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)

HELD VIRTUALLY

CASE NO: LP02/2023

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

05/09/2025

In the matter between:

THE SPECIAL INVESTIGATING UNIT **APPLICANT**

and

EASYWAY, TARMAC, PAVE AND PROJECTS CC **FIRST RESPONDENT**

GEORGE SEFAKO **SECOND RESPONDENT**

TRUST SEFAKO **THIRD RESPONDENT**

MOGALAKWENA LOCAL MUNICIPALITY **FOURTH RESPONDENT**

DIRECTOR GENERAL OF THE DEPARTMENT OF WATER AND SANITATION **FIFTH RESPONDENT**

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 05 September 2025 at 10:00.

JUDGMENT

Mashile J

Introduction

[1] The Applicant ("the SIU") seeks an order that the decision of the Fourth Respondent ("the Municipality") to award Tender No: 06-2017/2018 ("the Tender") to the First Respondent ("Easyway") be declared unconstitutionally invalid, reviewed and set aside. The application is founded on an alleged misrepresentation by Easyway that it had undertaken three projects valued over R50 Million at Marothobong in Nkangala District Municipality in 2013, Victor Khante Municipality in 2013 and Goven Mbeki Local Municipality in 2015. The application is opposed by Easyway alone on the grounds that I can only describe as obscure, except for one relating to disputes of fact.

[2] The SIU acknowledged that it launched the application late, considering that review applications brought under the principle of legality ought to be brought within a reasonable period. While the 1eighty-day period within which review applications brought

under legality ought to be launched, it is settled that once it exceeds the one hundred and eighty-day mark that is prescribed for reviews under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), an applicant may have to give a reasonable account why it could not have done so earlier.

[3] To that end, the SIU incorporated an application for condonation into its main application. The SIU did so despite the fact that Easyway did not raise the issue of the late launch of the application. In view of that fact, I consider it sufficient to state that I have perused and considered the reasons supplied by the SIU for the late launching of the application, and I am satisfied that it will be just and equitable to grant condonation against the background given by the SIU. Accordingly, I grant condonation as requested.

[4] Turning lastly to the issue that the Second and Third Respondents be directed to pay the amount claimed, I have perused the papers of the SIU and could not find any justification to direct the two Respondents to pay jointly and severally with Easyway. I am mindful that the SIU has joined them as co-respondents, but their joinder is meaningless if not accompanied by proper grounds justifying the lifting of the corporate veil of Easyway, especially in light of it being a close corporation. In the circumstances, an order that they, together with Easyway, are liable for the payment of the amount cannot succeed.

Factual Matrix

[5] On 13 October 2017, the Municipality advertised the tender for the supply, delivery, installation, and/or construction of borehole development, storage reservoirs, and bulk gravity supply pipelines. In response to the invitation to bid for the tender, the Municipality received thirty bid documents, including those that had come from Easyway. On 26 February 2018, the Municipality awarded the tender in the amount of R167 919 973.47 inclusive of Value Added Tax ("VAT") to Easyway. The parties ("Municipality and Easyway") subsequently entered into a contract for a period of 18 months, with the termination date set as 5 July 2020.

[6] On 5 March 2021, the President of the Republic of South Africa directed the SIU to investigate the allegations contemplated in Proclamation R180 of 2021 published in Government Gazette Number 44230 (“the Proclamation”). In terms of the Proclamation, the SIU was instructed to investigate, amongst others, the procurement of, or contracting for goods, works or services by or on behalf of the Municipality and payments made in respect thereof in a manner that was not fair, competitive, transparent, equitable, cost-effective, or in any way *ultra vires*.

[7] Following its investigation, the SIU found that the award of the tender to Easyway by the Municipality was characterised by irregularities. The scoring for functionality in the bid documents is divided into two categories – company experience under Tables A1 and A2. Under Table A1, the tender should mention five completed similar projects with a value greater than R50 million. Such projects will score 5 per project. The total score under this category will be 25. Insofar as Table A2 is concerned, the tenderer should have completed a similar project to the value greater than R100 million, which will score 25 or greater than R50 million, which will score 10.

[8] Easyway stated in its bid document that it had undertaken three projects valued above R50 Million, being (i) bulk water supply at Marothobong in Nkangala District Municipality in 2013, (ii) construction of a water retention system in Victor Khante Municipality in 2013, and (iii) construction of roads and stormwater in Embalenhle Extension for Goven Mbeki Local Municipality in 2015. Easyway has admitted these allegations in its answering affidavit.

[9] The SIU investigated the matter and laid bare the following in respect of Nkangala District Municipality and the Goven Mbeki Local Municipality: (i) Ms Magaret Skosana, Municipal Manager of the Nkangala Municipality, confirmed under oath that Easyway performed works valued at R6 109 569.45. Easyway has therefore overstated the amount by R50 867 571.05 in its bid documents. (ii) Ms Tshabalala, a director of community services within Govan Mbeki Municipality, confirmed under oath that the Municipality had

no record of the appointment of Easyway for a project named: Construction of Roads and Stormwater in Embalenhle Extension. Again, Easyway does not refute these averments.

[10] When investigating the matter, the SIU found that the Bid Evaluation Committee ("the BEC") provided scoring using summary evaluation criteria and did not record scoring utilising the sub-criteria recorded in the tender specifications. In light of the affidavits obtained from the Nkangala and Govan Mbeki Municipalities, the score allocated to Easyway should have been less than the 76.4 points. Had the points been adequately allocated by the BEC, Easyway would not have passed the 70% threshold. Additionally, ESOR Construction, one of the bidders, scored 88 points during the evaluation of the bids, whereas Easyway scored 76.4 points. While a deviation is permitted, the reasons for it ought to be accurately and adequately recorded by the bid committees, which they failed to do, in this instance. Easyway does not deny this but merely notes it in its reply to the founding affidavit.

[11] When the Municipality awarded the tender, Easyway was a contractor with a grading designation of 8CE PE. That meant that it was entitled to be awarded and to undertake a contract with a value of less than or equal to R130 000 000.00. If Easyway were to be allowed for a 15% reasonable excess, it would be entitled to be awarded and to undertake a contract valued at not more than R149 500 000.00. The Municipality awarded and Easyway accepted the tender offer of R167 919 973.47, which was R18 419 973.47 above the reasonable excess allowed for a contractor of Easyway's grading and approximately 29% above its allowed contract value.

[12] The award of the tender to Easyway occurred against the background of another tenderer, Lilithalethu Trading 41 ("Lilithalethu"), with a CIBD grading of 8CE PE, having submitted a bid in the amount of R109 263 952.32. The amount was within the allowed contract value for its grading designation and R58 656 021.15 lower than the tender awarded to Easyway.

[13] Like Easyway, Lilithalethu too participated in the bidding process for tender number 04-2017/2018. This was one of the tenders forming part of the Municipality's Bulk Water Master plan. As such, a similar scope of services was for boreholes and pipelines. Lilithalethu submitted noticeably similar documentation in support of its bid for tender 04-2017/2018 and was scored favourably during the evaluation of its bid for that tender. Lilithalethu received particularly favourable scores during the evaluation of its "company experience" and "value of projects". In evaluating the same criteria under the tender 06-2017/2018, Lilithalethu received a score of zero. As in many other instances in the answering affidavit of Easyway, this is not challenged at all.

Issues

[14] From the facts above, this Court is to decide whether:

14.1 Easyway secured its appointment by materially misrepresenting its working experience in its bid document, thus inducing the Municipality to believe that it was the qualified bidder;

14.2 The evaluation criteria were unfair as the BEC provided the scoring using the summary criteria and did not record the scoring utilising the sub-criteria using the tender specification;

14.3 Easyway's grading designation as per the Construction Industry Development Board ("CIDB") did not qualify for the contract value exceeding R150 000 000.00. The tender award of R167 919 973.47 to Easyway infringes the CIDB Regulations, in consequence of which it is unlawful;

14.4 Lilithalethu was unfairly disqualified from the procurement process as it had the same CIDB grading as Easyway and its tender amount was R109 263 952.32, which was R58 656 021.15 less than the tender awarded to Easyway; and

14.5 Having regard to all the above, this Tribunal should review and set aside the appointment and craft an appropriate remedy.

Legal Framework

[15] When dealing with the procurement of goods in the public sector, the Constitution of the Republic ("the Constitution") is the main source from which all others derive. Section 1 of the Constitution is premised on certain values, which include, amongst others, the supremacy of the Constitution and the rule of law. See, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*.[1] Equally, the doctrine of legality demands that the exercise of public power and functions conferred on an organ of state must be *intra vires,* applied in good faith, and be rational in both purpose and process. Non-observance of this by organs of state contravenes the doctrine of legality. See paragraph 59 of *Fedsure Life Assurance Ltd supra*.

[16] To the extent that one of the grounds upon which this review is based concern section 217(1) of the Constitution, it is useful to set out its provisions: "(1) 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 217 represents the primary basis of an organ of state's power to procure goods and services; consequently, its total observance is absolute.

[17] In paragraph 1 of *Minister of Social Development and Others v Phoenix Cash & Carry Pmb CC*,[2] the ourt stated that the law on procurement is prescriptive because the award of public tenders is notoriously prone to influence and manipulation. In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,[3] the Court said that the objective of section 217(1) of the Constitution is to eliminate fraud and corruption in a procurement process. This was echoed in *Allpay Consolidated Investment Holdings v CEO, South African Social Security Agency and Others*,[4] where the Court held that a supply chain

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[1] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC).
[2] *Minister of Social Development and Others v Phoenix Cash & Carry Pmb CC* [2007] 3 All SA 115 (SCA).
[3] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 33 to 35.
[4] *Allpay Consolidated Investment Holdings v CEO, South African Social Security Agency and Others (No.1)* 2014 (1) SA 604 (CC).

management system within an organ of state is required to comply with the Constitution and all pieces of legislation that are meant to give teeth to section 217.

[18] Similarly relevant to this matter are the provisions of section 195(1) of the Constitution, which provide as follows:

> "(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
> (a) A high standard of professional ethics must be promoted and maintained.
> (b) Efficient, economic and effective use of resources must be promoted.
> (c) Public administration must be development-oriented.
> (d) Services must be provided impartially, fairly, equitably and without bias.
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
> (f) Public administration must be accountable.
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
> (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated."

[19] The Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPFA") requires organs of state to implement a procurement policy by following a preference point system in respect of any "acceptable tender". An "acceptable tender" in turn is defined in section 1 of the said Act as being "...any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document." Section 2 of the PPPFA states that an organ of state must determine its preferential procurement policy and implement it within a prescribed framework.

[20] Item 5 of the Preferential Procurement Regulations, 2017 ("PPR") deals with tenders to be evaluated on functionality. It provides that:

20.1 An organ of state must state in the tender documents if the tender will be evaluated on functionality.

20.2 The evaluation criteria for measuring functionality must be objective.

20.3 The tender documents must specify:

20.3.1 the evaluation criteria for measuring functionality;

20.3.2 the points for each criterion and, if any, each sub criterion; and

20.3.3 the minimum qualifying score for functionality.

[21] Section 76(4)(c) of the Public Finance Management Act 1 of 1999 ("PFMA") empowers the National Treasury to issue instructions applicable to all institutions concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. In the same breath, section 111 of the Local Government: Municipal Finance Management Act 56 of 2003 ("MFMA") states that each Municipality must have and implement a Supply Chain Management Policy, which gives effect to the provisions and requirements of the Act. The provisions of section 217 of the Constitution have been replicated in section 112 of the MFMA.

[22] It was held in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa*[5] that organs of state are not expected to conclude a procurement contract which is inconsistent with the applicable legislation, and they are also not expected to enforce procurement contracts which are concluded in breach of the applicable legislation.

[23] Regulation 17 issued in terms of the Constructions Industry Development Board Act 38 of 2000 ("CIDBA Regulations"), a contractor is capable of undertaking contracts *subject* to the following grading:

23.1 A contractor with a grading designation of 7 (seven) is entitled to undertake a contract less than, or equal to R40 000 000;

23.2 A contractor with a grading designation of 8 (eight) is entitled to undertake a contract less than, or equal to R130 000 000;

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[5] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa* 2015 (5) SA 245 (CC) para 75.

23.3 A contractor with a grading designation of 9 (nine) is entitled to undertake a contract of any value.

[24] CIDBA requires the promotion and implementation of policies, programmes and projects focused on the support of the emerging enterprise sector. In giving effect to the CIDBA, Regulation 5 read together with Regulation 6 of the CIDBA Regulations provide for the development of the emerging enterprise sector and for a category of registration known as “a potentially emerging enterprise” (“PE”), the criteria for which are recorded in Regulation 13 of the CIDBA Regulations.

[25] As an emerging contractor, Easyway was entitled to a reasonable excess above the allowed contract value as provided for in Regulation 17(5), in terms of Regulation 25(7A) of the CIDBA Regulations. In the Construction Industry Development Board’s (“CIDB”) Inform Practice Note 3 issued in October 2020, the CIDB provided guidance on interpreting “reasonable” in the context of Regulation 25(7A). The CIDB’s guidance is that an excess of 10-15% would be considered reasonable, whereas 20% would not. It has become established that Regulation 25(8) provides for a PE to be awarded a contract value one level above its grading designation, *subject* to certain requirements and that Regulation 10 states that one that does not satisfy the relevant criteria must be rejected.

[26] According to the CIDB practice note, Regulation 25(8) may be invoked in circumstances where the Municipality:

26.1 Intends to ensure that financial management or other support is provided to the contractor, so that the contractor may be enabled to successfully execute the contract.

26.2 Is satisfied that the contractor has the potential to develop and qualify to be registered in a higher grading designation.

26.3 Creates an enabling environment by applying any of the following procurement models:

26.3.1 Direct Targeting Model wherein the Municipality intends to develop contractors within a Contractor Development Programme (CDP); and

26.3.2 Indirect Targeting Model wherein the Municipality intends to develop contractors through a Targeted Development Programme (TDP).

[27] The SIU has argued that Easyway conducted itself in a rather fraudulent manner when it misrepresented its grades, thereby inducing the Municipality to award the Tender to it, thinking that it was eligible for the appointment. In making the appointment, the Municipality did so to its detriment. I am mindful of the protestations of Easyway that what transpired did not amount to fraud. I must reject that approach. Even more absurd is the argument that the Municipality in fact failed to conduct due diligence and that had it done so, it would have verified the falsity of the information. The duty to furnish accurate information rested squarely on Easyway and not the Municipality, as Easyway would have this Tribunal believe.

[28] Turning to case authority, a fraud-contaminated transaction unravels everything. In this regard, it could be instructive to mention the English case of *Lazarus Estates Ltd v Beasley*[6] where Lord Denning had to answer the question whether a declaration could be challenged on the ground that it was false and fraudulent. Rejecting the approach that it could not be challenged in the Civil Courts at all, even though it was false and fraudulent, and that the landlords could recover and keep the increased rent even though it was obtained by fraud, he stated the following:

> "If this argument is correct, the landlords would profit greatly from their fraud. The increase in rent would pay the fine many times over. I cannot accede to this argument for a moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever."

[6] *Lazarus Estates Ltd v Beasley* [1956] 1 Q.B. 702; [1956] 1 All E.R 341.

[29] Recently, the above passage was quoted with approval in the case of *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others*.[7] Various Courts in this country have referred to the passage in the *Lazarus Estates* case *supra*. See in this regard, *Firstrand Bank Ltd t/a Rand Merchant Bank and another v Master of the High Court, Cape Town and others*.[8] There is thus no question that fraud, once pleaded and proved, will unravel everything and that the English approach has permeated our law.

Evaluation

Misrepresentation by Easyway

[30] When Easyway completed the bid documents, it knew that it had not undertaken three projects whose value was above R50 000 000.00, yet it expressly stated that it had done so and mentioned the projects as:

30.1 Bulk Water Supply at Marothobong in Nkangala District Municipality in 2013;

30.2 Construction of Water Retention System in Victor Khante Municipality in 2013; and

30.3 Construction of Roads and Stormwater in Embalenhle Extension for Goven Mbeki Local Municipality in 2015.

[31] The inaccuracy of the information in the bid documents of Easyway was exposed by the investigations of the SIU when Ms Margaret Skhosana, the Municipal Manager of the Nkangala District Municipality, disclosed that Easyway performed work valued at R6 109 569.45, which was far below the value claimed by Easyway. Similarly, the information that Easyway supplied in respect of Govan Mbeki was false, as Ms Tshabalala, Director of Community Services within Govan Mbeki Municipality, declared that the Municipality did not have any record of the appointment of Easyway for a project named: Construction of Roads and Stormwater in Embalenhle Extension. Easyway's assertion that Tshabalala did not state that it had not performed the works

[7] *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others* [2014] 2 All SA 493 (SCA) para 25.

[8] *Firstrand Bank Ltd t/a Rand Merchant Bank and another v Master of the High Court, Cape Town and others* [2014] 1 All SA 489 (WCC).

does not exclude the possibility that it did, is farcical. If Easyway did the work, who would have engaged its services without the authority of the Municipality?

[32] By supplying contract prices that were above the minimum required in the bid documents and engineering projects that never existed, Easyway has incontestably and deliberately misrepresented to the Municipality that it was a qualified bidder when it knew the converse to be correct. Moreover, Easyway does not in any manner contradict the evidence of the SIU, thus making fraud a matter of common cause. This Court must view fraud in this matter in the exact manner as did the Court in the *Esofranki* and the *FNB* matters. In the result, the Tender is unlawful and invalid.

Unfair Evaluation Criteria

[33] The SIU uncovered during its investigation of the matter that the BEC provided scoring using summary evaluation criteria and did not record scoring utilising the sub-criteria recorded in the tender specifications. Given this, the score allocated to Easyway in respect of Nkangala District and Govan Mbeki Municipalities would have been lower than the 76.4 points allocated. Had the BEC correctly allocated the points, Easyway would not have passed the 70% threshold because it would have received nothing in respect of the Govan Mbeki Municipality and far less than it did in the case of Nkangala.

[34] It is common cause that ESOR Construction, one of the bidders, scored 88 points, 11.6 points higher than Easyway, which scored 76.4. The bid committees were expected and obliged to accurately and adequately capture the reasons for departing from the rule that the party with the highest score would get the appointment. The Municipality cannot simply choose not to appoint ESOR Construction, as the bidder with the highest points, without any proper account. The conclusion that the evaluation was not fair, equitable or transparent and that the process constitutes non-observance of Regulation 4(4) of the PPR and section 112(1) of the MFMA read together with section 217 of the Constitution *supra* is inescapable and, as such, unlawful and invalid.

Inadequate CIDB Grading of Easyway

[35] Regulation 25(8) permits a PE to be awarded a contract value one level above its grading designation, subject to certain requirements. Regulation 10 provides that a contractor which does not satisfy the relevant criteria must be rejected. It is manifest from the facts of this matter that the Tender of R167 919 973.47 awarded to Easyway was by far out of the bracket of the amount of R130 000 000.00 intended for bidders of grade designation of 8CE PE, even if a 15% reasonable excess was allowed.

[36] The appointment of Easyway was, in the circumstances, unreasonable and, as such, unlawful because it did not qualify to undertake such work with a grade designation of 8CE PE. The evaluation of the bid of Easyway was contrary to Regulation 4(4) of the PPR issued in terms of PPPFA and section 112(1) of the MFMA. The resultant contract and expenditure arising from the award could not have been free of irregularities. The award also violated the provisions of the CIDBA Regulations. These irregularities have rendered the award unconstitutional, unlawful and invalid.

[37] The assertion that the award does not infringe any law, notwithstanding that Easyway was designated grade 8CE PE, stands to fail, especially as it is made in the face of legislative provisions to the contrary. There is a rationale behind those legislative provisions. Appointing a small and inexperienced bidder may not only turn out financially disastrous but may also pose risks to limbs and lives. This becomes more pronounced in circumstances where the Municipality does not have CDP or TDP because it means that Easyway could not have been ready to undertake a project of the magnitude assigned to it. Besides, it leads to gratuitous challenges to awards, which ultimately protract completion of projects and implementation. The communities whose poor living circumstances and experiences these projects are meant to improve continue to live under hardship.

The Unfair Disqualification of Lilithalethu

[38] Like Easyway, Lilithalethu had a CIDB grading designation of 8CE PE. It also submitted a bid in the amount of R109 263 952.32, which was within the allowed contract value for its grading designation and R58 656 021.15 less than the tender awarded to Easyway. Lilithalethu also participated in the bidding process for tender number 04-2017/2018. This was one of the tenders forming part of the Municipality's Bulk Water Master plan. As such, a similar scope of services was for boreholes and pipelines.

[39] The Municipality has to date not proffered an account of its allocation of zero points to Lilithalethu when evaluating the same criteria under Tender No. 06-2017/2018. This is particularly confounding because Lilithalethu had submitted bid documents noticeably like those of Easyway in support of its bid for tender 04-2017/2018 and was scored favourably during the evaluation of its bid for that tender, receiving particularly promising scores during the evaluation of its company experience and value of projects. This differentiation is therefore unfair, non-transparent and in direct contravention of section 217 of the Constitution, rendering the appointment of Easyway unlawful and invalid.

Declaration of Invalidity

[40] Section 172 of the Constitution is entitled: "Powers of Courts in constitutional matters" and provides:

> "When deciding a constitutional matter within its power, a court –
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including –
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[41] I have already stated the consequences of municipalities making the wrong appointment and how devastating such an action can be on the communities the projects

are meant to benefit. In this matter, the contract has been terminated and needless to state, the project is hopelessly behind schedule, the amount initially set aside for the project has distended and the community remains disadvantaged. Due to the outcome at the end of this case, I deem it unnecessary to explore the reasons for the termination of the contract. In short, the award should not have been made in the first place and no contract should have been concluded between the Municipality and Easyway.

[42] Against the above background and as expected in terms of section 172(1)(a) of the Constitution, I am constrained to declare the award of the bid to Easyway unconstitutional, unlawful and invalid. In doing so, I am following in the footsteps of *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*[9] where the Constitutional Court held that:

> "[52] We concluded earlier that, in awarding the DoD agreement, SITA acted contrary to the dictates of the Constitution. Section 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution. The award of the contract thus falls to be declared invalid."

Just and Equitable Remedy

[43] The SIU seeks relief that once the SIU has declared the award of the Tender and the resultant contract to Easyway invalid, reviewed and set aside, the Tribunal must direct Easyway, the Second and the Third Respondents to forthwith pay to the SIU an amount of R68 866 908.88 together with interest reckoned from the date of service of its application to the date of payment, alternatively, within thirty days from the date of the order of this Tribunal. In the alternative to the aforesaid payment, it seeks relief that this Tribunal should, in terms of section 8(2)(b) of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("SIU Act"), order that:

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[9] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC) para 52.

43.1 Easyway is ordered to, within 30 (thirty) days of this order, provide the parties with the Audited Financial Statements, invoices and/or any supporting documents regarding their income and expenses for the period in question.
43.2 The SIU must, within 60 (sixty) days of receipt of the documents referred to in 43.1 above, inform Easyway of the amount relating to the profit that must be paid back to it.
43.3 If a dispute arises regarding the amount to be paid by Easyway, the matter may be re-enrolled for a determination by this Tribunal.
43.4 The parties may approach this Tribunal for directives on any issue regarding the orders sought herein.

[44] The SIU contends that, in view of the unchallenged evidence of fraud, it will be proper that Easyway be ordered to return all the profits that it has derived from the contract. The justification for the return of the ill-gotten spoils is that fraud, effectively in an unfair and non-transparent manner, has excluded the other competitors in the selection process. Moreover, adds the SIU, Easyway cannot claim innocence here because CIDBA Regulations and the PPR are generally known or should be known to seasoned tenderers who are not unfamiliar with these tender processes and the laws applicable to them.

[45] I am at a complete loss on the claim of Easyway that there is a dispute of fact arising from the different amounts that either side claims it is owed by the other. In my view and on the facts of this matter, no disputes of fact can occur. The reason for that is that the award and the subsequent conclusion of the contract by the parties were vitiated by fraud executed against the Municipality by Easyway. If I must accept, as I am bound, that fraud unravels everything, all the events that happened following the conclusion of the contract cannot claim legitimacy from an unlawful contract. In these circumstances, therefore, the Plascon Evans Rule does not arise at all. If it were to arise, it would be between the Municipality and Easyway and not between the SIU and Easyway.

[46] The above is what the Court in *North-West Provincial Government and Another v Tswaing Consulting CC and Others*[10] conveyed when it held that:

> "[21] Evasion of this sort could not serve to raise a dispute of fact impeding the province's claim to repayment. Once the province established the fraud, and its entitlement to rescind the contract, it became entitled to repayment in the absence of evidence affording a basis for a finding that restitution would be unjust. That could only have come from Tswaing, which could have set out the work it did, its expenditures, the value delivered and the services rendered under the contract. It failed to do so. Instead, it sought refuge in a bare denial of the province's claim that it had added 'no or very little value' to the roads project, and an evasion of all the other relevant allegations.
>
> [22] It must follow that no factual basis existed for denying the province the equitable remedy of restitution. Justice requires that Tswaing be ordered to repay what it received in consequence of the fraud. If it is entitled to recompense for unjust enrichment against the province, it is free to establish that claim in appropriate proceedings."

[47] The only just and equitable order in these circumstances is for Easyway to return the whole amount that it received because of fraud. As in the case of the *Tswaing Consulting CC* case above, if Easyway has an unjust enrichment claim against the Municipality, it is at liberty to pursue that claim by initiating fresh proceedings. Accordingly, and in my view, an order to return the whole amount paid would be inappropriate where one of the parties or both were culpable, in which event it would be just and equitable for Easyway to be directed to return the profit it had made under the contract, it being of no moment that Easyway was innocent. By the commission of the fraud, Easyway has made its bed and must lie on it.

[48] Everything considered, I am constrained to make the following order:

1. The SIU's delay in the launching of this application is condoned;

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[10] *North-West Provincial Government and Another v Tswaing Consulting CC and Others* [2006] ZASCA 108; [2007] 2 All SA 365 (SCA); 2007 (4) SA 452 (SCA) paras 21 and 22;

2. The decision of the Municipality to award the Tender to Easyway, which it communicated on 26 February 2018, is declared unlawful and invalid, and it is hereby reviewed and set aside;

3. The contract entered into between Easyway and the Municipality in terms of the Tender and any expenditure incurred in terms thereof is declared invalid and set aside;

4. Easyway is directed to pay to the SIU an amount of R68 866 908.88 together with interest thereon at the prescribed legal rate reckoned from the date hereof to the date of payment;

5. Easyway is liable to the SIU for costs occasioned by this application;

6. The costs mentioned above shall include those of two Counsel, where applicable.

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B A MASHILE
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

Counsel for the Applicant:	Adv MB Lecoge SC
	Adv ST Seshoka
Instructed by:	State Attorney, Pretoria
Counsel for the Respondents:	Adv D Mukosi
	Adv LM Moloi
Instructed by:	Kabai Attorneys
Date of Judgment:	05 September 2025