	Ninth Respondent
INVESTEC BANK LIMITED	Tenth Respondent

JUDGMENT

MODIBA J:

INTRODUCTION

[1] This is the second of three applications in which the Special Investigating Unit (SIU) was granted the same relief against different cohorts of respondents, pending a review application. The relief in all the applications, interim in nature, was granted *ex parte* and on an urgent basis.

[2] The SIU instituted the present application on 31 May 2021. On 1 June 2021, the Special Tribunal granted the SIU relief as prayed for in the notice of motion. On 30 June 2021, the respondents filed an answering affidavit. They seek a

reconsideration of the order in terms of Rule 10(9), read with Rule 12(9) and Rule 23(5) of the Special Tribunal Rules.

[3] They sought to have the reconsideration application heard on 2 July 2021, without following the procedure in Rule 12(4) and (5), in that they designated a date for hearing, a function reserved for the Special Tribunal's Registrar. Further, they did so without regard for the Special Tribunal's convenience and without allowing time for the filing of further papers, including heads of argument. It is for that reason that the reconsideration application was not enrolled for hearing on that date.

[4] On 1 July 2021, the presiding member of the Special Tribunal convened a case management meeting and issued directives for the filing of further papers and hearing of the matter in terms of Rule 12(8) read with Rule 19 of the Special Tribunal Rules.

[5] The SIU subsequently filed a replying affidavit. It did so later than the due date as directed at the 1 July 2021 case management meeting. It seeks condonation for the late filing of the replying affidavit.

[6] I am satisfied that the SIU has shown good cause for the late filing of the replying affidavit. The respondents filed an extensive answering affidavit spanning 228 pages. They set out issues that required extensive investigation by the SIU. The SIU's counsel was engaged in another matter during court hours from 1 to 7 July 2021. The respondents suffered no prejudice from the late filing of the replying affidavit as the presiding member of the Special Tribunal became unavailable to hear the application on the date determined at the case management meeting.

[7] Therefore, the request for condonation stands to be granted.

[8] The parties have filed comprehensive heads of argument from which I derived extensive benefit when preparing for the hearing and writing this judgment. I am indebted to counsel for the parties for their assistance.

[9] Regrettably, the application was not heard on 9 July 2021 as determined at the case management meeting due to the bereavement of the presiding member of the Special Tribunal. The parties understanding, sympathy and patience in this regard is greatly appreciated. The matter was heard at the earliest convenient date, being 19 July 2021.

[10] The interim applications arise from the awarding of contracts to 280 contractors by the Gauteng Department of Education (the Department), to sanitize, deep clean and decontaminate schools that have been exposed to the corona virus, known to cause the Covid-19 infection.

[11] The Department requested the SIU to investigate the awarding of the contracts. The SIU alleges that its investigation found material irregularities in the awarding of the contracts. Meanwhile, the contractors had performed in terms of the contracts and most of them paid a cumulative sum of approximately R431 million. In the review application instituted on 17 June 2021, the SIU seeks a review and setting aside of the contracts, as well as consequential relief against each contractor, for the disgorgement of profits derived from the contracts.

[12] The SIU traced bank and investment accounts in which funds derived from these payments are held, sought and was granted an order prohibiting the respondents from dealing in any manner with the funds standing to their credit in the relevant accounts. The accounts relevant to this application are listed in

annexure ‘A’ to the order granted on 1 June 2021 (the listed accounts). It is this order that the respondents seek reconsidered.

[13] This being a reconsideration application, the question that arises is whether the SIU made out the case for the order granted on 1 June 2021. The respondents contend that it did not. Hence, they seek the order discharged and set aside. They rely on the following grounds of opposition:

13.1 The Special Tribunal’s lack of jurisdiction over the review application;

13.2 The relief sought in the review, based on the no-profit principle, is incompetent;

13.3 Lack of urgency;

13.4 The *ex parte* procedure was inappropriate in the circumstances;

13.5 Improper reliance on Rule 23;

13.6 No case for preservation is made out; and

13.7 The absence of material irregularities.

THE SPECIAL TRIBUNAL'S JURISDICTION

[14] This ground of opposition is determinative of the application. Hence, I deal with it first.

[15] The no-profit principle, being the basis on which the SIU claims the disgorgement of profits in the event that it is successful in the review application, derives from the just and equitable relief granted at the court's discretion in terms of s172(1)(b) of the Constitution. The respondents contend that the Special Tribunal lacks jurisdiction to grant such a relief because it is not a court as envisaged in section 166(e) of the Constitution.

[16] They further contend that the Special Investigating Units and the Special Tribunals Act[1] does not confer the Special Tribunal the status of a court, and clearly distinguishes it from a court. Peculiarly, they cite no single provision in this Act to support this contention. Instead, they rely on *ITC 186 68 SATC 177* which analyzed the jurisdiction and status of the Tax Court, a specialized court established in terms of the Tax Administration Act[2]. Reliance on this judgment is not sustainable as the judgment specifically dealt with the constitutional jurisdiction of the Tax Court in terms of the Income Tax Act[3]. These statutes are not the Special Tribunal's enabling statutes.

[17] A detailed analysis of the Special Tribunal's jurisdiction as derived from its enabling statute, the Special Investigating Units and the Special Tribunals Act, the Constitution and the Superior Courts Act[4] is set out in this Special Tribunal's

decision in *Caledon River.*[5] The Supreme Court's decision in *Nadasen*[6] and this Special Tribunal's decision in *Ledla*[7]*,* which were both handed down before *Caledon River,* found that the Special Tribunal is a court with the status of a High Court. This finding was confirmed in *Caledon River*, where this Special Tribunal went further and found that the Special Tribunal has constitutional jurisdiction. The respondents have advanced no reasons why these decisions were incorrectly made.

[18] The respondents' argument, that the Special Tribunal lacks jurisdiction over this matter, is rejected on the above authorities.

THE NO-PROFIT PRINCIPLE IS INCOMPETENT WHERE THERE HAS BEEN FULL PERFORMANCE IN TERMS OF THE IMPUGNED CONTRACT

[19] The respondents contend that the no-profit principle on which the SIU premise the relief it seeks in the review, is incompetent in the present circumstances as the respondents have fully performed in terms of the impugned contracts. They contend, on the authority in *Shabangu*[8] at paragraph 27, that the no-profit principle only applies were the court seeks to suspend the declaration of invalidity of a contract, to allow continued performance under such a contract. Therefore, the principle finds no application in the pending review.

[20] The respondents' reliance on what is stated in this singular paragraph is unsustainable for the reasons that follow.

[21] An immersed reading of the judgment in *Shabangu* from paragraph 23 to 31 reveals that what the Constitutional Court was considering in that section of the judgment, is the consequences that should flow from an invalid agreement based on the facts in *Shabangu*.

[22] The Constitutional Court considered whether a compromise reflected in an acknowledgment of debt, is tainted with the same invalidity that taints the underlying loan agreement. The Land Bank, which sought to derive benefit from an invalid loan agreement through an acknowledgement of debt subsequently signed by sureties, contended that the acknowledgment of debt is not tainted with the invalidity that taints the underlying loan agreement. The Constitutional Court found that the acknowledgment of debt is equally tainted, as its terms perpetuates the original invalidity. It also found that the acknowledgment of debt could only anchor a valid principal obligation if it recognized the invalidity of the debt arising from the loan agreement, as was the case in *Panamo*.[9]

[23] In *Shabangu*, the sureties only bound themselves for the indebtedness which flowed from the invalid loan agreement, whereas in *Panamo* the mortgage bound expressly covered in general, any existing or future debt that Panamo owes or may owe to the bank. Hence, in *Panamo*, the Supreme Court of Appeal upheld the bank's claim based on the mortgage bond.

[24] Even more problematic for the respondents is their selective reliance on paragraph 27. Quoting this paragraph here facilitates its close scrutiny.

> *"[27] While there is some kind of overlap between the basis for an enrichment claim (restoring a legally unjustified imbalance) and the "no-*

> *profit principle" (not allowing profit from unlawfulness), there are differences. Enrichment is a valid claim that may arise from an unlawful contract, while the no-profit principle prevents the perpetuation of unlawfulness. The latter is part of regulating the just and equitable relief of suspending the declaration of unlawfulness in respect of a contract. It is therefore bound up in that just and equitable assessment and the continued (if suspended) operation/enforcement of an unlawful agreement, something different to the remedial nature of an enrichment claim"*

[25] The Constitutional Court notes the overlap and differences between the no-profit principle and the basis for an enrichment claim. It expressly elucidates the no-profit principle as follows: 'not allowing profit from unlawfulness'. It then states that the no-profit principle prevents the perpetuation of unlawfulness. Then, it states that the no-profit principle is part of regulating the just and equitable relief of suspending the declaration of unlawfulness in respect of a contract. Here, the Constitutional Court states the no-profit principle as applied to the peculiar circumstances in *AllPay*[10]. Nowhere in Shabangu, does the Constitutional Court state that the no-profit principle is only applicable in those circumstances. (*Emphasis added*)

[26] On the contrary, the Constitutional Court did not apply the no-profit principle on the terms argued by the Chachulani respondents. It generally applied the no-profit principle to the facts in *Shabangu*. It did not allow the Land Bank to profit from the acknowledgment of debt. The suspension of the finding of invalidity and whether there was performance under the original loan agreement are not factors it took into account in making that decision.

[27] The respondents seek to conveniently limit in their favour, the no-profit principle, which is clearly of general application. *AllPay* and *Shabangu* is not authority for such a limitation.

[28] Therefore, this ground of opposition stands to be dismissed.

URGENCY

[29] It is trite that urgency involves the abridgement of times and forms where an applicant contends that it cannot be afforded substantial redress at a hearing in due course.[11]

[30] The respondents attack the urgency of this matter on the basis that the SIU only approached the Special Tribunal several months after the respondents received payment from the Department and the SIU investigation was finalized. They contend that the Department paid the respondents in October 2020; Mhlophe and Manngo's supporting affidavits were deposed to on 24 and 26 February 2021; yet, the SIU waited another three months prior to bringing the application.

[31] Even if this basis of opposition is upheld, which the SIU does not admit, the respondents' grounds of opposition are unsustainable, as they have not addressed the second leg of the test, whether the SIU could be afforded substantial redress at a hearing in due course.

[32] I find that the SIU meets both requirements for the test on urgency.

[33] The SIU contends that it did not delay to bring the application. Mhlophe and Manngo's supporting affidavits were compiled in the course of the SIU investigation and not for the purpose of bringing this application. At the time, the SIU was still busy with its investigation and was still interviewing key informants. It then had to consider all the evidence and make recommendations. The affidavit containing the recommendations was deposed to by Nkuna on 13 May 2021. It was only after this date that the SIU could consider the cause of action, obtain approvals and brief counsel to institute the *ex parte* application. It launched the *ex parte* application on 31 May 2021.

[34] Under these circumstances, I find that the SIU did not delay unduly to bring the application.

[35] The SIU's efforts to prohibit the respondents from dealing with the funds held in the listed accounts is consistent with Rule 23. The funds standing to the credit of the respondents in these accounts is evidence of the proceeds of the impugned contracts. The SIU intends to disgorge profits derived from the impugned contracts, in the event that the contracts are reviewed and set aside. This relief renders the urgency of the matter continuous.

[36] The respondents have been dissipating the funds standing to their credit in the listed accounts. The respondents' contention, that they have only gradually spent the funds, does not sustain their defence. If the respondents were not prohibited from dealing with the funds, they would continue to dissipate the funds, even if they would do so gradually, as they did before the 1 June 2021 order was granted. They have offered no undertaking not to do so. Neither have they offered security for the

profits the SIU seeks to disgorge. Therefore, if their access to the funds is not abated, the review proceedings may be rendered moot.

[37] For the above reasons, this ground of opposition stands to be dismissed.

WHETHER THE *EX PARTE* PROCEDURE WAS INAPPROPRIATE

[38] The reasons advanced by the respondents, as to why the *ex parte* procedure was inappropriate, are also unsustainable.

[39] The listed accounts were frozen in terms of Directives issued by the Financial Intelligence Centre (FIC) on 21 May. Some Directives would expire on 3 June 2021 and others on 4 June 2021. The SIU instituted the application on 31 May 2021. Under these circumstances, the respondents contend that the SIU should have given them two days' notice of the Rule 23 application prior to the granting of the order, and should not have been allowed to violate their right to *audi alteram parterm.*

[40] The respondents are further grieved that the order, granted *ex parte,* fails to make provision for a return date.

[41] An *ex parte* application is the appropriate procedure where a party seeks an order in terms of Rule 23. The risk of further dissipating funds if the respondents were afforded notice, perfectly justifies this procedure.

[42] When it issued Directives, the FIC notified the respondents of its investigation into the funds. With the eminent lapsing of the Directives, the respondents would

have access to the funds. This is precisely what the 1 June 2021 order serves to avert.

[43] It is improbable that the urgent application could be disposed of in two days if the respondents intended opposing it. The time it took the respondents to file an answering affidavit – almost a month after the 1 June 2021 order was served - and for the full sets of affidavits and heads of arguments to be filed, supports this probability. In the meantime, the funds would become vulnerable to further dissipation.

[44] If the 1 June 2021 order made provision for the return date, the respondents could, in terms of Rule 10(9), anticipate the return date on 24 hours' notice to the SIU. They advance no explanation why they waited almost a month to seek a reconsideration of the preservation order, only then asserting their right in terms of Rule 10(9).

[45] The presiding member of the Special Tribunal exercised a discretion not to provide for a return date and advised the respondents of their right to apply for a reconsideration of the order in terms of Rule 12(9). This rule, equally protects the respondents' right to *audi alteram partem*. The only difference is that it does not make provision for the respondents to set the reconsideration application down on 24 hours' notice to the applicant. This is practical where the respondents oppose the application without filing opposing papers.

[46] Where the respondents take a month to compile a comprehensive answering affidavit, it is unreasonable for the respondents to demand the applicant to file a

reply within a few hours of service of the answering affidavit, for the matter to be heard on 24 hours' notice to the applicant.

[47] The omission of a return date, as well the inordinate delay in seeking a reconsideration application, is not commensurate with the prejudice the respondents complain of.

[48] The prejudice that the respondents complain of, that the reconsideration was only heard six weeks after the *ex parte* order was granted, was self-created.

[49] Therefore, this ground of defence stands to be dismissed.

IMPROPER RELIANCE ON RULE 23

[50] The respondents contend that the SIU failed to make out a case for the preservation of the funds in terms of Rule 23. The rule is aimed at preserving evidence. Funds in a bank account are not evidence as they have no corporeal existence. The funds in a bank account are owned by the bank. The account holder only has a personal claim against the bank to make payments to the account holder or to third parties on the account holder's instructions.[12]

[51] The *Burg Trailers* principle as correctly stated by the respondents, regrettably does not sustain their argument. Rather, the 1 June 2021 order as sought by the SIU and granted by the Special Tribunal, is seamlessly consistent with the *Burg Trailers* principle.

[52] The respondent account holders, with the exception of Naledzi, derived the funds standing to their credit in the listed accounts from the payments made to

them by the Department, pursuant to the impugned contracts. Naledzi received payment from Psychin Consulting from the funds Psychin Consulting received from the Department pursuant to the impugned contracts. These funds were acquired pursuant to the *prima facie* case of irregular procurement process made out in this application and, in the review application, and as such, constitute evidence of serious maladministration in connection with the affairs of any State institution as foreshadowed in section 2(2) of the Act.

[53] The 1 June 2021 order serves to prohibit the respondents from exercising their personal claim to the funds, pending the review. Thus, what is preserved, is not the funds *per se,* but the respondents' claim over the funds, which is also evidence of the Department's payments to the respondents. In the event that the contracts are reviewed and set aside, and the Special Tribunal finds that it is just and equitable that the respondents' profits are disgorged, it will order the institutions holding the funds to the respondents' credit to pay the funds to the Department to make good the proved damages and losses to the state in terms of section 4 of the Act, thus depriving the respondents of their claim to the funds.

[54] The 1 June 2021 order is the only practical means of preserving the funds pending the review application. It is interim in nature. It only preserves the funds pending the review proceedings. It goes no further.

ABSENCE OF MATERIAL IRREGULARITIES

[55] The respondents have based this ground of opposition on two premises. Relying on *Mseme Road Cons CC*[13] and *JFE Sapela Electronics,*[14] they contend that the irregularities are mere slips and fail to meet the materiality requirement postulated in these judgments. They also contend that the irregularities are an internal departmental arrangement to which the respondents were ignorant.

[56] The irregularities itemized below, are material and not mere slips. The SIU has made out a very strong *prima facie* case of irregularities in the awarding of the impugned contracts. The respondents' ignorance of the applicable supply chain management statutory and regulatory requirements does not sanitize the irregularities. It would be absurd if the ignorance of a party to public procurement requirements, renders an otherwise unlawful public procurement contract, lawful.

[57] The foundational defect in the supply chain process that led to the awarding of the contracts to the respondents is its inconsistency with the principles that regulate public procurement as set out in section 217 of the Constitution. Section 217(1) provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

[58] National Treasury and the Department have devised a procurement system foreshadowed in section 217, provided for in several policies and Regulations.

[59] On 24 May 2020, the Department obtained a deviation in terms of Treasury Regulation 16A6.4. It was motivated on the basis of the emergency created by the Covid-19 pandemic to urgently appoint service providers to sanitize and decontaminate schools exposed to Covid-19.

[60] A procurement deviation authorizes a departure from standard procurement procedures to expedite the procurement process. The deviation is still required to meet the section 217 requirements. More importantly, there has to be a rational connection between the deviation sought and the need to procure goods urgently in an emergency to justify a deviation from with the section 217 requirements. The deviation is not intended to justify wanton non-compliance with section 217. The SIU contends that the procedure followed by the Department lacks in the following respects:

60.1 the Supply Chain Management Division in the Department, whose responsibility it is to manage supply chain management processes, including inviting, vetting and appointing bidders, was not involved in the procurement process. The deviation never authorized a departure from this standard procedure;

60.2 the procurement fails to meet the cost effectiveness requirement, in that:

60.2.1 the service providers did not submit quotations;

60.2.2 the contract fees were devised by Baloyi, the Chief Director: Physical Resource Planning and Property Management in the Department,

without reference to the nature and type of service to be rendered, the size of the school, cost of the materials and/ or labour resources to be employed;

60.2.3 the basis on which Baloyi determined to offer a fee of 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 is inconsistent with the abovementioned cost factors;

60.2.4 performance certificates signed by school principals and district offices reflect that the same amount was charged without reference to the nature of the work done, the duration of the work and the number of persons employed to perform the work.

On the respondents own version, the nature and duration of the work and human resources employed to perform it, differed across schools; yet, they charged the same fee for each school category as determined by Baloyi.

The respondents' assertion that there is no practical purpose in setting aside the contract where the evidence indicates that full value was received and cannot be returned is not substantiated. They have offered no justification for the fees that they have charged. Nor have they quantified the fees. They simply justify the fee on the basis of Baloyi's determination. The SIU intends to establish in the review application, that the Department did not receive full value for the payment it made to the respondents.

60.3 the contractors were randomly appointed from a list of service providers that were retained for a previous contract. Others were identified through WhatsApp messages. This manner of selection and appointment falls short of the transparent, fair and equitable requirements in section 217.

[61] Even if the Chachulani respondents were registered on the CSD and accredited for the procured service as they contend, the other irregularities listed above, to which the respondents have advanced no defence, *prima facie*, are fatal to the contracts.

[62] In the premises, the preservation order granted on 1 June 2021 was premised on a proper case made out by the SIU. The respondents' grounds of opposition lack merit. Therefore, the reconsideration application stands to be dismissed with costs.

[63] The following order is made:

ORDER

1. Condonation for the late filing of the replying affidavit is granted.

2. The reconsideration application is dismissed.

3. The costs of the *ex parte* application are reserved.

4. The first to seventh respondents shall pay the applicant's costs of opposition.

5. With the exception of paragraphs 4 and 5, whose purpose has been exhausted, the order granted on 1 June 2021 remains operative on the terms set out in that order.

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JUDGE L. T. MODIBA (Ms.)
MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the SIU:	Adv. Gilbert Marcus SC assisted by Adv. Emma Webber
Attorney for the SIU:	Ms. Stella Zondi, Office of the State Attorney, Pretoria
Counsel the 1st to 7th respondents:	Adv. John Peter SC assisted by Adv. Eric Mkhawane
Attorney for the 1st to 7th respondents:	Ms. Levern Oosthuizen, Motsoeneng Bill Attorneys INC
Date of hearing:	19 July 2021
Date of Judgment:	30 July 2021

Mode of delivery: *this judgment is handed down in open court on the Micro Soft Teams Platform. It is also emailed to the parties' legal representatives and loaded on Caselines. The date and time for hand-down is deemed to be 12:00 pm on Friday 30 July 2021.*

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[1] Act 74 of 1996
[2] 28 of 2011
[3] 58 of 1962
[4] Act 10 of 2013
[5] *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
[6] *Special Investigating Unit v Nadasen and Another* 2002 (4) SA 605 (SCA)
[7] *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
[8] *Shabangu v Land and Agricultural Development Bank of South Africa and Others* 2020 (1) SA 305 (CC) at paragraph
[9] *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* [2015] ZASCA 70; 2016 (1) SA 202 (SCA)
[10] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC)
[11]Special Tribunal Rule 12, which bears material similarities to Uniform Rule 6(12)
[12] *Burg Trailers SA (Pty) Ltd v Absa Bank Ltd* 2004 (1) SA 284 (SCA) at paragraph 6
[13] *Mseme Road Cons CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA)
[14] *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA)