



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

CASE NO: KN06/2024

In the matter between:

THE SPECIAL INVESTIGATING UNIT

Applicant

And

ISF CONSTRUCTION SERVICES (PTY) LTD

First Respondent

SHULA CONSTRUCTIONS CC

Second Defendant

KWAZULU NATAL DEPARTMENT OF TRANSPORT Third Defendant

**HEAD OF DEPARTMENT KZN DEPARTMENT OF
TRANSPORT**

Fourth Respondent

JUDGMENT

FORTUIN, J

A. INTRODUCTION

1. This is an application to review and set aside the decision of the Kwa-Zulu Natal Department of Transport (“the Department”) to award a tender to the ISF Shula Joint Venture (“the ISF Shula JV”), together with the contract subsequently entered into between the Department and the JV (“the Contract”). The JV is comprised of the first respondent (“ISF”) and the second respondent (“Shula”). The tender was for the construction of a concrete barrier wall along 8km of the South African border with Mozambique (“the tender”).

2. The applicant alleges that the award of the tender was unlawful and invalid for the following reasons:
 - a) The Broad-Based Black Economic Empowerment (“B-BBEE”) certificate submitted by the ISF Shula JV was fraudulent and invalid (“the fraudulent B-BBEE certificate”) when a valid B-BBEE certificate was a mandatory bid requirement.
 - b) The letter of Good Standing with the Compensation Commissioner submitted by ISF was stale and invalid. A valid letter of Good Standing was also a mandatory bid requirement.
 - c) The ISF Shula JV did not comply with the mandatory financial capacity requirements of the tender. This was a mandatory requirement, and the failure should have resulted in the disqualification of the JV’s bid at the first stage of the tender evaluation process.

- d) The JV deliberately made a material misrepresentation in its bid by representing that it would operate as a JV but had no intention of doing so.
3. The Contract was awarded in the amount of R85 796 470.06 (Eighty Five Million Seven Hundred Ninety Six Thousand Four Hundred and Seventy Rand and Six Cents). The ISF Shula JV has been paid an amount of R84 346 497.86 (Eighty-Four Million Three Hundred and Forty Six Thousand Four Hundred and Ninety Seven Rand and Eighty Six Cents). The JV did not complete the tender project.
4. In an explanatory affidavit the Department stated that, on average, 74.7% of the work was done before the Contract was cancelled. Subsequent to the cancellation, the Department issued a fresh tender to the value of R62 288 559 (Sixty Two Million Two Hundred and Eighty Eight Thousand Five Hundred and Fifty Nine Rand) for the completion of the work that the JV failed to do.
5. In the result, the SIU seeks the following relief:
- a) Reviewing and setting aside the award of the tender to the JV (and the Contract which was concluded pursuant thereto).
 - b) To pay to the SIU R84 346 497.86, being the total amount paid by the KZN DoT to ISF Shula JV pursuant to the award of the tender and implementation of the contract.
 - c) In the alternative, directing ISF and Shula to repay the profits made by the ISF Shula JV (or the individual JV partners) pursuant to the award and implementation of the tender. If this

relief is granted, the SIU seeks ancillary relief that sets out the process by which the ISF Shul JV's profits will be determined.

d) The SIU also seeks costs against any respondent opposing the relief.

6. The Department does not oppose the review whilst both the JV partners oppose the merits and the relief sought.

B. POINTS IN LIMINE

i. FIRST RESPONDENT'S CONDONATION APPLICATION FOR LATE FILING OF HEADS OF ARGUMENT

7. The first respondent filed an application for condonation for the late filing of its Heads of Argument. A proper explanation is set out in its application for condonation, in huge part that it was due to the applicant not filing its Heads of Argument timeously, even after being reminded of the directive setting out the timelines for filing. The applicant ignored this reminder.

8. I am of the view that the late filing of the first respondent's Heads of Argument did not prejudice any of the parties. In the circumstances, this application for condonation is granted.

ii. APPLICANT'S FAILURE TO APPLY FOR CONDONATION

9. The applicant served its Heads of Argument 9 days late without furnishing any reasons for the lateness.

10. The law in respect of delay when bringing a review is trite and has been solidified by this tribunal in numerous decisions. *In casu*, the delay in bringing this application is not at issue. However, a delay by the applicant in filing its Heads of Argument is. This, in my view, points to a total disregard for the orders of this tribunal. This Special Tribunal issued a formal directive with timelines, which was ignored by the applicant and no formal application for condonation was brought.
11. The first respondent objects to the applicant not furnishing any reasons for its late filing of its Heads of Argument and submits that the applicant had no regard for the impact of their late filing on the respondents, nor did it have any regard to the tribunal's directive. I agree with these submissions and find the behaviour of the applicant's legal team contemptuous.
12. It is further the first respondent's case that the applicant has no prospect of success and that the applicant's case is vexatious and frivolous. In addition, the first respondent submits that it would suffer financial prejudice in that its legal representative had to rearrange its diaries due to this delay. They also complain that 11 days would not be sufficient to prepare their Heads of Argument.
13. I do not agree with the first respondent that the application for review stands to be dismissed on this ground alone. The issues raised are of great constitutional importance. I am of the view that, in the interest of justice, the merits of this application should be traversed. This tribunal, however, takes account of the lax attitude of the applicant in this regard.

iii. APPLICANT'S FOURTH GROUND OF REVIEW

14. The first respondent objects to the applicant raising a new ground of review in its Heads for the first time. The objection is based on the fact that it was not given an opportunity to respond to the allegation in its answering affidavit.

15. I am discussing the grounds of review later in this judgment and will deal with this complaint then.

C. COMMON CAUSE FACTUAL BACKGROUND

16. In July 2016, the community of uMkhanyakude in KwaZulu-Natal protested, complaining about the rampant crime in the areas, in particular the smuggling and trafficking of stolen and hijacked vehicles into neighbouring Mozambique. One of the measures adopted by the KZN Department of Transport ("the Department") was the construction of a barrier wall along part of the border ("the border wall").

17. On 29 March 2018, the Department published an invitation to tender for the construction of an 8km concrete barrier wall between uMkhanyakude and Mozambique ("the Tender Notice").

18. The closing date for the bids was 4 May 2018. A total of fourteen bids were submitted. Six of these bids were found to be unresponsive because they failed to meet the conditions and requirements listed in the Tender Notice. The majority of these were non-responsive as they did not meet the requirement that the tenderer must have a B-BBEE Level 1 status.

19. The eight responsive bids were evaluated for functionality. Five of these did not meet the 60%-point threshold for functionality and could accordingly not progress to the assessment for the price and preference points.
20. The ISF Shula JV bid was one of three that progressed to the evaluation on price and preference points. The tender was approved on 12 July 2018 by the then Head of Department and ultimately awarded to the ISF Shula JV.
21. The Department issued its Order Approval on 15 April 2019 and the contract between the Department and the ISF Shula JV for the construction of the concrete barrier wall was concluded on 16 August 2018 (“the Contract”). This approval stated that the budget for the project would be divided into R30 million for the current fiscal year, and R50 million in the next fiscal year.
22. The ISF Shula JVC started the work on the concrete barrier wall, but did not complete the work.
23. It is common cause that the Department eventually cancelled the Contract. It is further common cause that the JV did not produce or place the necessary number of concrete panels at the site. Moreover, it did not pour all of the concrete required to bind and erect the wall panels.
24. It is further common cause that in June 2023, the Department issued a new tender to the value of more than R62 million for completion of the required work.

25. On 7 May 2021, the President issued Proclamation R.16 (“the Proclamation”) directing the SIU to investigate certain allegations relating to the affairs of the Department between 13 July 2016 to 7 May 2021. This included investigating the lawfulness and validity of the award of the tender to the ISF Shula JV.
26. It is by now common cause that the SIU conducted the investigation. Consequently, on 27 March 2024, the SIU brought these proceedings to review and set aside the award of the tender (“the impugned decision”) and subsequent contract, i.e. two years and 10 months later.
27. The applicant brought no application for condonation, and no allegation was made by the respondents that the application was unreasonably delayed. The issue of unreasonable delay is therefore not relevant save for the late filing of the Heads of Argument by both the applicant and the first respondent as discussed above.

D. ISSUES FOR DETERMINATION

28. 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.
29. The issues for determination are the following: whether the contract entered into between the first and second respondent on the one hand and the third and fourth respondent on the other is invalid and to be reviewed and set aside. In the event that it is reviewed and set aside, should

the first and second respondents retain the payment that they already received for the work already performed; would the first and second respondents be entitled to their proven profits.

E. ISSUES IN DISPUTE

a. APPLICANT'S SUBMISSIONS

30. It is the applicant's case that only 5.29km of the concrete wall panels have been erected with a balance of 2.71 km still need to be erected. In addition, that some associated works still need to be completed.

31. It is the applicant's submission that its version of the facts is substantiated and corroborated and should for that reason be accepted over that of the Department.

b. FIRST RESPONDENT'S SUBMISSIONS

32. It is the first respondent's case that the award of the tender was not unlawful or invalid. It submitted that the applicant has not made out a case for the order that it is seeking. The tribunal was requested to consider that the third respondent did not suffer any damages. Instead, it is the first and second respondents who suffered damages because the retention amount due to them has not been paid. According to the first respondent there are accordingly no merits to sustain this review. Moreover, on its version, the fact that another contractor has been appointed to the value of R62 million is irrelevant.

33. The tribunal was requested to dismiss the review with costs.

c. SECOND RESPONDENT’S SUBMISSION

34. It is the second respondent’s submission that if there was a failure on the part of the third respondent in its duties of evaluation, and if the award was incorrectly made, there is no liability to be attached to the tendering parties.

35. Moreover, that granting an order for the return of the entire project price would effectively give the third respondent a substantially completed contract for free.

d. THIRD AND FOURTH RESPONDENTS’ SUBMISSIONS

36. Both the third and fourth respondents (“the Department”) delivered a Notice to Abide.

F. DISCUSSION OF RELEVANT LEGAL FRAMEWORK

a) CONSTITUTIONAL IMPERATIVES

37. I find it necessary to quote the relevant constitutional provisions which guide a court/tribunal when assessing the lawfulness of a contract. The following constitutional provisions are applicable when this tribunal considers whether a contract is reviewable:

‘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’.

38. The Public Finance Management Act (“the PFMA”), The Preferential Procurement Policy Framework Act (“the PPPFA”) and the Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities (“the Treasury Regulations”) are all legislation and regulations giving effect to section 217 of the Constitution.

39. The KwaZulu Natal Department of Transport, as all other provincial departments, is bound by section 217 and the above regulations.

b. SPECIAL TRIBUNAL’S REMEDIAL POWERS

40. The principle of legality is relevant as this review is brought in terms of this principle. As held in **Ledla Structural Development (Pty) Ltd and Others v Special Investigations Unit1 (“Ledla”)**, this Special Tribunal is empowered to consider and decide reviews of procurement decisions brought under the principle of legality.

41. In a number of judgments, the grounds of review under the principle of legality were laid down.

The grounds relevant in casu are inter alia:

¹ 2023 (2) SACR 1 (CC).

a) A mandatory and material condition of the empowering provision – the tender specification – was not complied with. See in this regard **Diggers Development (Pty) Ltd v City of Matlosana and Others**.²

b) The decision was taken because irrelevant considerations were taken into account or relevant considerations were not taken into account. In this regard see **Democratic Alliance v President of South Africa and Others**.³

c) The decision was based on a material mistake and/or misrepresentation of facts. In the regard see **Pepcor Retirement Fund and Another v Financial Services Board and Another**.⁴

d) The decision was taken in *fraudem legis*. In this regard see **Diggers Development**, supra; and

e) The decision was not rationally related to the evidence before the decisionmaker. In this regard see **SA Predator Breeders' Association and Others v Minister of Environmental Affairs and Tourism**.⁵

c) DISGORGEMENT OF PROFITS

42. A detailed discussion on disgorgement of profits can be found under the heading “Remedy” further below.

43. I now proceed to deal with the grounds of review relied on by the applicant before this tribunal.

² 2010 JDR 0214 (GNP).

³ 2013 (1) SA 248 (CC).

⁴ 2003 (6) SA 38 (SCA).

⁵ [2011] 2 All SA 529 (SCA).

G. GROUNDS OF REVIEW

a. FALSE AND /OR FRAUDULENTLY ISSUED B-BBEE CERTIFICATE

i. APPLICANT'S VERSION

44. The Tender required a certified copy of the bidders' B-BBEE certificate, showing a Level 1 B-BBEE status. Where a bidder was a JV, it was required to submit a certified copy of a consolidated B-BBEE Verification Certificate issued for the JV in accordance with the promulgated Codes of Good Practice.

45. The ISF Shula JV provided a consolidated Joint Venture B-BBEE certificate, number CSG-SPC-260895-08JV, dated 1 December 2017 ("the JV Certificate"). This certificate states that it was issued by Inforcomm and reflected a B-BBEE contribution status for the ISF Shula JV. It also reflects a 50/50 split between ISF and Shula.

46. It is the applicant's case that the JV Certificate was patently fraudulent or false for the following reasons:

- a) Firstly, it is submitted that the Chief Executive Officer at Inforcomm provided a sworn statement confirming that Inforcomm did not issue a B-BBEE certificate number CSG-SPC-260895-08JV to the ISF Shula JV. He states that, *'If it is a B-BBEE certificate it is a false and or fraudulent B-BBEE certificate'*. He also states that Inforcomm has no record of a joint venture B-BBEE certificate being issued to ISF Shula JV.
- b) Secondly, the applicant submits that the JV Certificate states that the Shula and ISF both gave a 50% share in the JV. This is contrary to what is stated in the JV Agreement submitted by the JV as part of its bid documents. The JV Agreement provides that ISF has a 70%

share and Shula a 30% share in the JV. The contents of the B-BBEE certificate are therefore inconsistent with the JV Agreement.

- c) Thirdly, it is submitted that the JV Certificate reflects that it was issued in terms of the B-BBEE Codes of Good Practice 2007 (“the 2007 Codes”). It is common cause that these codes were repealed by publication of the 2013 Amended B-BBEE Codes of Good Practice (“the 2013 Codes”) which came into effect on 1 May 2015. Accordingly, at the time of the issuing of the fraudulent certificate, the 2013 Codes were applicable.
- d) Fourthly, that the JV Certificate reflects that the ISF Shula JV has a Level 1 B-BBEE contributor status, with a B-BBEE score of 80 points. This is inconsistent with both the 2007 and the 2013 Codes. The 2007 Code determines that an entity with 80 points is only a Level Three contributor and the 2013 Code determine that a score of 80 points is a Level Four contributor. Under both the 2007 and the 2013 Codes the ISF Shula JV could never achieve a Level 1 B-BBEE contributor status.
- e) Fifthly, the applicant submitted that the JV Certificate does not have the features of a normal B-BBEE certificate issued by Inforcomm for a joint venture. The tribunal was pointed to the following aspects:
 - i. The certificate claims to be valid *‘for 12 months from the date of issue’*, being 1 December 2017. The reflected date of expiry is 1 December 2018 and not 30 November 2018 as it should be.
 - ii. The B-BBEE certificate submitted by the ISF Shula JV does not contain any of the required details i.e.
 - a. the name of the joint venture;

- b. the objective of the joint venture (typically in the form of the tender number); and
 - c. the date of commencement of the joint venture
- iii. The Measurement Date on the JV Certificate is 28 February 2018, which is after the date of issue. It is the applicant's case that the B-BBEE calculations cannot be made prior to the fiscal year having ended.
- iv. The formatting and arrangement of the JV certificate is different to that of an Inforcomm B-BBEE certificate for a joint venture in more than one respect.

47. It is noteworthy that the fact that the JV certificate was falsified and fraudulently issued is not seriously contested by the respondents. They raise only the following issues:

- a) The Department states that it verified with SANAS that Inforcomm was accredited by them but did not verify the JV certificate itself. On their version they had no reason to suspect that the certificate was not issued by Inforcomm. The Department does not however deny that the certificate was not issued by Inforcomm and that it was falsified.
- b) Shula also does not deny that the JV Certificate was falsified. It instead shifts the blame onto one Mr Budden for procuring the falsified certificate.
- c) Likewise, ISF does not deny that the JV Certificate was falsified but adds that it did not at the time when it included it in the bid document know that it was falsified. ISF also shifts the blame to Mr Budden for procuring the false certificate adding that Mr Budden apologised for the false certificate.

48. Two issues arise in relation to fraud. They are:

- a) The first issue is whether the certificate was falsified and issued fraudulently. In my view, the applicant has established this.
- b) The second issue is whether the JV (both ISF and Shula) was aware that the B-BBEE certificate was falsified and knowingly submitted the falsified certificate as part of the bid documents.

49. In my view, it is not necessary for me at this stage to determine whether the falsified certificate was knowingly submitted as part of the bid documents. This issue of fraud is not relevant at this stage but rather at the time of determining which remedy would be appropriate.

ii. FIRST RESPONDENT'S VERSION

50. The first respondent denies that it submitted a fraudulent and false B-BBEE certificate. It is the first respondent's version that it, together with the second respondent engaged the services of a professional, one Mr Budden, an accountant, to obtain the said B-BBEE certificate. On their version, Mr Budden gave them a list of documents he required in order for them to obtain a level 1 B-BBEE certificate and they provided him with such information. The certificate was then issued. A copy of this certificate was certified by Mr Budden which was then submitted by first and second respondents.

51. On their version, they did not have any reason to suspect that the certificate could have been fraudulent and/or false. On enquiry from Mr Budden, he explained that his company did not

issue the certificate but outsourced that function to a third party. He stated that he was not aware of the allegations.

52. It is the first respondent's case that it was the Bid Committee's responsibility to disqualify the JV and eliminate it at this stage of the process if the JV did not qualify. Moreover, that it was the Bid Committee's responsibility to have the submitted information verified. Accordingly, because the first and second respondents were not part of the Bid Committee, they cannot be punished for the negligence of the Bid Committee.

53. The tribunal is requested to consider that the fact that the information must be verified, confirms that the persons handling the process have to be thorough and meticulous. Moreover, that it would be unfair to expect of the first and second respondents to interrogate the information of the certificate while the Department stated that it had no reason to suspect that the certificate was not issued by Inforcomm. All that was done by the department was to check whether Inforcomm was registered with SANAS. This was evidently not sufficient.

54. It is submitted by the first and second respondents that this activity does not meet the requirements of the common law offence of fraud.

55. In respect of the allegation that a materially false statement was made with the intent to deceive, it is the first and second respondents' submission that they would not have made enquiries from Mr Budden if they had the intention to deceive. They had no knowledge of the falsity. It is submitted that the third respondent is not a victim because they had a duty to verify the information. Moreover, that nobody suffers any damages as a result of the B-BBEE certificate.

Because the third respondent submitted that 74,7% of the work was done by the first and second respondents who were indeed paid for this work.

56. As a result of the above submissions, this tribunal is requested to accept the denial that the B-BBEE certificate was fraudulent and false.

iii. SECOND RESPONDENT'S VERSION

57. In most part, the submissions by the second respondent mirrors that of the first respondent. On its version, the certificate was submitted bona fide on the bidders' part and that no fraud was shown.

58. Due to the difficulty in obtaining a confession from Mr Budden, it is the second respondent's submission that fraud was therefore not proven. In addition, the applicant did not ask for a referral to oral evidence.

59. As stated earlier, it is my view that the certificate was falsified and issued fraudulently. Whether the first and second respondents knowingly submitted a fraudulent certificate, and if so, what the effect thereof should be, will be discussed later in this judgment.

60. It is astonishing how the first and second respondents fail to take responsibility for this fraudulent B-BBEE certificate. This was a document in their names, submitted for a tender in their names and all the responsibility is shifted to a third party(s).

61. This attitude persists throughout this application and will, as it should, be considered as one of the factors in determining an outcome.

b. EXPIRED LETTER OF GOOD STANDING

i. APPLICANT'S VERSION

62. All bidders were required to submit a valid letter of Good Standing with the Compensation Commissioner. This was a mandatory tender requirement. This was to be submitted for both parties in a joint venture. Any bidder who failed to do so would be ineligible to bid.

63. It is common cause that both ISF and Shula had to submit this letter. ISF submitted a letter issued on 7 May 2017, while on ISF's own version the letter expired on 30 April 2018.

ii. FIRST RESPONDENT'S VERSION

64. Once again, the first respondent submitted that the responsibility to verify the letter of Good Standing and to disqualify the first and second respondents was with the Bid Adjudication Committee. Because the first and second respondents were not part of the evaluation committee, they are not in a position to justify the decision of the committee.

iii. SECOND RESPONDENT'S VERSION

65. The second respondent submitted that, where the requirement was mandatory, as in this instance, the responsibility to evaluate the validity of the letter and to disqualify a non-compliant bidder once again rests with the Bid Adjudication Committee.

66. In my view, the letter was indeed stale and invalid for the purposes of the tender. In effect, therefore no Letter of Good Standing was submitted by Shula.

c. NON-COMPLIANCE WITH FINANCIAL CAPACITY REQUIREMENTS

i. APPLICANT'S VERSION

67. One of the Tender Notice requirements was that a bidder score at least 60% (24 out of 40) in the functionality (quality) assessment. This required bidders to submit a certified letter from their banking institution, confirming their credit rating. ISF failed to meet this mandatory tender requirement in the following respects:

- a) The Tender Evaluation Report states that the ISF Shula JV scored a total of 26 points. This equated to 65% in the 'quality' assessment. In the 'Financial Capacity' category the JV scored 6 out of a possible 10 points.
- b) In order to receive a score of 6 points in this category, a credit rating of Grade C was needed.
- c) The ISF Shula JV should not have been awarded 6 points for the following reasons:
 - i. The JV bid documents contained a letter from Nedbank confirming that the JV had a Grade 1 (CRG) and bank Code C.
 - ii. the JV's bid documents from FNB confirming the account of 'Shula Construction CC but, however, did not state Shula's credit rating.
- d) Thus, the ISF Shula JV failed to submit a certified letter from the relevant banking institutions confirming both JV members' credit ratings. In the result, the score awarded should have been zero.

e) Had the proper score of zero been given for 'Financial Capacity', the ISF Shula JV would have scored 20 after 14 in the functionality evaluation. This would have resulted in a score of 50%, which fell short of the mandatory threshold of 60%. At most, the JV should have been awarded a score of 2 points for credit rating of Grade C. This would have resulted in a score of 22 out of 40 being 55%. On any interpretation therefore, the JV's bid should have been disqualified at the first stage of evaluation and should not have advanced to evaluation on price and preference points.

68. Therefore, the applicant submits that under the legality principle, the award of the tender to the ISF Shula JV was unlawful.

ii. FIRST RESPONDENT'S VERSION

69. The first respondent disputes the applicant's contention that the JV failed to comply with this requirement. It contends that the JV had submitted a letter of good standing confirming that ISF was in good standing with ISF being the 70% beneficiary of the JV, and that this resulted in the JV being awarded 6 points.

iii. SECOND RESPONDENT'S VERSION

70. The second respondent submits that they complied with the requirement as, on their version, they submitted a letter of good standing which resulted in the JV being awarded 6 points. Moreover, that neither the first nor the second respondents were part of the decision-making process.

71. In my view, whether the respondents were part of the decision-making or not is not relevant in the determination of whether there was compliance with the tender requirements or whether the contract is unlawful and to be reviewed and set aside.

a. FRAUDULENT MISREPRESENTATION REGARDING INTENTION TO OPERATE AS A JV

i. APPLICANT'S VERSION

72. In the submitted bid, ISF and Shula presented that they were a JV and as such would use the combined skill and expertise to carry out the tender. A proper reading of Shula's answering affidavit, however, states the following:

- a) Shula was part of the ISF Shula JV for the border wall project in name only as Shula never intended to conduct any work or otherwise participate in the project for which the tender was awarded.
- b) ISF and Shula formed the JV in order to increase their CIDB rating, which allowed them to tender for projects of higher value. They only tendered as a JV to meet the mandatory bid requirement of an 8 CE, CIDB grade. Not meeting this requirement, would have rendered their bid as individual companies non-responsive.
- c) ISF and Shula tendered for two projects as the JV, with the intention that they would then divide the projects between the two companies, and work on them separately.

73. In my view, it is therefore safe to assume that this accordingly gave Shula and ISF access to projects that they would not otherwise have qualified for as individual companies. The JV was

therefore a sham. The two companies planned to, after winning the tender, split back into individual companies and work on their respective projects.

74. This is further evidenced by the fact that the new JV agreement was entered into on 9 April 2019, i.e. after the award of the tender. To illustrate this further, I quote certain clauses in this agreement.

2.1 Establishment and purpose

The joint venture is established for the specific purpose of qualifying the parties to tender for contracts that would otherwise be in excess of the amount legally permissible as a 7CEPE and to enable them to legally tender for upgraded contracts. This agreement is to govern and regulate the rights and obligations of each party, which contracts and in what respects they will be responsible, and how the costs and profit will be divided....

...

2.4 Participation of Parties and Management

2.4.1 As to the joint venture in respect of the Bergville Sewer Reticulation contract, ISF shall attend to all the work as a subcontractor of the joint venture, and any profits or losses that ISF may derive or incur from discharging the works in respect of this subcontract will ensure to the sole benefit of ISF.

2.4.2 ISF shall not be obliged to share any profits or loss within joint venture, as pertains to this project;

2.4.3 As to the joint venture in respect of the Construction of Concrete Barrier Wall between uMkhanyakude and Mozambique Border Phase1, Shula undertakes to attend to all the work as a subcontractor of the joint venture, and any profits or losses that it derives or incurs from discharging the works in respect of this contract will ensure to the sole benefit of Shula;

2.4.4 *Shula shalt not be obliged to share any profits or loss with the joint venture, as pertains to the project....'*

ii. FIRST RESPONDENT'S VERSION

75. No submissions were made by the first respondent in respect of this ground of review.

ii. SECOND RESPONDENT'S VERSION

76. No submissions were made by the second respondent in respect of this ground of review.

77. I have considered the objection by the first and second respondents about this ground of review being raised by the applicant in its Heads of Argument for the first time. It is trite that a party should be given an opportunity to answer all allegations on which an applicant will rely. Moreover, the purpose of pleadings is to define the issues for the other parties and the court.

78. In my view, this issue goes to the heart of the content and intention of section 217 of the Constitution. In the interest of justice, I discussed the submission by the applicant in this regard above.

79. As stated earlier though, and even in the absence of the fourth ground review, one or more of the remaining three grounds of review would amount to an unlawful contract to be reviewed and set aside.

80. Bearing in mind these trite principles, I therefore make no finding in respect of the fourth ground of review.

H. REMEDY

81. The applicant seeks an order reviewing and setting aside the award of the tender to the JV. In addition, the SIU seeks that the JV pay the total amount received from the KZN DoT pursuant to the award.

82. In the alternative, the SIU seeks a direction that the JV should repay the profits made by the JV or the individual partners pursuant to the award and the implementation of the tender. Should this relief be granted, the SIU seeks ancillary relief that sets out the process by which the JV's profits will be determined.

83. It is trite that this Special Tribunal has broad remedial powers.

84. 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.

85. This Tribunal's jurisdiction to conduct legality reviews and its wide remedial powers in terms of the Special Investigating Units and Special Tribunals Act Act No. 74 of 1996 ("SIU Act"), were recognised in *Ledla*⁶ where it was inter alia held as follows:

'[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,

⁶ Supra note 1 at paras 66-67.

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.”

86. This Special Tribunal’s remedial powers include the power to:

- a) grant an order to review and set aside an unlawful procurement contract; and
- b) grant any appropriate order to give effect to the Tribunal’s ruling that the procurement contract was unlawful.

87. The powers included in the Tribunal's arsenal are contained in section 8(2) of the SIU Act.

They include the powers to:

- a) Issue suspension orders, interlocutory orders or interdicts on application by such Unit or party;
- b) Make any order, which it deems appropriate so as to give effect to any ruling or decision given or made by it; and
- c) Make any order which it deems appropriate as to costs.

88. The issue of remedy in the review of administrative actions has been at the centre of numerous judgments in our courts recently. The **Allpay II** matter had laid down the guiding principles since 2014. The proper interpretation of the **Allpay II** judgment had, however, recently been discussed in the matter of **Mafoko Security Patrols (Pty) Ltd**⁷.

89. The issues that were grappled with in **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others**⁸ ("**Allpay II**") was that the company who was awarded with a contract could walk away and leave welfare recipients without a way of getting their grants. In that matter the payments continued until a new service provider was appointed. This is unlike the facts before me where a different service provider was in fact appointed to complete the construction of the barrier wall. A new tender was issued for this purpose. Whether the wall was subsequently completed is not an issue currently before this tribunal.

⁷ Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others [2025] ZASCA 179.

⁸ 2014 (4) SA 179 (CC).

90. The issue of an innocent tenderer is in my view at the center of the remedy sought by the SIU in this matter. It is useful to discuss, as was done in **Mafoko**, the developments of the law on this issue as discussed by our courts since **Allpay II** was decided.

91. In **Special Investigating Unit v Phomella Investments (Pty) Ltd and Another**⁹, the meaning of **Allpay II** was discussed. It was held that the award of a tender that is subsequently found to be unlawful and invalid does not give rise to a right to benefit from such an unlawful contract. The following was stated in **Mafoko** citing **Allpay II**:

*'[67] It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract. And any benefit that it may derive should not be beyond public scrutiny'. I shall, for convenience, call this the two-truths dictum.*¹⁰

92. The SCA in **Mafoko**, supra, therefore approved this interpretation of **Allpay II** by the SCA in **Phomella**.

93. Following this reasoning, it is necessary for this tribunal in exercising its discretion to craft a just and equitable remedy to assess the blameworthiness of the first and second respondents and whether they should be entitled to the profits from the undisputed services it rendered to 74% of the building.

⁹ 2023 (5) SA 601 (SCA).

¹⁰ **Mafoko** supra note 7 at para 11; **Allpay II** supra note 8 at para 67.

94. From the respondents' submissions, it seems as if they consider these basic principles which are the cornerstones of our democratic state as optional. It seems as if they consider that finding loopholes in the system, even if there are none, is the way in which 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.
95. Following proper procurement procedures is not a choice. It is a constitutional obligation. Disregarding these principles laid down in section 217 and in particular section 217(1)(b) of the Constitution, is accordingly a violation of a basic constitutional principle.
96. Finally, in respect of the remedy sought by the SIU and considering the developments in our constitutional jurisprudence, 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.
97. In considering the factors present in this matter, I am of the view that the more than R62 million which the KZN DoT had to spend on a second tender to complete the construction of the wall, is a relevant consideration as this was an additional costs incurred by the tax payer and the public purse.
98. More importantly though, state officials should be held responsible where they are found to be implicated in the financial loss suffered by the state where unlawful contracts are entered into.

See in this regard the judgment by this tribunal in **Special Investigating Unit v Hawulethu and 2 others**¹¹.

99. 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 28 of 2024 gives effect to this section while at the same time ensuring procedural fairness to the affected party(s).

100. 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. This Tribunal is, however, empowered in terms of the purpose of the SIU ACT to make any order which gives effect to its mandate.

I. COSTS

101. 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 and second respondents did not seriously dispute the fact that the B-BBEE certificate was false and that they at no stage took any responsibility.

102. Therefore, I can find no reason to divert from this trite principle in respect of costs.

¹¹ (KN08/2024) [2025] ZAST 21.

J. CONCLUSION

103. Considering the first ground of review in respect of the false and or fraudulently issued B-BBEE certificate, I first took into account the fact that the respondents does not seriously dispute this ground. More importantly though, this is a flagrant disregard of a basic requirement. An invalid B-BBEE certificate amounts to no certificate being submitted. Consequently, I find that the award of the tender to the ISF Shula JV was unlawful because a falsified and invalid B-BBEE certificate was provided. Moreover, as discussed above, no responsibility for this falsified certificate is taken by the first and second respondents.
104. I am in agreement with the applicant in this matter that the merits of this review could succeed on this basis alone. This requirement answers to the constitutional imperative in section 217 (2)(b). Any attempt to bypass this constitutional section which is aimed at ensuring *'the ... advancement of persons, or categories of persons, disadvantaged by unfair discrimination. ...'* should be considered by our courts with the necessary seriousness. Despite this failure though, and in the interest of justice, the merits were traversed.
105. In respect of the second ground of review, i.e. the expired Letter of Good Standing, as discussed above, this resulted in the award of the tender to the JV being unlawful and falls to be set aside under the principle of legality.
106. The third ground of review, as discussed above, in relation to the non-compliance with financial capacity requirements, I am of the view that the tender to the ISF Shula JV was

unlawful and falls to be set aside under the legality principle. This ground, on its own, would similarly be sufficient for the review and setting aside of this contract.

107. It is trite that it is impermissible for parties to bid for and win a tender as a joint venture without even intending to operate as a joint venture. As stated above however, no finding is made on this ground of review.

108. In my view, ISF and Shula's misrepresentation rendered the award of the tender reviewable on the following grounds:

- a. A mandatory and material condition of the empowering provision was not complied with because the JV failed to correctly set out who the true bidder was.
- b. The tender award was based on a material mistake and/or misrepresentation of facts.
- c. The decision to award the tender to the ISF Shula JV was taken because relevant considerations were not taken into account.
- d. The decision was taken in *fraudem legis*.


K. ORDER

109. In the circumstances, I make the following order:

- a. The decision of the third respondent to award the tender and subsequent contract to the ISF Shula Joint Venture (comprising the first and second respondents) for the construction of a concrete barrier wall between Umkhanyakude and Mozambique – phase 1 under tender number ZNT4128/16T in terms of Proclamation R16 of 2021, is reviewed and set aside.

- b. The first and second respondents are ordered to disgorge the profits made by ISF Shula JV (comprising the first and second respondent) pursuant to the award and implementation of the tender. The following process should be followed:
- i. Within 30 days of the Tribunal's order, the first and second respondents must submit a statement setting out the ISF Shula JV's income, expenditure and profits made in the execution of the tender award (the statement), together with supporting documents substantiating the amounts set out in the statement.
 - ii. Within 30 days of the submissions of the statement, the applicant may indicate whether it accepts or disputes the statement.
 - iii. If the SIU accepts the statement, the first and second respondents should make payment of the total amount of profits into an account nominated by the applicant (the details of which must be provided by the applicant).
 - iv. If the applicant disputes the account and/or sum of profits claimed in the statement, the matter should be referred back to the special tribunal (in terms of section 8(2)(b) of the SIU act) for an expedited debatement of the statement and determination of the amount of profits earned by the ISF Shula JV as a consequence of the award of the tender and the subsequent contract.
 - v. In the case of such a dispute, once the issue is resolved and upon the return demand by the applicant to pay the sum of the profits so determined, the first and second respondents shall be liable to pay the determined sum (jointly and severally) within 60 days of the demand, together with interest *a temporae mora* as prescribed from time to time, from the date of determination of the payable sum until the date of payment.

- c. The first and second respondents are ordered to pay the costs of this application (including the costs of two counsel, one being senior counsel on a joint and several basis, the one paying the other to be absolved).
- d. The third and fourth respondents are ordered to, within 30 days of the granting of this order, start disciplinary procedures against those officials who served on the Bid Evaluation Committee, who, at the time of the granting of this order, had not been disciplined for their involvement in the awarding of this contract.



JUDGE FORTUIN
MEMBER OF THE SPECIAL TRIBUNAL

Appearances:

For the applicant: Adv. ZZ Matebese SC assisted by Adv E Webber

Instructed by: State Attorney Pretoria.

For the first respondent: Adv. J Moraka

Instructed by: Maduna PJ Attorneys

For the Second respondent: Adv I Pillay SC

Instructed by: MB Pederson & Associates

For third and fourth respondent: Adv. D Mtsweni

Instructed by: Mbili Attorneys

Date of hearing: 10-11 July 2025

Date of judgment: 31 March 2026

Mode of delivery

This judgment is handed down by email transmission to the parties' legal representatives, uploading on Caselines and release to SAFLII and AFRICANLII. The time of delivery is deemed to be 31 March 2026