IN THE SPECIAL TRIBUNAL

[REPUBLIC OF SOUTH AFRICA]

(Held at the High Court, Gauteng Division, Pretoria)

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED: YES/~~NO~~

SIGNATURE 10/12/2020 DATE

~~DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT~~
SPECIAL TRIBUNAL
CNR AMANDA AVENUE & RIFLE RANGE ROAD, OAKDENE
2020 -12- 10
C/A No: One
~~REGISTRAR~~

CASE NO: GP 07/2020

In the matter between:

SPECIAL INVESTIGATING UNIT	Applicant
and	
LEDLA STRUCTURAL DEVELOPMENT (PTY) LTD	First Respondent
K MANUFACTURING AND SUPPLY (PTY) LTD	Second Respondent
MEDIWASTE PACKAGING (PTY) LTD	Third Respondent
ATTURO TYRES (PTY) LTD	Fourth Respondent
BLSM SERVICE (PTY) LTD	Fifth Respondent
VIVID SIGHTS PROJECTS (PTY) LTD	Sixth Respondent
PNE GRAPHICS CC	Seventh Respondent
MAELA DISTRIBUTORS AND PROJECTS CC	Eighth Respondent
ATLAND CHEMICALS CC	Ninth Respondent

PHM HOLDINGS (PTY) LTD	Tenth Respondent
NUTRI K (PTY) LTD	Eleventh Respondent
LLOYD MTHOBEKI	Twelfth Respondent
RHULANI MBOWENI LEHONG	Thirteenth Respondent
KGODISHO NORMAN LEHONG	Fourteenth Respondent
HALLMANN WORLDWIDE LOGISTICS (PTY) LTD	Fifteenth Respondent
DOUBLE CLICK BTC (PTY) LTD	Sixteenth Respondent
SKYLINE CONTRACTORS (PTY) LTD	Seventeenth Respondent
HOME VISION PROJECTS (PTY) LTD	Eighteenth Respondent
XC LOGIC (PTY) LTD	Nineteenth Respondent
RONEN BARASHI	Twentieth Respondent
YUCHANG XIAO	Twenty First Respondent
MPHO MAFENYANE	Twenty Second Respondent
XINGYU PLASTIC RECYCLING (PTY) LTD	Twenty Third Respondent
MORTZ MARKETING ENTERPRISE CC	Twenty Fourth Respondent
INJEMO ENGINEERING AND PLASTIC PRODUCTS (PTY) LTD	Twenty Fifth Respondent
BUHLE WASTE (PTY) LTD	Twenty Sixth Respondent
API PROPERTY GROUP (PTY) LTD	Twenty Seventh Respondent
SASOL SOUTH AFRICA LIMITED	Twenty Eighth Respondent
MUTASA TOOK AND DIE ENGINEERING (PTY) LTD	Twenty Ninth Respondent
EMPIRU (PTY) LTD	Thirtieth Respondent
BOXLEE (PTY) LTD	Thirty First Respondent
YONGLIAN LIN	Thirty Second Respondent
MAPITI AARON MALOPA	Thirty third respondent
JONATHAN MAAKE	Thirty Fourth Respondent

JAMAC TECHNOLOGICAL CC	Thirty Fifth Respondent
MANIKENSIS INVESTMENTS 6 (PTY) LTD	Thirty Sixth Respondent
ANGELIC JULIANA GROENEWALD	Thirty Seventh Respondent
MICHAEL GERAD ROFAIL	Thirty Eighth Respondent
PATRICK JOHN KALIL	Thirty Ninth Respondent
ROYAL BHACA (PTY) LTD	Fortieth Respondent
MEC: GAUTENG DEPARTMENT OF HEALTH	Forty-First Respondent
MANTSU KABELO LEHLOENYA	Forty-Second Respondent
GOVERNMENT EMPLOYEES' PENSION FUND	Forty-Third Respondent
GOVERNMENT PENSIONS ADMINSRATION AGENCY	Forty- Fourth Respondent

Date of hearing: 20 November 2020

Date of judgment: 10 December 2020

JUDGMENT

MOTHLE J

Introduction

[1] On 19 August 2020 the Special Investigating Unit *("SIU")* launched an *ex parte* urgent application before the Special Tribunal *("Tribunal")*, wherein it sought as interim relief, three specific orders. The first order was for the cancellation of a contract unlawfully awarded by the Gauteng Provincial Department of Health *("the Department")*. It was awarded to Ledla Structural Development (Pty) Limited *("Ledla")*, cited as the first respondent.

[2] Secondly, the preservation of specified amounts of money held in various banks by thirty-nine respondents, which monies were distributed to these respondents by Ledla. Ledla had received a payment of more than R38,758,155.00 from the Department in terms of the unlawful contract. The SIU prayed for an order that the amounts in the banks be preserved, with a view to have them declared forfeited to the State as the proceeds of unlawful activity.

[3] Thirdly, a request for an interdict, prohibiting the Government Employees Pension Fund, the forty-third respondent, and the Government Pensions Administration Agency, the forty-fourth respondent, from releasing the moneys held as pension and retirement benefits due to the former Chief Finance Officer, Mantsu Kabelo Lehloenya *("Ms. Lehloenya")*, pending the outcome of an already instituted action in the Tribunal.

[4] The Tribunal granted the interim order in the form of a *rule nisi*, calling upon all respondents to show cause on a return date, why the interim order should not be made a final order. Some of the respondents filed opposing affidavits while others notified the SIU that they will abide the outcome of the proceedings. This judgment is the outcome of the return date of the *rule nisi* on the interim order.

Background

[5] In March 2020, the Republic of South Africa, was caught by the wave of the coronavirus *("Covid-19")* global pandemic. It became necessary therefore for the Government to begin preparations for a state of readiness, to combat Covid-19. One of the aspects of this preparation was the need to procure additional hospital beds, ventilators, primary health care sanitizers, masks and personal protection equipment *("PPE")* for health workers.

[6] On 15 March 2020, the Government of the Republic of South Africa declared a National State of Disaster in terms of section 27 of the Disaster Management Act, 2002. the declaration was effected after South Africa had experienced an increasing number of patients diagnosed with Covid-19. The procurement of medical sanitizers and PPE was delegated to the Provincial Governments' Health Departments, including the Gauteng Health Department. Ms. Lehloenya was appointed as chairperson of the Bid Adjudication Committee to be in charge of the procurement for the Department.

[7] For reasons of exigency, deviations from compliance with the normal tender processes, were authorised and the Department did not issue tenders, but received bids from individuals and businesses. One of the entities to submit a bid was Royal Bhaca (Pty) Limited *("Royal Bhaca"),* the fortieth respondent, and a company whose sole director was Mr. Thandisizwe Diko *("Mr. Diko"),* a close family friend to Dr. Bandile Masuku, then a Member of the Executive Council *("MEC")* for Health in the Gauteng Government. Mr. Diko presented two bids on 30 and 31 March 2020, to supply masks, disposable bags and sanitizers to the Department and secured two contracts to the value of R125,000,000.00. When this fact became public knowledge, Mr. Diko proposed to cancel the contract and substitute Royal Bhaca with another company, Gimtato Trading, owned by a close family friend. This intended substitute by Gimtato did not materialise. As the evidence demonstrated, Ledla became the substitute instead.

[8] The President of the Republic of South Africa, acting in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996 *("the Act"),* issued a proclamation[1] authorising the SIU to investigate acts of mal-administration, corruption and breaches of procurement procedures relating to Covid-19, as well as take remedial action of recovering any losses of public money belonging to the State institutions.

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[1] Proclamation R 23 of 2020, Published in the Government Gazette No 43545 of 23 July 2020, and amended by Proclamation R 29 of 2020, Published in the Government Gazette No.43681 of 3 September 2020.

[9] On 3 August 2020, the Department made an electronic payment of an amount of R38,758,155.00 into Ledla's bank account. Upon receipt of this amount and on the same day, Ledla transferred a large portion of the amount into various bank accounts belonging to the second to fourteenth respondents, in different amounts. The disbursements of the funds in Ledla's bank account were directed by Mr. Sangoni, who was neither a director or employee of Ledla. He is a cousin and a family member of Mr. Diko's wife. On 3 August 2020, K Manufacturing, the second respondent, received an amount of R16,500,000.00 into its bank account and were directed by Mr. Sangoni to transfer R8,500,000.00 from the R16,500,000.00, to his company Zakheni Strategic Solutions (Pty) Limited. From the remaining R8 million, K Manufacturing, again on the same date 3 August 2020, distributed various amounts to 5 companies and 3 individuals, the fifteenth to twenty-second respondents.

[10] The third respondent, Mediwaste Packaging (Pty) Limited received R3,470,000.00 from Ledla on 3 August 2020. On the following day, 4 August 2020, Mediwaste transferred various amounts to the bank accounts of 9 business entities and 3 individuals, cited as twenty-third to thirty-fourth respondents.

[11] Atturo Tyers (Pty) Limited cited as the fourth respondent, also received R1,426,000.00 from Ledla on 3 August 2020 and also distributed part of it on 3 and 4 August 2020, in various amounts into the bank accounts of 3 individuals and 2 business entities, cited as thirty-fifth to thirty-ninth respondents.

[12] Between 3 and 5 August 2020, Ledla also directly paid into the bank accounts, in various amounts, to business entities and individuals cited as fifth to fourteenth respondents.

[13] With the exception of Mr. Sangoni's Zakheni company which was not cited in the application, all the respondents that received part of the R38,758,155.00 within the rapid distribution trail from Ledla between 3 to 5 August 2020, had their bank accounts subjected to the preservation order, to the extent of the amount received. In order to recover the loss of the amount paid by the Department, the SIU sought as relief, the forfeiture to the State, of the moneys held in the banking accounts under the preservation order.

[14] The SIU investigation identified Ms. Lehloenya as being central to the Department awarding the unlawful contract and authorising the payment of R38,758,155.00 to Ledla. Ms. Lehloenya belatedly filed an answering affidavit opposing the interdict against payment of her pension and retirement benefits. In her affidavit, she implicates the Premier, the MEC and the Head of Department as the officials who provided the names of individuals and entities whose bids she received. She further denies being involved in the payment of R38,758,155.00 to Ledla on 3 August 2020, in that by that date she had already left the Department, having resigned on 1 May 2020.

[15] As will be demonstrated later in this judgment, Ms. Lehloenya's affidavit introduces disputes of fact between her and Ms. Thandy Pino *("Ms. Pino")* the newly appointed Chief Director: Supply Chain and Asset Management. She had commenced her duties in that position on 25 March 2020. Ms. Lehloenya is cited as a defendant in the pending action proceedings. For the purposes of this application, it suffices to consider whether an official or officials in the Department concluded a contract with Ledla and paid R38,758,155.00, unlawfully.

The Issues to be decided

[16] There were three issues to be decided in this case. First, whether the contract entered into between Ledla and the Department as well as the subsequent payment of R38,758,155.00 to Ledla should be reviewed, set

aside and cancelled as being unlawful. Secondly, that the payment of R38,758,155.00 received and distributed by Ledla, be declared as proceeds of unlawful activity and be forfeit to the State. Thirdly, whether the interdict issued prohibiting the payment of the pension and retirement benefits of Ms. Lehloenya, should be extended, pending the finalisation of the civil trial. I turn to deal with each of these issues.

The Ledla contract and payment of R38.7 million.

[17] The law relating to government procurement of goods and services has its foundation in section 217(1) of the Constitution of the Republic of South Africa, 1996. The section provides:

'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.'

[18] The declaration of the state of disaster was followed by the publication of Regulations[2] to contain the Covid-19 Pandemic. Regulation 9(1) provided that the emergency procurement for State Institutions shall be subject to the provisions of the Public Finance Management Act, 1 of 1999 (PFMA) and the applicable emergency provisions in the Regulations and instructions made under section 76 of the PMFA[3].

[19] The National and Provincial Treasury issued instruction Notes to Provinces to direct the procurement of Covid-19 items. The Treasury Notes emphasised the adherence to PFMA. In particular, on 20 May 2020, Treasury Note 5 was amended to provide *'Update of Price List and Supplier List'*. Permission was granted to State institutions to approach any other suppliers to obtain quotes and to procure from such suppliers, subject to the following conditions; firstly, that the items to be acquired were to be in terms of the

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[2] Regulations were published in the Government Gazette No. 43107 of 18 March 2020.
[3] *Ibid.*

specifications determined by the National Department of Health; secondly, that the prices were to be equal or lower than the prices listed in Annexure "A" attached to Treasury Note 8, Treasury Note 5 and amended Treasury Note 5; and thirdly, that the supplier is registered in the Central Supplier Data Base.

[20] According to the evidence, on 30 March 2020, Royal Bhaca submitted a quote to the Department for the supply of one million Bio Hazard Health Care Boxes at R40.00 per box, as well as for one million Bio-Hazard Health Care Disposable Bags Plain Red at R7.00 per bag. The value of the contract was R47,000,000.00. The Department awarded the contract on the same terms of the quotation as they were, on the same day.

[21] On 31 March 2020, the very next day after having been awarded the first contract, Royal Bhaca submitted another quote for the supply of 500 000 N95 Masks, at a price of R62.00 per mask, and 500 000 x 500ml Hand Sanitisers at R95.00 per bottle. The total value of the quotation was R78,750,000.00. The following day on 1 April 2020, the Department issued the second letter of commitment, accepting the terms of the quotation as they were submitted.

[22] Both quotations were accepted in writing through letters of commitment signed by Ms. Pino. When she signed the first letter of commitment on 30 March 2020, Ms. Pino was on her fifth day in that position, having commenced duty on 25 March 2020.In her position as Head of Supply Chain, Ms. Pino had delegated authority to award a contract with a total value not exceeding R30,000.00. Both contracts were in excess of that amount.

[23] In her affidavit, Ms Pino alleged that it was Ms. Lehloenya who invited the suppliers by email and telephone, to submit bids. Some were not registered on the Department's data base as goods or service providers. Ms Pino further alleged that Ms. Lehloenya instructed the staff to assist the bidders to meet the qualification requirements, she alleged further that it was Ms. Lehloenya who instructed her to sign Royal Bhaca's letters of

commitment, after Ms. Lehloenya had told her that *'the MEC wants his people'.*

[24] Ms. Lehloenya denied the allegation that she said *'the MEC wants his people.'* She alleged in her affidavit that she had been appointed the chairperson of the Bid Adjudication Committee and placed in charge of the procurement for the Covid-19. Ms. Lehloenya further alleged that she received the names of the suppliers from the Premier, the MEC and the Head of the Department.

[25] Mr. Jonathan Maake *("Mr. Maake"),* the Managing Director of Mediwaste, both cited as the thirty-fourth and the third respondents respectively, alleged in his affidavit that on 3 April 2020, he was approached by Mr Norman Lehong *("Mr. Lehong")* and Ms Rhulani Mboweni-Lehong *("Ms Mboweni-Lehong")* as representatives of Royal Bhaca. They placed orders for supply of disposable bags and health care boxes. Mediwaste charged R0.75 a bag, which came to R750,000.00 for one million bags. As already stated, Royal Bhaca had quoted the Department R7.00 per bag which totals R7,000,000.00 for one million bags, resulting in a profit of R6,250,000.00 from the provincial government funds. The Department agreed to the amount of R7.00 per bag, as opposed to the R0.75 market value, an amount almost ten times the price.

[26] Mr. Maake further alleged in the affidavit that the representatives of Royal Bhaca, in his presence, phoned Mr. Diko and requested him to pay the deposit of R90 000.00 required by Mediwaste, which he did. The bags were delivered to Royal Bhaca.

[27] On 4 April 2020, Mr. Diko attended personally to Mediwaste offices to arrange for the payment of the balance. It was at the same meeting that Mr. Diko proposed a partnership between Royal Bhaca and Mediwaste, to be capitalised by obtaining a capital loan of R30,000,000.00, from the Industrial Development Corporation *("IDC").* However, Mr. Lehong suggested to Mr.

Maake that the R30,000,000.00 would be split among them, where-after Mediwaste would '*be run down*' and apply for bankruptcy. The proposal for partnership, which Mr. Maake at that time allegedly rejected, was later followed up by Mr. Diko through exchange of emails.

[28] On 30 April 2020, the day before she resigned, Ms. Lehloenya cancelled the contracts of Royal Bhaca with the Department. At that time, Mr. Lehong, on behalf of Royal Bhaca, had already arranged delivery of the bags and boxes from Mediwaste to the Department. On cancellation of the Royal Bhaca contracts, Mr. Diko informed the Department to accept the already delivered goods as a donation.

[29] Prior to the cancellation of the two Royal Bhaca contracts, on 30 April 2020, Ms. Lehloenya had on 13 April 2020, received a quotation from Ledla. According to the SIU, '*the analysis of the data imaged from Ms. Lehloenya's device indicated that the same quotation was created by Mr. Diko and modified by Ms. Lehloenya.*' The quotation was for the supply of Masks: FFP2; Masks: N95; Hand Sanitizers Bottle spray; Boxes of Bio-Hazard Health Care 1421 and Bio-Hazard Health Care Disposable Bags Plain Red, all for a total of R139,000,000.00. Ms. Lehloenya accepted the quotation on behalf of the Department, by sending a letter of commitment, attached to an email dated 20 April 2020 and addressed to *Mr. Diko* and not Ledla, and referred to as *"amended commitment letter*". The quotation submitted by Ledla was partly identical in content to the Royal Bhaca quotes.

[30] Ms. Mboweni Lehong and Mr. Lehong who were respectively cited as thirteenth and fourteenth respondents, were directors of Ledla and also acted as representatives of Royal Bhaca. They approached Mr. Maake again on behalf of Ledla to place orders for the items on the contract. The balance on the orders of Royal Bhaca after the R90,000.00 deposit, was paid by Ledla. The evidence thus presented, proves that there was a link between Royal Bhaca and Ledla. In essence, Ledla became a substitute to Royal Bhaca in the amended contract and a proxy to Mr. Diko.

[31] *Messrs* Diko and Lehong as well as Ms. Mboweni-Lehong were acting in concert with officials of the Department to supply Covid 19 items at inflated prices. in these proceedings, Mr. Diko never filed an affidavit on behalf of Royal Bhaca or himself, to dispute the allegations. The SIU contends, which is not disputed, that when the award of the two contracts to Royal Bhaca became public knowledge, Mr. Diko colluded with officials of the Department to substitute Royal Bhaca, with Ledla, by way of an amended contract, to stay in business with the Department.

[32] The prices quoted by Royal Bhaca and later Ledla, were far in access of the maximum prices regulated in terms of Annexure "A" of the Treasury Note 8 and Treasury Note 5. There is no evidence that the one or more or all the senior Department officials made attempts to negotiate with the bidders to bargain for cost-effective prices from those quoted in the bids. Quotations were acceptance on the same terms, with no evidence of meetings to evaluate and adjudicate. The critical stage to ascertain information relating to costs of production of goods from manufacturers or market prices from retailers supplying the goods, was never undertaken.

[33] The contracts awarded to Royal Bhaca and Ledla were thus not transparent, competitive and cost effective. They were not acquired in terms of the prescripts of section 217 of the Constitution, the PFMA and the Regulations thereof as directed by the National and Provincial Treasury. The award was not compliant with the system of delegation of authority in respect of the limits to the extent of amounts authorised to be procured. Ledla was not registered on the central data base of suppliers of medical goods. Thus its substitute to Royal Bhaca occurred in a corrupt manner, with at least one Department official being involved.

[34] It is thus the finding of the Tribunal, on the basis of the aforementioned reasons, that the conduct of one or more or all of the senior officials of the Department involved in the procurement of Covid-19 items, acting in concert

with Mr. Diko in awarding the two contracts to Royal Bhaca and one to Ledla,, was unlawful as contemplated in sections 2(2)(a),(b),(c),(d) and (e) of the Act[4].

[35] Consequently, the Ledla contract falls to be reviewed, set aside and cancelled on the grounds of illegality.

Interdict against payment of Ms. Lehloenya's pension and retirement benefit

[36] The SIU applied for and was granted an interim interdict, prohibiting the Government pension fund from paying the pension and retirement benefits of Ms. Lehloenya, pending action proceedings, which I was informed, had already been instituted on 10 August 2020 under case no GP 11/2020, before the Tribunal.

[37] The order for interim interdict was granted mainly because there was documentary evidence of record, which implicates the former CFO, specifically in the award of the Ledla contract. That evidence records that on 20 and 30 April 2020, before she left the Department, Ms. Lehloenya wrote two emails to Mr. Diko. The second email dated 30 April 2020 at 06h33, with the subject "*Cancellation of orders*" read:

'Dear Mr Diko

Kindly note that the attached commitment letters have been cancelled by the Gauteng Department of Health.

Regards

Kabelo'

[38] In the first email dated 20 April 2020, she wrote to Mr. Diko, informing him about the acceptance of the quotation submitted by Ledla, which she

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[4] "(2) ...(a) serious maladministration in connection with the affairs of any State institution; (b) improper or unlawful conduct by employees of any State institution; (c) unlawful appropriation or expenditure of public money or property; (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property; and (e) intentional or negligent loss of public money or damage to public property.

referred to as "*the amended letter of commitment*". The significance of this email is two-fold. Firstly, it was the first commitment letter to Ledla and could therefore not have been an amendment to a previous non-existent one. What was the amendment for, who initiated and effected it and why are some of the questions confronting Ms. Lehloenya.? Secondly, why was the email addressed and directed to Mr. Diko, who on record was not part of Ledla? Similarly, why was the email not addressed to the directors of Ledla? These were but some of the questions from the documentary evidence begging for answers from Ms. Lehloenya.

[39] At the hearing, Ms. Lehloenya's counsel submitted that the interim interdict should be dismissed as the SIU had not disclosed in the *ex parte* application that Ms. Lehloenya had resigned her employment with the Department, and could thus not have been responsible for the payment of R38 758 155.00 on 3 August 2020 to Ledla. I agree that this information was not disclosed to the Tribunal. However, I do not consider such to be fatal to the granting of the interdict. The interdict was granted mainly on her alleged role in the award of the unlawful contract to Ledla. That contract became the basis of authority for the payment of R38 7538 155.00 to Ledla. It should also be recalled that prior to her award of the contract to Ledla on 20 April 2020, Ms. Lehloenya, had been communicating with Ms. Pino in a series of emails. One such email, is dated 6 April 2020 sent at 16h22 by Ms. Pino to the Head of Department, the Chief Operations Officer and to Ms. Lehloenya. In that email, Ms. Pino raised her concern about the Department's non-compliance with Covid-19 procurement.

[40] As regards to the issues raised, such as the obvious dispute of fact between her version and that of Ms. Pino, and the interpretation of the provisions of the pension and retirement conditions, I have no doubt that those could be appropriately dealt with at the trial. What is before me is a plea to extend the interim interdict to be considered and dealt with at trial. I see no reason why I should not grant the order of extension. Either than that, I make no finding against her.

Forfeiture of the amounts under preservation order

[41] The Ledla contract, falling to be reviewed and set aside, the payment of R38,758,155.00 by the Department to Ledla is declared proceeds of an unlawful contract. The SIU in terms of rule 26 of the Tribunal rules, requested that these proceeds be declared forfeit to the State. In support of this request, the SIU contended, on authority of *Ex parte: National Director of Public Prosecutions v Bank of Baroda [2018] ZAFSHC 100* that a party found in possession of part of the proceeds held subject to a preservation order, for whatever reason, should forfeit to the State that portion received.

[42] The relief sought by SIU that money under the preservation order should be forfeit to the State was strenuously objected by the respondents. The grounds of attack by the respondents focused on Preservation orders and Forfeiture orders as respectively stated in Rules 24 and 26 of the Tribunal rules. The grounds of the legal attacks were that: Rule 26 cannot create substantive law; the Tribunal is not a court; the Tribunal had no jurisdiction to decide on a review; the SIU lacked *locus standi;* the SIU can only investigate and file reports; the principle of *Commixtio* and the interpretation of Rule 26 as formulated, before and after its amendment. I turn to deal with these objections.

Overview of the SIU and Special Tribunal Act

[43] There is no doubt in my mind that the SIU and Special Tribunal Act as it stands, fails to make the ranks of the most elegantly drafted legal instruments. That being said, the Act is *sui generis* in that it traverses legal principles in the fields of labour or employment relations; civil disputes and criminal activity; dealing with acts of malfeasance and corruption. That appears in the grounds mentioned in section 2(2).

[44] The Act establishes two separate and independent-functioning structures. Section 2(1)(a) empowers the President to establish a Special Investigating Unit to investigate matters in section 2(2); and in terms of section 2(1)(b) to establish one or more Special Tribunals to adjudicate upon justiciable civil disputes, emanating from any investigation by any particular SIU.

[45] Considering the Act as a whole, its purpose conveys a clear intent to assist in the prevention and combating of corrupt activities by State employees and other persons. It provides for a mechanism to speedily recover or mitigate cases of loss of public money or damage to property of State institutions, arising from unlawful activity or corrupt activities, through civil proceedings.

Is a Tribunal a court of Law?

[46] The *Special* Tribunal is unique and *sui generis*. The Tribunal has a limited jurisdiction over civil disputes arising from the investigations conducted by SIU within the ambit of section 2(2). It is presided by judicial officers who are empowered to adjudicate in civil disputes and make orders (as opposed to recommendations) that are binding; having legal effect and executable within the Republic of South Africa. It is not named as such but it performs the functions of a civil court.

[47] Unlike the tribunals and commissions generally, whose decisions are either appealable or reviewable by the High Court presided by a single Judge, in terms of section 8(7) of the Act, a decision of the Tribunal is appealable to the *full court* on the same basis as a decision of a Division of a single Judge in the High Court. In effect, apart from the fact that it is not named as a court, and does not have appellate jurisdiction from the magistrate court, it would fit the description of a court as contemplated in section 166(e) of the

Constitution. Section 166(e) names the various courts in the order of hierarchy, and in sub-(e) provides:

'any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or Magistrate Courts.'

Does Rule 26 create substantive law? Does the Tribunal have jurisdiction to adjudicate reviews?

[48] The Rules of court are intended to regulate court processes. They are not meant to establish a cause of action. It was thus incorrect, in my view, for the SIU to rely on Rule 26 as their cause of action. The Act and the Regulations are however, a different matter. The grounds of investigation listed in section 2(2) of the Act provide the cause of action. In this instance, is section2(2)(b)(c)(d) and (e). The Minister of Justice and Correctional Services, acting in terms of section 11 of the Act, is authorised to make *'regulations regarding any matter not in conflict with the Act.'* The Regulations, in adumbration to the Act, do create substantive law on the basis of which relief can be sought in the form of a specific motion or action procedure.

[49] In 2019, the Minister published the Regulations.[5] Regulation 5 deals with the ordinary meaning and scope of the civil proceedings in the Act. In particular, that reference to civil proceedings in the Act, '*shall include'* and may be instituted '*for any relief for the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by a state institution.'*[6] Therefore, the usual causes of action applicable in the civil proceedings in the High Court apply, but limited to the grounds stated in section2(2) of the Act The Regulation 5 lists the various forms of relief that may be sought. These forms of relief are restraint orders; preservation orders; forfeiture orders; declaratory and interdict orders. The cause of action and appropriate relief are instituted in court procedurally, either by motion or action proceedings.

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[5] Regulations No. 42729 published in the Government Gazette of 26 September 2019.
[6] See section 2 (2) (e) intentional or negligent loss of public money or damage to public property.

[50] The list of orders in Regulation 5 is inclusive rather than exclusive. It is to be construed as additional relief envisaged within the meaning of civil proceedings, thus the review and setting aside of unlawful conduct or activity, though not specifically referred to in Regulation 5, is not excluded when a proper meaning is ascribed to 'civil proceedings', provided that such relief would arise from investigations conducted in terms of section 2(2).[7] The review and setting aside of an improper or unlawful conduct by employees of any State institution, arising out of the investigation in section 2(2) of the Act, is competent relief that may be sought within the meaning of *'civil proceedings'* in the Regulations.

Does the SIU have locus standi?

[51] In instituting civil proceedings, the SIU is not acting on behalf of or as an agent of a State institution, but in its own right. Section 5(5) of the Act provides:

'A special investigating unit may institute civil proceedings in a special tribunal if, arising from its investigation, it has obtained evidence substantiating any allegation contemplated in Section 2(2).'[8]

[52] The Regulations also expatiates on the functions and *locus standi* of the SIU as provided for in section 4(1)(b) and (c) of the Act, to specify the relief or remedy through institution of civil proceedings, which would include recovery of the loss of public moneys or damage to the property of the State. The SIU may institute civil proceedings in its own right and title, against employees of a State institution. There is thus no merit in the contention that the SIU does not have *locus standi* to institute any civil proceedings before the Tribunal.

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[7] Other civil proceedings such as those for liquidation or insolvency; or actions for divorces or recovery of damages to personal injury are not envisaged in section 2 (2) of the Act and would thus be *ultra vires* the Tribunal.

[8] Section 2(2) refers to the limited grounds upon which an investigation can be conducted as itemised in paragraphs A to G inclusive.

Is the SIU only confined to investigate and file reports?

[53] Each investigation conducted by the SIU is preceded by the President issuing a proclamation identifying the object of the investigation or category of areas of investigations, where he has reason to believe that any of the grounds listed under Section 2 exists. The SIU does not investigate to gather information or evidence for statistic or data purposes. It has been established to contribute to the prevention and combating of corruption through recovery of losses of public money and property of the State.

[54] The SIU, as with the Constitutional Chapter Nine State Institutions, is also enjoined by its Act to account to Parliament for the performance of its mandate and report on administrative matters which includes the issues of finances. The SIU does not conduct investigation and compile evidence solely for the purposes of reporting.

The commixtio principle.

[55] Some respondents raised the principle of *commixtio a*s part of their defence. The respondents took the point that the SIU case should be dismissed, for the reason that SIU sought to preserve *money in the bank accounts* as opposed to the *rights, title and interests* of bank account holders.

[56] In *Trustees, Estate Whitehead v Dumas 2013 (3) SA 331 (SCA*) at 13, the Court explained the commixtio principle as follows:

'Generally, where money is deposited into a bank account of an account- holder, it mixes with other money and, by virtue of commixtio, becomes the property of the bank regardless of the circumstances in which the deposit was made or by whom it was made'

[57] It seems to me that apart from salaries that may have been paid by cheque to some respondents, the transfers of the larger amounts of money

into various accounts in this case occurred through direct bank to bank and account to account transfers. Such amounts were to the credit of the receiving respondents, giving rise to the right, title and interest therein.

[58] In *National Director of Public Prosecutions*[9], the Court expressed a view that:

'It is clear that the credit balance of a criminal's bank account may be frozen or preserved even if the funds deposited therein consist of so-called clean and dirty (or tainted) money.'

[59] I agree with this conclusion. By requesting an order for the preservation of specified moneys held by the respondents in various bank accounts could only mean the rights, title and interest of the account-holders in this context. Failure to state that it is the rights, title and interest that is preserved is not fatal to the SIU case.

Interpretation of Rule 26 of the Tribunal rules.

[60] Rule 26 deals with the forfeiture to the State, of the proceeds of unlawful activity. This rule concerned most of the respondents who were recipients of the distributed money that was paid to Ledla. Rule 26 is linked to rule 24 which provides for the preservation of property.

[61] Rule 26 originally[10] provided thus:

"**Forfeiture orders.** At the conclusion of the proceedings and on final determination of the dispute, depending on the outcome on the unlawful activities of the respondent or the defendant, as the case may be, the Tribunal shall make a final order for forfeiture to the State, of the property held under a restraint order or property preservation order where a respondent has been found to have partook in unlawful activities."[11]

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[9] Ex parte: National Director of Public Prosecutions [2018] ZAFSHC 100 at para 53.
[10] Published in the Government Gazette No 42783 of 18 October 2019.
[11] This Rule is one of the Rules that was amended recently and published on 25 August 2020, after the proceedings have been instituted. The amended Rules take effect from 25 August 2020 and consequently the new Rules would not be applicable to this case.

[56] For the record, after the amendment it read:

"Forfeiture orders. At the conclusion of the proceedings and on a final determination of the dispute, depending on the outcome on the unlawful activities of *the* respondent or *the* defendant, as the case may be, the Tribunal *may* make a final order for forfeiture to the State, of the property held under a *preservation* order or *interdict* order where *the* respondent has been found to have *participated* in unlawful activities." Words in *italics* are substitutes from the original text.

[62] The original Rule 26 was published in October 2019, a month after the publication of Regulation 5. Its language was peremptory, by the use of the word *shall.* The text was thus inconsistent with Regulation 5.3 which provides that the Tribunal *may* grant forfeiture as relief. As demonstrated by the authorities referred to further in this judgment, the original text advocated for arbitrary deprivation of property and would not survive Constitutional scrutiny. It had to be amended. Similarly, as to the linguistic argument raised on *the* respondent as opposed to *a* respondent; the former refers to the perpetrator, while the latter includes also the accomplice and accessory after the fact.

[63] Chapter 6 Parts 2 and 3, of the *Prevention of Organised Crime Act 121 of 1998 ("POCA"),* provides the procedure for civil recovery of property. Part 2 deals with the Preservation of Property, and Part 3 Forfeiture of Property. These powers are exercised by National Director of Public Prosecution ("NDPP"), who may seek an order for the preservation of property that has been declared an instrument of criminality or proceeds of unlawful activity. The NDPP may thereafter obtain an order declaring the preserved property, forfeit to the State. Rules 24 and 26 of the Tribunal respectively, mirror these provisions in POCA.

[64] *In Mohunram v National Director of Public Prosecutions (Law Review Project as amicus curiae) (2007) ZACC 4 (CC) at 120,* the Constitutional Court stated:

'Civil asset forfeiture constitutes a serious incursion into well- entrenched civil protections particularly those against arbitrary and excessive punishment and against arbitrary confiscation of property. Courts in this country and elsewhere have generally been astute to the fact that forfeiture of the instrumentalities of crime can produce arbitrary and unjust consequences.'

[65] The same Court recently expressed the rationale for the forfeiture mechanism in the *National Director of Public Prosecutions v Botha N.O. and another 2020 (1) SACR 599 (CC)* where *at para 27*, the Constitutional Court held:

'POCA seeks to establish a civil mechanism to forfeit wrongfully gained property. The rationale is, in essence, that no one should profit from their own wrong'.

[66] It would not fall outside the realm of possibilities and even probabilities in a given case, that those involved in corrupt activities would rapidly dissipate illegally obtained funds through transfers to a network of bank accounts held by others. either for value or with a view to retrieve such funds later. In that sense, the SIU in following the distribution or laundering trail would be the logical and correct procedure to prevent the disappearance of the public monies or property.

[67] However, it would also be reasonable to expect that not everyone who comes into possession of such funds through deposits in the bank accounts, would be part of a conspiracy to corruption. It may well be that the funds are transferred into another bank account as part of a *bona fide* lawful business activity. In dealing with forfeiture of property to the State, the Tribunal has to be mindful of striking the delicate balance between the two scenarios.

[68] In *Botha at 79*, the Constitutional Court stated as follows:

'. . .A proportionality analysis ensures that the ordering of forfeiture does not amount to an arbitrary deprivation of property. Clearly, arbitrariness is broader than just proportionality. This Court stated in FNB, and affirmed in Shopright Checkers, that a deprivation of property is arbitrary when the law does not provide sufficient reason for the deprivation or when it is procedurally unfair. A forfeiture order that is disproportionate will, in short, be arbitrary. The point was well put, in this context by the Supreme Court of Appeal in the following terms: "it is indeed the purpose of the proportionality enquiry to avoid arbitrary deprivation of property and to ameliorate the potentially unjust consequences that could follow if the forfeiture is grossly disproportional to the offence."'

[69] The SIU approached this case on the notion[12] that once property, in this case money from a State institution, has been declared proceeds of unlawful activity, any person or entity found in possession of such property, regardless whether it was acquired lawfully, must forfeit such property to the State. Predictably, this approach generated a lot of heat during the hearing, on the basis that it is arbitrary and offends the Constitutional right against arbitrary deprivation of property as expressed by the Constitutional Court in *Mohunram* and in *Botha* quoted above.

[70] In *Botha at 108 and 10*9, The Constitutional Court stated further thus:

'If the person opposing forfeiture persuades the High Court that forfeiture should not be granted, it should not grant the order. Where that person establishes the she has legally acquired interest for consideration in the proceeds of unlawful activities, the court may exclude such interest in the operation of the forfeiture order.
It is evident from the scheme emerging from sections 48-52 of POCA that proceeds of unlawful activities may be forfeited to the state unless a party opposing forfeiture has legally acquired them for consideration. If the acquisition occurred after January 1999, she must also show that she did not know or had no reasonable grounds to suspect that the property in which she acquired interest was the proceeds of unlawful activities.'

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[12] Supposedly from their reading and understanding of the view expressed in NDPP v Bank of Baroda supra.

[71] It all comes down to the *"innocent owner"* defence as formulated by the Constitutional Court in *NDPP and another v Mohamed N.O. and others 2003 (5) BCLR 476 (CC) at 18* where the Court stated:

'At the forfeiture stage of the proceedings, an owner (bank-holder or recipient of the money) can claim that he or she acquired an interest in the property in question legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in the offence.'

[72] The Constitutional Court approach in *Botha* and *Mohamed* are instructive. As regards to the respondents in this case, I have to be persuaded that: (a) each respondent who had money deposited or transferred into his/her bank account, acquired the right, title and interest to the money in the bank account legally; (b) that the acquisition was for value; and (c) the respondent neither knew nor had reasonable grounds to suspect that the money was proceeds of unlawful activity. With that in mind, I turn to consider the case of each respondent in the order in which they were cited and where applicable, together with another co-respondents opposing the application as a collective.

Ledla Structural Development, R Lehong and K N Lehong

[73] Ledla alleges that after receiving R38,758,155.00 from the Department, it paid R16,500,00.00 to K Manufacturing under the mistaken impression that K Manufacturing had delivered items to it on credit as a result of K Manufacturing's relationship with Mr. Sangoni. The version continues to state that it had a loan agreement with Mr. Sangoni in the amount of R8,000,000.00. The loan had to be paid to his company from the R16,500,000.00 it had already paid K Manufacturing.

[74] In support of this version, Ledla attached an agreement without Mr. Sangoni's signature but no affidavit from Mr. Sangoni, confirming this version.

The agreement is in the name of BaPhalane Ba Mantsere Investment Holdings, of which Mr. Sangoni is neither a director nor authorised representative for the purported loan of R20,000,000.00 to Ledla. Further K Manufacturing paid out R8,000,000.00 of the R16,500,000.00 to Zakheni, a company of which Mr. Sangoni is the director, not to BaPhalane Ba Mantsere investment holdings.

[75] Ledla's version of events in seeking to explain the payments is not persuasive. Firstly, there was no business relationship between Ledla and K Manufacturing. Why pay such a huge amount to an entity which you have no business with? Secondly, Ledla presented as evidence justifying the payment, being for a loan debt of R20 000 000.00 arising from an agreement with Ba-Phalane Ba Mantshere Investment. The loan was purportedly received from Mr. Sangoni who it turns out is neither a director nor a representative of Ba-Phalane Ba Mantshere Investment. Third, instructions as to how the payment of R16,500,000.00 to K. Manufacturing was to be dealt with, came from Mr. Sangoni and not Ledla.

[76] **Ledla and its Directors failed to dispute Mr. Maake's affidavit concerning Mr. Diko's attempt to forge a partnership to defraud IDC; failed to explain how they were offered a bid when they were not on the Central Data Base for Supply of medical goods and inflated their prices as a proxy to Mr. Diko. I am thus not persuaded that (a) Ledla and its directors acquired R38,758,155.00 lawfully from an unlawful contract in whose award it was complicit, (b) that it acquired the amount for value; and (c) that being complicit, it and its directors did not know that the amount was proceeds of an unlawful activity. I conclude that Ledla's preserved amounts in the bank and those of its directors must be forfeit to the State.**

K Manufacturing, Hellman Worldwide Logistics, R Barashi and M Mafenyane

[77] K manufacturing's version is that on 3 August 2020, it received R16,500,000.00 from Ledla. This amount was not due and no such payment was expected from Ledla, since the Ledla had no business with K. Manufacturing.

[78] The deponent further avers: "in hindsight, I realised that Mr. Sangoni (and Ledla) used K Manufacturing for this payment as Ledla should have paid Zakheni (Sangoni's company) for the financing of the N95 masks of 15 July 2020. Instead he used us as apparently, he wanted to distance himself from Ledla, presumably because Ledla had become exposed in the media.

[79] K Manufacturing is implicated in distributing funds received with its account from Ledla, with no link between the two companies. Ledla did not place orders with K Manufacturing. It is bizarre that as a company it would receive instructions from Mr. Sangoni who holds no position in it, to transfer R8,000,000.00 to his company. The balance of R8,500,000.00 was paid in various amounts to fifteenth to twenty-second respondents, whose confirmatory affidavits were submitted much later.

[80] K Manufacturing does not submit an affidavit of Mr. Sangoni. It failed to persuade me that there was any consideration of value to Ledla or lawful business relationships with Ledla that gave rise to the transactions from the other service providers. The rapid manner by which the money was laundered from The Department to Ledla and from Ledla to K Manufacturing and from K Manufacturing to eight entities all on the same day, 3 August 2020, calls for clarification as to when were agreements reached, orders placed and delivery effected. For the record, K Manufacturing alleged that there was no balance left in its bank account, of the R16,500,000.00 received from Ledla.

[81] **On its own version, K Manufacturing allowed itself as an independent company to be used to launder money. It distances itself from knowledge of any illegality on the laundering of money and is unable to prove any value or consideration it received. K manufacturing should have reasonably suspected, there and then when R16,500,000.00 landed in their bank account, not on hindsight, that Mr. Sangoni is using them and Ledla to launder money, which was proceeds of unlawful activity. I conclude that K manufacturing's preserved amount in the bank must be forfeit to the State.**

Mediwaste Packaging (Pty) Ltd; Injemo Engineering and Plastic Products; Buhle Waste (Pty) Ltd; Mutasa Tool and Die Engineering; Mapiti Molopa and Jonathan Maake.

[82] Mediwaste alleges that it supplied goods and services to Ledla in the ordinary course of its business and was subsequently paid R3,471,333.22. The funds were received in good faith and in circumstance where there was no reasonable basis to know or suspect that funds were proceeds of unlawful activities. Mediwaste disbursed most of the amounts to about eleven respondents and loaned an amount o R2,000,000.00 to Buhle Waste.

[83] If there was any respondent who was aware or ought to have been aware of unlawful activity by directors of Ledla, is Madiwaste. The affidavit of Mr. Maake alluded to earlier in this judgment, indicated that Mr. Diko and Mr. Lehong attempted to lure Mediwaste in a scheme to defraud the IDC and to inflate its prices. Being aware of the motive of the directors of Ledla, Mediwaste nevertheless went into business with Ledla.

[84] **Mediwaste and its director should have desisted from conducting business with persons who proposed fraud and requested inflated prices. I am not persuaded that Mediwaste and its director had no reasonable basis to suspect that the money received was proceeds of**

an unlawful activity. I conclude that Mediwaste and Mr. Maake's evidence must be analysed for determination of prices charged.

Atturo Tyers (Pty) Ltd; Michael Gerard Rofail

[85] On 3 August 2020, Atturo Tyers (Pty) Ltd ("Atturo") received payment from Ledla in the amount of R1,425,900.00. According to Atturo, there was a business of purchase and sale conducted between itself and Ledla as follows;

1. On 6 April 2020 a group of individuals attended at our client's shop (21 Herman Road, Meadowdale to view our client's stock of empty PET bottles. As a result, they purchased 5280 x empty 500ml PET nozzle spray bottles. They sent a truck and trailer to collect the bottles.

2. On 8 April 2020 a group from Ledla Structural Developments returned to the shop to purchase more bottles. They informed me that they were buying them to fill with sanitizer. They were invoiced for 1300 x 500ml PET nozzle spray bottles. They sent their truck and trailer to collect bottles.

3. On 18 April 2020, representatives from Ledla Structural Developments returned to buy more bottles as well as 150 x 3ply masks. Our client had no knowledge that any of the representatives from Ledla Structural Developments had any dealings and/or connections with Government.

4. On 29 May 2020 Rhulani returned to the shop for a further purchase of 2000 litres of sanitizer. She requested our client to invoice Ledla Structural Developments. She took collection of the sanitizer same day.

5. On 2 June 2020 Rhulani returned to purchase more sanitizer, 2000 litre. In addition, she ordered 1x foot pump dispenser and 10000 x Nikki FFP2 Masks. These were invoiced to Ledla Structural Developments and collected between 2 June 2020 and 4 June 2020.

6. On 9 June 2020 100000 x Disposable Respirator FFP2 Masks were invoiced to Ledla Structural Developments.

7. It was at this time that Rhulani requested our client to begin production to supply 20000 units of 500ml bottled sanitizer per week. She dropped off stickers at the shop with the name "Ledla Structural Developments" to use as labels on the bottled sanitizer. By this stage, Atturo had outlaid large sums of capital to increase production of sanitizer as well as purchase bottles, trigger sprays, FFP2 Masks and Packaging for the order for Ledla Structural Developments.

8. On 25 June 2020 1000 x 500ml bottled sanitizers were invoiced to Ledla Structural Developments as well as 10000 x 3ply Surgical masks and 40 x boxes of Latex gloves. A further 20 000 bottles of 500ml sanitizers with spray nozzles was invoiced to Ledla Structural Developments.

9. On 26 June 2020 we had the 20 000 bottles prepared and packaged in boxes, ready for collection. The truck was only able to carry 12 pallets (with 1000 x bottles per pallet.

[86] Atturo attached invoices for these services as proof. The problem with these services is that on record, Ledla lodged its quotation to the Department on 13 April 2020. The *"amended letter of commitment"*, awarding Ledla the contract was sent to Mr. Diko on 20 April 2020, the day before Ms. Lehloenya resigned. How could Ledla have made orders to Atturo prior to being provided the contract and for almost 4 months without effecting any payment, only to pay from money that came on 3 August 2020. **I am thus unable, without cross referencing, to make a determination on Atturo's evidence.**

BLSM Services (Pty) Ltd

[87] BLSM Services (Pty) Limited is an accounting and tax consultancy firm contacted by Ledla to render accounting and tax consultancy services such as registration of UIF and acquiring tax clearances. Ledla paid an amount of R18,080.00 on 3 August 2020 for accounting and tax services rendered. The amount paid was an outstanding balance due, for services rendered from April 2020 to July 2020.

[88] This transaction does not arise from the supply of Covid-19 goods to the Department. It is a service to Ledla. It meets with the criteria set by the Constitutional Court and appears to be legal and of value. **I am persuaded that the amount was received legally and for value. There is no evidence that the BLSM services knew that the amount received was proceeds of an unlawful activity. The preservation order is discharged and the amount is released.**

Maela Distributors and Projects.

[89] Maela was approached in April 2020 by Rhulani Lehong, on behalf of Ledla, to supply sanitizers to GDOH. Maela procured a large quantity of sanitizer which it delivered to GDOH's nominated warehouses. Maela supplied the sanitizers which it had undertaken to supply at appropriate price. Maela contends that there is no allegation that it was aware of, or participated in, any unlawful activity, overpricing, collusion or the like.

[90] **Maela Distributors' evidence is not properly presented.**

Sasol South Africa Limited

[91] Sasol is responsible for the production and sale of the Sasol Base Chemicals (SBC) polyolefin grades products, which are used *inter alia* in manufacturing packaging materials and containers. The final Sasol products produced for sale to the market are in the form of small pellets (a few millimetres in diameter). The final product pellets are sold packaged in different package modes, primarily in 25 kg quantities in bags. This is also what Mediwaste purchased.

[92] On 4 August 2020, Mediwaste placed an order for goods. Sasol generated a *pro forma* invoice on the same day and Mediwaste made the payment into the Sasol. account against the pro forma invoice and provided

SBC's Finance Department with proof of payment. The invoice for product order was generated by SPD on 5 August 2020 and delivery of the product was made by SPD to Mediwaste.

[93] The product ordered, paid for and collected by Mediwaste was 1.375 tons of Polypropylene Copolymer CRV648 25kg bags, which was priced at the going rate quoted to all SPD's customers. **It seems to me that the transaction was legal and for value. There is further no evidence that Sasol knew or ought to have known that Ledla was involved in an unlawful contract. I am persuaded that Sasol has made out a case to justify the release of the preserved amounts. I conclude that the rule nisi on the preservation order against Sasol should be discharged and the funds released.**

Empiru (Pty) Ltd

[94] Empiru alleged that neither has the SIU requested it to account for any alleged suspicious business transactions, in particular the transaction that led to the payment of R73,936.95 by the Mediwaste into the Empiru's bank account.

[95] Mediwaste is still liable to Empiru in the amount of R19 811-80 which is outstanding, due and payable.

[96] Empiru has no knowledge of the business transactions concluded by the Mediwaste. Empiru testified thus: "What I know and submit is that the Thirtieth Respondent sold products it manufactures to the Third Respondent."

[97] **The evidence of Empiru does not indicate in what business do they trade, what products they sold and at what price. Further, there is no indication as to the stock they allegedly supplied, was duly delivered. I refer to forensic analysis.**

Boxlee

[98] Boxlee specialises in the manufacture, supply and delivery of corrugated packaging products, including medical waste boxes on a large scale. Products are manufactured, supplied and delivered by Boxlee on an ad hoc basis. Boxlee was registered during 1998. It showed a turnover for the financial year ending 29 February 2020 of R346,063,821.00; a profit before taxation of R5,539,648.00 and a net profit of R4,869,170.00.

[99] Boxlee has been one of Mediwaste's clients since 25 July 2018. Mediwaste enjoys a 60-day payment from statement account and has ordered products from Boxlee which has been invoiced in the sum of R4,102,085.75 (VAT Inclusive) since the opening of Mediwaste's trading account. As at 16 September 2020, Mediwaste was indebted to Boxlee in the sum of R1,289,460.22.

[100] On 4 August 2020, Mediwaste transferred a sum of R114,390.40 into Boxlee's account, which account was opened on 10 February 2003 and has a credit facility of R40,000,000.00. Mediwaste ordered corrugated packaging from Boxlee. In addition to the payment of R114,390.40 on 5 August 2020, a further amount of R86,063.86 was made to Boxlee on 28 August 2020.

[101] Boxlee charged Mediwaste in terms of a price list which was published on 1 October 2019. Boxlee's price list remains fixed for a period of 12 months. All the relevant products prior to and after the so-called Ledla order were priced at R6.81 per 50 litre box. Everything Boxlee supplied to Mediwaste (whether or not it concerned the Ledla contract) was supplied in terms of an arm's length transactions at a market related price. Boxlee gave value for the R114,390.40.

[102] **Of all entities, Boxlee presented a defence that fully complies with the approach of the Constitutional Court. It stated, with reference to documentation, the history of trade between itself and Mediwaste from**

as far back as 2018, before the global pandemic to date. I am persuaded that Boxlee made out a case justifying the discharge of the rule nisi and the release of the funds from the preservation order.

[103] The respondents' cases are in three categories. The first category is of the respondents who succeeded to persuade me that the money they received in their banking accounts was acquired lawfully and for value. These are **BLSM Services; Sasol and Boxlee; The 3 respondents who received salaries less than R 4 600.00. They are Angelic Juliana Groenewald; Mpho Mfenyane and Loyd Mothobeki.**

[104] The second category is that of the affected respondents who allege that they acquired the money lawfully and for value, but were only able to provide some random source documents which require analysis, cross reference and reconciliation by a forensic accountant. These are **Atturo Tyers; Michael Rofail**; **Helmann Worldwide Logistics; Home vision Projects; Skyline Contractors; Ronen Barashi; XL Logic; Double Click; Yuchang Xiao. IPI Property Group; Mapiti Malopa; Xingyu Plastic Recycling; Yonglian Lin; Injemo Engineering; Motz Marketing Enterprise; Empiru; Mutasa Tool and Die; J Maake; Manikensis Investments; Patrick John Kalil; Atland Chemicals; Nutri K; Vivid Sights; PHM Holdings and Maela distributors and Projects**

[105] The third category cases are those of the respondents who failed to persuade me that they did not know or reasonably did not suspect that the money was proceeds of unlawful activity. These are **Ledla and its directors, R Lehong-Mboweni and N Lehong and K Manufacturing.**

The remaining respondents

[106] Prior to the hearing, the SIU withdrew their case against Buhle Waste (Pty) Ltd cited as twenty- sixth respondent and Jamac Technological CC, cited as thirty-fifth respondent.

Conclusion

[107] The forfeiture of property to the State is a form of relief which the Tribunal, as with the courts, is enjoined by section 172(1)(b) of the Constitution to make any order that is just and equitable[13]. Of the respondents stated above, few were able to persuade me and met the minimum threshold of the required defence. For others, the affected respondents, the general contention was that they supplied some items of value for which they were accordingly compensated. In order for the Tribunal make a determination whether the money was legally acquired and for value, the Tribunal will require a forensic accountant report only on the affected respondents.

[108] The forensic report must be based **only** on the documentary evidence on record in this application and analysed and narrated sequentially, with reference to the following information: Analysing and referencing each transaction relating to the payment received by each respondent as to dates, items/goods and amounts in each transaction. Most importantly, determining the difference between the market price and the amount charged by each respondent as well as the prices recommended by Treasury and attached to the Treasury Notes, for the relevant goods delivered. This forensic report must be compiled by an independent forensic accountant firm and only in respect of the affected respondents.

[109] Pending the submission of the forensic report by the forensic accountant not later than 15 January 2021, the *rule nisi* on the preservation

[13] Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others 2014 (1) SA 604 (CC) at para56.

order concerning the bank accounts of the affected respondents will be extended to Tuesday 26 January 2021 for judgment. The report will be distributed to the affected respondents for written comment and submission, if any to be delivered by email not later than Friday 22 January 2021 to the Tribunal.

Costs

[110] The costs will follow the result in each case.

In the premises I make the following order:

1. The contract for supply of goods dated 20 April 2020 and awarded to the first respondent by the Gauteng Department of Health, is reviewed, set aside and cancelled; The first respondent is ordered to pay the costs of the applicant, including the costs of two counsel.

2. The order for interim interdict dated 20 August 2020, prohibiting the Government Employees' Pension Fund and Government Pensions Administration Agency from payment of pension and retirement benefits due to the forty-second respondent, is extended, pending the finalisation of the action proceedings under case number GP/11/2020 in the Special Tribunal; the forty-second respondent is ordered to pay the costs only of the applicant, including the costs of two counsel;

3. As to the rule nisi on preservation orders dated 20 August 2020 and granted against the respondents it is ordered:
   (a) As against the **fifth, twelfth; twenty-second twenty-eighth; thirty–first; and thirty-seventh** respondents, the rule nisi is discharged and the preservation order is dismissed. The amounts held by the respondents in the bank accounts as preserved are released; The applicant is ordered to pay the

costs of each of these respondents including costs of counsel where applicable.

(b) As against the **first; second; thirteenth and fourteenth** respondents, the rule nisi is confirmed and the amounts in the banking accounts of these respondents are declared forfeit to the State; These respondents are ordered to pay to the applicant the costs including the costs of two counsel;

(c) As against the following affected respondents: **third; fourth; sixth; seventh; eighth; ninth; tenth; eleventh; fifteenth; sixteenth; seventeenth; eighteenth; nineteenth; twentieth; twenty-first. twenty-third; twenty-fourth; twenty-fifth; twenty-seventh; twenty-ninth; thirtieth; thirty-second; thirty-third; thirty fourth; thirty-sixth; thirty-eighth; and thirty-ninth respondents**

it is ordered that

(c1) The SIU, at its costs, shall not later than 22 December 2020, appoint from the list of service providers to the Auditor General, a firm of forensic accounting services, to prepare a forensic report for submission to the Tribunal not later than 15 January 2020, on the following terms and conditions:

(i) Analyse and reconcile the source documents including the invoices and delivery notes issued and attached as evidence in this application separately by each of the affected respondents listed in (c) above, as against the amounts received between 3 and 5 August 2020 from either Ledla Structural Development, and/or the second; third or fourth respondent., and

(ii) Determine the difference between the prices charged by each of the affected respondents for the goods sold, to the market prices then, as well as the recommended price list attached to the Treasury Notes and marked annexure "A";

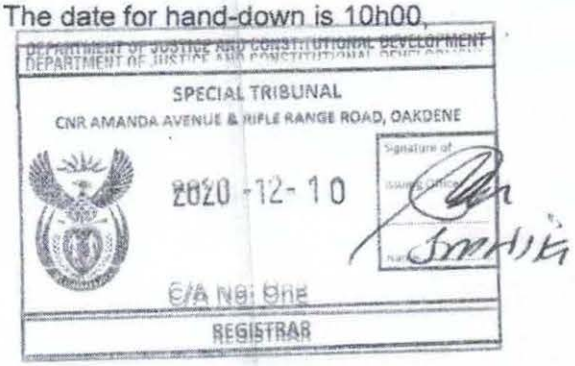
(c2) Upon receipt of the forensic accountant report and on 16 January 2021, the affected respondents shall receive a copy thereof for comment only to be delivered to the Tribunal on or before Friday 22 January 2021.

(c3) The rule nisi for the preservation order and forfeiture order as against the affected respondents in (C) is extended to Tuesday 26 January 2021 for judgment; and

(c4) The costs relating to the affected respondents are reserved for determination on 26 January 2021.

Judge SP Mothle
Judge of the High Court
Member of the Special Tribunal.

Delivered: This judgement was prepared and authored by Judge Mothle and is handed down electronically by video conferencing and circulation to the parties/their legal representatives by email. The date for hand-down is 10h00, 10 December 2020.



Appearances

For Applicant: Adv P Kennedy (SC)
Adv: Gcobani

Instructed by: State Attorney, Pretoria