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 NO: GP19/2021

In the matter between:

Zaheer Cassim N.O.	Applicant
And	
Thabiso Hamilton Ndlovu	First Respondent
Hamilton Holdings (PTY) LTD	Second Respondent
(Registratio No.2016/195301/07)	
Hamilton Projects CC	Third Respondent
(Registration No.2010/095176/23)	
Faliham (PTY) LTD	Fourth Respondent
(Registration No. 2017/43867/07)	
Akanni Trading and Projects (PTY) LTD	Fifth Respondent
(Registration no. 2016/206052/07)	

In the matter between:

Akanni Trading and Projects (PTY) LTD	Applicant
(Registration no. 2016/206052/07)	
And	
Special Investigating Unit	First Respondent
National Health Laboratory Service	Second Respondent

In the matter between:

Zaisan Kaihatsu (PTY) LTD	Applicant
And	
Special Investigating Unit	First Respondent
National Health Laboratory Service	Second Respondent

In re:

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	Fourth Respondent
Victor Nkwashu Attorneys	Fifth Respondent
Zaheer Cassim N.O	Sixth Respondent
Commissioner of South African Revenue Services	Seventh Respondent
Akanni Trading and Projects (PTY) LTD	Eighth Respondent
Hamilton Ndlovu 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
Joritants Logistics (PTY) LTD	Fourteenth Respondent
Persto (PTY) LTD	Fifteenth Respondent
Kgodumo Mokone Trading Enterprise (PTY) LTD	Sixteenth Respondent

Summary – civil procedure – application for contempt of the Tribunal's order of 7 June 2022 – rescission application – whether the applicants are in willful default and whether they have a *bona fide* defense.

JUDGMENT

Modiba J

Introduction

[1] This judgment relates to three applications. The first is an application for the contempt on an order of this Tribunal. It is brought by Zaheer Cassim N.O. (the curator) against the first to fifth respondents (the contempt application). The second is a rescission application brought by the fifth respondent, Akanni Trading and Projects (Pty) Ltd (Akanni). The third is a rescission application brought by Zaisan Kaihatsu (Pty) Ltd (Zaisan). Both rescission applications are brought against the Special Investigating Unit (SIU) and the National Health Laboratory Service (NHLS) cited as the first and second respondents (rescission application(s)).

[2] Conveniently, I refer to the parties in the contempt application as follows:

(a) The SIU and the NHLS individually by their names and jointly as the applicants for contempt;

(b) The first to fifth respondents jointly as respondents in the contempt application and individually by their names as cited. When it is necessary to draw a distinction between the first to fourth respondents on the one hand and the fifth respondent on the other, I refer to the former as the Ndlovu respondents and the latter by its name as cited. Where I need to distinguish between Hamilton Ndlovu (Mr Ndlovu) as the first respondent and the second to fourth respondent, I refer to Mr Ndlovu by his name and the latter respondents as the Ndlovu entities.

[3] In the rescission applications, I conveniently refer to the parties as follows:

(a) The applicants individually by their names as cited;

(b) The first and second respondents as the rescission respondents and individually by their names as cited.

[4] The genesis of the three applications is the dispute between the SIU and the NHLS on the one hand and the first to fifth and eighth to sixteenth respondents on the other as cited in the main proceedings. It has an elaborate litigation history. The SIU and NHLS brought numerous applications and obtained orders against these respondents between 2021 and 2023. Relevant of these is the interdict application brought on 24 August 2021 as supplemented by the supplementary application dated 29 September 2021 and the second supplementary application dated 19 November 2021. The interdict and supplementary applications were brought pending a review application. They culminated in the orders of 31 August 2021, 4 October and 3 February 2022.

[5] In terms of these orders, assets belonging to the Ndlovu respondents, Akanni, Zaisan and other respondents which the SIU and NHLS alleged were acquired from proceeds of procurement transactions the NHLS irregularly and unlawfully concluded with several entities for the supply of personal protective equipment (PPE) (the impugned transactions) were preserved pending the determination of the review application the applicants for contempt intended bringing.

[6] Reference is also made in this judgment to a preservation order the Commissioner for the South African Revenue Service (SARS) obtained in September 2020 in terms of Section 163 of the Tax Administration Act 28 of 2011 (the TAA) under case number 2020/35696 in respect of the assets of the Ndlovu respondents (SARS preservation order) by way of a *rule nisi*. The SARS preservation order was confirmed and made final on 1 March 2021. The 3 February 2022 order further preserved the assets preserved in terms of the SARS order which remained after the tax liability of the implicated taxpayers was satisfied, pending the review application.

[7] The SIU and NHLS subsequently brought an application to review and set aside the impugned transactions and payments made to these respondents in terms of the impugned transactions (impugned payments) on the basis that they are irregular and unlawful. They sought consequential relief for the recovery of monies the respondents received in relation to the impugned payments. The review application culminated in a judgment and forfeiture order of 7 June 2022 (forfeiture order), granting both the review and consequential relief. As part of the consequential relief, the preserved assets and assets subject to the interdict were declared forfeited to the state.

[8] The forfeiture order names the applicant in the contempt application, Zaheer Cassim N.O as the curator *bonis.* It also defines the rights he is to exercise as the curator *bonis* in relation to the forfeited assets. The curator alleges that in terms of the forfeiture order, Mr Ndlovu and several respondents in the review application were ordered to surrender the forfeited assets to the curator. He further alleges that the Ndlovu respondents and Akanni are in contempt of the forfeiture order as they have failed to surrender several forfeited assets to him. In the contempt application, the curator seeks the following order:

"1. The First to Fifth Respondents are declared to be in contempt of the Judgment of the Special Tribunal under Case Number GP19/2021 granted on 7 June 2022 ("the Special Tribunal's Judgment');

2. The First Respondent personally and the Directors and Members of the Second, Third, Fourth and Fifth Respondents are committed to prison for a period of 30 days and a warrant of arrest be authorized for their immediate arrest and committal.

3. The Order in paragraph 2 above for the incarceration of the Directors and Members of the Second to Fifth Respondents and the First Respondent personally be suspended for a period of 30 days to allow the Respondents to comply with the Special Tribunal's Orders and leave be granted to the Applicant to approach the Special Tribunal to supplement the current papers should the said Respondents remain in contempt, to have the incarceration Order made effective;

4. The First to Fifth Respondents are fined R500 000.00 each or such amount that the Special Tribunal deems just, each which is wholly suspended for a period of 1 year on condition that they are not found guilty again of contempt of the Special Tribunal and/or the Special Tribunal's Orders during the period of suspension;

5. That the Applicant be granted leave to approach the Special Tribunal, on the same papers as supplemented (including a supplemented Notice of Motion), for further relief, should any of the Respondents persist with their non-compliance of the Special Tribunal Orders;

6. That the costs of this Application be paid by the First to Fifth Respondents jointly and severally the one paying the others to be absolved, on the scale as between attorney and own client;

7. Granting to the applicant's such further and/or alternative relief as the Special Tribunal may direct."

[9] Akanni, together with the Ndlovu respondents oppose the contempt application on the following grounds:

(a) They allege that the curator does not have the necessary standing to seek an order of contempt because he has not been issued with letters of curatorship as required by Tribunal rule 27(1);

(b) The Ndlovu respondents submit that to the extent necessary and the permissible in law in terms of the forfeiture order, Mr Ndlovu had the intention of complying with the order and to co-operate with the curator. However, the curator has no authority to demand any other moveable assets except the "forfeited assets", as defined in the forfeiture order. They dispute that the assets that ground the application for contempt are forfeited assets.

(c) The Ndlovu respondents are unable to co-operate with the curator in relation to the Scania Trucks because Mr Ndlovu has no knowledge of the whereabouts of the trucks. He alleges that the trucks are owned by Akanni. It is on that basis that Akanni opposes the contempt application and seeks rescission of the forfeiture order.

[10] In the rescission application, Akanni and Zaisan seek orders in terms of which the forfeiture order is rescinded to the extent that it relates to them. The SIU and the NHLS both oppose the rescission application.

[11] Akanni and Zaisan seek rescission of the forfeiture order on largely the same grounds. It is on the same grounds that Akanni also resists the contempt application. They contend that they are not in wilful default as they were not served with the application papers and the relevant orders. They also contend that they have a *bona fide* defence. They dispute that certain forfeited assets belong to Mr Ndlovu and/ or

any of the entities associated with him. The SIU and the NLHS are adamant that papers were properly served on these entities in terms of the Tribunal and uniform rules. Therefore, the SIU and NLHS further contend, they are in wilful default. Further, they contend that the applicants for rescission lack a *bona fide* defence because the relevant forfeited assets were acquired with money derived from the impugned payments, they belong to Mr Ndlovu and are simply housed in Akanni and Zaisan to mask their true.

[12] As the SIU and NHLS correctly point out, since Zaisan is not a party to the contempt application, its rescission application should have been brought separately, citing the SIU and NHLS as respondents. It is out of expediency that the Tribunal directed that the contempt and the rescission applications be dealt with in the same proceedings as they raise overlapping issues. The SIU and NHLS did not object to this procedure. The Tribunal did not order that the contempt and two rescission applications are consolidated.

[13] Notwithstanding that Akanni is a respondent in the contempt application, it essentially brought the rescission application to resist the contempt application which implicates assets it contends belong to it. Together with Zaisan, Akanni remains applicants in their respective rescission applications. The SIU and NHLS are the respondents. As contended on behalf of the SIU and the NLHS, the versions of these parties are accordingly determined in line with the seminal *Plascon Evans* rule.

The contempt application

[14] The *curator* alleges that the respondents in the contempt application are in contempt of the forfeiture order as they have failed to surrender the following assets to him in terms of the forfeiture order:

(a) the Mercedez Benz G63 AMG;

(b) 2020 Cartier gentlemen's wristwatch with black leather bracelet with serial number 488751ZX; and

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(c) 2020 Rolex Oyster perpetual white roman numerals gentleman's wristwatch with gold and silver bracelet Model 126233 with serial number 267M719;

(d) The Scania trucks.

[15] I conveniently collectively refer to the above as the disputed assets. As already pointed out, the Ndlovu respondents and Akanni have mounted separate opposition to the contempt application, raising overlapping issues. Some of Akanni's grounds of opposition overlap with the basis on which it seeks rescission of the forfeiture order. Together with the other respondents in the contempt application, Akanni takes issue with the curator's authority to act as curator in terms of the forfeiture order. The Ndlovu respondents contend that the AMG and wristwatches are not forfeited assets.

[16] Mr Ndlovu also contends that he is unable to handover the Scania trucks to the curator because the Scania trucks do not belong to him and he does not know their whereabouts. Akanni raises its alleged ownership of the Scania trucks both as a defence to the contempt application and as a *bona fide* defence in its rescission application. To avoid prolixity and unnecessary repetition, since the Scania trucks ownership defence is an overlapping issue, I address it in Akanni's rescission application.

[17] It follows that the following issues stand to be determined in the contempt application:

(a) Whether the curator is duly authorised to act as such;

(b) The scope of the forfeiture order;

(c) Whether the SIU and NHLS have made out a proper case for the Ndlovu respondents and Akanni to be held in contempt of the forfeiture order.

The curator's authority

[18] While the respondents in the contempt application admit that the curator was appointed by the Tribunal in terms of paragraph 6.1 of the forfeiture order, they take issue with his standing to bring the contempt application because he is not a bearer of letters of curatorship issued in terms of Tribunal rule 27(1) read with

sections 71 and 72 of the Administration of Estates Act[1].

[19] It is common cause that the curator is not a bearer of letters of curatorship issued by the Tribunal in terms of Tribunal Rule 27(1).

[20] The curator initially blamed his failure to obtain letters of curatorship on two factors:

(a) When the forfeiture order was granted, he had already been appointed a curator in terms of the TAA in respect of the Ndlovu respondents' assets preserved in terms of the SARS order. The TAA does not expressly require letters of curatorship to be issued prior to the commencement of his duties as *curator bonis.*

(b) Given the extreme urgency in locating and preserving the implicated assets due to the high risk of dissipation in matters pertaining to preservation orders in the TAA, he was required to act swiftly to protect the interests of SARS.

[21] The curator further contended that interpreted purposefully, notwithstanding the requirement in Tribunal Rule 27(1), the forfeiture order gives him the authority to act immediately and does not depend on some future event. In supplementary papers, the curator later contended that Tribunal Rule 27(1) read with Tribunal Rule 26 and the provisions in the Administration of Estate's Act find no application in respect of the forfeiture order.

[22] Tribunal rule 27(1) provides that where the Tribunal grants a preservation or interdict order, the Tribunal may, at any time, appoint a *curator bonis* who shall, after the issuing of letters of curatorship, *inter alia*, assume control of the property and take such property into his or her custody; take care of the said property; administer the said property and do any necessary act for that purpose.

[23] The absurdity and resultant injustice that would result if this Tribunal were to hold that since the curator failed to obtain letters of curatorship, he has no authority to bring this application is indescribable is glaring. Such a finding would have implications on the curator's authority to act in terms of the Tribunal's orders by

[1] Act 66 of 1965.

taking control of the preserved assets in the first place. For reasons set out below, I find that the curator enjoys the requisite standing to bring this application:

(a) As the curator contends, he was already appointed a curator in terms of the TAA and acted swiftly to preserve assets subject to the SARS preservation order. Since 20 September 2020 when the SARS preservation order was granted, the curator assumed control of the assets subject to that order.

(b) Since 31 August 2021, the curator has assumed control of additional assets owned by the first to fourth respondents and fifth respondents in terms of the 31 August 2021, 4 October 2021 and 3 February 2022 orders granted by the Tribunal and at no point did the respondents impugn his authority to act as such:

(c) When the Tribunal finally determined the respondents' liability to the SIU and NHLS in the amount of R158 million in the review application and declared the preserved assets forfeit to the state, the preserved assets had been under the curator's control for approximately three years. It would be absurd for this Tribunal to hold that the curator has no standing to bring the contempt application under these circumstances. That would undermine the forfeiture order by keeping the assets under preservation longer than necessary. As a result of the forfeiture order, which in its terms is enforceable immediately would be rendered unenforceable.

(d) On the authority in *Bouwer N.O. v Saambou Bank Beperk*[2] on which the SIU and NHLS place reliance, the purpose of Tribunal Rule 27(1) is to safeguard the interests of the *de cujus* and not that of a third party. This Tribunal would fail in the performance of its duty if it adopted an interpretation that frustrates this purpose.

[24] For the above reasons, I therefore find that the curator's failure to obtain letters of curatorship under these circumstances did not deprive him of the standing to act in terms of his appointment under the 31 August 2021, 4 October 2021 and 3 February 2022 orders.

[2] 1993 (4) SA 492 (T).

[25] The curator attempted to obtain letters of curatorship from the Master of the High Court in terms of section 71 read with section 72 of the Administration of Estate's Act in vain. The Master refused his request, on the basis that he has no authority to issue the curator with letters of curatorship in terms of the above provisions. The curator filed a supplementary affidavit explaining his efforts and supplementary heads of argument addressing the legal basis on which the Master refused his request. The respondents in the contempt application has not taking issue with the legal basis on which the Master refused to grant the curator letters of curatorship in terms of section 71 read with section 72 of the Administration of Estate's Act.

[26] As contended on behalf of the curator and for reasons set out below, I find that Tribunal Rule 27(1) read with Tribunal Rule 26 and sections 71 and 72 of the Administration of Estates Act do not apply in respect of the forfeiture order.

[27] Paragraph 6.1 of the forfeiture order expressly appoints the *curator bonis* as such in respect of assets forfeited in terms of that order. Therefore, the *curator bonis* is not asserting his authority to hold any of the forfeited assets under a preservation order or an interdict order as provided for in terms of Rule 27.

[28] Section 71 of the Administration of Estates Act provides as follows:

> "Certain persons not to administer property as tutor or curator without letters of tutorship or curatorship
> No person who has been nominated, appointed or assumed as provided in section seventy-two shall take care of or administer any property belonging to the minor or other person concerned or carry on any business or undertaking of the minor or other person, unless he is authorized to do so under letters of tutorship or curatorship, as the case may be, granted or signed and sealed under this Act, or under an endorsement made under the said section."

[29] Section 72 regulates the provision of letters of curatorship by persons appointed to administer property in terms of section 71. It provides as follows:

> "72 Letters of tutorship and curatorship to tutors and curators nominate and endorsement in case of assumed tutors and curators:

"(1) The Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 5 of the Matrimonial Affairs Act, 1953 (Act 37 of 1953), or any order of Court made under any such provision or any provision of the Divorce Act, 1979, on the written application of any person-

(d) who has been appointed by the Court or a judge to administer the property of any minor or any other person as tutor or curator and to take care of his person or, as the case may be, to perform any act in respect of such property or to take care thereof or to administer it."

[30] The curator was not appointed to administer property in terms of section 71. The forfeited assets are excluded from section 71. The requirement for letters of curatorship in terms of the above provisions only apply to curators appointed to administer or take care of property for the benefit of an individual under curatorship. The circumstances under which *the curator* was appointed in the present instance are entirely different as the assets in which the right, title and interest have vested in the curator are being administered to the benefit of the NHLS and SARS and not the individuals under curatorship. The forfeited assets do not vest in the curator at any time. He merely has custody and control of them.

[31] Consequently, the *curator* has the requisite authority to act in terms of the 7 June 2022, including *locus standi* to apply for an order declaring the respondents in the contempt application to be in contempt of court.

The scope of the forfeiture order

[32] The Ndlovu respondents dispute that the AMG and wristwatches fall within the scope of the forfeited order. They contend that only the assets referenced in paragraph 7 of the forfeiture order constitute forfeited assets. The curator contends that these assets ought to have been surrendered to him as part of the SARS order. They were preserved pending the review application in terms of the 3 February 2022 order. They are specifically referenced in paragraph 7 of the forfeiture order and are therefore duly forfeited in terms of that order.

[33] Paragraph 3 of the 31 August 2021 order provides as follows:

"3. The First, Second and Fourth Respondent are prohibited from dealing in any manner with the assets, money and/or properties listed in Annexure "A" (attached hereto) pending the final determination of review proceedings to be instituted by the Applicants within 30 court days of the date of this order including any of the following actions in respect of any of the properties listed in Annexure A:

3.1. Transferring the property; and/or

3.2. Encumbering the property with a mortgage bond; and/or

3.3. Allowing any right(s) of retention to be established over the property; and/or

3.4. selling or leasing the property."

[34] The properties listed in annexure A 4 immovable properties registered to Zaisan. They are relevant for the purpose of Zasain's rescission application.

[35] In the meantime, the SARS order had been obtained (by SARS) in September 2020 and confirmed in March 2021 in favour of SARS, preserving the Ndlovu respondents' assets pending the determination of the tax liabilities of these respondents. Realizing the risk that in the event the value of the assets preserved in terms of the SARS order exceed the tax liabilities of these respondents, once the Ndlovu respondents' tax liability is determined and settled from the preserved assets, the remaining preserved assets (the free assets) would be released back to the Ndlovu respondents, the SIU NHLS sought an order incorporating any remaining assets into paragraph 3 of the 31 August 2021, thus preserving them pending the review application. The SIU contended that the free assets were derived from the proceeds of the impugned transactions. Therefore, the free assets fall to be recovered by the SIU and declared forfeit to the State in terms of the forfeiture order sought in the review application.

[36] Paragraph 5 of the forfeiture order lists assets preserved in terms of the 31 August 2021, 4 October 2021 and 3 February 2022 as forfeited in terms of the forfeiture order. Notwithstanding that the SARS order was expressly incorporated into paragraph 3 of the 31 August 2021 order in terms of the 3 February 2022 order, paragraph 5.3 of the forfeiture order specifically references that order. It provides as follows:

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"The assets and funds held by the First and Ninth to Thirteenth Respondents set

out in the interim interdict order of the Special Tribunal of 3 February 2022 attached hereto as "C"."

[37] In relevant parts, the SARS order provides as follows:

"2. A provisional preservation order is hereby issued in accordance with the provisions of section 163 of the Tax Administration Act 28 of 2011 the Tax Administration (" the Tax Administration Act"), in respect of all realisable assets of all the respondents, with all the provisions thereof having immediate effect;

15. Any person having books and records or assets of any one or more of the respondents in his/her possession, must, subject to what is provided for below, when this order comes to that person's knowledge, notify the curator bonis of the fact that such are in his/her possession and hand over same to the curator bonis on demand, or within such time as the curator bonis may allow and, should that, for any valid reason, not be possible, or should the person have a right to retain possession thereof, then such person must make the documents or assets available to the curator bonis for inspection and supply the curator bonis with copies of any document pertaining to any one or more or all of the respondents, on demand by the curator bonis;"

[38] It is clear from a plain reading of the above paragraphs that the SARS order preserved all the assets of the Ndlovu respondents. As already stated, the basis for the SARS preservation order was the Ndlovu respondents tax liabilities. Hence, in terms of that order, all assets of these respondents were preserved.

[39] The basis on which SIU and NHLS preserved the assets of the Ndlovu respondents and other respondents in terms of the 31 August 2021, 4 October 2021 and 3 February 2022 was that the assets were acquired from proceeds of the impugned transactions. Therefore, the 3 February 2022 order was also sought and granted on the basis that the remaining assets were acquired from proceeds from the impugned transactions. Indeed, most of the assets preserved in terms of the SARS order fall into this category. However, it does not follow that all the remaining assets fall into this category. Assets that have not been shown to have been acquired from proceeds of the impugned transactions do not fall into this category.

[40] Nowhere in any of the application in terms of which the 3 February 2022 and the

forfeiture order has the curator shown that the AMG and wrist watched were acquired from proceeds from the impugned transactions. He has therefore not established before this Tribunal that these assets were forfeited in terms of the forfeiture 2022 order.

[41] The forfeiture order also holds the Ndlovu respondents liable to the NHLS for repayment of the profits acquired from the impugned transactions in the amount of R158 million. If this debt is not settled from the realised forfeited assets, nothing precludes the NHLS as judgment creditor from executing against any assets of the Ndlovu respondents including the AMG and wrist watches (if shown to belong to these respondents) to satisfy the remaining judgment debt. However, this execution process falls beyond the curator's scope of duties and authority as set out in the forfeiture order. It is very important that the curator does not conflate the two processes, lest he overreaches.

Whether the curator meets the requirements for contempt

[43] The requirements for civil contempt are trite. To succeed in the contempt application, the curator ought to establish that the order was made, that the respondents in the contempt application are aware of it and that they have failed to comply with it. The curator must establish beyond reasonable doubt that the respondent's non-compliance with the forfeiture order is wilful or *mala fides*. In respect of this element, the respondents in the contempt application only bear a rebuttal onus.[3]

[44] The Ndlovu respondents' knowledge of the forfeiture order is not in dispute. By contending that the 31 August 2021 and 4 October 2021 orders, the applications that led to the granting of those orders, the review application and the forfeiture order were not served on it, Akanni places its knowledge of the forfeiture order in dispute. I deal with this issue more fully in Akanni's rescission application. There I find that Akanni had knowledge of the review application. However, the curator has not satisfied the Tribunal that the forfeiture order was served on Akanni and/or its sole director Mr Kubheka. He therefore fails to satisfy this requirement in relation to Akanni and Mr Kubheka. Further, that he never demanded the trucks from Mr Kubheka is

[3] *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA); *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (SC) at paragraph [36].

common cause.

[45] I have found that the wrist watches and AMG are not part of the forfeited assets. I deal with the issue of ownership of the Scania trucks under Akanni's rescission application and find that Mr Ndlovu acquired the trucks with proceeds from the impugned transactions. They therefore do not belong to Akanni. Mr Nldovu has not sustained the basis on which he refused to hand over the Scania trucks to the curator. I therefore find that Mr Nldovu has failed to comply with the forfeiture order.

[46] For reasons set out below, I find that the curator has established beyond reasonable doubt that Mr Ndlovu's non-compliance with the forfeiture order is wilful or *mala fides*. According to the curator, he met with Mr Ndlovu in March 2023. During the meeting, Mr Ndlovu had agreed to handover the AMG and wrist watches and provide the location of the Scania trucks. He later not only reneged on that undertaking, he contended that he does not know the location of the Scania trucks and that they do not belong to him.

[47] The high-water mark of the Ndlovu respondents' response to these allegations is that Mr Ndlovu is willing to cooperate with the curator. They allege that when Mr Ndlovu met with the curator in March 2023, he made his intention to cooperate with him clear. The curator is not entitled to an order for contempt in circumstances where Mr Ndlovu expressed his intention to co-operate with him.

[48] Mr Ndlovu has not disputed that he made an undertaking to hand over and/ or provided the location of the Sania trucks during the March 2023 meeting. It is clear from the issues he raises in these proceedings that he not only reneged on his undertaking, but he has also misled the curator and has no intention of complying with the forfeiture order to the extent it applies to the Sania trucks. He continues in his efforts to hide, conceal and/ or dispose assets as he is doing with the Scania trucks in breach of the order under which they were preserved and the forfeiture order with the clear intention of frustrating the curator's efforts to fulfil with his duties in terms of the forfeiture order.

[49] Mr Ndlovu's belated attempt to place the ownership of the Scania trucks in dispute is consistent with his deceptive conduct described above. The Scania trucks were preserved in terms of the 4 October 2021 order. Mr Ndlovu was aware of that order. Notwithstanding that he did not comply with it, he did not oppose it. He has been

aware of the forfeiture order since it was granted. That order was granted on the basis that the trucks were acquired with proceeds from the impugned transactions and that Mr Ndlovu used Akanni as a front to acquire the trucks to conceal the trail of funds. Mr Ndlovu did not dispute these allegations. Hence, When the curator closed in on him, he undertook to disclose the location of the trucks, only to concoct a new version in these proceedings to evade compliance with the forfeiture order. Mr Ndlovu's conduct places his wilful default and *mala fides* beyond reasonable doubt.

[50] While the curator has established that Mr Ndlovu is the master mind behind the cited Ndlovu entities, he has not established any culpability on the part of these entities because he has not established on behalf of which of the cited Ndlovu entities did Mr Ndlovu breach the forfeiture order. It is for that reason that I only hold Mr Ndlovu in contempt of the forfeiture order. His attempts to conceal his deceptive conduct behind Akanni are futile.

[51] I therefore find that the curator is duly authorised to act as a curator in terms of the forfeiture order. I find that Mr Ndlovu has failed to comply with the forfeiture order and that his noncompliance is *mala fides*. This finding does not extend to Akanni and its sole director Mr Kubheka because the curator has not shown that the forfeiture order was served on them, that he demanded from them in terms of the forfeiture order the Scania trucks and that they refused to accede to his demand.

Rescission applications

Akanni

[52] Akanni brings this application in terms of the common law. It correctly points out that it ought to succeed in the application if it provides a reasonable explanation for its default and establishes that it has a *bona fide* defence not made with the mere intention of delaying the SIU and NHLS's claim but has reasonable prospects of success in the main proceedings.

[53] The deponent to Akanni's answering affidavit in the contempt application and founding affidavit in the recission application, Mr Kubheka alleges that neither he nor Akanni were aware of all the interdict and preservation applications that culminated in the 22 August 2021, 4 October 2021 and forfeiture orders, at least until the preparation of this affidavit by Akanni's attorneys. These applications and orders

were never served on Akanni, including the application and the SIU and NHLS brought against it on 29 September 2021 on an *ex parte* basis and the order of 4 October 2021 granted pursuant thereto as it did not receive them at the Gmail email address the SIU and NHLS attorney alleged to have sent them to. Interestingly he references a term in the 31 August 2021 order that authorises service of these documents at the relevant email address.

[54] In reply, the respondents in the rescission application point out that this is the email address Akannii provided in its registration for the Central Supplier Database maintained by National Treasury. Interestingly, Mr Kubheka does not dispute that the email address belongs to Akanni. He does not allege that it is unattended to. He simply denies that he received the relevant documents at this email address. His version falls to be rejected as it constitutes a bare denial. On the authority in *Plascon Evans*, I find that the documents were duly served in terms of the Tribunal Rule 6(c), and paragraph 3 of the 22 August 2021 order.

[55] The documents were also served by the sheriff on a member in charge at Akannii's registered address as evidenced by the sheriff's return of service. Mr Kubheka alleges that he never received these documents either as the person named on the Sheriff's return of service is unknown to him. This does not take matters further as the documents were duly served by email in terms of the Tribunal Rules.

[56] For the above reasons, I find that Akanni has failed to provide a reasonable explanation for its default.

[57] Akannii's bona *fide defence* is that it is not related to and controlled by Mr Ndlovu. It alleges that the Scania trucks are owned by Akannii. In June 2021, it handed the trucks to James James Mzondidya, who is either a Zimbabwean / Zambian or Congolese National to make use of the trucks in the mines in Zimbabwe, Zambia and the DRC.

[58] Akanii has unsatisfactorily dealt with the Tribunal's findings that led to both the 4 October 2021 order and the forfeiture order regarding the flow of funds derived from the impugned transactions and the acquisition of the Scania trucks using this funds. Mr Kubheka's explanation for the flow of payments from Hamilton Holdings (Pty) Ltd and Hamilton Projects CC to Akanni is that he worked these entities from 2016 without renumeration as these companies lacked funds to compensate him. The

payments reflected in the flow of funds report constitute compensation for services he rendered to these entities since 2010.

[59] As pointed out by the respondents in the rescission application, for the reasons set out below, the version of Akannii and its sole director Mr Kubheka is so far-fetched that this Tribunal is unable to reasonably rely on it. It also falls to be rejected because:

(a) Mr Khubeka failed to disclose his family relationship with Mr Ndlovu;

(b) He misled the Tribunal that he has an employment relationship with Mr Ndlovu through his entities;

(c) He was dishonest regarding his employment activities Hamilton Holdings (Pty) Ltd and Hamilton Projects CC.

[60] Mr Kubheka is the sole director in Akanni. He is a descendant of Edward and Susan Ndlovu, a direct family member of Hamilton Ndlovu and a beneficiary of the Ed & Su Family Trust (the Trust). These relationships are reflected from the Trust's Deed of Trust which was part of the annexures to the Flow of Funds Report and annexed to the founding affidavit in the interdict application. Mr Kubheka signed the acceptance of Trust under oath in which these relationships and his status as a Trust beneficiary is recorded.

[61] Being born in 1995, Mr Khubeka was only 15 years old in 2010. It is highly improbable that he started working for the abovementioned entities in 2010 as he alleges. The falsity of this allegation is revealed by information published on his LinkedIn profile, where he states that he started working at the age of 21 for Pick 'n Pay and later for Vodacom. He only started working for Akanni in September 2018 as a Team Manager. His list of previous employers does not include the abovementioned Ndlovu entities. Yet, the flow of funds report reflects salary payments in the amount of R48,663 by Hamilton Holdings between 18 March and 28 August 2020.

[62] The flow of funds report reflects that the gross revenue of HamiltonN Holdings in the years 2017-2019 did not exceed R1.6m and it made losses in each of these years. On Akanni's version, it did not renumerate Mr Kubheka during this period due to lack of funds. This render's improbable Akanni's version that it reached an

agreement with Mr Kubheka February 2020 for payment of a lumpsum of R7.2 million as remuneration from payments HamiltonN Holdings and HamiltonN Projects sourced from ACSA and NPA. Prior to receiving these payments, as at 3 September 2020, Akannii only had R95.91 in its bank account. Shortly, after these payments, Akannii purchased the Scania trucks for R4,232,920.

[63] A copy of the alleged agreement has not been furnished. The particulars of the work Mr Kubheka did are not disclosed. Mr Ndlovu, HamiltonN Holdings and HamiltonN Projects have not confirmed the alleged agreement.

[64] In the review application, the Tribunal found that the Scania trucks were acquired by Akannii with funds paid into it by Shinjiro Group (Pty) Ltd, of which Mr Ndlovu is the sole shareholder. Shinjiro Group in turn received R4.77m of the total funds paid to Bugatti by the NHLS. The sole director of Akannii, Mr Kubheka, was a salaried employee of HamiltonN Holdings. Akannii is thus a further fronting company. Despite ostensibly being under the control of persons unrelated to Hamilton Ndlovu, Akannii is in fact related to and controlled by him.

[65] In the review application as consolidated, all the opposing respondents accepted the SIU and NHLS version that when NHLS officials ordered PPEs supplies from the fronting companies, they failed to comply with the applicable procurement procedures. The Mr Ndlovu also did not dispute the allegation that he used Akanni as a fronting company to mask his acquisition of the Scania trucks. He only disputed that the impugned payments were without cause because no PPEs were delivered to the NHLS. He asserted the right to recover all the costs he and the companies he represents incurred when they supplied PPEs to the NLHS in accordance with the no profit no loss principle enunciated in *All Pay*.[4] These issues were resolved as asserted by Mr Ndlovu and the Ndlovu entities.

[66] The rest of the fronting companies (with the exception of Akanni and Zaisan) tendered repayment of the amounts retained or Mr Ndlovu paid them from funds deriving from the impugned payments.

[67] If the forfeiture order is rescinded, in the review proceedings opposed by Akanni,

[4] See *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC), *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC).

the finding that Mr Ndlovu controlled Akanni will be fortified by a finding that its sole director, Mr Khubeka is Mr Ndlovu's family member and co-beneficiary in a family Trust Mr Ndlovu founded, factors in respect of which Mr Ndlovu in the review application and Mr Kubheka in this application misled this Tribunal. The fact that Akannii is an incorporated entity and that no relief was sought against it in terms of section 20 (9) of the Companies Act that its incorporation and use constitute abuse of the juristic personality of Akannii does not strengthen Akannii's case in the recission application. No order was sought and granted that Mr Ndlovu is liable for Akanni's debts. Therefore, Akanni's reliance on section 20(9) is misplaced.

[68] For all the above reasons, I find that there are no prospects that if the rescission application is granted, in the review application opposed by Akanni, the Tribunal would not make the same finding that Akannii is controlled by Hamilton Ndlovu and that the Scania trucks were acquired with funds derived from the impugned transactions. Since Akanni has failed to provide a reasonable explanation for its default and has also not established a *bona fide* defence, the rescission application falls to fail.

Zaisan

[69] Zaisan brings this application in terms of the common law, alternatively uniform rule 42. It contends that it was not in wilful default. It also contends that it has a *bona fide* defense to the SIU and NHLS's case in the review application.

[70] It is common cause that 4 immovable properties registered in Zaisan's name were attached and preserved in terms of the Tribunal's order of 31 August 2021. They were forfeited in terms of the forfeiture order. Zaisan contends that the application that led to the granting of the 31 August 2021 order and the review application that led to the granting of the forfeiture order were not served on it. Once these orders were granted, they were also not served on it. The forfeiture order was only brought to its sole director Mr Mokoena's attention in June 2023. He did not bring this application timeously due to lack of funds. He requires condonation for bringing the application late.

[71] Zaisan further contends that according to the sheriff's return of service, the applications were served at its registered address by affixing to the principal door. This is not possible as the property is secured by palisade fencing. Therefore, the sheriff would not have been able to access the principal door and affix a 1,000 paged document and USB thereto.

[72] Zaisan relies in the following grounds of defence:

(a) There was no piercing of the corporate veil;

(b) Non-joinder of the Trust that sold the properties to Zaisan and failure to set aside the relevant sale transactions;

(c) The SIU and NHLS failed to disclose material information to the Tribunal when they brought an *ex parte* application for an interdict that led to the granting of the 31 August 2021 order.

[73] Zaisan contends that in the preservation and review applications, relief was not sought for the piercing of its corporate veil in terms of the common law or section 20(9) of the Companies Act 71 of 2008 (the Companies Act). Therefore, its separate legal personality cannot be ignored. It can only be ignored when its corporate veil is pierced accordingly.[5] Zaisan further contends that its director, Mr Mokoena, has denied that Zaisan is a company under the control of Hamilton Ndlovu, and that Hamilton Ndlovu is the real owner of the preserved properties. Mr Mokoena's version must be accepted, in recognition of Zaisan's juristic personality, and secondly in terms of section 66(1) of the Companies Act which confirms that "*the business and office of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise*".

[74] Zaisan also contends that its separate legal existence was, in relation to the relevant transactions relating to the preserved assets, recognised by SARS when it imposed an income tax liability of R32 million against Zaisan and its

[5] Ex Parte Gore and Others N N O (Gore) 2013 (3) SA 382 (WC).

director. No tax obligation was placed on Mr Ndlovu. Accordingly, a finding that Zaisan is under the control of Mr Ndlovu and that the preserved properties are for the benefit of Mr Ndlovu is not supported by the actions taken by SARS against Zaisan and its director.

[75] It is Zaisan's further contention that its financial obligations (and not that of Mr Ndlovu) in relation to the preserved assets is recognised by the body corporates and the municipalities for the payment of levies, rates and taxes. These liabilities, same as the SARS liability, are enforced against Zaisan and not Mr Ndlovu.

[76] Lastly, Zaisan contends that it purchased the relevant properties from the funds received from the ED & SU Family Trust (the Trust), a separate legal entity. The Trust was not cited in both the preservation and review applications, despite its apparent material, direct and substantial interest in both applications. Nowhere in the founding affidavit was it contended that the Trust and/or its Trustees were involved in the unlawful procurement of the PPEs, or that the Trust, prior to the acquisition of the relevant properties, had no source of income other than the income received from the PPEs to fund the acquisitions of the relevant properties. The funding transactions between the Trust and Zaisan in terms of which Zaisan acquired the relevant properties are lawful. It was never contended in the preservation application nor the review application that the funding transactions constitute a simulated transaction or that for some reason or another are null and void. Zaisan is the lawful registered owner of the properties.

[77] A foreseeable material dispute of fact irresolvable on the papers has arisen regarding whether the sheriff did effect service of process as stated in his return of service. Zaisan has not sought referral of this dispute to oral evidence. The SIU and the NHLS correctly point out that the dispute regarding the manner of service ought to be resolved in its favour in terms of the *Plascon Evans* rule.

[78] For reasons that follow, Mr Mokoena barely alleges that the applications and orders were not served on Zaisan. Notably, Mr Mokoena fails to take this Tribunal into his confidence regarding how he became aware of the Tribunal's 7 June 2023 order. This is a critical omission in Zaisan's explanation for its default in light of the SIU and NHLS's contention that the applications were duly served by the

sherrif but more especially in light of the Tribunal's finding in the review application, that Mr Ndlovu used Zaisan as a fronting company and that Zaisan is under his control.

[79] It is common cause that Mr Ndlovu was served with the forfeiture order. He sought to appeal it. The appeal has lapsed. The contention by the SIU and NHLS (considering Zaisan's unexplained knowledge of the order) that Mr Ndlovu as the person controlling Zaisan was aware of the order and is using Zaisan to resuscitate his failed appeal against the forfeiture order is not far-fetched. The fact that Mr Mokoena and Zaisan purportedly became aware of the forfeiture order in June 2023 but only bring this application on the back of the contempt application further supports this thesis.

[80] The fact that in terms of section 66(1) of the Companies Act only its directors are authorised to act on its behalf does not refute the allegation Mr Ndlovu failed to dispute in the review that he is Zaisan's controlling mind. That finding was made in the review and still stands. In any event, Zaisan inordinately delayed bringing this application after Mr Mokoena inexplicably became aware of the forfeiture order in June 2023. His failure to explain how he gained knowledge of the order and the source of funds he used to bring the application renders his explanation incomplete and unsatisfactory. Since I find that Zaisan lacks a *bona fide* defence, it has no prospects of success in the review application. I am therefore constrained to find that it has failed to make out a proper case for its delay in bringing the rescission application to be condoned. The condonation application falls to be dismissed with costs.

[81] For reasons set out above, I also find that Zaisan has failed to establish that it is not in wilful default.

[82] Zaisan misconstrues the SIU and NHLS's case in the preservation application and in the review. They did not seek to hold Mr Ndlovu liable for Zaisan's obligations. Therefore, section 20(9) finds no application. It was also not their case that Zaisan and the Trust were involved in irregular and unlawful procurement. Their case is that Mr Ndlovu used Zaisan as a fronting company to conceal that he was the real and beneficial owner of the preserved properties. The flow of funds report demonstrates that the Trust acquired the properties from

funds received from the impugned procurement transactions and not from its legitimate trading activities.

[83] The fact that Zaisan has been recognised as a separate legal entity by SARS, body corporates and municipalities who raised tax liabilities and property related expenses against it does not refute the fraudulent way in which Mr Ndlovu concealed his ownership of the preserved properties in Zaisan. Zaisan, represented by Mr Mokoena in these proceedings has not answered to these serious allegations. This Tribunal is not bound by decisions and determinations made by SARS, body corporates and municipalities. The Tribunal's findings are not undermined by the conduct of these entities. Rather, the Tribunal's orders are binding on these entities. It is open to Zaisan and Mr Mokoena to raise the forfeiture order as a defence against claims brought against Zaisan by SARS. Zaisan's liabilities against body corporates and municipalities will be resolved as part of the execution process because transfer of ownership to new owners may not be effected until those liabilities are settled. These liabilities are therefore not a valid defence to the SIU and NHLS's claims against Zaisan in both the preservation and review applications.

[84] Further, the alleged non-disclosure by the SIU and the NLHS would not advance Zaisan's case in any manner. The information the SIU and NHLS are alleged to have failed to disclose to the Tribunal would not support Zaisan's case in the review because it would only have a bearing on the review relief. Since Zaisan was not awarded any of the procurement contracts which were impugned in the review, it has no substantial interest in the review relief.

[85] In any event, the undisclosed information relates to the non-delivery of PPE items and excessive pricing. The SIU failed to establish the allegations they made on these issues. Hence, no finding was made that PPE items were not delivered and that excessive prices were charged. It is for that reason that the cost of the PPE items were deducted from the amount the relevant respondents in the review application were held liable for. Lastly, the amount the relevant respondents were found liable for was not determined on the basis of excessive pricing but on the basis of the no profit no loss principle enunciated in *All Pay*[6].

[6] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC).

[86] Even more seriously, Zaisan has not put up any defence to the allegation, in respect of which a finding was made in the review, that Mr Ndlovu lined up fronting companies and used them to obscure his involvement to fraudulently obtain multiple tenders from the NHLS. He has also not disputed the flow of funds report which established that 90% of funds the relevant respondent entities derived from the reviewed tenders were used for the personal benefit of Mr Ndlovu and his family members. This omission renders Zaisan's case in the review utterly hopeless.

[87] For the above reasons, I find that Zaisan lacks a *bona fide* defence The case it intends mounting in the review application if the forfeiture order is rescinded is bereft of any prospects of success. Therefore, Zaisan's rescission application also stands to fail.

[88] In the premisses, the following orders issue:

Contempt application

1. The first respondent is declared to be in contempt of the judgment of the Special Tribunal under case number GP19/2021 granted on 7 June 2022 (the Special Tribunal's order);

2. The first respondent is committed to prison for a period of 30 days. A warrant of arrest is authorized for the immediate arrest and committal of the first respondent (the incarceration order).

3. The incarceration order is suspended for a period of 30 days allow the first respondent to comply with the Special Tribunal's order. Leave is granted to the applicant to approach the Special Tribunal to supplement the current papers should the first respondent remain in contempt, to have the incarceration order made effective;

4. The first respondents is fined R500 000.00 for contempt of the orders of the Special Tribunal. This fine is wholly suspended for a period of 1 year on condition that he is not found guilty again of contempt of the Special Tribunal

orders during the period of suspension;

5. The applicant is granted leave to approach the Special Tribunal, on the same papers as supplemented (including a supplemented notice of motion), for further relief;

6. The first respondent shall pay the costs of the contempt application on the scale as between attorney and client.

Rescission applications

The rescission applications brought by Akanni Trading and Projects (Pty) Ltd and Zaisan Kaihatsu (Pty) Ltd are dismissed with costs.

JUDGE L.T. MODIBA
PRESIDENT OF THE SPECIAL TRIBUNAL

Appearances:

Attorney for Zaheer Cassim N.O: Mr E. Jooma, Mothle Jooma Sabdia Inc.

Counsel for Zaheer Cassim N.O: Adv R Raubenheimer

Attorney for the first to fifth respondents in the application for contempt and the applicants in the rescission application: Mr D Molepo,Edward Nathan Sonnebergs Inc.

Attorney for the SIU and NHLS: Mr R Moodley, Cliffe Dekker Hofmeyr Incorporated

Counsel for the SIU and NHLS: Adv. B Roux SC, assisted by Adv. I Currie

Mode of delivery

This judgment is handed down by email transmission to the parties' legal representatives, uploading on Caselines and release to SAFLII and AFRICANLII. The date and time for delivery is deemed to be 10 am on 5 November 2024.