CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 319/21

In the matter between:

LEDLA STRUCTURAL DEVELOPMENT (PTY) LIMITED	First Applicant
RHULANI LEHONG	Second Applicant
KGODISHO NORMAN LEHONG	Third Applicant
and	
SPECIAL INVESTIGATING UNIT	Respondent

Neutral citation:	*Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* [2023] ZACC 8
Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J and Tshiqi J
Judgments:	Mhlantla J (unanimous)
Heard on:	24 May 2022
Decided on:	10 March 2023
Summary:	Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act — Special Tribunal is not a court but has the jurisdiction to adjudicate legality reviews

ORDER

On appeal from the Special Tribunal held at the High Court of South Africa, Gauteng Division, Pretoria:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MHLANTLA J (Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mlambo AJ, Theron J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order of the Special Tribunal held at the High Court of South Africa, Gauteng Division, Pretoria. The Special Tribunal is established in terms of section 2 of the Special Investigating Units and Special Tribunals Act[1] (SIU Act). The Special Tribunal reviewed and set aside an unlawful contract. It issued an interdict and a forfeiture order in respect of monies held in terms of a preservation order. The central question in this matter is whether the Special Tribunal is a court and has review powers as well as the powers to grant preservation and forfeiture orders.

[1] 74 of 1996.

Parties

[2] The first applicant is Ledla Structural Development (Pty) Ltd (Ledla). The second and third applicants are Ms Rhulani Lehong and Mr Kgodisho Norman Lehong, respectively. They are the directors and co-chief operations officers of Ledla. The respondent is the Special Investigating Unit (SIU), an organ of state established in terms of section 2(1)(a)(i) of the SIU Act.

Background

[3] The following background is largely taken from the judgment of the Special Tribunal. In December 2019, the world was introduced to COVID-19.[2] The first confirmed case of COVID-19 in South Africa was reported on 5 March 2020.[3] The unanticipated emergence of COVID-19 prompted the South African government to take active measures to prevent the further spread of the coronavirus and, as far as possible, mitigate its effects.[4] One such measure was the procurement of personal protective equipment (PPE), a task that was to be performed by the various provincial departments of health.

[4] On 27 March 2020, the Chief Operations Officer of the Gauteng Department of Health (Department) presented a report that revealed a PPE shortage of R1.7 billion for the entire Department. The report was informed by a decision of the Department that was taken to assess and project the impending PPE shortage, as well as the quantities required to ensure that frontline health workers would be protected. As a result of this

[2] The World Health Organisation (WHO) declared COVID-19 a pandemic on 11 March 2020. See Cucinotta and Vanelli "WHO Declares COVID-19 a Pandemic" (2020) 9 *Acta Biomed* at 157. See also Nyamutata "Do Civil Liberties Really Matter During Pandemics? Approaches to Coronavirus Disease (COVID-19)" (2020) 9 *International Human Rights Law Review* 62 at 70; Allam *Surveying the Covid-19 Pandemic and its Implications* (2020) *Elsevier Inc* at 1-2; and Huang et al "Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China" (2020) 395 *The Lancet* at 497.

[3] Herman "Coronavirus: SA's First Positive Case of Covid-19 Confirmed" *News24* (5 March 2020), available at https:/www.news24.com/SouthAfrica/News/breaking-sas-first-positive-case-of-covid-19-confrmed-20200305.

[4] Sobikwa and Phooko "An Assessment of the Constitutionality of the COVID-19 Regulations Against the Requirement to Facilitate Public Participation in the Law-Making and/or Administrative Process in South Africa" (2021) 25 *Law, Democracy and Development* 309 at 311, 326-7.

report, a decision was taken to procure PPE stock. Ms Mantsu Kabelo Lehloenya, the Chief Financial Officer of the Department, was appointed as the chairperson of the Bid Adjudication Committee and was placed in charge of the procurement process for the Department.

[5] For reasons of exigency, the Department authorised a deviation from compliance with the normal tender processes. It is worth noting that this deviation was adopted by the Department, notwithstanding Note No 8 of 2019/2020 that was issued in terms of section 76 of the Public Finance Management Act[5] (PFMA) on 19 March 2020 by the National Department of Treasury. Note 8 was issued to, among other things, support effective and efficient service delivery, as well as to curb possible abuses of supply chain management systems during the period of managing COVID-19. Clause 2.3 of Note 8 emphasises that in procuring COVID-19 items, state institutions were required to comply with the PFMA and the applicable emergency provisions of the Treasury Regulations.[6] Regulation 16A6.4 of the Treasury Regulations provided that if it was impractical to invite competitive bids, the accounting officer may procure the required goods and services by other means, provided that the reasons for deviation from inviting competitive bids were recorded and approved by the accounting officer. Although the Department did not advertise the tender or call for bids, as it would in the ordinary course, it received bids from various individuals and businesses.

[6] The Department received two bids to supply masks, disposable bags and sanitisers from Royal Bhaca (Pty) Ltd (Royal Bhaca), whose sole director was Mr Thandisizwe Diko – a close family friend to Dr Bandile Masuku, the then Member of the Executive Council for Health in Gauteng. Mr Diko secured two contracts (PPE contracts) with the Department to the value of R125 million. When the relationship between Mr Diko and Dr Masuku became public knowledge, Royal Bhaca was substituted with Ledla.

[5] 1 of 1999.

[6] Treasury Regulations, GN R225 *GG* 27388, 15 March 2005.

[7] On 25 March 2020, Ms Thandy Pino was appointed as Chief Director of Supply Chain and Asset Management in the Department. Five days after her appointment, Ms Pino signed commitment letters for PPE contracts valued at R125 million. It is common cause that Ms Pino did not have the necessary authority to sign off on procurement contracts that exceeded the value of R30 000. Ms Pino advised the SIU that Ms Lehloenya had instructed her to sign the letters of commitment.

[8] On 13 April 2020, Ms Lehloenya received a quotation from Ledla for several PPE items amounting to R139 million. According to the SIU's investigation, the quotation was created by Mr Diko and modified by Ms Lehloenya. On 20 April 2020, the quotation was accepted by Ms Lehloenya and the amended commitment letter was sent directly to Mr Diko. On 30 April 2020, Ms Lehloenya sent two emails to Mr Diko. One of them cancelled the two contracts with Royal Bhaca and the other was an acceptance of the quotation on behalf of the Department. The second email also contained the amended letter of commitment attached to an email dated 20 April 2020. Thereafter, Ms Lehloenya resigned from the Department on 1 May 2020.

[9] On 3 August 2020, the Department deposited an amount of R38 758 155 into Ledla's bank account. Between 3 and 5 August 2020, Ledla transferred a large portion of this amount into various bank accounts. K Manufacturing and Supply (Pty) Ltd (K Manufacturing) received an amount of R16.5 million. Mr Sangoni, who was neither a director nor an employee of Ledla, but a relative of Mr Diko's wife, instructed K Manufacturing to transfer R8.5 million to his company, Zakheni Strategic Solutions (Pty) Ltd. From the remaining money, K Manufacturing distributed various amounts to five companies and three individuals.[7] Mediwaste Packaging (Pty) Ltd (Mediwaste), received R3 470 000 from Ledla. On the next day, Mediwaste transferred various

[7] The five companies were: Hallmann Worldwide Logistics (Pty) Ltd; Double Click BTC (Pty) Ltd; Skyline Contractors (Pty) Ltd; Home Vision Projects (Pty) Ltd; and XC Logic (Pty) Ltd. The three individuals were Mpho Mafenyane, Yuchang Xiao and Ronen Barashi.

amounts into the bank accounts of nine other business entities and three individuals.[8] Another company, Atturo Tyres (Pty) Ltd, received R1 426 000 from Ledla and it also distributed it to various business entities and individuals.[9]

[10] Mr Jonathan Maake, the managing director of Mediwaste, filed an affidavit before the Special Tribunal in which he alleged that, on 3 April 2020, he was approached by Mr Lehong and Ms Lehong, as representatives of Royal Bhaca, seeking to place orders for the supply of disposable bags and health care boxes. Mediwaste charged 75 cents for each disposable bag. The total for a million disposable bags came to R750 000. Royal Bhaca charged the Department R7 per bag, totalling R7 million for the million disposable bags. Royal Bhaca, therefore, made a profit of R6 250 000 on the disposable bag transaction.

[11] According to Mr Maake, while Mr Diko was attending at Mediwaste to facilitate a certain payment, Mr Diko proposed that Mediwaste and Royal Bhaca enter into a partnership. This partnership, in terms of the proposal, was to be capitalised by securing a loan for the amount of R30 million from the Industrial Development Corporation. Upon securing the loan, this amount would be shared between the two entities, whereafter Mediwaste would file for bankruptcy.

[12] Several complaints were made regarding allegations of corruption in the procurement of PPE. The Head of Department referred the allegations to the Office of the Premier. A preliminary investigation was conducted by the Office of the Premier. The investigation revealed violations of procurement prescripts and impropriety in the processing of payments. The media widely reported on the award of two contracts to Royal Bhaca and suggested that the awards may have been as a result of Mr Diko's proximity to political power. As a result, the President of the Republic of South Africa

[8] The nine businesses were: Xingyu Plastic Recycling (Pty) Ltd; Mortz Marketing Enterprise CC; Injemo Engineering and Plastic Products (Pty) Ltd; Buhle Waste (Pty) Ltd; Api Property Group (Pty) Ltd; Sasol South Africa Limited; Mutasa Tool and Die Engineering (Pty) Ltd; Empiru (Pty) Ltd; and Boxlee (Pty) Ltd.

[9] Atturo distributed the funds to the following entities and individuals: Jamac Technological CC; Manikensis Investments 6 (Pty) Ltd; Angelic Juliana Groenewald; Michael Gerad Rofail; and Patrick John Kalil.

issued a proclamation in terms of the SIU Act, authorising the SIU to investigate acts of maladministration, corruption and breaches of procurement procedures relating to COVID-19 and for remedial steps to be taken.

[13] The SIU conducted investigations and concluded that Ms Lehloenya was central to the conclusion of the unlawful contract and authorisation of the payment of R38 758 155 to Ledla. This was based on email correspondence between Ms Lehloenya and Mr Diko, as well as evidence from other parties. The SIU's findings prompted it to approach the Special Tribunal for urgent relief relating to the contract awarded to Ledla.

Litigation history

Special Tribunal

Urgent application

[14] In August 2020, the SIU launched an ex parte urgent application against Ledla and various other business entities and individuals for relief in three parts: (a) cancellation of the contract between the Department and Ledla; (b) a preservation order against various banks which held the amount of R38 758 155 paid to Ledla; and (c) an interdict prohibiting the Government Employees Pension Fund and the Government Pensions Administration Agency from releasing monies held in pension and retirement benefits due to Ms Lehloenya. The interim order was granted and a rule nisi was issued.

Return date

[15] On the return day of the rule nisi, the SIU applied for the contract concluded by Ledla and the Department to be reviewed and set aside for being unlawful. It also applied for the amount of R38 758 155 which was subject to a preservation order, to be forfeited to the state. The respondents opposed the relief sought on several grounds. These included that: (a) the Special Tribunal is not a court and does not have review powers to grant the orders sought; (b) the SIU lacked locus standi; (c) the funds had

mixed with other monies in the bank and thus became the property of the bank (*commixtio*); and (d) they sought a proper interpretation of rule 26 of the Rules for the Conduct of Proceedings in the Special Tribunals (Special Tribunal Rules).[10]

[16] The Special Tribunal had to determine whether: (a) the contract entered into between Ledla and the Department should be reviewed and set aside; (b) the amount of R38 758 155 should be declared as the proceeds of unlawful activity and forfeited to the state; and (c) the interdict should be extended.

[17] On the first issue, the Special Tribunal considered the Instruction Notes issued by the National and Provincial Treasury for PPE procurement and found that, on the evidence, it appeared that Royal Bhaca submitted a quotation for the supply of bio-hazard health care boxes and bags valued at R47 million and the Department awarded it the contract for that amount. The next day, Royal Bhaca submitted a quotation for the supply of masks and hand sanitisers valued at about R78 million and the Department also awarded it the contract for that amount. Both quotations were accepted through commitment letters that were signed by Ms Pino. She alleged that it was Ms Lehloenya who had instructed her to sign the commitment letters and who personally invited the suppliers to submit bids. Ms Lehloenya disputed these allegations.

[18] The Special Tribunal held that there was a link between Royal Bhaca and Ledla – in essence Ledla became a substitute for Royal Bhaca in the amended contract signed by Ms Lehloenya on 20 April 2020. Mr Diko, Mr Lehong and Ms Lehong were acting in concert with officials from the Department to supply PPE at inflated prices. The prices quoted were in excess of the maximum prices set by Treasury, none of the

[10] Rule 26(1) of the Special Tribunal Rules regulates forfeiture orders and states:

> "At the conclusion of the proceedings and on final determination of the dispute, depending on the outcomes on the unlawful activities of the respondent or the defendant, as the case may be, the Tribunal shall make a final order for forfeiture to the State of the property held under a restraint order or property preservation order where a respondent has been found to have partaken in unlawful activities."

senior officials negotiated these prices and a cost comparison was never undertaken. In conclusion, the Special Tribunal held that one or more senior officials at the Department acted in concert with Mr Diko and, therefore, the contracts awarded to Royal Bhaca and Ledla were unlawful and fell to be set aside.

[19] On the second issue, the Special Tribunal held that Mr Diko had been implicated by documentary evidence. Ms Lehloenya sent two emails to Mr Diko just before she resigned: one that cancelled the contract with Royal Bhaca and another that contained the amended letter of commitment to Ledla. The significance of this, according to the Special Tribunal, is that it was strange that an "amended" letter of commitment would be sent to Ledla, when no previous commitment had been made. Further, the Special Tribunal questioned why the email was sent to Mr Diko, who had nothing to do with Ledla.[11] The Special Tribunal held that the unlawful contract was the basis for the payment of R38 758 155. Therefore, it was irrelevant that Ms Lehloenya had resigned by the time the payment was made.[12] The Special Tribunal extended the interdict pending the finalisation of the action proceedings under case number GP/11/2020 in the Special Tribunal.

[20] Regarding the question whether the Special Tribunal is a court, it was held that the Special Tribunal, although *sui generis* (of its own kind), performs the functions of a civil court.[13] A decision by the Special Tribunal is appealable to the Full Court of the High Court and, therefore, fits the description of a court as contemplated in section 166(e) of the Constitution. The Special Tribunal held that, although the SIU was wrong to rely on the Special Tribunal Rules to found a cause of action, there is a cause of action under the SIU Act.[14] It further held that the review and setting aside of improper or unlawful conduct by employees of any state institution arising out of an

[11] *Ledla Structural Development (Pty) Ltd v Special Investigating Unit*, unreported judgment of the Special Tribunal, Gauteng Case No GP 07/2020 at para 39 (Special Tribunal judgment).

[12] Id.

[13] Id at para 46.

[14] Id at para 48.

investigation in section 2(2) of the Act is competent relief that may be sought within the meaning of civil proceedings in the SIU Regulations.[15] It held that the SIU has the necessary locus standi to institute proceedings in the Special Tribunal.[16] The Special Tribunal also dismissed the defence that, since the funds had been deposited in the various bank accounts, the funds had mixed with other monies in the bank and thus became the property of the bank.[17]

[21] The Special Tribunal considered the evidence against each of the cited respondents to determine whether forfeiture was appropriate, given this Court's decisions in *Botha*[18] and *Mohamed*,[19] and the right not to be arbitrarily deprived of property. The Special Tribunal said that rules 24 and 26 of the Special Tribunal Rules mirror the provisions of the Prevention of Organised Crimes Act[20] (POCA) in respect

[15] Id at para 50.

[16] Id at para 52.

[17] Id at para 59.

[18] In *National Director of Public Prosecutions v Botha N.O*. [2020] ZACC 6; 2020 (1) SACR 599 (CC); 2020 (6) BCLR 693 (CC) at paras 108-9, this Court held:

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

[19] *National Director of Public Prosecutions v Mohamed N.O*. [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at paras 18-9, this Court held:

> "Prior to the forfeiture stage of the proceedings there is an opportunity for affected parties to have preservation orders set aside or varied. So, section 47(3) provides that a High Court shall rescind a preservation order made in respect of immovable property 'if it deems it necessary in the interests of justice' to do so. Section 47(1) provides, in respect of movable property, that a High Court may vary or rescind the preservation order, but in much more limited circumstances than in the case of immovable property.
>
> At the forfeiture stage of the proceedings an owner can claim that he or she acquired an interest in the property in question legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence ('the innocent owner' defence)."

[20] 121 of 1998. Rule 24 of the Special Tribunal Rules regulates preservation orders. It provides:

> "(1) Any interested person or party including the SIU may by way of an ex parte application

of preservation and forfeiture. Relying on the decisions of this Court relating to POCA, the Special Tribunal said its approach to forfeiture would be to ascertain whether the Special Tribunal was persuaded that: (a) each respondent to whom the money was

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apply to the Tribunal for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The application must demonstrate that the property concerned:

(a) is or has been [an] instrumentality of an offence referred to in schedule 1 of [Prevention and Combating of Corrupt Activities Act]; or

(b) constitutes the proceeds of unlawful activities emanating from the findings of an investigation conducted by SIU, pursuant to a proclamation made by the President relevant to that investigation, in terms of section 2(1) of the Act.

(3) The Tribunal at the time of granting a preservation order may at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the Tribunal considers appropriate for the proper, fair and effective execution of the preservation order.

(4) Property seized under this Rule shall be dealt with in accordance with the directions of the Tribunal.

(5) Where the Tribunal orders preservation of a property, the SIU shall, as soon as is practicable after granting the order—

(a) give notice of the order to all persons known to the SIU to have an interest in property which is subject to the order; and

(b) publish a notice of the order in the Gazette.

(6) A notice under this sub-rule 5 shall be served in the manner provided for in these Rules.

(7) Any person who has an interest in the property which is subject to the preservation order may enter an appearance to apply for an order excluding his or her interest in the property concerned from the operation thereof.

(8) An appearance under this Rule shall be delivered to the SIU and in the case of—

(a) a person upon whom a notice has been served under sub-rule 5, 14 days after such service; or

(b) any other person, 14 days after the date upon which a notice under subsection (1)(b) was published in the Gazette.

(9) An appearance under sub-rule 5 shall contain full particulars of the chosen address for the delivery of documents concerning further proceedings and shall be accompanied by an affidavit stating—

(a) full particulars of the identity of the person entering the appearance;

(b) the nature and extent of his or her interest in the property concerned; and

(c) the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof."

transferred acquired the rights to the money legally; (b) the acquisition was for value; and (c) the respondents neither knew nor had any reasonable grounds to suspect that the money was the proceeds of unlawful activity.[21] The Special Tribunal found that the three applicants that are before this Court had failed that test. The Special Tribunal also declared the contract to be unlawful and set it aside. It extended the interim interdict pending the finalisation of the action proceedings. It confirmed the preservation order against Ledla, K Manufacturing, Ms Lehong and Mr Lehong and declared the money forfeited to the state.

[22] Aggrieved by the decision of the Special Tribunal, the applicants applied for leave to appeal. That application was dismissed.

Supreme Court of Appeal

[23] The applicants petitioned the Supreme Court of Appeal. That Court refused leave to appeal.

In this Court

Applicants' submissions

Jurisdiction and leave to appeal

[24] The applicants submit that this Court's jurisdiction is engaged as this matter requires this Court to determine: (a) the "proper interpretation and application of instruments intended to give effect to section 217 of the Constitution"; (b) the proper interpretation and application of the right to a fair trial; (c) the interpretation and application of section 217 of the Constitution; (d) the scope of the Special Tribunal's public powers to adjudicate judicial reviews, which – according to the applicants – is a matter that falls within the exclusive preserve of the High Court; and (e) the powers of the Special Tribunal to effect a deprivation of private property.

[21] Special Tribunal judgment at para 72.

[25] With regard to leave to appeal, the applicants submit that the application enjoys reasonable prospects of success, as the relief sought by the SIU should have been dismissed. The applicants further submit that it would be in the interests of justice for this Court to hear this matter, as its adjudication will aid in providing certainty on the scope of the Special Tribunal's powers and functions.

Merits

[26] The applicants submit that the Special Tribunal is not a court and, consequently, the review proceedings and the forfeiture orders it granted were a nullity, as they were premised on an incorrect assumption that the Special Tribunal is a court of law. The applicants draw a distinction between the powers and functions of tribunals and courts, and submit that tribunals have limited powers and functions which are conferred on them. The applicants argue that the Special Tribunal is set up by the President of the Republic of South Africa and the Legislature could not have contemplated conferring unfettered discretion on the President to create a court.

[27] The applicants submit that the Special Tribunal does not have the powers to "adjudicate judicial reviews of administrative action or any exercise of public power for the contravention of section 217 of the Constitution" under any judicial review scheme. They submit that a breach of section 217 can only elicit a judicial review under two avenues – the principle of legality (section 1(c)) or through the Promotion of Administrative Justice Act[22] (PAJA). On legality review, the applicants contend that the remedial action that may be taken by a court is in terms of section 172 of the Constitution, which entitles a court to make a just and equitable order, inclusive of a declaration of constitutional invalidity. The applicants submit that tribunals are not authorised to exercise section 172 powers, as these are reserved for the courts. Under PAJA review, the applicants state that section 6(1) of PAJA empowers a "court or a tribunal" to conduct a "judicial review of an administrative action". The applicants elucidate that PAJA defines a court as "a High Court or another court of similar status"

[22] 3 of 2000.

and the "Magistrates' Court", exclusive of a body akin to the Special Tribunal. Therefore, a tribunal is excluded from the definition. The applicants submit that the Special Tribunal acted beyond its powers when it engaged in a judicial review and, thus, its decisions are a nullity. The applicants also reject the submission that the Special Tribunal's review powers are sourced from the Regulations of the Special Investigating Units and Special Tribunals[23] (SIU Regulations).

[28] The applicants submit that the Special Tribunal was not empowered by the SIU Regulations or the Special Tribunal Rules to grant a preservation order. According to the applicants, the SIU Regulations do not permit civil forfeiture, unless the preservation order, under which the property is subject, is "legally competent". The applicants submit that legal competence is not conferred by the SIU Regulations but must be pre-existing – the forfeiture powers must be conferred by an extrinsic empowering instrument. In the absence of that instrument, a forfeiture of assets is incompetent and not authorised. Additionally, the applicants submit that an order relating to the forfeiture of assets is a deprivation of property, which implicates section 25(1) of the Constitution.[24] The section 25(1) right may only be limited in terms of a law of general application. The applicants submit that the Special Tribunal Rules do not constitute a law of general application and cannot be interpreted as such.

[29] The applicants make several submissions to the effect that the Special Tribunal erred in its factual findings. The applicants submit that the finding by the Special Tribunal that the awarding of the contract to the first applicant was tainted with corruption and fraud related to an issue that was not before it for adjudication. They refute the finding that Ledla was unlawfully substituted for Royal Bhaca. They further disavow the finding that the quoted prices were in excess of the maximum prices

[23] Regulations: Special Investigating Units and Special Tribunals GN R360 *GG*25024, 14 March 2003.

[24] Section 25(1) of the Constitution provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

regulated in terms of Treasury Notes 5 and 8 as well as the finding that Ms Lehloenya had acted alone and beyond her powers in the procurement process.

[30] The applicants seek an order setting aside the order of the Special Tribunal and an order "discharging the rule nisi and dismissing the application with costs including costs of two counsel". The applicants further seek costs of the special application for leave to appeal to the Supreme Court of Appeal, inclusive of costs consequent upon the employment of three counsel.

Respondent's submissions

Jurisdiction and leave to appeal

[31] The respondent submits that it would not be in the interests of justice for this Court to grant leave to appeal. In support of its submissions, the respondent contends that the applicants have no material defence, as the award of the tender to Ledla was "manifestly unlawful and calculated to conceal the interests of Mr Diko".

[32] The respondent also submits that the applicants have raised mostly novel issues and arguments in their written submissions. These include the challenge to the status or jurisdiction of the Special Tribunal. The respondent argues that these issues were not raised by the applicants in the proceedings before the Special Tribunal or in the application filed in the Supreme Court of Appeal or this Court. The respondent submits that the challenge to the Special Tribunal's status and jurisdiction is a far-reaching issue of public importance, which could affect a range of respondents who have been and/or will be subject to review proceedings. Thus, by adjudicating this matter, this Court will be acting as a court of first and last instance, without the benefit of the respondent's adequately prepared submissions and in the absence of the Minister of Justice, who ought to have been a party to the proceedings. The respondent further submits that the applicants, in their application for leave to appeal in this Court, expressly accepted the status of the Special Tribunal as a court and that it was entitled to grant an order reviewing and setting aside the award of a tender.

Merits

[33] The respondent submits that the Special Tribunal's power to conduct reviews and to grant forfeiture orders is not determined by its status as a court, "but by the proper interpretation of the powers vested in it by the SIU Act and the Regulations". The respondent further contends that nothing in the Constitution "precludes an independent and impartial Tribunal" from exercising review powers, setting aside tender awards and/or making forfeiture orders. Further, the respondent submits that the Special Tribunal is a court. According to the respondent, the Special Tribunal may be described as "any other court" in terms of section 166(e) of the Constitution and/or qualifies as a court "established in terms of an Act of Parliament" – the Special Tribunal was established pursuant to the SIU Act. The respondent also contends that it meets the requirements of independence outlined in section 165(2) of the Constitution. The respondent submits that when determining whether the Special Tribunal is a court, its functions and features must be taken into account. The respondent contends that the Special Tribunal functions on the same basis as a civil court, bearing in mind its composition, the public participation in its proceedings and the effect of its decisions.

[34] On its composition, the respondent submits that the Special Tribunal is composed of judges and magistrates who are already clothed with judicial authority. On its functioning, the respondent submits that the Special Tribunal is independent and impartial;[25] specifically tasked with adjudicating civil proceedings and making orders similar to a court;[26] empowered to issue warrants for persons who fail to honour a subpoena; and makes decisions that are executed and appealed on the same basis as a single judge of the High Court.[27]

[25] See section 8(1) of the SIU Act.

[26] See section 8(2) of the SIU Act.

[27] See sections 8(7) and 9(7) of the SIU Act.

[35] The respondent submits that the Special Tribunal is empowered to adjudicate civil proceedings in terms of section 8(2) of the SIU Act. It contends that the impugned review proceedings were civil proceedings in terms of section 8(2), thus the Special Tribunal has the necessary jurisdiction. The respondent further submits that section 8(2) of the SIU Act accords with section 34 of the Constitution and PAJA.

[36] Additionally, the respondent argues that the contention that the Special Tribunal does not have the jurisdiction to adjudicate reviews subverts the scheme of the SIU Act, which was intended to investigate "serious malpractices or maladministration in connection with the administration of state institutions". The respondent submits that review proceedings are "quintessential civil proceedings designed to remedy malpractices and maladministration in connection with the administration of state institutions".

[37] The respondent contends that the Special Tribunal has the requisite authority to grant forfeiture orders. In this regard, the respondent submits that the applicants erroneously relied on the Special Tribunal Rules that were promulgated in 2020, whereas the rules relied upon to seek the preservation order when the proceedings were launched were promulgated in 2019. The respondent avers that rule 24 of the 2019 Rules was capable of supporting the preservation and forfeiture orders that were granted by the Special Tribunal. It further submits that there is no merit in the applicants' contention that the Special Tribunal Rules are not a law of general application, as they were published and apply to "all persons who found themselves subject to proceedings before the Special Tribunal".

[38] Lastly, the respondent argues that there is no merit in the allegation that the Special Tribunal made incorrect factual findings. The respondent contends that it presented substantial evidence about the material issues in the case, some of which were unchallenged. The respondent further submits that the Special Tribunal's findings were premised on uncontroverted evidence. The respondent argues that the applicants' version is contrived, and the evidence presented demonstrates that the first applicant

was "unlawfully and irregularly awarded" the contract. Thus, the respondent seeks that the application for leave to appeal be dismissed, or if leave is granted, the appeal be dismissed with costs, including the costs of two counsel.

Issues

[39] The preliminary issue that must be determined is whether the jurisdiction of this Court is engaged and, if so, whether leave to appeal should be granted. The main issues that must be determined relate to the status of the Special Tribunal. In particular: whether the Special Tribunal is a court of law; whether the Special Tribunal has powers to adjudicate reviews and, if so, whether it may issue forfeiture orders; and whether it is open to this Court to determine the correctness of the Special Tribunal's factual findings concerning the applicants' conduct.

Jurisdiction and leave to appeal

[40] This matter is primarily centred on the determination of the scope and content of the Special Tribunal's status, powers and functions. This exercise also involves, to some extent, the interpretation of section 8 of the SIU Act. These are constitutional issues as they concern an enquiry into the exercise of public power. Consequently, this Court's jurisdiction is engaged. Further, the inquiry into the status, powers and functions of the Special Tribunal raises an arguable point of law of general public importance, as envisaged in section 167(3)(b)(ii) of the Constitution. This Court is also called upon to provide clarity on the competence of the Special Tribunal to adjudicate reviews and make forfeiture orders.

[41] These are questions that have greater implications, not just for the litigants before this Court, but also for other parties who may find themselves before the Special Tribunal in similar cases. Therefore, it is in the interests of justice that leave to appeal should be granted.

Merits

Is the Special Tribunal a court?

[42] Before determining this issue, it is imperative to address the respondent's contentions that the questions surrounding the Special Tribunal's status and powers were raised for the first time in this Court and that the applicants made a concession on the status of the Special Tribunal.

[43] On the first contention – whether the questions surrounding the Special Tribunal's status and powers were raised for the first time in this Court – the record before us reveals the following: in an affidavit filed at the Special Tribunal and deposed to by the second applicant, the SIU's authority to institute the review proceedings and to seek a forfeiture of assets, as well as the Special Tribunal's jurisdiction over these matters, are challenged. The applicants alleged that the appropriate remedy for confiscation and forfeiture could only be in terms of the POCA or the Prevention and Combating of Corrupt Activities Act,[28] which may only be brought by the National Prosecuting Authority. The applicants expressly argued that the SIU does not have legal standing to prosecute a claim against the other respondents and that the Special Tribunal does not have jurisdiction over the envisaged claim.

[44] The question whether the Special Tribunal is a court and whether it has jurisdiction to adjudicate reviews was also directly addressed by the Special Tribunal in its judgment, in which it made a finding that its status fits the description of a court.

[45] On the second contention – whether the applicants made any concession on the status of the Special Tribunal – due regard must be had to the applicants' conduct. The applicants have been consistent in their arguments and their challenge of the Special Tribunal's status and powers. Their conduct is not consistent at all with the alleged concession. Furthermore, a concession on the status and jurisdiction of the Special Tribunal amounts to a legal concession and it is well-established that legal

[28] 12 of 2004.

concessions that have been erroneously made are not binding. In *Matatiele*, this Court held that "[i]t is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law".[29] In *Dengetenge*, this Court held that "a concession made by counsel on a point of law may be withdrawn if the withdrawal does not cause any prejudice to the other party".[30]

[46] From this, it is evident that these issues were squarely pleaded by the applicants and considered by the Special Tribunal. They were not raised for the first time before this Court in the applicants' written submissions. It is further evident that the alleged legal concessions are not binding and are in any event also not dispositive of the live issues before us. Thus, the respondent's contentions in this regard do not gain traction.

[47] Now that the preliminary issues have been dispensed with, I will determine the question whether the Special Tribunal is a court.

[48] The starting point is section 166 of the Constitution, which provides:

> "The courts are—
>
> (a) the Constitutional Court;
> (b) the Supreme Court of Appeal;
> (c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;
> (d) the Magistrates' Courts; and
> (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts."

[29] *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 67.

[30] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC) at para 55.

[49] A plain reading of section 166(e) reveals that it applies to a court established or recognised in terms of an Act of Parliament. It also includes a court of similar status to the High Court or the Magistrates' Courts. It does not apply to a tribunal.

[50] The Special Tribunal is established and constituted on an ad hoc basis. In terms of section 2(1) of the SIU Act, the President as Head of the Executive has been given a discretion to issue a proclamation establishing a Special Tribunal. Section 2(2) also makes clear that only the President is empowered to refer matters to the SIU or to establish a Special Investigating Unit in order to investigate a matter. These features are not those of a court of law. The Special Tribunal's jurisdiction is also restricted to civil proceedings that arise from the investigations and referral by the SIU, in terms of section 2(2) of the SIU Act.

[51] It is so that the presiding officer of the Special Tribunal is a judge or retired judge. However, the other members of the Tribunal are not always judges. In terms of section 7(3),[31] the additional members may be appointed from the ranks of judges or acting judges, magistrates and advocates or attorneys. Section 7(5) empowers the President to determine the period of appointment of the members of the Special Tribunal. This means that the members have no security of tenure, something enjoyed by judges.

[52] In the result, these factors ineluctably point to only one conclusion; that the Special Tribunal is not a court.

[31] Section 7(3) of the SIU Act reads:

> "Additional members of the Tribunal may be appointed by the President from the ranks of--
>
> (a) judges or acting judges; and
>
> (b) magistrates and advocates or attorneys of the Supreme Court of South Africa who have been involved in the administration of justice for a period of at least seven years."

Does the Special Tribunal have the power to adjudicate reviews?

[53] Having determined that the Special Tribunal is not a court, the next question is whether the Special Tribunal has review powers. Section 6(1) of PAJA states: "any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action". Section 1 of PAJA defines a tribunal as "any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act". On a plain reading of section 6(1) of PAJA, the Legislature refers to a court or tribunal. The word "or" must be read to imply that the tribunal is different from a court. The definition of a tribunal must mean that the Special Tribunal has no power to adjudicate a review of administrative action under PAJA. This is simply because it has not been "established by national legislation for the purpose of judicially reviewing an administrative action in terms of [PAJA]".

[54] The question then becomes: can a tribunal, more specifically the Special Tribunal, conduct a legality review?

[55] Recently, in *Group Five*,[32] this Court had occasion to consider questions similar to the ones currently before this Court, specifically, whether the Competition Tribunal has review powers in matters arising out of the interpretation and application of chapters 2, 3 and 5 of the Competition Act.[33] In *Group Five*, the Competition Commission (Commission) referred a complaint against Group Five Construction Limited (Group Five), one of the construction companies alleged to have been involved in collusive conduct concerning the construction of stadia for the 2010 Soccer World Cup, to the Competition Tribunal for possible collusive and anti-competitive conduct in contravention of section 4(1)(b)(i) and (ii) of the Competition Act.[34] In response,

[32] *Competition Commission of South Africa v Group Five Construction Ltd* [2022] ZACC 36; 2023 (1) BCLR 1 (CC).

[33] 89 of 1998.

[34] *Group Five* above n 32 at para 4. Id.

Group Five raised the defence that the Commission had previously granted it immunity from prosecution through its Corporate Leniency Policy and that the Commission's referral was effectively oppressive, vexatious and mala fide.[35]

[56] Thereafter, Group Five launched a review application in the High Court against the Commission's decision to refer the complaint to the Competition Tribunal.[36] In response, the Commission sought an order to declare that the review proceedings constituted an irregular step and, on that basis, to set them aside. The Commission's case was that the High Court lacked jurisdiction to hear the matter as it pertained to the interpretation and application of Chapters 2, 3 and 5 of the Competition Act, matters over which the Competition Tribunal has exclusive jurisdiction in terms of section 62 of the Competition Act.[37]

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[35] Id at para 5.

[36] Id at para 6.

[37] Id at para 7. See also section 62 which provides:

> "(1) The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:
>
> (a) Interpretation and application of Chapters 2, 3 and 5, other than—
>
> (i) a question or matter referred to in subsection (2); or
>
> (ii) a review of a certificate issued by the Minister of Finance in terms of section 18(2); and
>
> (b) the functions referred to in sections 21(1), 27(1) and 37, other than a question or matter referred to in subsection (2).
>
> (2) In addition to any other jurisdiction granted in this Act to the Competition Appeal Court, the Court has jurisdiction over—
>
> (a) the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of this Act;
>
> (b) any constitutional matter arising in terms of this Act; and
>
> (c) the question whether a matter falls within the exclusive jurisdiction granted under subsection (1).
>
> (3) The jurisdiction of the Competition Appeal Court—
>
> (a) is final over a matter within its exclusive jurisdiction in terms of subsection (1); and
>
> (b) is neither exclusive nor final in respect of a matter within its jurisdiction in terms of subsection (2).

[57] The High Court held that the matter pertained to the lawfulness and validity of the referral, an issue that falls within the purview of section 62(2)(a) of the Competition Act.[38] The High Court further held that the Competition Tribunal only has the powers afforded to it in the Competition Act, and these do not include the power to conduct PAJA or legality reviews.[39]

[58] On appeal, the Supreme Court of Appeal held that the matter concerned the lawfulness and validity of the initiation and referral of the Commission's complaint, an issue that is a jurisdictional question and thus a constitutional matter.[40] The Supreme Court of Appeal concluded that the High Court's jurisdiction was not ousted.[41] Following the decision of the Supreme Court of Appeal, the Commission filed an application for leave to appeal in this Court.

[59] In this Court, Majiedt J, writing for the majority, held that the Competition Tribunal and Competition Appeal Court have exclusive jurisdiction over matters that fall within the scope of section 62(1) of the Competition Act.[42] However, this does not extend to matters referred to in section 62(2), over which the Competition Appeal Court and the High Court have concurrent jurisdiction.[43] The majority held that section 62(2), read together with section 62(3)(b), confers upon the Competition Appeal Court and the High Court the jurisdictional power to decide

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(4) An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of subsection (2) lies to the Constitutional Court, subject to section 63 and its respective rules.

(5) For greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising out of a prohibited practice."

[38] *Group Five* above n 32 at para 10.

[39] Id.

[40] Id at paras 11-7.

[41] Id at para 18.

[42] Id at para 125.

[43] Id.

"whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of this Act",[44] as well as any constitutional matter. According to the majority, this is the power to decide legality or vires challenges.[45]

[60] The majority further held that it is trite that both PAJA and legality review applications are constitutional matters and that, by virtue of section 169(1)(a)(ii) of the Constitution, the High Court had inherent jurisdiction to adjudicate them – a power which is shared by the Competition Appeal Court owing to it having "a status similar to that of the High Court" and by virtue of it being empowered by section 62(2) of the Competition Act.[46] The majority explicitly concluded that these powers – that is the power to conduct PAJA and legality reviews – do not extend to the Competition Tribunal.

[61] The majority elucidated that the Competition Act does not confer on the Competition Tribunal the jurisdiction to deal with any of the matters in section 62(2).[47] Thus, effectively, the Competition Tribunal does not enjoy any plenary review jurisdiction.[48] The judgment further stipulated that the Competition Tribunal does not enjoy any review powers under PAJA in that section 6(1) of PAJA confines review powers to a court or a tribunal and section 1 of PAJA defines "tribunal" as "any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of [PAJA]".[49] The PAJA definition of a tribunal therefore does not include a statutory body like the

[44] Id at para 132.

[45] Id at para 125.

[46] Id at para 132.

[47] Id at para 127.

[48] Id at paras 118 and 127.

[49] Id at para 131.

Competition Tribunal.[50] Ultimately, it was held that the Competition Tribunal does not have the jurisdiction to adjudicate PAJA or legality reviews.[51] Majiedt J stated:

> "[T]he central issues here are not competition law issues, but legality or *vires* issues. They fall squarely within the carve out in section 62(2)(a) – a question whether actions are *ultra vires* the Commission. In this determination one must have regard to the provisions of the Act, but that does not change the nature of the review, which remains one of *vires*. And once the issue is one of *vires*, this is a matter over which the Competition Appeal Court has concurrent jurisdiction with the High Court, to the exclusion of the Tribunal."[52]

[62] As I see it, the Special Tribunal is in the same position as the Competition Tribunal – both are creatures of statute. As this Court said in *Group Five*, "[the Competition Tribunal] is a creature of statute, limited in the exercise of its powers to those afforded to it within the four corners of the Act. Absent any express powers in the Act to do so, the Competition Tribunal has no authority in law to review the lawful exercise of public power."[53]

[63] Therefore, it is clear from the *Group Five* decision that we must consider the legislation establishing the Special Tribunal to determine whether it is empowered to make findings in respect of a legality review.

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[50] Id.

[51] Id at para 125, it was held that—

> "[T]he Competition Appeal Court's non-exclusive jurisdiction may extend beyond a strict *ultra vires* challenge. This legislative design is sensible because it is a court that must enjoy supervisory jurisdiction over whether the Tribunal has acted within its powers. The Tribunal cannot itself decide that matter. In its wisdom, Parliament decided that questions of that kind may be decided by the Competition Appeal Court and/or the High Court. The Tribunal cannot be characterised as a court, because its actions are subject to review. The specialist nature of the Tribunal and the Competition Appeal Court is important for the purposes of substantive analysis and decision making, but that is not engaged in the same way when the question is one of the lawful exercise of power. That is true generally in reviews concerning *ultra vires* issues. For example, superior courts, like the High Court, the Supreme Court of Appeal and this Court do not require special expertise to decide questions of *vires* in diverse fields like telecommunications, information technology and fishing, to mention a few."

[52] Id at para 147.

[53] Id at para 144.

[64] In this regard we must consider the provisions of the SIU Act. The relevant section in the case of the Special Tribunal is section 8(2) of the SIU Act which provides:

> "A Special Tribunal shall have jurisdiction to adjudicate upon any civil proceedings brought before it by a 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."

[65] This, to me, is the first distinguishing feature of this case from *Group Five* as there is no provision in the SIU Act which limits the powers of the Special Tribunal like section 62 of the Competition Act. The Special Tribunal's power of legality reviews emanates from its broad remedial powers in section 8 of the SIU Act. The wide language employed in that section ("*any* civil proceedings") points to the power of legality review not being excluded from its power to adjudicate civil proceedings.[54]

[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:

[54] My emphasis.

> "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;
> (ii) any relief relevant to any investigation; or
> (iii) any relief relevant to the interests of a Special Investigating Unit."

[68] From the preamble and section 4 of the SIU Act, it is clear that the legislative intention was to cast a wide net over the scope of the proceedings the Special Tribunal is empowered to adjudicate upon. Therefore, a legality review is not excluded from the ambit of the jurisdiction of the Special Tribunal as there is no carve-out of the powers of the Special Tribunal to adjudicate over civil proceedings.

[69] In this regard, it is diametrically different to the Competition Tribunal to which the carve-out in section 62(2) of the Competition Act applies, as this Court has held in *Group Five*. Accordingly, the Special Tribunal has the jurisdiction to adjudicate reviews brought by the SIU and to grant an order setting aside an unlawful procurement contract.

[70] In the result, I conclude that the Special Tribunal is not a court. However, it has the power to adjudicate legality reviews.

Does the Special Tribunal have the power to issue forfeiture orders?

[71] The applicants have challenged the Special Tribunal's powers to issue preservation and forfeiture orders. They have asked this Court to interpret rule 26 of the Special Tribunal Rules as well as regulation 5(c) of the SIU Regulations. Although the applicants seek an interpretation in form, their argument in this respect is effectively a constitutional challenge against rule 26 of the Special Tribunal Rules and regulation 5(c) of the SIU Regulations. This Court has expressly refused to engage in

an interpretative exercise where the effect thereof was to challenge the constitutionality of the provision. In *EFF*,[55] it stated:

> "The applicants contend that a proper interpretation of the Trespass Act in conjunction with PIE ought to yield a meaning that effectively renders it impermissible for one to face criminal charges and a possible conviction flowing from an alleged violation of section 1(1) of the Trespass Act where PIE applies or offers protection. It is also argued that PIE has implicitly repealed the Trespass Act.
>
> Since PIE owes its breath to section 26(3) of the Constitution, it is not unreasonable or inappropriate to read a reference to PIE as a pointer to the inescapability of the role of section 26(3) as the cardinal reference point in addressing this issue. The way the issue was raised renders it unavoidable that the constitutionality of section 1(1) of the Trespass Act be effectively pronounced upon, even if it might not be expressly referred to as such. Truth be told, this is another way of seeking to have us declare this section unconstitutional. This we will not do.
>
> This approach, foisted upon us by the applicants, is very difficult if not impossible to manage to its intended end. They ought to have launched a frontal challenge to the constitutionality of section 1(1). Nothing stopped them from doing so. But, they chose not to. Instead, they opted for this intractable interpretive route. They would therefore have to fall by their free choice."[56]

[72] What was said in *EFF* equally applies in this matter. The applicants should have launched a frontal attack on the impugned rule and regulation and should have joined the Minister of Justice to those proceedings, as opposed to raising an interpretative argument, which in substance is a constitutionality challenge. On this premise, this Court cannot entertain this issue.

[55] *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC).

[56] Id at paras 73-5.

Did the Special Tribunal err in its factual findings?

[73] The applicants have enjoined this Court to make a determination on whether the Special Tribunal erred in its factual findings concerning their conduct as it related to the impugned procurement process. It is now trite that this Court will decline to entertain an appeal against the factual findings of a court where the dispute of fact is not connected to "a separate constitutional issue".[57]

[74] Having assessed the parties' submissions on this aspect, it is plain that the factual disputes arising out of this matter are considerably divorced from the primary constitutional issue on account of the fact that it is entirely possible to make a determination on the status, powers and functions of the Special Tribunal without first resolving the factual disputes. Consequently, there is no basis for this Court to consider the factual findings of the Special Tribunal.

Conclusion

[75] In the result, the Special Tribunal is not a court. However, it has jurisdiction to adjudicate legality reviews in terms of the SIU Act. It follows that the appeal must fail.

Order

[76] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

[57] *Rail Commuters Action Group v Transnet Limited t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 52.

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