IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2(1) OF THE SPECIAL INVESTIGATING UNITS AND SPECIAL TRIBUNALS ACT 74 OF 1996 (REPUBLIC OF SOUTH AFRICA)

Case No: GP20/2021

SPECIAL INVESTIGATING UNIT	**Applicant**
and	
ANGLOGOLD ASHANTI LIMITED	**First Respondent**
GOLDEN CORE TRADE AND INVEST (PTY) LTD	**Second Respondent**
CV CHABANE AND ASSOCIATES (PTY) LTD	**Third Respondent**
PONELOPELE ARCHITECTS & ASSOCIATES (PTY) LTD	**Fourth Respondent**
PICTURE PERFECT TRADING 215 (PTY) LTD t/a IMPOFU ENGINEERING SERVICES	**Fifth Respondent**
PRO-SERVE CONSULTING (PTY) LTD	**Sixth Respondent**
TAKGALANG CONSULTING CC	**Seventh Respondent**
DIPHATSE TRADING AND PROJECTS CC	**Eighth Respondent**

MJR TRADING SERVICES (PTY) LTD	**Ninth Respondent**
MAKHADO PROJECT MANAGEMENT (PTY) LTD	**Tenth Respondent**
YIKUSASA BUILDING CONTRACTORS SA (PTY) LTD	**Eleventh Respondent**
NJR PROJECTS	**Twelfth Respondent**
THENGA HOLDINGS (PTY) LTD	**Thirteenth Respondent**
MVUSULUDZO PROJECTS (PTY) LTD	**Fourteenth Respondent**
MEMBER OF THE EXECUTIVE COUNCIL: GAUTENG PROVINCIAL DEPARTMENT OF HEALTH	**Fifteenth Respondent**
MEMBER OF THE EXECUTIVE COUNCIL: GAUTENG PROVINCIAL DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT	**Sixteenth Respondent**
MEMBER OF THE ECECUTIVE COUNCIL: GAUTENG PROVINCIAL TREASURY	**Seventeenth Respondent**

JUDGMENT

CORAM: **NAIDOO, J**

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[1] This is an application by the Special Investigating Unit (SIU) to declare certain decisions and actions of the fifteenth and sixteenth

respondents, being respectively the Gauteng Provincial Department of Health (GDOH) and the Gauteng Provincial Department of Infrastructure Development (GDID), invalid and/or unlawful and/or inconsistent with the Constitution, and to review and set aside such decisions and actions.

[2] The SIU filed an amended Notice of Motion and, in terms thereof sought an order in the following terms:

"1. Declaring that the decisions taken by the fifteenth and sixteenth respondents to enter into lease agreements with the first and second respondents, in relation to the premises known as the Western Levels Deep Mine Hospital and residence (the Hospital), are inconsistent with the Constitution of South Africa, 1996 and invalid, and/or unlawful and accordingly stand to be reviewed and be set aside.

2. Declaring that as a consequence, the lease agreements and any extensions and/or addenda thereto entered into or concluded by the fifteenth and sixteenth respondents and the first and second respondents in relation to the premises known as Western Levels Deep Mining (sic) Hospital and are reviewed and set aside on the grounds of unconstitutionality and/or illegality.

3. Declaring that the decisions taken by the sixteenth and/or fifteenth respondents to appoint the third to fourteenth respondents as Professional Service Providers and/or Contractors, as the case may be, to provide services and/or perform works relating to the refurbishment and renovation of the Hospital are inconsistent with the Constitution and/or are unlawful and are hereby reviewed and set aside and declared invalid.

4. Declaring that appointments of the third to fourteenth respondents by the sixteenth and/or the fifteenth respondents and/or any contracts or agreements entered into between them in relation to the Hospital are

inconsistent with the Constitution and/or unlawful and hereby set aside, and declared invalid.

5. In terms of section 172(1)(b) and flowing from the aforesaid declarations of invalidity, the third to fourteenth respondents are ordered to make payment in the sums as set out hereunder which represent their respective overcharging for works done or services rendered as the case may be in connection with the Hospital:

5.1 As against the third respondent, in the sum of R 4 491 947.34.
5.2 As against the fourth respondent, in the sum of R2 370 051.04.
5.3 As against the fifth respondent, in the sum of R4 319 116. 97.
5.4 As against the sixth respondent, in the sum of R1 470 010.06.
5.5 As against the seventh respondent, in the sum of R7 066 555.71.
5.6 As against the eighth and ninth respondents, jointly and severally, the one paying, the other to be absolved, in the sum of R4 392 003.61.
5.7 As against the tenth respondent, in the sum of R34 163 715.26.
5.8 As against the eleventh respondent, in the sum of R14 540 885.44.
5.9 As against the twelfth respondent, in the sum of R11 522 856.15.
5.10 As against the thirteenth respondent, in the sum of R3 737 505.00
5.11 As against the fourteenth respondent, in the sum of R4 626 900.24.

6. Payment of interest by the respective respondents on the aforesaid sums at the rate of 7.50% per annum calculated from 5 April 2022 until date of final payment.

7. <u>In the alternative</u> to prayers 5 and 6 above:

7.1 each of the third to fourteenth respondents shall submit a statement and debatement of account in respect of their appointment, performance and payment as a service provider by the fifteenth and/or sixteenth respondents, to determine the profits derived by them therefrom;

7.2 if the accounting and the sum of the profit determined is disputed by either the applicant or the respondent in question, these parties shall approach the Tribunal for an appropriate order on supplemented papers as necessary;

7.3 upon the conclusion of the steps in 7.1 and 7.2, and upon the written demand by the applicant to pay to it the sum of the profits so derived, the relevant respondent shall pay the determined sum within 60 days thereof, together with interest at the rate of 7.5% per annum from the date of determination of the payable sum, until date of payment;

7.4 if the accounting and the sum of the profits is (sic) not disputed or is agreed between the applicant and the relevant respondent, such profit shall be paid to the applicant within 15 days of such agreement, together with interest at the rate of 7.5% per annum from the date of the agreement, until date of payment.

8. in the alternative to prayers 5 to 7 above, that the issue of the amount, if any, that each of the third to fourteenth respondents shall pay to the applicant, the sixteenth and/or the fifteenth respondents, be referred to oral evidence or to trial on such terms as the Special Tribunal may direct.

9. That the costs of this application, including the costs of two counsel (including that of a senior counsel), are to be paid by any of the respondents who oppose this application or any part thereof, jointly and severally, the ones paying the other to be absolved."

[3] I pause to mention that in the initial Notice of Motion, the SIU did not seek an order for the just and equitable relief, which it sought in the amended Notice of Motion, in the form of compensation or damages against any of the respondents. The amendment was

occasioned by the preparation and completion of an expert report by Motara Consulting (Pty) Ltd (Motara Consulting), together with a number of reports by other experts relating to the AGA Hospital project, including certain experts' findings relating to overcharging by the Professional Service Providers (PSPs) and contractors engaged by the GDOH and/or GDID. I shall return to this aspect later.

Background

[4] The Covid-19 pandemic, which hit South Africa early in 2020, necessitated urgent government action to provide hospital accommodation and medical facilities to cope with the onslaught of the pandemic. This resulted in a number of companies and entities offering various services and products required for hospitals and other establishments dealing with the pandemic. Contracts were signed by government for, *inter alia*, the lease of premises, which were intended to be converted into (temporary) hospitals, for the provision of items such as personal protective equipment and the like. Government departments countrywide were in a race to arm themselves with the facilities and resources to cope with patients who had become infected with the SARS-COV-2 virus and required urgent medical attention. The GDOH and GDID similarly entered into various contracts for premises and services. This matter has its genesis in such contracts.

[5] The SIU, via its team of investigators, conducted an investigation into the procurement processes purportedly followed by the GDOH and the GDID, in relation to a lease agreement for premises that were leased by GDOH and/or GDID from the first respondent, AngloGold Ashanti Limited ("AngloGold" or "AGA" or first

respondent). The SIU investigation included the renovation and refurbishment of the existing hospital building (the AGA Hospital) as well as a residence (collectively “the premises”). The land upon which the hospital and residence are situated was previously owned by AngloGold, but is apparently currently owned and managed by the second respondent, Golden Core Trade and Invest (Pty) Ltd (second respondent or Golden Core). SIU’s mandate was to investigate the alleged numerous irregularities in the processes followed in respect of the conclusion of the lease agreement, in the appointment of PSP’s and Contractors, and the exponential increase in the costs involved in the renovation and refurbishment of the hospital.

[6] Among the major concerns which prompted the investigation appear to be the extreme increase in the costs of the renovation and refurbishment of the premises, the legality of the contracts entered into, and appointments of service providers, from which such costs arise. Work in respect of such refurbishment commenced shortly after the lease agreement was signed. Ultimately, it seems that the costs expended by the Gauteng Provincial Government were in excess of R500 million, such costs being in respect of improving buildings it did not own and without the State holding any long-term rights over the buildings or land. The SIU further alleges that in spite of such enormous costs being incurred, the works were not completed timeously, and GDOH could not use the hospital during the first three waves of the Covid-19 pandemic. This rendered, superfluous and meaningless, the project of urgently securing additional hospital beds to accommodate patients who had become infected with the SARS-COV-2 virus.

[7] It is perhaps useful at this stage to set out the provisions of sections 2 and 217(1) of the Constitution. The former deals with the supremacy of the Constitution while the latter embodies the prescripts relating to procurement of goods and/or services by an organ of state:

> **Supremacy of Constitution**
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> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.
>
> **Procurement**
>
> 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.

Section 31(1)(a)(iii) of the Public Finance Management Act 1 of 1999 (PFMA) is the national legislation which gives effect to section 271(1) of the Constitution.

[8] It appears that an informal approach was made in February 2020 to AngloGold by a representative of the West Rand District Department of Health to lease and renovate the AGA hospital for use as a mental institution. Nothing came of this until the hospital was inspected, in March 2020, by a delegation made up of representatives of the GDOH, GDID and AngloGold, seemingly with the aim of utilising the hospital for treatment of patients who had become infected with the Covid virus. The delegation allegedly reported that the hospital was in an “impressive condition” and required minimal work to revitalise it. GDOH used GDID as the implementing agent in this project. AngloGold apparently informed

the delegation that it could not enter into a sale agreement in respect of the hospital as it was in the process of selling its operations to Harmony Gold. The recommendation was that the GDOH enter into a lease agreement and record its intention to acquire the hospital "outright", upon the conclusion of the sale of the hospital to Harmony Gold. The Member of the Executive Council (MEC) for GDOH at the time, a Dr Masuku, was informed of the situation regarding the acquisition of the hospital.

[9] The GDOH approached the MEC for approval and costing of the envisaged extra beds to combat Covid-19. In support of the request, the Deputy Director General (DDG) of GDOH, intimated that the team which inspected the hospital unanimously concluded that the hospital was "*in a very good general condition, requiring only minor renovations to make it wholly usable and operational*" The DDG recommended that the engagement with AngloGold be expedited. The GDID was then approached to implement all measures to acquire and refurbish the AGA Hospital for use during 2020. The written request to GDID itemised the various areas for refurbishment. Noteworthy points mentioned in that request are, first, that acquisition of ownership was a challenge but that the alternative of a ten-year lease was considered reasonable security of tenure, which would be permitted by the Public Finance Management Act 1 of 1999 (PFMA). Second, that the estimated cost of refurbishment was R50 million with a further cost of R10 Million to refurbish the residential accommodation on the premises.

[10] The GDOH requested the GDID to appoint PSPs and contractors for the purpose of implementing the refurbishment, which was approved by the Acting Head of Department (HOD) of the GDID.

The HOD also signed the Agreement of Lease, allegedly disregarding a note in the request for approval to sign the lease agreement, that matter was to be discussed with the HOD Health before signing. The SIU proceeded to set out the salient terms of the lease, highlighting the agreement that GDOH and/or the GDID were to undertake the necessary refurbishment at their cost, subject to AngloGold's approval of the plans and schedule of finishes before any work commenced. The further point highlighted was that at the termination of the lease, the alterations made would become the property of AngloGold which would not pay any compensation for such alterations.

[11] The SIU argued that the condition of the hospital and the extent of the refurbishments were misrepresented to the persons responsible for approving the expenditure, that the appointment of the PSPs and Contractors was irregular as the proper procurement and appointment processes, as required by the GDID's Supply Chain Management Policy, were not followed. I mention that there were two addenda to the lease agreement, the details of which were set out in the Founding Affidavit. With regard to the lease agreement, the SIU alleged various irregularities and inconsistencies with applicable procurement processes.

[12] It alleged that the lease agreement was not consistent with applicable procurement prescripts for several reasons, which include that:

a. the lease was not concluded following a fair, equitable, transparent, competitive and cost-effective procurement process, as required by section 217(1) of the Constitution;

b. The Accounting Officer did not approve the deviation from the applicable procurement processes in relation to a lease agreement entered into pursuant to an unsolicited bid. The deviation was also not reported to the Gauteng Provincial Treasury within the time period prescribed in the Treasury Regulations and relevant Practice Notes;

c. GDOH and /or GDID estimated the costs of refurbishment to be R50 million but expended R500 million in respect thereof;

d The initial period of the lease was (unrealistically) six months. The hospital facilities could never have been ready in that period for use by GDOH to treat Covid-19 patients.

e. When the lease agreement was concluded, GDOH gave no indication of any long-term plans in respect of the facility to justify the expenditure it would incur, nor did it ensure that it would have access to and use of the facility for an extended period of time.

[13] For the reasons listed above, the SIU contends that the lease agreement did not meet the rationality test required for the constitutional and lawful exercise of public power in accordance with the principle of legality. There was, for instance, no feasibility study or report concerning the suitability of the AGA Hospital to treat Covid-19 patients or whether it had future use for GDOH, considering it is located on a disused mine and is a considerable distance away from the nearest town. As a result of the misrepresentations and irregularities specified above, significant prejudice and loss were occasioned to GDOH, causing it to incur irregular expenditure, which may well be fruitless and wasteful expenditure to the tune of approximately R500 million.

[14] The SIU set out in great detail the relevant statutory and legal framework (statutes, National Treasury Regulations and Practice Notes and internal procurement policies of the relevant government departments in this matter), which regulates procurement by government. Numerous irregularities were listed, which point to a contravention of various procurement policies, as well as Treasury Regulations and Practice Notes, and which indicate malfeasance or irregular conduct within the relevant government departments and on the part of many of the respondents. In addition, the SIU had engaged experts to investigate, *inter alia*, the costing of the AGA Hospital project. The preliminary findings of the experts, in summary, were that original contract period was unrealistic and not achievable within the stipulated time, the charges of the contractors and PSPs were very high and not market related, the inconsistencies in some sections of the Bills of Quantities are suggestive of the possibility that they were not prepared by the same quantity surveyor. In general, there had been an overstatement of costs. The SIU argued that the entire AGA Hospital project and lease were ill-conceived from the beginning. In support of this contention, the SIU pointed out that this is evident from the concept of requiring an additional permanent facility, to the lack of real rights in favour of GDOH in respect thereof, to the inexplicable cost increases, to the appointment of contractors and PSPs on an emergency basis without going out to tender and soliciting market-related costings , to the delays in the works, so that the hospital was not fully completed (with only one wing having been handed over), and the completion being delayed by some 16 months. On this basis, the SIU argued for the grant of the relief sought in the Notice of Motion.

[15] As alluded to earlier, the SIU initially claimed only the relief as contained in prayers 1 to 4 of the Notice of Motion. The reason for this was that, at the stage when the application for review was instituted, the report of the expert was not complete, as the costings and other contractual aspects were still being investigated. The SIU indicated that it was not, at that stage, claiming a just and equitable remedy because of the anticipated dispute of facts in this regard, and would do so in separate proceedings at a later stage. It sought only the setting aside of the of the lease agreements entered into by GDOH and/or GDID with the first respondent, and the appointments of the PSPs and contractors. Subsequently, the completed reports of Motara Consulting (Pty) Ltd came to hand, together with the reports of the various other experts that were engaged by the SIU. I have summarised some of their conclusions in the previous paragraph. Thereafter a Case Management Meeting was held at which the then President of the Tribunal indicated that, in the interests of expeditiously finalising the matter, the claim for a just and equitable remedy should be dealt with in one application. This led to the amended Notice of Motion and Supplementary Founding Affidavit being filed in April 2022.

[16] The relief for an order in respect of a just and equitable remedy that the SIU envisaged seeking in separate proceedings was now being sought in the review application, on the basis that the experts engaged by the SIU found, *inter alia*, that the time periods contracted for were unrealistic and that there was evidence of overcharging. The SIU also asserted that during the various case management meetings, the manner in which the application would

proceed, namely that the merits regarding the setting aside of the lease agreements and appointments of PSPs and contractors, together with the prayer for just and equitable remedy would be dealt with in one application, was discussed and accepted by the respondents.

[17] The investigation by SIU's lead investigator and deponent to SIU's Founding and Supplementary Founding Affidavits as well as its Replying Affidavit, Cornelius Daniel Du Toit (Mr Du Toit), spanned some five to six months, during which time, he gathered thousands of documents, and interviewed a large number of people, including the so-called decision makers in the GDOH and GDID and other role-players, undertook various site visits, sent and received a large amount of correspondence. It is noted that the respondents declined to cooperate with him, in that they neither allowed him to interview them nor did they furnish him with information and documentation, which was within their knowledge and in their possession. During his investigation, Mr Du Toit uncovered various procurement irregularities involving GDOH and GDID in relation to the AGA Hospital.

[18] To elaborate on the irregularities I alluded to earlier, Mr Du Toit found, *inter alia*, that:

a. neither GDOH nor GDID could provide an explanation of how the estimated expenditure of R50 million for the project increased to over R500 million;

b. no valid procurement processes (in terms of internal policies) were followed with respect to the appointment of persons who undertook the refurbishment of the hospital;

c. PSPs and contractors commenced their work at the site, based on a letters received from GDID, which contained no details of costing, budget or scope of works. The appointments of these service providers were furthermore dependant on the finalisation of the agreement for acquisition of the hospital;

d. no tender processes were followed by GDOH and GDID in the appointment of the PSPs and contractors; PSPs and contractors were seemingly telephonically advised of their appointments; Many of these service providers were not on GDOH's or GDID's panel of approved service providers

e. no approvals from the Provincial Treasury were obtained for the expenditure.

[19] Before I deal with the versions of the respondents, there are a few preliminary matters that require mention. Not all the respondents opposed the application brought by the SIU. The first and second respondents, AngloGold and Golden Core respectively, filed notices to abide by the Tribunal's decision. The third respondent (CV Chabane & Associates), did not oppose the review and setting aside orders sought by the SIU. The fourth (Ponelopele Architects), sixth (Pro-Serve Consulting), seventh (Takgalang Consulting), tenth (Makhado Project Management), eleventh (Yikusasa Building Contractors) and thirteenth (Thenga Holdings) respondents oppose the entire application. The fifth, eighth, ninth, twelfth and fourteenth respondents, did not file Answering Affidavits. The matter proceeded unopposed against these latter-mentioned respondents.

[20] The legal representative of the fifth and twelfth respondents, who

was not present on the first day of the hearing, attempted, on the second day, to gain a hearing, alleging that she had filed certain papers with the registrar of the Tribunal. Neither the Tribunal nor the other parties had received such papers. Prior to this day, no papers at all were filed by the fifth and twelfth respondents. Strong objections were raised by the SIU and all the other respondents. The Tribunal considered the untenable position that neither it nor the other parties would be in a position to meaningfully deal with any case that those respondents would have presented. In addition, the matter would have to be adjourned to allow the SIU and other respondents to file papers in Answer. Taking all the circumstances into account, the fifth and twelfth respondents' application for a hearing was refused.

[21] The fifteenth, sixteenth and seventeenth respondents, being the MEC: GDOH, the MEC: GDID and the MEC: Gauteng Provincial Treasury (GPT) respectively, did not oppose the application nor did they participate in these proceedings. The SIU did not seek any relief against them. The sixth respondent (Pro-Serve) brought a conditional counter application against AngloGold, which it intended to prosecute in the event that the Tribunal ordered it to pay any sum of money to the SIU. AngloGold opposed the application. However, Adv Klopper who appeared for Pro-Serve in this matter, advised that it will not proceed at this stage with that application, as it is conditional upon a monetary order being made against. Pro-Serve. He indicated that the conditional counter application need not detain the attention of the Tribunal in this matter.

[22] In spite of numerous Case Management Meetings being held and time frames being set, and extended, for the filing of Answering Affidavits, Heads of Argument and other process, almost all the parties have flouted those time frames and filed either their Answering and where applicable, Replying Affidavits or Heads of Argument out of time, without seeking condonation for such late filing. At the hearing, Adv Arendse indicated that, in the interests of proceeding with the matter, the SIU has no objection to the late filing of the Heads of Argument by the first, third, tenth eleventh and thirteenth respondents. The SIU itself filed its Replying Affidavit out of time and sought condonation therefor. None of the respondents raised any objection to such condonation being granted. Similarly, the thirteenth respondent filed its Answering Affidavit out of time, and SIU has indicated that it does not object to condonation being granted for such late filing. To the extent necessary, condonation is granted to the SIU and the respondents for the late filing of the Heads of Argument and the process that I have mentioned. The fourth, sixth and seventh respondents, in flagrant contravention of the Tribunal Rules, failed to file any Heads of Argument at all, sought no condonation for this, nor did they even have the courtesy to mention such failure.

[23] The sixth respondent (Pro-Serve) belatedly brought an application for leave to file a Supplementary Affidavit, to which the SIU did not respond. The seventh respondent (Takgalang Consulting) filed a Supplementary Answering Affidavit, without an accompanying application for leave to file such affidavit. It was only when I indicated that leave must be formally sought for such affidavit to be filed that Takgalang filed that application. But, again, a lack of respect for the Rules is demonstrated in the fact that Takgalang

did not even bother to sign and commission the Founding Affidavit to the application for leave to file that further affidavit. This is perhaps an appropriate stage to express this Tribunal's disquiet at the manner in which many of the respondents in this matter have conducted the litigation. It speaks of a lack of care in the preparation of documents, which displayed many avoidable errors, the lack of expeditious responses within agreed time frames, and the lack of observance of the Rules of the Tribunal which, like the Rules of Court, are designed to ensure certainty, order and expedition in the conduct and finalisation of litigation.

[24] Having said that, I deal with Pro-Serve's application for condonation to file a Supplementary Answering Affidavit, and the affidavit filed. The SIU did not oppose or even respond to the application. In as far as this may be relevant, it is evident that Pro-Serve approached the SIU with settlement proposals, which seemed to have stretched over many months (causing delays in the matter), and ultimately the SIU rejected such proposals. The deponent to the Supplementary Affidavit, Mr Thabang Mbembele, explained that due to a personal tragedy and thereafter time constraints in consulting with his legal representatives to prepare the Answering Affidavit, as well as the Supplementary Affidavit to accommodate the additional issue that had arisen as a result of the Motara report, he exceeded the time by which the affidavit had to be filed. I consider his explanation to be adequate, and in view of a lack of opposition by SIU, condonation is granted for the late filing of the Supplementary Affidavit.

[25] With regard to Pro-Serve's Supplementary Affidavit, the issue raised therein is that of the overcharging by Pro-Serve, as alleged

by the SIU. It is common cause that there was an error in calculation by Ms Motara in her report. The error was however, corrected and the amount then communicated to the respondents. It appears, however, that Pro-Serve still disputes the methodology and substance of Ms Motara's calculations, and that it overcharged the GDOH/GDID. From what will follow, it will become apparent that my view is that the relief sought by SIU in prayers 5 to 8 of the amended Notice of Motion should be referred to oral evidence or trial. For this reason, the issues raised in Pro-Serve's Supplementary Affidavit can conveniently be dealt with by the court/Tribunal to which the matter will be referred. Pro-Serve is, accordingly granted leave to file its Supplementary Answering Affidavit.

[26] I deal now with the application by the seventh respondent (Takgalang) for leave to file a Supplementary Answering Affidavit. Its Answering Affidavit was dated 29 July 2022, and presumably filed on the same day. The Supplementary Affidavit dated 5 October 2022, was also presumably filed on that date. As I indicated earlier, the Supplementary Affidavit was not accompanied by the application for leave to file same. That application appears to have come to light on 17 October 2022 (which is the date on the Notice of Motion), after the Tribunal gave directions to do so. The Founding Affidavit to that application is neither signed, nor commissioned. In my view, this Tribunal is not obliged to consider the defective application for leave to file the Supplementary Affidavit. Takgalang repeatedly asserts that it is in the interests of justice that the Supplementary Affidavit be admitted, as it raises important defences.

[27] The reason it puts forward for the filing of a Supplementary Affidavit is that these defences were brought to its attention only after the filing of its Answering Affidavit. It seems that Takgalang appointed new attorneys after the Answering Affidavit was filed, and the “law points” it now raises were clearly on the advice of its new attorneys. Without making any pronouncements with regard to the merits of the defences raised in the Supplementary Affidavit, a perusal thereof, reveals that these points were addressed in the papers, namely, the delay by SIU in bringing this application, that this Tribunal does not have jurisdiction to hear this matter and that the legality review is the wrong procedure to have been followed as the Promotion of Administrative Justice Act (PAJA) is applicable in this matter. In addition, the judgments of this Tribunal on these points are binding until set aside. The Tribunal has previously held that the legality review is the appropriate procedure to follow, and that PAJA is not applicable. In my view, Takgalang impermissibly seeks to amplify its defences and gain an advantage it would not ordinarily be entitled to. Its prospects of success in such an application are negligible.

[28] With regard to the interests of justice, clever/opportunistic legal points not previously taken (when the opportunity presented itself to do so), to bolster the defences of a litigant can hardly be said not to prejudice the other parties in this matter. If one has regard to the fact that the application for leave to file the Supplementary Affidavit was filed on 17 October 2022, less than a month before the matter was scheduled for hearing, the prejudice and inconvenience to the other parties, as well as the Tribunal, are evident. Given the magnitude of the matter and the extensively voluminous papers, this last-ditch attempt by Takgalang, which

claims that no prejudice can result from this application, cannot be countenanced. The SIU and other parties were clearly placed under severe constraints to consider the application, in such a short time period before the hearing, and could hardly be expected to have properly responded. The unanimous view of the respondents at the hearing that the matter must proceed was based to a large extent on the difficulties encountered in finding a date suitable to all of the many legal representatives and respondents involved in this matter, once again highlighting the prejudice and inconvenience that the Tribunal and the other parties were subjected to. Takgalang's application to file the Supplementary Answering Affidavit, is accordingly refused.

[29] The relief claimed by the SIU in paras 5 to 8 of the amended Notice of Motion has been opposed by all respondents, who deny that they have overcharged the government in respect of the AGA Hospital project. They particularly dispute the Motara report, on various grounds. Save for the 10th and 11th respondents, who have filed reports by experts that they engaged, none of the other respondents have filed any evidence to substantiate their disputes in respect of the Motara report. However, my view is that the monetary disputes as well as other aspects of the Motara report relating to costings and the like, cannot be resolved on the papers. The nature of the disputes is such that the experts will have to be subjected to cross-examination in order for a decision to be made in respect of the monetary relief, or indeed any "just and equitable remedy" that the SIU seeks. It may well be that the evidence of supporting witnesses may also be necessary for a final determination to be made, which is not possible on these papers. I mention that Adv Arendse, in the course of discussing the

documentation that the SIU and Ms Motara relied on to arrive at the conclusion that the respondents overcharged in respect of the project, as well as discussing the exponential increase in the costs of the project, intimated that if the Tribunal was not inclined to consider the relief that the SIU claimed in respect of the overcharging and disgorgement of profits, these aspects could be dealt with at a later stage.

[30] For the reasons I have articulated, I propose to deal only with the relief sought in prayers 1 to 4 of the SIU's amended Notice of Motion, and defer the rest of the relief sought, for hearing at a later stage. I will deal briefly with the answers and defences raised by the respondents in respect of prayers 1-4 of the amended Notice of Motion. The respondents focussed mainly on disputing and attempting to disprove the findings of SIU's experts. In view of what I have said earlier, I refrain from dealing with this aspect, which is related, *inter alia*, to the allegations of overcharging and invoicing for amounts that are not market related. With regard to prayers 1 to 4 of the Notice of Motion, most of the respondents raised similar defences and arguments. The third respondent is the only one which, in effect, conceded prayers 1 to 4, by asserting that it was unable to dispute the assertions of the SIU in respect of those prayers. The following broad denials and assertions emerge from the papers filed by the respondents:

a. they deny SIU's evidence that GDOH and GDID failed to follow valid procurement processes, which they were obliged to do;

b. a number of them alleged that they have no knowledge of the internal processes of these provincial departments;

c. they asserted that if the state failed to comply with the law in making appointments of and entering into agreements with service providers, they played no part in this and therefore committed no illegality. In the circumstances, the appointments were not unlawful, nor were the contracts concluded with the respondents. Consequently, those contracts did not fall to be set aside.

[31] The respondents did not put forward any evidence to support their assertions nor did they proffer any evidence to gainsay the SIU's version that there was non-compliance by the state with legislative and procurement prescripts. The Tribunal, therefore, has before it bare denials of non-compliance with procurement prescripts, as opposed to the detailed legal framework set out by the SIU and an equally detailed exposition of the various instances of non-compliance with and breaches of statutory provisions, Treasury Regulations and internal procurement policies. Many of the respondents raised certain points *in limine*, which are similar. Two that are of note and which I will deal with are that the SIU ought to have instituted action proceedings instead of application proceedings, and the non-joinder of the government officials who were involved in and played a role in the appointment of the respondents and the conclusion of the impugned contracts.

[32] With regard to the action vs application point, I will deal only with the validity thereof in respect of prayers 1 to 4 of the Notice of Motion. As I indicated, there is no real challenge or material dispute of fact that requires consideration. The bare denials of non-compliance, unlawfulness and invalidity are not material

disputes of fact, which the SIU ought reasonably to have foreseen when it instituted the application. In fact, at that stage, it indicated that it was not pursuing the just and equitable remedy because it had only a preliminary report from its expert and anticipated disputes of fact. When that preliminary report was concretised, the amendment to the Notice of Motion was pursued. The failure by all but two of the respondents to file expert reports challenging that of Ms Motara is a further indication that their disputes do not amount to material disputes of fact. The report filed by the 11th respondent is in fact a preliminary report, and at the time that this matter was heard, the probative value of that report was doubtful. I note that the information that the SIU sought in order to quantify the amounts it envisaged claiming, could readily have been provided by the respondents, as that information and the relevant documentation were in the possession of the respondents. The latter refused to cooperate with the SIU's investigation.

[33] Save for the errors in calculation in Ms Motara's report, which were detected and corrected, the SIU was able to quantify the amounts by which the government was overcharged by the respondents. Except for the tenth respondent, this Tribunal would have been entitled to consider making an order in those amounts, as against the rest of the respondents. However, this Tribunal weighed the interests of the various respondents as well as the SIU (representing the government) and held the view that in their interests and in the interests of justice, the fairest course would be to refer the issue of a just and equitable remedy for separate consideration, where evidence could be led on issues of the costings and charges, in order to determine what amounts, if any,

were due to the state. Therefore, in my view, application proceedings in this matter were neither incorrect nor inappropriate, and that point *in limine* falls to be dismissed.

[34] With regard to the non-joinder of individual departmental officials involved in this matter, it seems to have escaped the attention of the respondents that these officials were acting in the course and scope of their duties while in the employ of the fifteenth, sixteenth and/or the seventeenth respondent, who have been cited as respondents. It is further well settled in our law that joinder of a party to proceedings depends on whether or not he/she has a direct and substantial interest in the subject matter of the litigation. 'Interest' in this context has been held to be a legal interest. The respondents have failed to allege or show that any of the departmental officials they referred to, had a right or rights that were likely to be affected by the order of this Tribunal. Should the Tribunal set aside the contracts entered into and order repayment of any proven amounts owing to the government, such orders cannot affect the interests or rights of the departmental officials involved. The argument that they ought to have been joined as parties to these proceedings is misplaced. This point *in limine,* too, cannot succeed.

[35] I mention further that the sixth, seventh, tenth, eleventh and thirteenth respondents challenged the SIU's ability to use the evidence and documentation relied upon by Mr Du Toit, on the basis that it is inadmissible hearsay evidence, especially as the authors of the documents did not sign confirmatory affidavits. In

arguing for the admission of Mr Du Toit's evidence and the documents he relied on, the SIU relied on the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (the Evidence Act), which provides as follows:

> (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
>
> (a) ….
>
> (b) ….
>
> (c) the court, having regard to-
>
> (i) the nature of the proceedings;
>
> (ii) the nature of the evidence;
>
> (iii) the purpose for which the evidence is tendered;
>
> (iv) the probative value of the evidence;
>
> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
>
> (vi) any prejudice to a party which the admission of such evidence might entail; and
>
> (vii) any other factor which should in the opinion of the court be taken into account,
>
> is of the opinion that such evidence should be admitted in the interests of justice.

[36] The SIU addressed each of the factors stipulated in s3(1)(c) as follows:

a. This is a judicial review, emanating from a state-authorised investigation, where the relief is claimed by the SIU as an organ of state on its own behalf of and on behalf of two other government departments, namely the GDOH and GDID. These are civil proceedings akin to a self-review[1], where these two government departments were represented in these proceedings by their

[1] See SIU v Phathilizwi Training Institute & Another (EC06/2020 ZAST 11 (18 May 2022 at para 11.

Executive Heads, and cited as the fifteenth and sixteenth respondents. The latter did not oppose this application;

b. The nature of the evidence is mainly documentary, which documentation was obtained from officials of GDOH and GDID, and is the best and most reliable evidence of the failure to follow procurement processes, that the SIU could have placed before the Tribunal. Had there been evidence that procurement processes were followed, that would have been given to the SIU;

c. The purpose of the evidence was to demonstrate that procurement procedures were not followed by GDOH and GDID, which is the central issue in this application, and in respect of which, no countermanding evidence had been presented by the respondents;

d. The probative value of Mr Du Toit's evidence is high, considering that the respondents played no part in the internal workings of the provincial departments concerned and were, for the most part, unable to counter the evidence and assertions of the departmental officials who authored and/or signed the documents in question. The contents of such documents were also not challenged. The parties that would have been in a position to dispute Mr Du Toit's evidence as well as the documents he relied on, were the fifteenth and sixteenth respondents, but they chose not to do so.

e. With regard to the reasons why the state officials did not depose to confirmatory affidavits, the SIU explained that those officials, save for Mr Nkomo and Mr Qolohle, had resigned, were suspended and/or had disciplinary proceedings pending against them. Then there was Mr Tabane, who was involved in the appointment of the service providers, and who refused to depose to an affidavit;

f. With regard to the ground requiring the court to consider 'any other factor" for admitting hearsay evidence, the SIU contended

that the failure to follow proper procurement processes is consistent with the proven facts, that none of the respondents were meaningfully able to contend that proper procedures were followed in respect of their appointment.

[37] It is evident that none of the respondents meaningfully challenged the documents that were relied upon by Mr DuToit, nor were they able to dispute that the procurement procedures that were followed were not in accordance with the internal procurement policies of GDOH and GDID, and were, in fact, in contravention of National Treasury Regulations, Practice Notes, as well as statutory prescripts, such as those in the PFMA. Some of the respondent conceded that they have no knowledge of the internal workings of the provincial departments concerned and confirmed that they were appointed pursuant to a telephone call. They accepted such appointments and commenced work on the site prior to being informed what the scope of works was and what the contract price was. In fact, there was no dispute to SIU's allegation that work commenced before the funding was approved. In my view, these are *prima facie* indicators of irregularities which would vitiate a contract.

[38] While I am cogniscent of the fact that a court, or in this case, the Tribunal, must have regard to the prejudice that could be occasioned to other parties by the admission of hearsay evidence, this has to be balanced with the interests of the party seeking to admit such evidence, to determine, ultimately, if the admission of such evidence is in the interests of justice. The SIU undertook an extensive investigation uncovering and receiving

thousands of documents, as I indicated earlier. Mr Du Toit's investigative affidavit relies on these documents.

[39] In my view, the documents were received in the course of the investigative process, and if they corroborate the factual situation that existed during the investigation, for example, the manner in which service providers were appointed, that the latter commenced work before funding was approved and even before they were advised of the contract price and scope of works, that the costs of the project had increased exponentially and inexplicably, the refusal to admit such documentary evidence would defeat the purpose of the investigation which was state-mandated, and intended to detect irregularities, unlawful conduct and malfeasance, which had caused loss to the state. It goes without saying, that the interests of justice would be adversely affected by the refusal to admit such documents. I am, therefore of the view, that while there may be prejudice to the respondents, in that they may well be required to repay amounts that they benefitted from as a result of the irregularities and unlawful conduct outlined earlier, the only way to correct such irregularities is to admit the evidence, even if it amounts to hearsay, in order that justice and fairness are brought to bear in this matter.

[40] One further matter requires the consideration of this Tribunal. Some months after the hearing in this matter was completed, the tenth (Makhado) and thirteenth (Thenga) respondents, indicated by way of correspondence that they intended to bring an application to admit new evidence which would have a bearing on

the judgment of the Tribunal. The “new” evidence related to disciplinary proceedings against eight officials in the employ of GDOH and GDID. The thirteenth respondent was clearly driving this application, as the Founding Affidavit was deposed to by its sole director, Ms Thenga. In order to avoid confusion, I will refer to them either by their individual names or as “the respondents”. The respondents allege that Mr Du Toit’s evidence at the disciplinary proceedings contradicted his evidence in the Founding Affidavit in the main application herein. They allege that he did not conduct a proper investigation, that he and/or the SIU did not properly apply their minds to such of the evidence that was obtained during the investigation, and as such the investigation was flawed, affecting the veracity of the evidence upon which the SIU relies for the relief claimed in the main application. On these grounds, the respondents seek the dismissal of the main application with costs.

[41] A Case Management Meeting was held by the then President of the Tribunal, at which time frames were agreed upon between the parties and set. The papers in this application, which number approximately 960 pages (a large number of which being the transcripts of the disciplinary proceedings), were however, delivered to me many weeks later than they ought to have been, necessitating an enormous amount of time having to be spent on this matter. That said, a few preliminary observations are that only portions of the transcripts from the disciplinary proceedings were produced for the purposes of this application, the disciplinary proceedings had not been finalised at the time that this

application was launched, and seemingly the evidence of only three witnesses had been led at the time.

[42] The current allegations of Thenga and Makhado in this application, are examined against the background of what I have set out above in respect of Mr Du Toit's findings of irregularities, illegalities, lack of competitive, fair and transparent procurement processes and non- compliance with relevant legal procurement prescripts. The SIU assailed Ms Thenga's Founding Affidavit on the basis that she was not present at the disciplinary proceedings and could not, therefore, claim that the facts she deposed to are within her personal knowledge. The argument then goes that this would render the evidence she tenders, to be inadmissible hearsay evidence. Thenga did not attach signed confirmatory affidavits to the Founding Affidavit but did so in Reply. In any event the signed confirmatory affidavit of Mr Makhumisani does not advance the case of the respondents in respect of the core issue of the absence of proper procurement procedures being followed. He merely confirms that he has no connection to or personal relationship with these respondents.

[43] A perusal of the transcripts indicates that the versions of certain witnesses, still to be called, were put to Mr Du Toit, and it raises the question whether any conclusions can be drawn from Mr Du Toit's responses, without reference to the evidence of those witnesses. The Founding Affidavit attempts to show that Mr Du Toit conceded that his investigation was rushed, and that the conclusion should therefore be drawn that such investigation was

not thorough and therefore not credible. A reading of the transcripts does not support this conclusion which the respondents argue for. I also found that there were several instances where reference was made to part of Mr Du Toit's response, without reference to his entire response.

[44] I refer now to extracts from the transcripts which I mentioned above. In para 99.7 of the Founding Affidavit, Ms Thenga asserts that "*Mr Du Toit admitted that his investigation was rushed*" and, in this regard, referred to pages 10, 54 and 60 the transcript of 11 July 2023, in support of this assertion.

On p10, lines 5-10:, the questioning revolved around Mr Du Toit's (investigative) affidavit, where he was asked if there was a reason for his not dealing with facts chronologically in his affidavit. His response at lines 11-13, was "*Yes, it's the timeline that we have to do the investigation and the volumes of information that we received. I had to put that into a document as quickly as possible*"

P54: Mr du Toit's response is best understood in the context of the questions he was asked in relation to the extension of the panel of PSPs. It was put to him that Mr Tabane disputes that he asked for a panel extension. Mr Du Toit's evidence was that Mr Tabane failed and/or refused to make available the relevant documents in this regard. From line 16, the interaction between Adv T Govender and Mr Du Toit went thus:

"Adv T Govender: Okay. And if Mr Tabane wasn't cooperating with you, in providing those documents, you could have gone to the acting Head of Department. You could have requested those documents to other means not so.

Mr Cornelius Du Toit: Yes we could

Adv T Govender: But you didn't do that.

Mr Cornelius Du Toit: No, at that stage, we were comfortable in what we had. We had a lot of other hospitals to, to deal with. So we had to move on, we could not drag our feet during this time."

P60: The topic under discussion was the appointment of PSPs and the extension of the panel. Adv Govender put to Mr Du Toit that in connection with the appointment of the PSPs, the extension of the panel was a very important issue. The interaction starts at line 5:

"Mr Cornelius Du Toit: That's part of it not, the extension is not the whole crux of everything.

Adv T Govender: So what else is wrong with appointments of PSPs?

Mr Cornelius Du Toit: Its like I said (intervene)

Adv T Govender: We're talking about procurement.

Mr Cornelius Du Toit: Its like I said. They wanted a scope, so we said that the panel needed to know what exactly what they need to do. That was your words. That's how they got them to the panel. In this case, none of these people knew what they were supposed to do. So where's the scope? There isn't a scope.

Adv T Govender: We haven't even gotten there yet Mr Du Toit.

Mr Cornelius Du Toit: No but that's where it starts. That's why I'm saying, you can't eliminate part of it and then decide this part is much more important than that. It just doesn't work that way.

Adv T Govender: No, I agree with you. A lot of things in that investigation don't work. A lot of things in your affidavit don't work, but you say you were rushing."

[45] From the above exposition, it is clear that Mr Du Toit never admitted that his investigation affidavit was rushed, in the context of not including information that ought to have been included. Explaining that they had certain time frames in which they had to complete an investigation can, by no means, be interpreted to mean that there was admission that the report was rushed. On page 60, Adv Govender incorrectly remarks to Mr Du Toit that he said he was rushing. Another instance where the full context in which a response was given was not explained, is para 99.18 of the Founding Affidavit. Thenga asserted that Mr Du Toit and the investigating team failed to apply their minds objectively to information, to the extent that they even failed to identify the Head of Supply Chain Management. In support of this, reference was made to pages 84-88 of the transcript for 11 July 2023.

[46] A perusal of those pages reveals a lengthy exchange between Adv Govender and Mr Du Toit, in which she questioned him about who the Head of Supply Chain Management (SCM) was, referred him to certain correspondence bearing the name of a Ms Mahlango as Head of SCM. He acknowledged that Ms Mahlango's name so appears but explained that he was referred to Mr Tabane as the correct person to speak to. Mr Tabane in fact informed him that he (Mr Tabane) was the acting Chief Financial Officer (CFO) and Head of SCM, which Mr Du Toit accepted, especially as it was in fact Mr Tabane who signed off the appointment of PSPs. He was then accused of not conducting his investigation properly for not interviewing Ms Mahlango, even though her name appeared on the correspondence.

[47] The papers are replete with various such examples relating to various aspects of Mr Du Toit's investigations. From the above examples alone, it is evident that the so called inaccuracies do not go to the heart of the subject matter of the main application. An inaccurate citation of a person's position does not alter the identity of the person who is the *dramatis persona* involved in the irregularities and illegalities that were factually committed. Mr Tabane was clearly the person intrinsically involved in the appointment of the PSPs which was irregularly done. His refusal to cooperate in the investigations adds credence to Mr Du Toit's assertions that he accepted that Mr Tabane was the person to speak to in respect of the appointment of PSPs. Citing extracts out of context to bolster the respondents' contention that the investigation is flawed and unreliable, simply does not advance the case of Thenga and Makhado.

[48] In my view, none of the issues raised by Thenga and Makhado, relevant to the issues of lack of proper procurement processes, irregularities, and non-compliance with legislation amount to new evidence. Such of the inaccuracies or omissions that have been raised are of peripheral interest only, and do not, in my view go to the heart of SIU's case or vitiate the cogency of Mr Du Toit's investigations in respect of the real issues in the main application. For these reasons, I am not convinced that the application to introduce new evidence has any merit, or bears in any way upon the judgment in the main application. The application accordingly falls to be dismissed.

[49] For the various reasons set out in this judgment, my view is that the SIU has shown, on a balance of probabilities, that it is entitled to the relief it seeks in prayers 1 to 4 of the amended Notice of Motion. In the circumstances, the following orders are made:

49.1 The decisions taken by the fifteenth and sixteenth respondents to enter into lease agreements (the lease agreements) with the first and second respondents, in relation to the premises known as the Western Levels Deep Mine Hospital (the Hospital) and residence (collectively "the premises") are inconsistent with the Constitution of the Republic of South Africa, 1996 (the Constitution), are invalid and /or unlawful, and are reviewed and set aside;

49.2 The lease agreements and any extensions and/or addenda thereto, in relation to the premises are reviewed and set aside on the grounds that they are unconstitutional and/or illegal;

49.3 The decisions taken by the fifteenth and/or sixteenth respondents to appoint the third to fourteenth respondents as Professional Service Providers and/or Contractors, as the case may be, to provide services and/or perform works relating to the refurbishment and renovation of the Hospital are declared inconsistent with the Constitution and/or unlawful, and are hereby reviewed, declared invalid and set aside;

49.4 The appointments of the third to fourteenth respondents by the fifteenth and/or sixteenth respondents as well as any contracts or agreements entered into between them, in relation to the Hospital, are declared inconsistent with the Constitution and/or unlawful, and are declared invalid and set aside;

49.5 The subject matter of prayers 5 to 8 of the amended Notice of Motion are referred to trial. A Case Management Meeting is to be convened to determine the logistics, procedure, terms and date/s for trial;

49.6 The costs of this application, including the costs consequent upon the appointment of two counsel, are to be paid by the third to fourteenth respondents, the one paying the others to be absolved;

49.7 The application by the sixth respondent to file a Supplementary Answering Affidavit is granted;

49.8 The costs of the application referred to in 49.7 are to be paid by the sixth respondent;

49.9 The application by the seventh respondent to file a Supplementary Answering Affidavit is dismissed with costs;

49.10 The application by the tenth and thirteenth respondents to introduce new evidence is dismissed with costs, the one paying the other to be absolved.

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JUDGE S. NAIDOO

MEMBER OF THE SPECIAL TRIBUNAL

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Date of Hearing: 14 -17 November 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 18 February 2025*