



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

Case No: KN08/2024

In the matter between:

THE SPECIAL INVESTIGATING UNIT

Applicant

and

HAWULETHU

1st Respondent

MEMBER OF THE EXECUTIVE COMMITTEE (MEC)

FOR THE DEPARTMENT OF EDUCATION (DOE), KZN

2nd Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 6 NOVEMBER 2025

INTRODUCTION AND THE PARTIES.

1. The Applicant seeks an order reviewing, declaring invalid and setting aside the decisions taken by or on behalf of the Second Respondent to contract or conclude agreements with the First Respondent in June 2020 and the extension of this agreement.
2. The Applicant, the SIU, brought this application for inter alia, the following relief:
 - a. the condonation of the late filing of the application for review;
 - b. the contract concluded between the First and Second respondents be and is declared unlawful, unconstitutional, invalid and of no force or effect;
 - c. the First Respondent be directed to pay the total contractual amount of R2 538 000.00; alternatively,
 - d. the First Respondent is directed to pay all profits derived from the contract; and
 - e. the First Respondent is directed to pay the costs of this application.
3. The parties to the dispute are the Special Investigating Unit ("the SIU"), an organ of state established in terms of Section 2 of the **Special Investigating Units and Special Tribunal Act 74, 1996** ("the SIU Act") as the Applicant. The Applicant is directed to inter alia investigate:
 - 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 acts, transactions, measures or practice having a bearing upon state property;
- e. Intentional or negligent loss of public money, or damage to public property; ...”

4. The First Respondent is Hawulethu (Pty) Ltd, a company with its principal place of business in KwaZulu Natal (KZN).

5. The Second Respondent is the Member of the Executive Committee (MEC) for the Department of Education (DoE), KZN, cited in his representative capacity. No relief is sought against the MEC.

6. It is the Applicant’s case that the officials/employees of the Second Respondent contravened inter alia section 217 of the Constitution, different sections of the Public Finance Management Act (“the PFMA”), as well as Regulation 16A6.4 of the Treasury Regulations.

7. The SIU alleges that the following officials/employees of the Department of Education were instrumental in the procurement of 72 chemical toilets and in processing the award to the First Respondent for the supply and service of the 72 toilets:

- a. Ms Ngobi (Acting Director: Demand and Acquisition) – a member of the Quotation Evaluation Committee (“QEC”)
- b. Mr Ngcobo (Deputy Director: Finance) – nominated the First Respondent and was the chairperson of the QEC;
- c. Ms Madiba (Acting Director: Finance) – a member of the QEC;

- d. Mr Mavundla (Admin Clerk) – a member of the Quotation Adjudication Committee (“QAC”);
- e. Ms Hadebe (Chief Education Specialist) – chairperson of the QAC;
- f. Ms Gumede (Chief Director: Operations Management) – authorised the extension of the contract with the First Respondent;
- g. Ms Naidoo (Accounting Clerk) – a member of the QEC and allocated and signed as the budget controller;
- h. Ms Mthethwa (Educational Specialist) – approved the requisition and authority to purchase;
- i. Mr Maharaj (Educational Specialist) – a member of the QAC;
- j. Mr Reddy (Chief Admin Clerk) – approved commitments and final payment orders to the First Respondent;
- k. Ms Mabaso (Provincial Admin Clerk) – approved final payment order to the First Respondent;
- l. Mr Nkosi (Educational Specialist) – approved extension of the contract of the First Respondent;
- m. Ms Nkwanyana (Educational Specialist) – a member of the QAC;
- n. Ms Dlamini (Deputy Director General IDS) – approved the extension of the contract;
- o. Mr Mthembu (Deputy Director General) – approved the extension of the project;
- p. Ms Brijlal (Admin Clerk) – signed and checked the final payment order..

COMMON CAUSE FACTUAL MATRIX

8. On **5 June 2020** the Head of the Department of Education in KwaZulu Natal, sent a memorandum to the district directors to procure and provide chemical mobile toilets for the district schools for one month, with a cap of R3000 per item. All Supply Chain Management ("SCM") processes and procedures had to be complied with.

9. The need for the provision of these toilets arose as an emergency measure to ensure that learners at the affected schools had access to adequate toilet facilities following the lifting of the national lockdown in response to the Covid – 19 pandemic and the subsequent return of learners to schools in the week commencing 8 June 2020.

10. On **10 June 2020**, when acquisitions and authority for purchases were compiled and signed, the invitation to bid (SM001) was sent to the First Respondent. The bid was submitted, and the First Respondent was appointed to supply and deliver 72 units to 11 different schools. The goods were indeed delivered. The delivery date is in dispute.

APPLICANT'S VERSION

11. The Applicant contends that the First Respondent admits receiving telephone calls before 10 June 2020 from the Second Respondent and that this points to collusion, price-fixing and unfair competitive practice.

12. It is contended by the Applicant that the First Respondent, inter alia, claimed for unrendered servicing of the goods during the school holidays and for the rent and servicing of the goods from 1 June 2020 to 11 June 2020 and from 15 to 31 December 2020. The Applicant submits that this expenditure was accordingly fruitless and wasteful.

FIRST RESPONDENT'S VERSION

13. It is the First Respondent's version that due to the urgency of the request, a formal tendering process was not followed prior to the contract being entered into by the Department and the First Respondent.

14. According to the First Respondent, it was approached directly by a representative of the Second Respondent on 5 June 2020 in order to quote for the supply and service of mobile toilets and that it duly furnished the First Respondent with such a quote on 5 June 2020.

ISSUES TO BE DETERMINED

15. The Constitution is the supreme law of South Africa and any conduct inconsistent with it is invalid. The obligations in the Constitution must be fulfilled. This is the legal framework within which we operate, and it is the legal framework that this Tribunal is to apply when hearing matters before it. It is therefore worth repeating (which I do below)

the relevant sections of the Constitution and the other legislation which gives effect to these sections.

16. The application was brought well outside the reasonable time period applicable in legality reviews. It is therefore necessary to determine whether this delay should be condoned. It is trite that, as part of this enquiry, this tribunal should also consider the merits as it relates to the Applicant's prospects of success.

17. Should this tribunal find that the delay should be condoned, the merits of the main application will be traversed. I will accordingly first deal with the Applicant's condonation application.

Applicant's Condonation application

General Principles on delay

18. In determining whether the delay in bringing this application should be condoned and whether this Tribunal should proceed in considering the merits of the application, it is necessary to consider a number of factors. Even though the facts in this matter are not similar to those in **Buffalo City Metropolitan Municipality v Asia Construction (Pty) Ltd**,¹ the principles on delay laid down in that matter are applicable.

¹ 2019 (4) SA 331 (CC)

19. I compare the delay in *casu* i.e. a legality review with that of a PAJA review. It is trite that in both instances, the court has a discretion as to whether to overlook the delay or not. In **Buffalo City**, *supra*, the majority of the Court confirmed that the issue of reasonableness applies in both PAJA and legality review delays. The application of the reasonableness threshold however differs between the two in that a legality review involves a broader discretion. In this regard see the statement by Theron J in **Buffalo City**²:

'There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available facts.'

20. The timeline in respect of this application is as follows. The SIU received the file on **7 July 2021**. Permission to instruct the Office of the State Attorney to brief Counsel was requested on **11 October 2021**. On **17 November 2021** the matter was approved, and the papers were finally issued on **1 June 2024** i.e. 3 years after receipt of the file and more than 4 years after delivery of the goods.

21. The relevant facts placed before this Tribunal by the Applicant to explain their delay of 3 years can be gleaned from the common cause timeline. In short, the SIU submits that the delay was mostly caused by factors which were not in their control but were brought about by the inefficiencies in the State Attorney's office, the tender processes to

² *Supra* at para 53

appoint a panel of attorneys and various other unsuccessful processes which are by now common cause.

22. The period between 7 July 2021 to 1 June 2024, however, does, in my view, not apply only to this application. It is common cause that the various state institutions were under-resourced at this time. The difficulties that the SIU faced in bringing matters before the Tribunal is by now also common cause. See in this regard the findings by the Tribunal i.e. **SIU v Kwasa Food Suppliers (PTY) Ltd and 4 others**³ where the delay was condoned because it was found not to be willful.

23. I am thoughtful of the submissions made by both parties on the issue of delay. The guiding principles that I have to apply are, however, as expressed by Cameron J in **Buffalo City** as follows:

*‘Even where a delay is found to be unreasonable, however, our precedents establish that a court retains a discretion to overlook the delay provided it is in the interests of justice to do so. This stage of the procedural enquiry should not take place in a “vacuum”. It must instead involve weighing (a) the effect of the delay on the parties and (b) the nature of the impugned decision’.*⁴

24. Following this approach and taking all the factors into account, I find that a big portion of the delay was not willful. The circumstances during this period i.e. 7 July 2021 to March 2024 were mostly out of the Applicant’s control.

³ (EC02/2024) [2025] SAST 3

⁴ Supra, at para 121

25. In line with many of the decisions dealing with condonation for delay, I place particular emphasis on the matter of **Ferris v First Rand Bank Ltd**⁵ where the Constitutional Court held as follows:

'In Bertie Van Zyl this Court held that lateness is not the only consideration in determining whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it. As the interests of justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors'.

26. A similar position was held earlier in the matter of **Geldenhuis v National Director of Public Prosecution and Others**:⁶

*'The general rule is that non-compliance with the Rules of this Court will be condoned when it is in the interests of justice to do so. Non-compliance must not only be discouraged as it creates great inconvenience for the courts and other litigants; it may also result in prejudice to the latter, placing the administration of justice in jeopardy.'*⁷

⁵ 2014 (3) SA 39 (CC) at para 10

⁶ [2008] ZACC 21

⁷ Supra at para 21

27. In line with these decisions, the delay must be considered together with the merits of the case. This would accordingly mean an analysis at this stage of the Applicant's cause of action, its prospects of success and the interest of justice.

28. The law in respect of condoning the late filing of a review is trite. Good cause must be shown where a complete and satisfactory explanation is provided, and a bona fide defense must be demonstrated. An additional requirement was laid down in **Grootboom v National Prosecuting Authority and another**⁸ where factors were listed to be considered when determining whether the interest of justice requires that condonation be granted. These factors are the degree of lateness, the reasons for the lateness, the prospects of success, the balance of convenience, the extent of the prejudice caused and lastly the effect of the delay on the administration of justice.

29. I will now proceed to discuss the merits as it relates to the application for condonation as well as in respect of the main review application.

30. It is trite that an Applicant seeking condonation for the delay in bringing a review application, has to show that there is a reasonable prospect of success. In casu, it is submitted by the Applicant that the Second Respondent failed to comply with and/or contravened Section 217 of the Constitution, sections of the PFMA and the Public Service Code of Conduct in its entirety.

⁸ 2014 (2) SA 68 (CC).

31. It is further submitted that the Second Respondent used the provisions of the emergency regulation without obtaining approval for the deviation from the HoD whose approval was obtained ex post facto the procurement process.

32. The specific pieces of legislation that were allegedly flouted are inter alia Section 217 of the Constitution, Section 38 of the PFMA, Section 45 (a) and (b), Section 76, Regulation 16.A.6.4 of the Treasury Regulations and the Code of Conduct.

33. It is submitted that all of these sections were flouted and as a result, the First Respondent provided goods and services, charged more than 100% mark-up and in addition claimed for services not rendered and goods not supplied.

34. It is further trite that a court/tribunal considering an application to condone the delay in bringing a review application should also consider the potential prejudice to be suffered by the parties, should condonation not be granted.

35. The allegations by the Applicant are serious. The Respondents are accused of stripping the public purse. I agree that the allegations against the Respondents should be tested so as to determine whether there was indeed prejudice suffered by the public fiscus. Should this tribunal decide to overlook the possible risk by not condoning the delay i.e. without testing the allegations, it will in fact be condoning a possible unlawful action.

36. In the circumstances, I am condoning the Applicant's delay in bringing this review due to the fact that there are reasonable prospects of success and the potential prejudice to be suffered by the State is in my view much greater than that to be suffered by the Respondents.

MERITS OF THE MAIN APPLICATION

37. I find it necessary to quote the applicable pieces of legislation. The following pieces of legislation are applicable when this tribunal considers whether a contract is reviewable.

1. The Constitution

'Section 217 Procurement

1. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

2. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for -

a. categories of preference in the allocation of contracts; and

b. the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

3. National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented'.

2. The PFMA

2.1 Section 38 reads in part as follows:

'... Section 38

(1) The accounting officer for a department, trading entity or constitutional institution –

a) must ensure that the department, trading entity or constitutional institution has and maintains-

b) effective, efficient and transparent systems of financial and risk management and internal control;...'

(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appointment. ..."

.....

2.2 'Section 45 (a) and (b) Responsibilities of other officials. An official in a department, trading entity or constitutional institution—

(a) must ensure that the system of financial management and internal control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official;

(b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;'

3. Regulation 16.A.6.4

Regulation 16A.6.4 is incorporated by reference in Treasury Note 5 ('TN5'). It provides as follows:

'If, in a specific case, it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority'.

38. It is clear that Regulation 16A.6.4 provides that in exceptional circumstances, an organ of state may procure goods or services in a manner that deviates from the normal procurement process.

39. Pursuant to the powers accorded to it by the PFMA, the National Treasury Instruction Note 5, dated **19 March 2020**, specified the various emergency procurement methods available to procure during the state of disaster. It provided emergency procurement provisions for accounting officers to procure the required goods or services by other means, such as price quotations or negotiations, in accordance with Treasury Regulation 16A.6.4.

40. Toilets are not included in the list of PPEs which would have warranted a deviation from the normal procurement process.

41. In respect of the main review application, the following is relevant in addition to contraventions of the specific sections listed above.

42. The Applicant requests this tribunal take account that the First Respondent admits the delivery of the goods was before the submission of the bid documents and its subsequent appointment. Moreover, I take account of the First Respondent's admission that the Supply Chain Management (SCM) processes and procedures were not complied with. In addition, the initial contract (SM001) was for a period of six months, i.e. from July to December 2020, and that the First Respondent fails to explain why a second bid was completed for the provision of the goods for the remainder of the year.

43. It is, however, the First Respondent's submission that it submitted a quote and duly supplied the toilets at the special instance and request of the Second Respondent. It was requested by the Second Respondent to complete the necessary SCM documentation retrospectively after the delivery of the mobile toilets, which it duly did.

44. The First Respondent disagrees with the Applicant's contention that it was the only supplier who was invited to tender for the supply of mobile toilets. On the First Respondent's version, at least four other suppliers were invited to tender with contracts being awarded to two other suppliers.

45. The First Respondent also disputes the claims of collusion and price fixing flowing from the telephone call received from the Second Respondent as on their version, it was not the only supplier appointed.

46. The First Respondent admitted without proper explanation to receiving telephone calls before 10 June 2020 from the Second Respondent. In my view, the only plausible inference that can be drawn from this primary fact, infers collusion, price-fixing and unfair competitive practice and is in contravention of section 217 of the Constitution.

47. In addition, the First Respondent admitted to delivering the goods before the submission of the bid documents and its subsequent appointment. Also, the SCM processes were not complied with. Moreover, no explanation is given why a second bid was completed for the provision of goods for the remainder of the year while agreeing that the initial contract was for a period of 6 months.

48. The First Respondent also made false declarations regarding its compliance. Moreover, it submitted inaccurate information regarding its operational capacity. It also did not declare a conflict of interest as its director is also a director of another company, also dealing with the Department of Education, as well as her position as a board member of a government institution.

49. It is now a well-established principle in our law that the conclusion of procurement contracts which deviate from legislated requirements renders such contracts unlawful and invalid. In this regard see **Imvusa Trading 1581 BK v Oudtshoorn Municipality**⁹.

50. The evidence shows that the First Respondent claimed R3 000 per month per unit while the goods were purchased at R1 000 and R1 500 per unit per month. The latter amount included delivery, collection and service of the goods.

51. It is the SIU's submission that the First Respondent was unjustifiably enriched as it overcharged the Second Respondent and profited from an unlawful contract. I agree with these submissions.

REMEDY

52. In the event that the Tribunal finds that the impugned contracts fall to be reviewed, the SIU seeks a just and equitable remedy or appropriate consequential relief in terms of Section 4(1)(c) read with section 8(2) of the SIU Act.

53. This Tribunal's jurisdiction to conduct legality reviews and its wide remedial powers in terms of the SIU Act were recognised in **Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit ("Ledla")**¹⁰ where it was inter alia held as follows:

⁹ [2022] ZAWCHC 211 (20 October 2022)

¹⁰ (CCT 319/21) [2023] ZACC 8

“[66] Secondly, the preamble of the SIU Act and section 4 make it abundantly clear that the Act has as its objective, amongst others, the establishment of structures, including the Special Tribunal, to address the rampant corruption in all forms of malfeasance in our country. The preamble of the SIU Act outlines its purpose as to—

“provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public and of instituting and conducting civil proceedings in any court of law or a Special Tribunal in its own name or on behalf of State institutions; to provide for the revenue and expenditure of Special Investigating Units; to provide for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units; and to provide for matters incidental thereto.”

[67] The functions of the SIU are set out in section 4(1)(c) of the SIU Act as follows:

“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 a State institution;** (my emphasis)
- (ii) any relief relevant to any investigation; or
- iii) any relief relevant to the interests of a Special Investigating Unit.”

DEBARMENT

54. Debarment is a measure through which government contractors are prevented from accessing or obtaining public contracts for committing various infringements/offences. In different jurisdictions, such measures are referred to as disqualification, debarment, exclusion, suspension, rejection or blacklisting.

55. The Procurement Act 28 of 2024 deals with debarment in section 15. It reads as follows: “*Debarment 15.*

(1) *Before issuing a debarment order in terms of this section, a procuring institution must provide the bidder, supplier or any of the directors, members, trustees or partners of that bidder or supplier (herein called “the affected person”) with a notice of the intention to debar.*

(2) *The notice must—*

(a) indicate the reason for the intended issuing of a debarment order; and

(b) invite the affected person to provide reasons, within 10 days, why the debarment order should not be issued.

(3) A procuring institution must issue a debarment order against a bidder or supplier and may issue a debarment order against any of the directors, members, trustees or partners of that bidder or supplier, if the bidder or supplier—

(a) provided false information in a bid or any other document submitted to a procuring institution in connection with a procurement process or contract;

(b) provided false information for purposes of registration in a database as envisaged in this Act;

(c) connived to interfere with the participation of other bidders;

(d) has been convicted of an offence involving corruption, fraud, collusion or coercion, price fixing or breach of confidentiality relating to procurement by a procuring institution;

(e) has not performed a material contractual obligation not due to circumstances beyond the control of the supplier;

(f) has been convicted of an offence relating to—

(i) obtaining or attempting to obtain a contract or subcontract; or

(ii) business or professional activities;

(g) attempted, or conspired with, aided, abetted, induced or incited another person to contravene a provision of this Act; or

(h) contravened a provision of this Act.

(4)(a) The procuring institution must consider the reasons submitted in terms of subsection (2)(b) and decide whether to issue a debarment order.

(b) The procuring institution must notify—

(i) the affected person;

(ii) the Public Procurement Office; and

(iii) the relevant provincial treasury, if applicable, within five days from the date of the decision.

(5) The procuring institution may, on application by the affected person—

(a) reduce the period of the debarment order; or

(b) revoke the debarment order, if the order was made in error of fact, error of law or fraud.

(6) The Public Procurement Office must—

(a) establish and maintain a debarment register of persons debarred in terms of this section; and

(b) make the register publicly available.

(7) The Public Procurement Office must, subject to the outcome of an application for review of the decision in terms of section 48, immediately after being notified of the decision to debar in terms of subsection (4)(b) include the name of the affected person in the register referred to in subsection (6).

(8) A debarment order takes effect on the date the name of the affected person appears in the register referred to in subsection (6).

(9) A debarment order may not exceed the prescribed period and different periods may be prescribed for debarment in terms of subsection (3).

(10) A debarment order prohibits the affected person, for the period specified in the debarment order, from participating in procurement by procuring institutions generally or in circumstances specified in the order.

(11)(a) A person debarred in terms of this section may not engage in conduct that, directly or indirectly, contravenes the debarment order.

(b) Without limiting paragraph (a), a person debarred contravenes that paragraph if the person enters into an arrangement with another person to engage in the conduct that directly or indirectly contravenes a debarment order in accordance with the written or verbal directions of the person debarred."

56. Section 4(1)(c) of the SIU Act states that a state institution is entitled to the "prevention of potential damages or losses ..." The Procurement Act gives effect to this section while at the same time ensuring that procedural fairness to the affected party(s).

57. This tribunal is obliged to prevent future damages to the State. This Act would be a great tool in the arsenal of weapons in the fight against corruption. As the Procurement Act is not in force yet, it cannot yet be used to prevent the possibility of the same contractors being awarded a tender to provide services to a state institution after a finding of a contravention of section 217 of the Constitution. This is regrettable.

DISCUSSION

58. It is evident that the officials of the Second Respondent did not comply with the SCM processes when the bid was awarded and the contract with the First Respondent was extended. As a result, the contract was irregular. The amount of R2 538 000.00 is accordingly an irregular expense by the Department of Education.

59. In my view, the officials were aware or should have been aware of the Code of Conduct, procedures and other regulations to be followed when awarding and evaluating bids. Their negligence has accordingly resulted in the Second Respondent incurring irregular expenditure.

60. There are a number of intentional actions performed by the officials and the Second Respondent which points to a fraudulent scheme to procure the goods and services without the necessary authorization. An example hereof is the fact that the Second Respondent split payments to the First Respondent to ostensibly enable procurement under the financial threshold. This amounts to a contravention of the PFMA.

61. On the First Respondent's side, Lebenya failed to declare her interest in a company, Icebofutyhi, which contracted with the Department of Education in the twelve months preceding the new contract. It also failed to declare that the First Respondent contracted with DOE approximately five months earlier. Both of these factors, should they

have been declared, would have disqualified the First Respondent from being awarded the contract. This amounts to a contravention of the PFMA.

62. In addition, Lebenya unlawfully and dishonestly backdated the bid documents from 22 July 2020 to 3 July 2020. She accordingly acted *mala fide*. This amounts to a contravention of both the PFMA and the Code of Conduct

63. The First Respondent also charged a markup of more than 100% on the goods provided and the services rendered. Moreover, services for a period of six weeks were charged for whilst no services were provided for that period. The Department was also charged for the provision of goods for a period of three weeks when these goods were in fact not provided for during that period. This amounts to a contravention of sec 217 of the Constitution, the PFMA and the Code of Conduct.

64. The officials/employees of the Second Respondent used the provisions of the emergency delegation without having obtained approval for the deviation from the HoD. Approval was only obtained after the procurement process.

65. The goods and services were procured irregularly in terms of Treasury Instruction Note 5 which dealt with the procurement of Personal Protective Equipment (PPE). Toilets were not listed as PPE. Normal procurement procedures should have been applied.

66. From the Respondents' submissions, it seems as if these basic principles which are the cornerstones of our democratic state are optional. It seems as if finding loopholes in the system, even if there are none, is how private individuals and/or companies should be contracting with the state. In my view, allowing this would be to carve away at these cornerstones of our democracy.

67. Following proper procurement procedures is not a choice. It is a constitutional obligation. Disregarding these principles, laid down in section 217 of the Constitution is accordingly a violation of a basic constitutional principle.

68. In respect of the remedy sought by the SIU, in my view, the Act is clear that the recovery of damages that a state institution may suffer is one of the purposes of the SIU Act. The setting up of this Tribunal would be a futile exercise if it did not result in the recovery of damages to the state where the review of contractual agreements is successful and set aside.

69. The SIU seeks an order that the First Respondent pay to the Department of Education profits it earned. This principle was applied by our courts before. In this regard see the decision in **Allpay 111 Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others**¹¹ (Allpay 111).

¹¹ 2014 (1) BCLR 1 (CC)

COSTS

70. It is trite that costs should follow the cause. The Applicant was forced to use public funds to pursue this matter. It bears noting that the First Respondent admitted that the correct Supply Chain Management procedures were not followed. I can find no reason to divert from the trite principle in respect of costs.

ORDER

71. In the circumstances I make the following order:

1. The late filing of the review application is condoned;
2. The decision of the Second Respondent to appoint the First Respondent to supply chemical toilets in terms of Bid reference SM001 and any contract concluded by the First Respondent and the Second Respondent after the appointment is declared unlawful, unconstitutional, invalid and of no force and effect and is reviewed and set aside.
3. The Second Respondent's decision to extend the agreement is declared unlawful, unconstitutional, invalid and is reviewed and set aside.
4. Consequential relief is granted in terms of Section 4(1)(c) read with Section 8(2) of the SIU and Special Tribunals Act 1996 no. 74 of 1996 in the following terms:

- 4.1 Forfeiture of all profits derived from the contracts;
- 4.2 Directing the First Respondent to prepare and render, by filing on Case Lines and to the Applicant and Second Applicant, within thirty (30) days of this Special Tribunal's order, a true and proper statement of account duly audited by a qualified and registered chartered accountant and auditor general with SAICA ("the First Respondent's auditor") who shall verify the information stated therein as being true, accurate and justified, together with the substantiating information, evidence and/or expert report(s) setting out inter alia:
 - 4.2.1 The goods supplied by the First Respondent to the Second Respondent and the date(s) upon which such deliveries took place;
 - 4.2.2 A complete, comprehensive and detailed description and particulars of the goods supplied and serviced;
 - 4.2.3 An account of the price paid by the First Respondent for the rent and service of the goods which were delivered to the department;
 - 4.2.4 An account of payments received from the Second Respondent
 - 4.2.5 The difference between the amounts invoiced to and paid by the Second Respondent for the goods and services incurred by the First Respondent (hereinafter collectively referred to as "the statement of accounts").

- 4.3 The Second Respondent will, within thirty (30) days of receipt of the statement of account, obtain and deliver by filing on Case Lines to the Applicant and the First Respondent a report by one or more duly qualified expert(s) addressing the statement of account, including but not limited to:
- 4.3.1 the truth, accuracy, justification and reasonableness of the information stated herein;
 - 4.3.2 any defects in the performance of the contracts);
 - 4.3.3 the value for money received by the Second Respondent, or any lack of such value received (hereinafter collectively referred to as “the Second Respondent’s report”) and
- 4.4 The First Respondent shall cooperate with the Second Respondent and provide all information and records reasonably requested by the Second Respondent for the assessment and verification process completed in paragraph 4.3 above within five (5) days of receipt of a written request;
- 4.5 The parties shall debate the statement of accounts and the Second Respondent’s report within ten (10) days of receipt of the Second Respondent’s report;
- 4.6 The parties shall, within ten (10) days after the debatement of the statement of accounts and the Second Respondent’s report, file joint minutes compiled by their respective expert(s) setting out the issues on which they agree and the issues on which they disagree;

- 4.7 If the joint minutes disclose a disagreement regarding the profits enjoyed by the First Respondent in terms of the contract, the Applicant and any of the respondents may approach the Special Tribunal for an appropriate order after supplementing the papers as considered necessary. In the alternative, the issue of the received profit (if any) that the First Respondent is required to reimburse the Second Respondent be referred to oral evidence or trial on such terms that the Special Tribunal may deem fit to impose or;
- 4.8 If the joint minutes disclose no disagreement regarding the profits earned and upon delivery of the joint minutes, the First Respondent shall be liable to pay the Second Respondent the amounts of profit specified in the joint minutes;
- 4.9 The First Respondent shall pay the Second Respondent the amount directed to pay, as described in paras 4.7 or 4.8 above, within twenty (20) days after the order is made or after the joint minutes are delivered, including interest incurred on the amount at a rate determined by the Minister of Finance under section 80(1)(b) of the Public Finance Management Act of 1999 read with Treasury Regulation 11.5, alternatively the interest rate prescribed by Section 1 of the Prescribed Rate of Interest Act 55 of 1975.
5. The Second Respondent is ordered to start disciplinary procedures against those officials listed in para 7 above who has, at the time of the granting of this order, not been disciplined for their involvement in the awarding of this contract.

6. The First Respondent is to pay the costs of this application.



FORTUIN, J

APPEARANCES

For the Applicant


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DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	
SPECIAL TRIBUNAL	
CNR AMANDA AVENUE & RIFLE RANGE ROAD, OAKDEN	
	2025 -11- 06
C/A No: One	
REGISTRAR	

Signature of: 
Name: 

For Respondent

: K C Mullins

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