X 4 October 2021

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

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: GP010/2021

In the matter between:

THE SPECIAL INVESTIGATING UNIT (SIU)	Applicant
and	
PETRUS SHAKA MAZIBUKO	First Respondent
SHADRAK MAZIBUKO	Second Respondent
THEPHUNOKHEJA PROJECTS (PTY) LTD	Third Respondent
COMMODITY LOGISTIX MANAGERS AFRICA (PTY) LTD	Fourth Respondent
MBULELO CLIVE BHEKUYISE KHOZA	Fifth Respondent
PHILIP BONGANI SIBANYONI	Sixth Respondent

THEMBATHLO (PTY) LTD Seventh Respondent

FIRST RAND BANK LIMITED Eighth Respondent

JUDGMENT

SIWENDU J

Introduction

[1] This application concerns the determination of the final relief[1] for the forfeiture of funds held in the name of the third respondent, Thephunokheja Projects (Pty) Ltd, with First National Bank under Account Number [redacted] to the State. The application follows a preservation order prohibiting Mr Petrus Mazibuko and Mr Shadrak Mazibuko from dealing in any manner with funds. The preservation order was granted *ex parte* on an urgent basis by Modiba J on 30 April 2021.[2]

[2] The applicant is the Special Investigating Unit (SIU), an organ of State referred to in section 2(1)(a)(i) of the Special Investigating Units and Special Tribunals Act 74 of 1996 (SIU Act). The SIU was established in terms of Proclamation No. R. 118 of 2001 published in Government Gazette No 22532 of 31 July 2001, by the President of the Republic to perform the functions outlined in the SIU Act.

[3] The first respondent is Mr Petrus Mazibuko (Mr Mazibuko), an adult male residing at [redacted] Drive, [redacted], 0[redacted]. He is an employee of Eskom Holdings SOC Ltd and serves as the Senior Manager within Eskom's Coal Operations Division. I understand that the Coal Operations Division is located within the Primary Energy Division responsible for the management of contracts for delivery of coal to a portfolio of Eskom's power stations.

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[1] It is a confirmation of the interim order in terms of Tribunal Rule 26 (*Rules for the Conduct of Proceedings in the Special Tribunals*, GG 43647 of 25 August 2020, General Notice 449).
[2] That application was brought *ex parte* in terms of Tribunal Rule 12 and 23 respectively.

[4] The second respondent is Mr Shadrak Mazibuko (his brother) who resides at [redacted] street, T[redacted], 1[redacted]. He is the registered director of Thephunokheja Projects (Pty) Ltd. It is common cause that he and Mr Petrus Mazibuko are brothers.

[5] The third respondent is Thephunokheja Projects (Pty) Ltd, (Thephunokheja) a registered company incorporated with its registered address, at [redacted] street, T[redacted], 1[redacted]. This registered address is that of Mr Shadrak Mazibuko. Its registration number 2017/023227/07 indicates the company was incorporated in 2017.

[6] The fourth respondent is Commodity Logistix Managers Africa (Pty) Ltd (CLM) incorporated in 2011. Its registered address is the 8th floor Fredman Towers, 13 Fredman Drive, Sandton Gauteng as well as at Financial Square, Entrance 5, 1st Floor Office 4 C/O Mandela & Woltemade Street Emalahleni 1039, Mpumalanga Province.

[7] The fifth and sixth respondents are Mr Mbulelo Clive Bhekuyise Khoza and Mr Philip Bongani Sibanyoni respectively. They are equal shareholders in CLM and are cited as it representatives.

[8] The seventh respondent is Thembathlo (Pty) Ltd, (Thembathlo) a registered company operating from 6811 Ramasodi Street, Ext 4, Mhluzi, Mpumalanga, 1050. Thembathlo does not oppose the application.

[9] The eight respondent is First Rand National Bank Limited (FNB), at 1 First Place, Bank City, Simmonds Street, Johannesburg. FNB is purely cited to comply with the order sought.

[10] Only the first to sixth respondents opposed the final relief. A review of the minutes of the case management meeting held on 10 June 2021 as well as correspondence between the parties, reveals that the SIU intended to file papers in respect of Part B of the relief it sought. Mr Mazibuko, his brother, and Thephunokheja first sought a reconsideration of the preservation order of 30 April 2021. A hearing was scheduled for the hearing of the reconsideration application on 18 June 2021. To this end, they filed their answering affidavit which was at first understood to be in respect

of the reconsideration. They later confirmed that the answering affidavit was in respect of Part B of the relief.

[11] I note the confusion with regards to Tribunal Rule 23(3), however the approach affected the presentation of the case by the SIU. It has implications for the complaints subsequently raised by the fourth to sixth respondents that the SIU sought to make its case in its replying affidavit. I deal with this later in the judgment. For now, I note that the reconsideration application was removed from the roll at the instance of Mr Mazibuko, his brother and Thephunokheja.

[12] Given the above, on 18 June 2021, the SIU sought the court's leave to amend prayer 1 of its notice of motion to include as prayer 1A and an order declaring that:

"1A.1 The conduct of the first to third respondents is in contravention of section 3 of the Prevention and Combating of Corrupt Activities Act 2004, in that they accepted gratification from another person for the benefit of themselves or for the benefit of another person in order to act, personally or by influencing another person to act, in a manner that amounts to the illegal, dishonest, unauthorised, incomplete, or biased; or misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers or duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation that amounts to the abuse of a position of authority; breach of trust; or the violation of a legal duty or a set of rules designed to achieve an unjustified result or that amounts to any other unauthorised or improper inducement to do or not to do anything.

1A.2 The conduct of the respondents to be in contravention of section 4 of the Prevention of Organized Crime Ac 1998 in that they knowingly or ought reasonably to know that the property is or forms part of the **proceeds of unlawful activities** and enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not or performs any other act in connection with such property, whether it is performed independently or in concert with any other person which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the said property or its ownership or any interest which anyone may have in respect thereof, or of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere to avoid prosecution or to remove or diminish any property acquired directly or indirectly as a result of the commission of an offence"

[13] On 30 June, the SIU filed a second notice of amendment. It sought to add as prayer 1A3 an order declaring that the following:

"1A3 The conduct of the 1st respondent to be in contravention of section 17(1) of the Prevention and Combating of Corrupt Activities Act 2004, in that he as a public official who acquired or holds a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body."

[14] These amendments were not opposed. In this judgment I first deal with the context and background to the application because it is relevant to the points *in limine* raised by the second respondent. The, I deliver reasons for my ruling, dismissing the points *in limine.* After this, I address the merits of the application and relief sought.

Background

[15] On 6 April 2018, the President of the Republic of South Africa issued Proclamation No. 11 of 2018 (published in Government Gazette No 41561) under section 2(1) of the SIU Act authorising the SIU to investigate the affairs of Eskom Holdings. The wide raging Proclamation includes an investigation into maladministration, non-performance, defective performance by service providers and any losses incurred by Eskom in respect of Medupi and Kusile Power Station Projects, the Ingula Pumped Storage Scheme, and the well-publicised appointment of McKinsey, Trillian and Regiment Capital amongst others.

[16] An extract of the Proclamation shows that it authorised investigation into:

"1. The contracting for or procurement of –

(a) coal;
(b) coal transportation services; or
(c) diesel;

by Eskom and payments made in respect thereof in a manner that was–

i. not fair, equitable, transparent, competitive or cost-effective;
ii. contrary to applicable–
(aa) legislation
(bb) manuals, guidelines, circulars, practice notes or instructions issued by the National Treasury; or
(cc) manuals, policies, procedures, prescripts, instructions or practices of, or applicable to Eskom;
iii. conducted by or facilitated through the improper conduct of –
(aa) employees, officials or agents of Eskom; or

(bb) any other person or entity; to corruptly or unduly benefit themselves or others or

iv. fraudulent,

and any related unauthorised, irregular or fruitless and wasteful expenditure incurred by Eskom or the State

……..

5. Any undisclosed or unauthorised interests which employees, officials or agents of Eskom may have had in contractors, suppliers or service providers bidding for work or doing business with Eskom or to whom contracts were awarded by Eskom, and the extent of any actual or potential benefits derived directly or indirectly by such employees, officials or agents from such undisclosed or unauthorised interests."

[17] The SIU alleges that during the course of the investigations, it obtained information from a whistle blower that Mr Mazibuko received funds from CLM and Thembathlo. These funds were paid into Thephunokheja's FNB Account [redacted].

[18] After the SIU obtained Thephunokheja's bank statements from FNB in terms of a section 5(2)(b) of the SIU Act, it initially stated that Mr Mazibuko and his brother were signatories to the bank account. However, it later established that Mr Mazibuko was the sole signatory to the Bank account. Thephunokheja has two bank accounts with the First National Bank (FNB) namely:

- A Gold Business Account Number: [redacted]; and
- Business Savings Pocket Account: [redacted]

[19] The SIU found that the following payments were deposited by CLM and Thembathlo into the Thephunokheja Bank Account.

Date	**Amount**	**Reference**
4/4/2019	R300 000.00	CLM
29/4/2019	R400 000.00	Thembathlo
7/5/2019	R150 000.00	CLM
7/5/2019	R500 000.00	Thembathlo
17/5/2019	R120 000.00	CLM

3/7/2019	R250 000.00	CLM
11/7/2019	R500 000.00	Thembathlo
19/7/2019	R462 834.00	Thembathlo
8/8/2019	R216 156.80	CLM
13/9/2019	R 466 961.08	CLM
4/10/2019	R 357 689.44	CLM
18/10/2019	R502 250.00	Thembathlo
4/11/2019	R577 374.81	CLM
5/12/2019	R 300 000.00	CLM
19/03/2020	R200 000.00	CLM
05/05/2020	R1075 188.69	CLM
07/05/2020	R836 302.58	CLM
02/06/2020	R784 904.08	CLM
29/06/2020	R51 245.00	Thembathlo
07/07/2020	R819 659.49	CLM
31/07/2020	R55 450.00	Thembathlo
12/08/2020	R629 860.14	CLM
04/09/2020	R73 085.95	Thembathlo
15//09/2020	R565 838.10	CLM
13/10/2020	R100 000.00	Thembathlo
15/10/2020	R474 347.34	CLM

05/11/2020	R385 366.28	CLM
10/11/2020	R312 857.01	Thembathlo
03/12/2020	R368 007.08	CLM
07/01/2021	R141 162.50	Thembathlo
07/01/2021	R100 000.00	Thembathlo
11/01/2021	R450 211.31	CLM
05/02/2021	R516 489.04	CLM
09/02/2021	R297 116.30	Thembathlo
08/03/2021	R485 416.60	CLM
16/03/2021	R241 012.40	Thembathlo
08/04/2021	R318 918.00	Thembathlo
19/04/2021	R639 672.57	CLM

[20] Mr Jacobs, an analyst at the Finance Intelligence Centre (FIC) issued a directive in terms of section 34 of the Financial Intelligence Centre Act 38 of 2001 to FNB to place the funds on hold because at the time, there was a reasonable suspicion that the funds were proceeds or represented proceeds of unlawful activities. He filed an affidavit to support the preservation application. Those papers were incorporated as part of the final application.

[21] It is a common cause that Mr Mazibuko did not declare his interest in Thephunokheja as required by Eskom's Conflict of Interest Policy. He also did not obtain written authority to conduct outside work or permission to receive additional remuneration over and above his salary at Eskom.

[22] CLM is a supplier of Eskom, registered in the Central Supplier Data Base under number MAAA0151119**.** In June 2018, CLM submitted a bid to transport coal for Eskom. On 11 December 2018, approximately six months after submitting the bid, CLM concluded a Joint Venture Agreement (JV) with Thephunokheja. It was

successful and was awarded the contract with Eskom in November 2019, and implementation commenced in December 2019.

[23] The payments made to Thephunokheja commenced in April 2019, approximately four months after the conclusion of the JV agreement, but before the award of the bid. As is evident from the schedule above, some of the payments were made after the award of the bid while CLM was a supplier of services to Eskom.

[24] The features of the JV between CLM and Thephunokheja were that the JV would be for an indefinite period. Its aim was to market, trade and broker commodities in the mining sector. Clause 3.3 of the agreement delineates the role of CLM as "*to play the role of contract, client and financial management*" while Thephunokheja's role is to "*bring the intellectual, technical expertise and relationships in the sector required to conclude transactions*."

[25] The SIU asserts that the payments were nothing more than *"unauthorised gratification"* in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA). The payments received by Thephunokheja from CLM and Thembathlo were Thephunokheja's only source of income. It also contends that there was no evidence to show that Thephunokheja rendered any services or was legally entitled to the payments.

[26] The SIU alleged further that Thephunokheja's business activities is in cupboard installation and the home improvements sector. It has no expertise in mining and coal. Thephunokheja and Mr Mazibuko's brother had no experience in the mining and coal business. They would have acquired the required experience through Mr Mazibuko who was an Eskom employee.

[27] The SIU grounded its case against Mr Mazibuko on the fact that, as an employee of Eskom, he was required to declare his interest in Thephunokheja in his annual disclosure. Clause 2.2.1 of Eskom's Conflict of Interest Policy prohibits employees from benefiting from Eskom contracts. It claimed the conduct cannot be regularised by managerial approval. Mr Mazibuko had not obtained any written authority to do work outside of his Eskom employment or to receive any remuneration in addition to his Eskom salary. Implicit from the SIU's papers was that he may have

played a role and influenced the award of the tender to CLM. Even though this lingered from the papers, the SIU did not pursue this aspect.

[28] Coupled with the failure to disclose his interest in Thephunokheja, the SIU claims that Mr Mazibuko also failed to disclose the interest between Thephunokheja and CLM (the JV). By failing to disclose his interest in the JV between Thephunokheja and CLM before, during and after CLM was awarded the contract, he acted in a way that compromised the credibility and integrity of the supply chain management system.

[29] The SIU alleged that Mr Mazibuko, his brother and Thephunokheja may have contravened s 4(a) and (b) read with section 3 of the Prevention of Organised Crime Act 121 of 1998 (POCA) and would be guilty of money laundering from 29 February 2019 to present. In so far as CLM and its representatives (Mr Khoza and Mr Sibanyoni) were concerned, the SIU contended that they too may have contravened section 4(a) and (b) read with section 3 of POCA and would be guilty of money laundering from 29 February 2019 to present.

[30] I pause to mention that the SIU made the above assertions before it sought an amendment of the relief in its notice of motion. As already stated, the amendments were prompted by the about turn made in respect of the reconsideration of the preservation order, and the abandonment of the earlier stance. As a result, the answering affidavit, in what was thought to be the reconsideration application, became the opposition to the current and final relief. Triggered by the answering affidavits, and a consequent inability to file anticipated papers for the final relief, on 25 June 2021 the SIU called on all the respondents to discover and make available:

- Their personal bank statements from 29 February 2019 to present;
- All the invoices issued by Thephunokheja to CLM and
- Any documents dealing with the relationship with CLM and Thembathlo;

The Uniform Rule 35 (12) Notice requesting the above documents was premised on the assertion made by Mr Mazibuko in paragraphs 7, 46, and 49 of his answering affidavit.

[31] The SIU simultaneously served a Uniform Rule 35 (12) Notice on CLM and its representative calling for the discovery of the:

- Eskom Bid Documents, as well as the signed contract or Bid awarded to CLM in November 2019;
- Contract for logistics from a mine to transport coal to various Eskom destinations;
- Purchase order and/or task orders, the waybills issued to capture the tonnage of coal Eskom received;
- Invoices sent to Eskom; and
- Bank statements, books and invoices received from Thephunokheja to CLM for the services rendered in terms of the JV.

The Uniform Rule 35 (12) Notice requesting the above documents was premised on assertion made by CLM in paragraphs 17, 18, 19, 20, 21, 22, 34, 35 and 36 of its answering affidavit.

[32] Mr Neave, who deposed to the affidavit states that when the SIU launched the *ex parte* application, CLM had not yet provided counter information to the SIU. He contended that there is no evidence that Thephunokheja rendered services or was legally entitled to claim for goods or services either from CLM and or Thembathlo. There is no evidence or explanation that the amounts paid to Thephunokheja were anything other than *"unauthorised gratification*" as defined in PRECCA. CLM and its representatives breached Eskom's Supplier Declaration of Interest Form. They did not disclose the link between Mr Mazibuko and Thephunokheja.

[33] Informed by the unopposed amendments referred to above, the SIU contended before me that I must declare that:

- Mr Mazibuko, contravened section 17(1) of PRECCA;
- In addition, Mr Mazibuko, his brother, and Thephunokheja contravened section 3 of PRECCA; and
- By their conduct, all the respondents contravened section 4 of POCA.

[34] Confronted with these allegations, Mr Mazibuko's brother and Thephunokheja took issue with the jurisdiction of the Tribunal to hear the application. At the hearing, I

ruled that the Tribunal is instilled with wide powers to hear the application, and when a case is made out, grant the orders sought. It is to that argument, and my reasons for the ruling I must first turn.

Jurisdiction of the Tribunal

[35] The overarching complaint about the jurisdiction of the Tribunal is that the declaratory orders sought by the SIU are criminal offences based on PRECCA and POCA.

[36] Mr Mphaga SC (for Mr Mazibuko, his brother and Thephunokheja) says the relief sought by the SIU falls beyond the scope of the Proclamation and the SIU Act. It asks the Tribunal to pronounce on and make a declaration on what is quintessentially a criminal[3] and labour matter. The argument is that criminal matters are the domain of the High Court and the NPA. Mr Mphaga SC also sought to persuade me that in order to have jurisdiction, PRECCA and POCA, must specifically refer to the Tribunal. The sole reference made to the Tribunal was in the definition of "judicial officer"[4] and nowhere else.

[37] The second argument is that the Proclamation limits the mandate of the Tribunal to civil proceedings instituted for the recovery of damages or losses and or the prevention of potential damages or losses suffered by State institutions. The complaint is that since there was no assertion or proof that the underlying contract between Eskom and CLM was unlawful; the contract remains and has not been reviewed or set aside.

[38] To support this line of argument, Mr Mphaga SC referred to the SCA decision in *The Special Investigating Unit v Nadasen*[5] where the court equated the Tribunal to

[3] For this, he relied on s 22 of PRECCA and the reference to corrupt activities in it.

[4] PRECCA includes in its definition of "judicial officer" a judge or additional member appointed under section 7 of the Special Investigating Units and Special Tribunals Act 74 of 1996 to a Special Tribunal established in terms of section 2 of that Act.

[5] 2002(1) SA 605 (SCA) held that "A Tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it

a commission of inquiry, noting that as a "*non- judicial tribunal*", it has no inherent jurisdiction and must strictly act within the confines of the statutory powers or authority conferred.

[39] An additional complaint was that both PRECCA and POCA define the process to be followed while the SIU Act and the Tribunal Rules do not. He contended further that s 4(1)(d) of the SIU Act reinforces his argument that if the SIU has uncovered acts of criminality, it must refer the criminal matter to the NPA. On this score, s 4 (1)(d) of the SIU Act limits the jurisdiction of the Tribunal. Mr Mphaga SC also impugned Tribunal Rule 26[6] but did not press the issue during the argument.

[40] A similar thread of argument to the above was that a breach of Eskom's Conflict of Interest policy is an employment contractual concern, regulated by the Labour Relations Act No 66 of 1995. The Tribunal would overreach into employment issues.

[41] Even though during the argument it was said these preliminary points were raised by Mr Mazibuko, his brother and Thephunokheja, they were not directly raised by Mr Mazibuko. They appear in his brother's answering affidavit. It is peculiar that he took up the cudgels on issues concerning Eskom's employment policies even though he is not an employee of Eskom. For reasons that appear later in this judgment, the complaint and categorisation of the breach of Eskom's Conflict of Interest Policy as a labour issue need not detain me.

[42] On the main issue, the challenge is not that the Proclamation is *ultra vires* the enabling legislation. As a result, it is imperative to examine the Proclamation and the relief the SIU seeks in the context of the enabling legislation. The Proclamation issued by the President authorising the investigation is empowered by s 2(1) of the SIU Act.[7]

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trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly (cf *Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605 (A) at 613F-J)."

[6] "At the conclusion of the proceedings and on the 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 preservation order or the interdict order where the respondent has been found to have participated in unlawful activities."

[7] "2(1) The President may, whenever he or she deems it necessary on account of any of the grounds mentioned in subsection (2), by proclamation in the Gazette –
(a) (i) establish a Special Investigating Unit in order to investigate the matter concerned;

The grounds on which the President may exercise the powers conferred are circumscribed in s 2(2)(a) to (g) of the SIU Act. The section makes clear that over and above instances of, *inter alia*, the maladministration of State affairs, improper and unlawful conduct by State employees, unlawful appropriation or expenditure of public money or property, the President may exercise the powers where:

> "s 2(2)(f) [o]ffence referred to in Part 1 to 4 or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act 2004 and which offences was [sic] committed in connection with the affairs of any State institution; or
>
> s 2(2)(g) Unlawful or improper conduct `by any person which has caused or may cause serious harm to the interests of the pubic or any category thereof."

[43] On its plain reading, the Proclamation mirrors the wording of the SIU Act. The wide ranging Proclamation covered procurement facilitated by Eskom employees through improper conduct to corruptly or unduly benefit themselves or others *as well as undisclosed unauthorised interests which employees may have had in contractors and suppliers*. The Proclamation also authorised an investigation into *offences* referred to in PRECCA,[8] *including any unlawful or improper conduct by any person which has caused harm or may cause serious harm to the interests of the public.* [emphasis added]

[44] In opposition Ms Platt SC (for the SIU) contended that the Proclamation includes an investigation into "*Improper conduct*"*.* She was at pains to stress that the foundation of the SIU's case is premised on the *"improper conduct*" envisaged in the Proclamation. The case was not about criminal conduct because that may still be referred to the relevant bodies. She submitted that *"improper conduct*" is wide and may include for example, an official turning a blind eye to what he or she should have been

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(ii) refer the matter to an investigating Unit for investigation; and

(b) Establish one or more Special Tribunals to adjudicate upon civil proceedings emanating from any investigation of any particular Special Investigating Unit:
Provided that if any matter referred to in subsection (2) falls within the exclusive competence of a province, the President shall exercise such powers only after consultation with or at the request of the Premier of the province concerned".

[8] The SIU relies on a breach of s 17 of PRECCA amongst others.

alert to - leading to an unlawful result or contract being concluded. She contended there need not be losses suffered for an improper conduct to exist.

[45] The argument is that the NPA and the High Court have exclusive jurisdiction over the orders sought and offences under PRECCA and POCA based on s 4(1)(d) of the SIU Act. The relevant parts of the section confer the SIU with the power to:

> "(c) To institute and conduct civil proceedings in a Special Tribunal or any court of law for -
>
> (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such State institution;
> (ii) any relief relevant to any investigation or
> (iii) any relief relevant to the interests of a Special Investigating Unit;
>
> (d) To refer evidence regarding or which points to the commission of an offence to the relevant prosecuting authority."

[46] Mr Mphaga SC based his argument solely on s 4(1)(d). However, s4(1) must be read as a whole, together with s 8(2) of the SIU Act. It states that -

> "A Special Tribunal shall have jurisdiction to adjudicate upon any civil proceedings brought before it by the Special Investigating Unit in its own name or on behalf of a State Institution or any interested party as defined by the regulations, emanating from the investigation by such Special Investigating Unit, including the power to-
>
> (a) issue suspension orders, interlocutory orders or interdicts on application by such Unit or party;
> (b) make any order which it deems appropriate so as to give effect to any ruling or decision given or made by it; and
> (c) make any order which it deems appropriate as to costs." [emphasis added]

[47] There is no doubt that PRECCA creates a range of statutory offences. In my view, both the NPA and SIU are cloaked with specific investigative powers.[9]

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[9] S 4(1) of the SIU Act states that -"The functions of a Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in section 2(1) -

(a) To investigate all allegations regarding the matter concerned;

(b) To collect evidence regarding acts or omissions which are relevant to its investigation."

Section 22 of PRECCA confers discretionary powers to the NPA and not the exclusive powers. The difficulty with Mr Mphaga SC's argument is that it fails to consider: (1) the broad nature of the orders the Tribunal may grant in s 4(1)(c); (2) the intersection of all the relevant legislation; (3) the imperative to adopt a purposive approach to their interpretation; and (4) the nature of the forfeiture proceedings before the Tribunal. The narrow construction propounded is based on a selective reading of the Proclamation, the SIU Act, PRECCA and POCA.

[48] PRECCA, whose offences are incorporated in the SIU Act and the Proclamation[10] is explicit in its broad intent. It recognises amongst others that an illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, *ethical values* and the *rule of law*. Contrary to the argument advanced, in my view this signals that the "*loss*" or "*damage*" or "*harm*" envisaged is not solely pecuniary in nature.

[49] The view that a "*corrupt activity*" or "*unlawful activity*" in contravention of PRECCA and POCA must translate to criminal conduct which results in losses unduly constricts the provisions. My view is that an *unlawful activity* need not be criminal conduct. It may also be due to egregious conduct or gross negligence or a breach of ethical values or a combination of all the above wrongs which are harmful to the interests of the public. As the SIU states, its complaint concerns an improper conduct that is damaging to the integrity of Eskom's supply chain. Any other interpretation would defeat the purpose of the SIU Act.

[50] Another fundamental flaw with the argument to oust the jurisdiction of the Tribunal pertains to the nature of the relief sought. POCA provides for a civil forfeiture not only of "criminal property" that has been used to commit an offence but also *property that is the proceeds of unlawful activity.*[11] As in this instance, a forfeiture

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[10] The Proclamation authorising the investigation specifically refers to offences in Part 1 to 4 or section 17, 20 or 21 of PRECCA

[11] Section 37 of POCA states:
"**Proceedings are civil, not criminal**
(1) For the purposes of this Chapter all proceedings under this Chapter are civil proceedings, and are not criminal proceedings.
(2) The rules of evidence applicable in civil proceedings apply to proceedings under this Chapter.
(3) No rule of evidence applicable only in criminal proceedings shall apply to proceedings under this Chapter.

remedy is not limited to post-conviction instances nor does it require a prior conviction. Section 50 of POCA makes it clear that the making of an order for forfeiture is subject to a standard of proof on the balance of probabilities.[12] While the SIU may refer criminal conduct to the NPA, nothing bars it from seeking a civil remedy from the Tribunal in respect of the same case. When PRECCA and POCA are read with s 8(2) of the SIU Act, it is clear that the Tribunal is conferred with the power to grant the relief sought if proved.

[51] Curiously, given the about turn on the reconsideration application, there was no challenge directed at the power of the Tribunal to grant the preservation order under Rule 23 but at the final forfeiture order under Rule 26. The order sought, if I find there are grounds to grant it, flows naturally and is consequent upon the granting of the preservation order.[13]

[52] I find the relief falls squarely within the jurisdiction of the Tribunal. The reliance on the SCA decision in *Special Investigation Unit v Nadasen* is misplaced because it fails to take into account the extensive amendments to the SIU Act subsequent to the decision. It also fails to consider that under the current legislative milieu, the judicial authority of the Tribunal is equivalent to that of the High Court.[14] For the reasons above, the ruling made on 16 September 2021 stands. I now turn to the merits.

MERITS

[53] The question on the merits is whether there are reasonable grounds to believe that the R11m in the FNB account constitutes proceeds of an unlawful activity and

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(4) No rule of construction applicable only in criminal proceedings shall apply to proceedings under this Chapter."

[12] "(1) The High Court shall, subject to section 52, make an order applied for under section 48 (1) if the Court finds on a balance of probabilities that the property concerned-

(a) is an instrumentality of an offence referred to in Schedule 1;
(b) is the proceeds of unlawful activities; or
(c) is property associated with terrorist and related activities."

[13] See s8(2)(b) *supra*.

[14] *Special Investigation Unit and Another v Caledon River Properties (Pty) Ltd t/a Magwa Construction and Another* [2021] ZAST 4.

should be forfeited to the State. In so far as Mr Mazibuko is concerned, I must determine whether he contravened s 17(1) of PRECCA. I am also enjoined to determine whether there was a breach of s 3 of PRECCA and s 4 of POCA by the other respondents.

[54] The common thread of the opposition was that the SIU had not made out its case in the founding affidavit and that it must stand or fall by the assertions made earlier in the preservation application. They contend the SIU had to show that the amounts paid into the account were proceeds of a crime. The argument is that the case against them was circumstantial and based on conjecture. These arguments were made to support the dismissal of the application premised on the view that:

54.1 There are no jurisdictional facts to show that the gratification alleged was offered and accepted for an unlawful purpose. There was no evidence of a causal connection between the award of the contract to CLM by Eskom and Mr Mazibuko or evidence of what act(s) if any were performed or what actions were taken to influence or exercise power over the decision to appoint CLM, or involvement by Mr Mazibuko in exchange for the gratification. On this basis, there is no evidence to support the offence of corruption under s 3 of PRECCA;

54.2 There were no jurisdictional facts in the founding affidavit supporting the offence of money laundering under s 4 of POCA. This contention is based on the existence of a legitimate JV between CLM and Thephunokheja. The argument is that the original source of the funds is a legitimate contract with Eskom which has not been reviewed or set aside. It is said that the original source of the funds does not constitute proceeds of a crime.

[55] Notwithstanding the above complaints, I agree with Ms Platt SC that the merits of the SIU's case turns on a non-disclosure by Mr Mazibuko of (1) his interest in Thephunokheja; (2) the indirect interest in the JV between CLM and Thephunokheja; and (3) the non- disclosure by his brother and CLM of the direct relationship with Thephunokheja, and indirectly, with Mr Mazibuko. The case against CLM is based on a non-disclosure as a supplier. As already alluded to above, Clause 5 of the

Proclamation authorised an investigation into non-disclosure of interests by employees and officials of Eskom. I now deal with the case against each of the respondents.

Mr Petrus Mazibuko

[56] The thrust of the defence is that Mr Mazibuko's brother is the sole shareholder and director of Thephunokheja. There was a legitimate JV between Thephunokheja and CLM which was concluded before CLM was awarded the contract by Eskom. The payments made to Thephunokheja were not unlawful proceeds as they were made before the award of the contract to CLM.

[57] As already alluded above, Clause 5 of the Proclamation authorised an investigation into the non-disclosure of interests by employees and officials of Eskom. The foundation for the duty to disclose private, personal or financial interests is Eskom's Conflict of Interest Policy which mandates disclosure: *"whether as a supplier, an advisor or by virtue of being a director or owner of a business or in any other capacity."*[15] The policy prohibits employees from having *any direct or indirect* personal or other beneficial interest in any contract with Eskom. Eskom cascaded this duty downwards beyond directors and prescribed officers to employees. Every employee and director has the obligation and duty to declare, manage and avoid conflicts of interest to ensure that Eskom avoids situations where it can be accused of improper, unlawful or unfair conduct.

[58] Mr Mazibuko contends that because he was not a shareholder or director, there was nothing to disclose and he had no duty to do so. The view was that Thephunokheja is a separate corporate entity and is not an official of Eskom. He was not involved in the operations of the company. He did not receive a salary from

[15] Clause 2.2.3 deals with related third parties:
"Related parties of employee must not engage in, nor have interest in any Eskom contract where there is a conflict of interest. This includes third-party related transactions with an indirect link to an Eskom contract (for example, having a personal or other interest in a business that has an interest in a supplier to Eskom)".
Clause 2.2.4 states that:
"The obligation to declare all conflict of interest, directorships, memberships, and details of any related or inter-related persons that does business with Eskom, and all material personal interests whether a conflict exists or not."

Thephunokheja. He was not aware that the CLM and Thembathlo were doing business with Eskom. He says his involvement was limited to assisting his brother with management of the financial affairs of Thephunokheja and to help prevent sporadic withdrawal of funds from the account. With the same breath, he did not dispute that his brother operated other bank accounts in which he was not involved.

[59] There is no merit to the defence. The defence based on the Joint Venture Agreement with CLM does not hold water because by his own admission, the JV created a direct or indirect relationship with an Eskom supplier. Mr Mazibuko was a sole signatory of the bank account. He represented to FNB on the bank application form that he was a director of Thephunokheja. The form which he signed also referred to him and his brother as "related parties" to Thephunokheja. Thephunokheja received significant inflows of cash from CLM and Thembathlo over a period. He did not explain why he made this representation to FNB. He also failed to explain why the sporadic spending affected this "investment account" and not other business accounts operated by his brother. The defence coupled with the lack of an explanation on the pertinent questions cannot be believed.

[60] I find that even though his name does not appear on the statutory register of directors, he was a *de facto* director of Thephunokheja and had represented himself as such. Even if he was not a *de facto* director which I have found he was, on his own version, he accepted that he was "*an advisor*" looking after the financial affairs of Thephunokheja. I find that he had a duty to disclose his interest and relatedness to Thephunokheja on all accounts.

[61] The second defence was that he did not know that Thephunokheja was in a JV with CLM and the JV was doing business with Eskom. Mr Mphaga SC also argued that Mr Mazibuko did not know the source of the funds in the account. I find the plea of ignorance unpalatable. Clause 3.39 of the Conflict of Interest Policy defines "*knowing or knows*" as either a person who:

> "(a) had actual knowledge of the matter; or
> (b) was in a position in which the person ought reasonably have–
> (i) Had actual knowledge;
> (ii) Investigated the matter to an extent that would have provided the person with actual knowledge or

(iii) Taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge."

[62] Curiously, the language of the policy emulates s 2(1) of PRECCA.[16] Importantly, Eskom's policy is not grounded on some ephemeral idea, but on a legal obligation under the Public Finance Management Act 1 of 1999 (PFMA) and the Companies Act 71 of 2008. The policy aligns with s 17 of PRECCA which states that:

"(1) Any public officer who, subject to subsection (2), acquires or holds a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body, is guilty of an offence.

(2) Subsection (1) does not apply to-

(a) a public officer who acquires or holds such interest as a shareholder of a listed company;

(b) a public officer, whose conditions of employment do not prohibit him or her from acquiring or holding such interest; or

(c) in the case of a tender process, a public officer who acquires a contract, agreement or investment through a tender process and whose conditions of employment do not prohibit him or her from acquiring or holding such interest and who acquires or holds such interest through an independent tender process."

[63] None of the above exceptions applied to him. He also had a duty to know what business Thephunokheja was in. As someone with an ardent interest to prevent the sporadic withdrawal of funds from the account, it follows that he would have overseen the payments made in the FNB bank account. Being solely responsible for the FNB account, he would have known, knew, or ought to have reasonably known where the source of the inflow of money deposited emanated from.[17] Over and above the annual

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[16] "2(1) For the purpose of this Act as person is regarded as having knowledge of a fact if–

(a) That person has actual knowledge of the fact or
(b) The court is satisfied that –
(i) the person believes that there is a reasonable possibility of the existence of that fact; and
(ii) the person has failed to obtain information to confirm the existence of that fact and "knowing: shall be construed accordingly."

[17] See the definition of "unlawful activity" in s 1 of POCA, subsections (2) -(3).

disclosure required, he had an on-going duty to disclose his interest within 5 days of knowing such conflict had arisen. That duty arose before, during, and after the award of the tender to CLM.

[64] I find his involvement in Thephunokheja triggered the duty to disclose, and the failure to do so was a breach of Eskom's Conflict of Interest Policy and a breach of s 17(1) of PRECCA.

Mr Shadrak Mazibuko and Thephunokheja

[65] They admit the business dealings with Eskom, albeit they claim the dealings arose long after they concluded the JV Agreement. They state that Mr Mazibuko "*merely*" assisted his brother in his activities with Thephunokheja. However, a common cause fact is that Thephunokheja is in the cupboard installation and home improvements business.

[66] When Thephunokheja entered into a JV with CLM, it agreed to be "*jointly and severally bound*" with CLM. The JV agreement required a particular set of skills in mining and coal. Clause 3. 3 of the JV agreement delineated the respective roles of the parties thus:

> "The Parties to this Agreement wish to agree that CLM shall play the role [sic] contract, client financial management. Thephunokheja shall bring the intellectual, technical expertise and relationships in the sector required to conclude the transactions."

Clause 3.6 of the JV recorded that:

> "this joint participating association requires the involvement of each Party's particular intellectual properties, expertise, knowledge, **know-how**, and business experience, financial and investment structures and its respected and **valuable contacts**."

[67] Mr Khoza who deposed to an affidavit on behalf of CLM admits that from inception, CLM sought associations or business relationships with other companies in the coal mining sector to enhance CLM's marketability and competitiveness for the procurement of mine related contracts. One such industry player is PB Tshabalala Investment (Pty) Ltd.[18] Mr Khoza implores the Tribunal to understand the Joint Venture agreement with Thephunokheja in the context of the relationship CLM has with PB

[18] CLM invested R1m in the company for strategic growth.

Tshabalala Investment (Pty) Ltd. He admits that Thephunokheja offered CLM the much needed expertise.

[68] The SIU argued that there was no rationale for Thephunokheja to enter into a JV that was not connected with its actual business and for which his brother had no skills or expertise. Ms Platt SC however agreed during the argument that the pervading question was, given that Thephunokheja was in a cupboard and home improvement business, a sector unrelated to coal and mining, what was the source of the intellectual property, skills, expertise and valuable contact Thephunokheja offered to the JV? There was no answer or plausible explanation to this question.

[69] I find the attempt to understate Mr Mazibuko's role and the assistance he gave to Thephunokheja and the JV difficult to believe. Mr Mazibuko, as Senior Manager in Eskom's Coal Operations division was the sole source of the skills, expertise and intellectual property to Thephunokeja and the JV. Consistent with my earlier findings that he was a *de facto* director, I also find he was the business brain of Thephunokheja and its offering.

[70] Mr Mazibuko's brother cannot plausibly deny the knowledge of the dealings between the CLM, Thephunokheja and Eskom. He was the signatory to the JV agreement. He did not profess to have expertise in coal and mining. But for Mr Mazibuko's involvement and expertise, Thephunokheja would not have offered the valuable contacts, skills and intellectual property. I find that both brothers knew about the dealings with Eskom.

[71] Ms Platt SC pointed to certain teller withdrawals made from the bank account. She also argued that when requested to provide invoices/documents for the JV payments for services rendered, none was forthcoming. She contended that an adverse inference should be drawn that the payments were, in fact, gratuitous payments to assist in the award of the tender.

[72] In my view, the only inference to be drawn is that the JV agreement served as the conduit through which the two brothers accepted gratification which included

undisclosed proceeds arising from a contract with Eskom. By their own admission, Thephunokheja received payments from a supplier of Eskom. The receipt of the payments was underpinned by a non-disclosure which is an improper conduct as well as an unlawful activity as aforesaid.

CLM, Mr Khoza and Mr Sibanyoni

[73] Turning to CLM, Mr Khoza and Mr Sibanyoni; I note from their answering affidavit that before registering CLM, in 2011, Mr Khoza was employed in the Trade and Investment Entity of the Kwa-Zulu Natal Provincial Government while Mr Sibanyoni was in banking. Mr Khoza says he amassed considerable experience in investment promotions globally where coal mining and marketing in the world was a key area of focus. I find the rationale for entering into the JV Agreement at odds with Mr Khoza's expertise and experience.

[74] Mr Khoza further stated that in June 2018, CLM secured a contract for logistics from a mine to transport coal to various Eskom destinations followed by another contract for materials handling in October 2018. Because of the experience it acquired, it made a bid for a Free Carrier Agreement to Eskom **in June 2018** to transport coal from mines to Eskom power stations. For a company that commenced business in 2011, little was said about the business which is fairly sized with 80 employees. Only one invoice dated February 2019 for Marketing and Advisory services was discovered by CLM and a single agreement with Mzimkhulu Mining.

[75] The nub of the issue is that all Eskom suppliers are required to read and sign the Integrity Pact whenever they participate in an Eskom Tender. It places an obligation on suppliers to avoid relationships with Eskom employees which are or that could be perceived to be contrary to constitutional principles of fairness, equity, transparency, and competitiveness. Just as in the case of the Conflict of Interest Policy, it creates an on-going obligation for disclosure and states that:

> "Should a supplier who later become aware of a conflict of interest (whether family, business and/or social relationship) between its owners/members/ directors/ partners/ shareholders and an Eskom employee/director with respect to a tender in which it participated, supplier is required to disclose the interest/relationship in to Eskom and submit whatever information may be required regarding the parties involved"

[76] Curiously Mr Khoza does not dispute or say CLM was not aware of Mr Mazibuko's involvement in Thephunokheja. The fact that CLM's engagement was procured by the Fuel Sourcing Department and the contract is managed by the Logistics Department is neither here nor there. CLM and its representatives had an independent obligation to disclose the relationship with Thephunokheja and Mr Mazibuko.

[77] Lastly, I have considered the complaint that the SIU's case was made out in the reply. The impression is that the decision to abandon the reconsideration application was a carefully considered stratagem to force the determination of the main application on the earlier papers to procure a dismissal. There is no merit to this complaint. There was no new matter raised in the reply and if there was, it was open to the respondents to seek the leave of the Tribunal to file further affidavits.

[78] The SIU succeeds in this case, and the costs must follow the result.

Accordingly, I make the following order:

1. The funds under the First National Bank account number [redacted] ("*the bank account*") as above-mentioned in paragraph 2 of PART A to this Notice of Motion is declared forfeited to the State and shall be transferred to the Applicant's Trust Account held by First National Bank, with account number [redacted].
2. The conduct of the 1st to 3rd respondents are in contravention of section 3 of the Prevention and Combating of Corrupt Activities Act 2004, in that they accepted gratification from another person for the benefit of themselves or for the benefit of another person in order to act, personally or by influencing another person to act, in a manner that amounts to the illegal, dishonest, unauthorised, incomplete or biased; or misuse or selling of information or

material acquired in the course of the exercise, carrying out or performance of any powers or duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation that amounts to the abuse of a position of authority; a breach of trust; or the violation of a legal duty or a set of rules designed to achieve an unjustified result or that amounts to any other unauthorised or improper inducement to do or not to do anything.

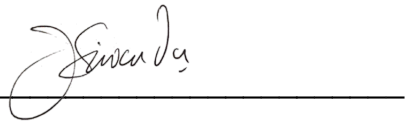
3. The conduct of the respondents are in contravention of section 4 of the Prevention of Organised Crime Act 1998 in that they knowingly or ought reasonably to know that the property is or forms part of the proceeds of unlawful activities and enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not or performs any other act in connection with such property, whether it is performed independently or in concert with any other person which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the said property or its ownership or any interest which anyone may have in respect thereof; or of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere to avoid prosecution or to remove or diminish any property acquired directly or indirectly as a result of the commission of an offence.

4. The conduct of the 1st respondent is in contravention of section 17(1) of the Prevention and Combating of Corrupt Activities Act 2004, in that he, as a public official who acquired or holds a private interest in any contract, agreement or investment emanating from or connected with the public body

in which he or she is employed, or which is made on account of that public body.

5. The interim order in terms of paragraph 2 of PART A of this Notice of Motion is confirmed.

6. The respondents be ordered to pay costs, jointly and severally liable, the one paying and absolving the others. The costs include the costs of Senior Counsel.



JUDGE T. SIWENDU

MEMBER OF THE SPECIAL TRIBUNAL

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 4 October 2021.

APPEARENCES

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Attorney for the 4th to 6th Respondents:	Mr Elijah Ramonyai, KOIKANYANG INC
Date of hearing:	16 September 2021
Date of Judgment:	4 October 2021