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

CASE NO: NM01/2024

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

31/03/2026

SIGNATURE DATE

In the matter between:

THE SPECIAL INVESTIGATING UNIT Applicant

and

NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY First Respondent

RENSH CC Second Respondent

RASHIDA CADER (ID NO: 70[...]) Third Respondent

THEMAK CONSULTING CIVIL ENGINEERING

CONSULTANCY CK NO. 2007/137807/23 Fourth Respondent

EDWIN ANDRIES HLAPI MAKOLA

(I.D. NO: 72[…]) Fifth Respondent

Summary:

Administrative Law — Review — Jurisdiction — Undue Delay — Condonation — Superannuation —Just and Equitable Relief —Interest of Justice.

JUDGMENT

MASHILE J

Introduction

[1] The Applicant ("the SIU") seeks firstly, to review and set aside the decision of the First Respondent ("the Municipality") to award a tender to the Second Respondent ("Rensh") on 7 March 2020 for the provision of the services of wastewater treatment works in the Ditsobotla Local Municipality and secondly, declare the resultant contract concluded on 26 March 2020 by the Municipality and Rensh ("the Contract") to be *null* and *void ab initio* and constitutionally invalid. If the application succeeds, the SIU requests this Tribunal to craft a just and equitable remedy as contemplated in Section 172(1)(b) of the Constitution of the Republic of South Africa ("the Constitution").

[2] The review is sought on the basis of the principle of legality. I may at this juncture indicate that I am mindful that Rensh and Cader, to which I will henceforth refer to

jointly as the Respondents, deny that the Tribunal has jurisdiction to adjudicate reviews based on the principle of legality. Perhaps it is appropriate to refer to paras 68, 69 and 70 of the Constitutional case of *Ledla Structural Development (Pty) Ltd and Others* v *Special Investigating Unit*[1], where the following is stated concerning the power of the Tribunal to decide reviews based on the principle of legality:

> "[68] From the preamble and Section 4 of the SIU Act, 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 Special Tribunal's jurisdiction, as there is no carve-out of its powers to adjudicate 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."

[3] The Municipality and the Fourth and Fifth Respondents ("Themak Consulting and Makola"), respectively, are not opposing the application. However, the Respondents are challenging it on several grounds, which I will outline later. Additionally, the Respondents have raised two issues: the SIU bringing this review after an inordinate delay and the late filing of the replying affidavit. As far as the first issue is concerned, the SIU has incorporated a condonation application to the current but has not done so in respect of the second.

[1] *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* 2023 (2) SACR 1 (CC) at paras 68-70.

[4] Other than the preliminary issues to which I have referred in the preceding paragraph, the Respondents have raised the following:

4.1 The relief sought is non-suited as against the Respondents;

4.2 The administrative action sought to be reviewed is not a legality review;

4.3 The Tribunal does not have Jurisdiction in the review;

4.4 The SIU did not make out a case for a delictual claim;

4.5 The SIU failed to make a case for the piercing of the corporate veil;

4.6 Superannuation;

4.7 The poor way the matter has been presented has caused prejudice to the Respondents, and it amounts to abuse of process;

4.8 Hearsay evidence is inadmissible;

4.9 Moot and conflated relief.

[5] Following an uproar concerning incidences of maladministration and corruption in the procurement of, or contracting for goods, works and services such as constructions, refurbishments, leasing occupations and use of immovable properties during the national state of disaster, the President of the Republic of South Africa issued Proclamation Number 23/2020 ("the Proclamation") published in Government Gazette, No. 313 of 15 March 2020.

[6] The Proclamation empowered the SIU to investigate allegations made in respect of all State Institutions which took place between 1 January 2020 and the date of publication of the Proclamation or which took place before 1 January 2020 or after the date of the publication of the Proclamation, but which are relevant to, connected with, incidental or ancillary to the matters mentioned in a Schedule ("the Schedule") attached to the Proclamation, or which involve the same persons, entities or contracts investigated under authority of the Proclamation.

[7] Additionally, the SIU is authorised to exercise or perform all the functions and powers given to it, including the recovery of any losses suffered by State Institutions or the State, in relation to the said matters in the Schedule. The Schedule mimics the Proclamation and elaborates on conduct or activities by the State institutions that were not fair, competitive, transparent, equitable or cost effective; contrary to legislation, National Treasury's manuals, practice notes, policies, guidelines, or those that were facilitated or conducted through the improper or unlawful conduct of employees or officials of the State Institutions or any other person or entity, to corruptly or unduly benefit themselves or any other person fraudulently.

Factual Background

[8] Pursuant to the issuance of the Proclamation, the SIU obtained information and documentation from the Municipality, Rensh, Themak Consulting, and other relevant witnesses to enable it to conduct its investigation. While this was happening, the Auditor General of South Africa ("the AGSA") was conducting her own investigation. She made a referral to the SIU under the Public Audit Act, No. 25 of 2004 ("Public Audit Act"), and the Material Irregularity Regulations ("the MI Regulations").

[9] Analysis of the information obtained revealed, amongst others, that the Municipality concluded the contract with the Respondents to provide services at four water pump stations and to repair one wastewater treatment facility in the Ditsobotla Local Municipality. The contract covered the Biesiesvlei/ Itekeng Pump Station, the Blydeville Ext 1 Pump Station, the Blydeville Ext 3 Pump Station, and the Lichtenburg Water Treatment Plant. It was further laid bare that the contract was entered into without following the proper procurement processes as contemplated in Section 217 of the Constitution and the provisions of the Public Finance Management Act, 1 of 1999.

[10] In July 2020, the Standing Committee on Public Accounts ("SCOPA") conducted a site inspection in the Ditsobotla Local Municipality ("Ditsobotla"). Upon its site visit

and inspection, SCOPA discovered that there was an amount of R93 000 000.00 earmarked to address water and treatment challenges during the COVID-19 pandemic. The Municipality alleged that it had expended the funds on water infrastructure in Ditsobotla and the district which falls within it. However, according to SCOPA, there was nothing to show for it on the ground.

[11] After the SCOPA site inspection, there was a public outcry and widespread media coverage of the estimated R93 000 000.00 the Municipality spent on water supply and treatment during the COVID-19 Pandemic, but nothing translated into concrete action. The SIU then investigated the procurement of repair and maintenance services for four pump stations and one water treatment facility in Ditsobotla. The plumbing work at Sawing Local Municipality's Fire Station and water treatment material at the Municipality were confirmed to be R49 012 638.12.

[12] Following the report of SCOPA and the public outcry, the investigation of the SIU revealed the following:

12.1 On 19 November 2019 and 20 January 2020, Themak, a Consulting Engineering Consultancy company, was appointed by the Municipality to be on the panel as one of its consultants for professional engineering services;

12.2 On 13 March 2019, Themak received its first appointment letter from the Municipality's Mr O A Losaba ("Mr Losaba"), the Municipal Manager or Accounting Officer for project number NMMDM 17/18/14 PMU. On 15 March 2019, Themak accepted the appointment;

12.3 On 19 November 2019, Losaba appointed Themak on a project that did not have a project number yet, for *"professional services for the operation and maintenance of bulk wastewater infrastructure for a period of 36 months.* Themak could therefore be used as and when required by the Municipality;

12.4 The appointment letter above provides that: *"This appointment is for inception, concept and viability, design development, documentation and procurement, contract administration, inspection and close-out engineering stage of the above-mentioned project"*. On 17 January 2020, Themak accepted the second appointment;

12.5 It is common cause that these appointments by the Municipality took place before the COVID-19 pandemic;

12.6 On 20 January 2020, Mr Mohamed Jafer Rasool ("Rasool"), the Technical Director: Basic Services of the Municipality, instructed Themak to commence with the assessment of four (4) critical pump stations and the wastewater treatment plant in Ditsobotla. Themak was requested to produce a Bill of Quantities ("BOQ") in line with its assessment of the plants and pump stations for repairs;

12.7 Themak complied with the above instruction, conducted the required assessment, and produced the technical assessment report detailing the work to be conducted as well as the amount to be paid for such work. The BOQ amounted to R36 923 045.77;

12.8 Themak invoiced the Municipality for an amount of R3 882 665.37 for its consulting services. The director of Themak, Mr Makola ("Makola"), who is also the Fifth Respondent, has deposed to a declaration of facts to confirm this.

[13] On 27 November 2019, the Municipality published a tender on e-Tender through the Department of National Treasury under BID Number: NMMDM 19/20/15 PWBS (A). The Bid Description read: Appointment of Service Provider for the Emergency Refurbishment of Dysfunctional & Poor-Conditioned Pump Stations & Associated Works in Biesiesvlei/Itekeng in Ditsobotla Local Municipality. On 5, 9 and 10 December 2019, five service providers submitted their BOQs to the Municipality for the work to be

carried out in accordance with the tender requirements to repair and maintain water pump stations and a wastewater treatment facility at Ditsobotla.

[14] It is not disputed that Rensh was not one of the five service providers that the Municipality requested submit BOQS, and that this occurred even before the Municipality instructed Themak to commence the consultancy work at Ditsobotla. One of the five potential service providers, Mr Tafadzwa Kelvin Dzimbanhete of Diges Group CC, who submitted a bid, was interviewed. His evidence is that, in December 2019, in response to tenders advertised by the Municipality, his close corporation completed and submitted the BOQ for the emergency refurbishment of four pump stations in the Ditsobotla area and attended site inspections, but has never heard how the tender was concluded or awarded.

[15] On 7 March 2020, Rasool of the technical department of the Municipality telephonically contacted Cader, a director of Rensh, to provide a quotation for the repair and maintenance on all facilities where Themak had already produced a BOQ in Ditsobotla. In response, Rensh produced a quotation for an amount of R25 884 435.75. In her affidavit, Cader states that she was telephonically contacted. There was neither a written contract concluded with the Municipality nor was there a letter appointing Rensh.

[16] On 15 March 2020, the first case of COVID-19 in the Republic of South Africa was identified. To ensure that the South African government responded appropriately to the COVID-19 pandemic, on 17 March 2020, the President of the Republic of South Africa declared a National State of Disaster. On 18 March 2020, the Minister in the Department of Cooperative Governance and Traditional Affairs ("COGTA") published Regulations issued in terms of Section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002 in the Government Gazette No 318, Regulations setting out Disaster Management.

[17] On 23 March 2020, Mr Rasool of the First Respondent prepared a memorandum requesting that Rensh be appointed using Regulation 36 of the Supply Chain Management to do urgent/emergency repairs at the four pump stations and one wastewater treatment plant in Ditsobotla as per the BOQ prepared by Themak. The deviation memorandum for an amount of R25 823 883.40 for these quoted projects was recommended by the Chief Financial Officer, Mr SS Mphato ("Mphato") and was approved by Losaba.

[18] The memorandum is silent on why Rensh was a suitable service provider as against the other five service providers who furnished their BOQs in compliance with tender document number NMMDM 19/20/15 PWBS (A). In motivating for the deviation, Rasool states that the COVID-19 pandemic was the overriding consideration for the invocation of Regulation 36. Still, he omits to touch on the reasons that persuaded the Municipality to single out Rensh as a suitable contractor.

[19] The Municipality has consistently failed to provide the SIU investigators with a copy of the contract concluded between it and Rensh for the services rendered by the latter. That said, it produced a letter of appointment, albeit that this came after a considerable exertion of pressure. The SIU alleges that Rasool would also not furnish any specific reason for how Rensh was identified, appointed and paid as a service provider above all the other five service providers.

[20] Rensh persists that its appointment was not irregular as it was in line with Regulation 36 of the Supply Chain Management Policy of the Municipality that governs the procurement of goods and services during an emergency such as was during the National State of Disaster. The appointment of Rensh was not in accordance with the BOQ prepared by Themak.

[21] On 26 March 2020, the Municipality gave Rensh a Purchase Order to commence with the work of installing and repairing the pump stations and generators at the five different sites. On 22 April 2020, Rensh completed work at the four (4) plants and one wastewater treatment plant, after which it invited Themak to visit the sites to issue completion certificates. Following the visit of Themak to the four different plants and one wastewater treatment plant, it prepared the Project Close-up Report and the Completion Certificates for the following:

21.1 Repairs of Beises've Wastewater Treatment Plant;

21.2 Repairs of Blydeville Extension 1 Wastewater Treatment Plant;

21.3 Repairs of Blydeville Extension 3 Wastewater Treatment Plant;

21.4 Repairs of Boikhutso Pump Station; and

21.5 Repairs of Lichtenburg Wastewater Treatment Plant.

[22] It is not disputed that paragraph 7.6 of the Project Closeout Report of Themak states that all parties accepted the overall quality of the works, and that paragraph 8.3 reads that all substandard work was rectified as per the standards. Although the work was not yet completed on 20 April 2020, Cader agrees having already prepared an invoice in an amount of R25 884 435.75 in anticipation. On 8 May 2020, the Municipality paid R25 884 435.75 into the Standard Bank Account of Rensh.

The Report of The AGSA

[23] In February 2024, the deponent to the founding affidavit deposed to a supplementary affidavit necessitated by an MI referral made by the AGSA to the SIU regarding the R25 884 435.75 amount paid to Rensh for the services rendered because of the contract between the Municipality and Rensh. The AGSA holds the view that the contract is not only irregular but that the entire transaction and process are fraudulent.

[24] The AGSA also found that prior to the declaration of the National State of Disaster and subsequent appointment of Rensh, tenders were advertised and that the Municipality

had received approximately 17 BOGs from different entities. These tenders and BOQs were already happening and well at an advanced stage for the tender known as Ditsobotla Local Municipality emergency refurbishment: dysfunctional and poor conditions pump stations and associated works. According to both the finding of the SIU and AGSA, the procurement processes were mysteriously discarded and only to appoint Rensh later.

[25] The AGSA'S finding was also that the conclusion of the contract between the Municipality and Rensh was not fair, equitable, transparent, competitive or cost effective, and was contrary to the provisions of Section 217 of the Constitution and other procurement prescripts. It is common cause that Rensh did not submit any tender documents for any of the advertised bids, nor did it submit a BOQ to the Municipality.

[26] The appointment was aberrant, remarks the SIU, for how could the Regulation 36 deviation be requested so that it would be granted to the Second Respondent without it having participated in any bidding process. It was even more peculiar and unlawful for Rasool to request a Regulation 36 deviation in favour of Rensh in circumstances where it was not in the running for any tender. The SIU concludes that the Municipality ditched a legitimate procurement process in favour of using a deviation to appoint Rensh, which did not submit a bid at all.

[27] Losaba and Mphato were only too happy to consent and approve the request without raising concerns or questions. In doing this, the AGSA found, they simply, illegally, unreasonably, unfairly, and unlawfully failed to execute the constitutional duties entrusted upon them individually and collectively.

[28] On 7 July 2020, the AGSA sent a referral of a Material Irregularity ("MI") for further investigation in terms of the Public Audit Act to the SIU following her audit cycle of 2020-21. According to the referral letter, the AGSA identified MI at the Municipality during this audit cycle, and she approved the referral of the MI to the SIU in terms of

Section 5(1A) of the Public Audit Act, read with Regulations 5 to 7 of the Material Irregularity Regulations.

[29] The Memorandum of Understanding, read with the Service Level Memorandum ("SLM"), duly signed between the AGSA and SIU, further refines the roles and responsibilities of the respective parties when MI is referred for investigation. The SLM outlines the terms of reference between the AGSA and SIU. In line with the requirements, as set out in the Public Audit Act read with the Material Irregularity Regulations and also regulated in terms of the Memorandum of Understanding read with the SLM, the SIU must, on completion of the investigation, provide the AGSA with the outcome of an investigation, subject to the conditions as set out in paragraph 18 of the SLM.

[30] The instances of MI as discovered by the AGSA were that Rasool of the Municipality falsely and fraudulently stated that the National COVID-19 lockdown constituted an '*emergency*' as provided for by Regulation 36(1)(a)(i) of the SCM Regulations and alleged that the situation posed a number of health hazards and unpleasant conditions for the communities of Ditsobotla Local Municipality. This could not have been an appropriate basis for the invocation of Regulation 36 Deviation given that on the 27 November 2019, the Municipality had already published a tender for the provision of the same services.

[31] Besides, there were issues with the machines already and in any event, the Municipality had already received several complaints from Ditsobotla Local Municipality offices and surrounding communities regarding the sewage overflowing onto the main roads and private gardens. These complaints were long standing having prompted the Department of Water and Sanitation ("DWS") to issue a directive to Ditsobotla Local Municipality on the non-compliance concerning the sewage spillage. These could not have been perceived as creating an emergency as understood in Regulation 36 of the

SCM. The variation and deviation were approved notwithstanding these manifestly irregular and unlawful orders.

[32] Another instance of irregularity is that Rensh had to deliver and install four 100KVA, 8kW diesel generators, at a rate of R250 000 (excluding VAT). Each site was to be provided with one such generator. The purpose of the generators was to assist in maintaining the Wastewater Treatment Plants. In violation of the variation order approved on 16 April 2020, Rensh procured and delivered 137 KVA diesel generators at a revised amount of R550 000.00 (excluding VAT) for which it submitted an invoice and received payment.

[33] In February 2021, the AGSA communicated this finding to Losaba of the Municipality. His response was that the 100KVA generators were not available at the time of procuring these generators and the Municipality opted for the 137 KVA with an output of 100kw. That said, there is nothing from the Municipality, Rensh and Cader supporting this answer prior to the AGSA's finding and communication to Losaba, the Accounting Officer.

[34] The ineluctable conclusion is that the bigger generators were simply acquired to justify a higher amount paid therefor. This is the only conclusion that one can arrive at given the statement of the owner of the shop where these generators were purchased.

[35] On 4 February 2021, the AGSA sent out her Communication of Findings to Losaba, which she identified during the audit of the Financial Statements/the Annual Performance Report/Compliance with Legislation of the Municipality for the year ending on 30 June 2020. In this Communication, the AGSA advised the Accounting Officer that, on 10 December 2020 and 28 January 2021, she conducted site visits to verify the actual work done against the payment certificates for various pump stations and a sewage treatment plant forming part of the contract.

[36] The AGSA indicated that she observed during the visit that some items were claimed on the payment certificate even though there was no indication that work had been executed on site. Insofar as contingencies were concerned, she noted that the payment certificate accommodated even those that had in fact been claimed on all the sites. That said, there was no documentary proof of additional work done to support the expenditure on the contingencies.

[37] The AGSA noted further that during the site visit, there was also no noticeable additional scope of work performed on all sites. According to the AGSA, that no additional scope of work was carried out on all the sites visited, was confirmed by the municipal representatives and the contractor. The total amount for the contingencies claimed and paid (including VAT) is R4 314 072.63.

[38] The AGSA referred these MI findings and recommendations to the management of the Municipality for comment. The AGSA received the response of the management of the Municipality on 15 September 2021. The Municipality did not accept responsibility insofar as the response was inadequate or wrong and, in certain instances, misleading. On 17 August 2021, the AGSA upgraded some of her earlier financial-year findings to MI. She then drew the attention of Losaba to the revision. In these MI findings, the AGSA was concerned, amongst other things, with the changed specifications and the pricing of the generators.

[39] In reaction to the MI letter of the AGSA dated 17 August 2021, on 15 September 2021 Losaba, stated that the Municipality had appointed external investigators to identify the perpetrators in the incurring of the financial losses, irregular expenditure and for the investigation outcomes to enable him as the Accounting Officer to determine how the loss will be recovered and prevented in future on 23 September 2021, Losaba informed the AGSA that the Municipality had appointed a panel of service providers to conduct

investigation on the MI raised by the AGSA on 7 September 2021 and to that end, attached Terms of Reference for the Investigators.

[40] Dissatisfied with Losaba's response to the MI's raised and the way he addressed them, the AGSA wrote a formal notification to Losaba, wherein she advised that, due to the lack of appropriate action to address the MI, she had escalated and referred the matter to the Directorate for Priority Crime Investigation ("DPCI"). The AGSA later reconsidered this referral, and on 29 May 2023, she formally notified Losaba that she was referring it to the SIU. For some reason, the AGSA held back on this referral in favour of affording the Municipality another opportunity to address her fully on the MIs.

[41] Thus, on 6 July 2023, the AGSA once again wrote a formal notification to Losaba, giving him an extended deadline to address the MI by 31 January 2024. In this notification, the AGSA put Losaba on terms and gave several guidelines and timeframes to which she expected Losaba to adhere when addressing the MI with the hope that the outcome would be different and satisfactory.

[42] In consequence of Losaba's objectionable response on 7 July 2023, the AGSA once again wrote a formal referral letter to the SIU. The letter referred the MI to the SIU for further investigations as envisaged in Section 5(1A) of the Public Audit Act, read with the MI Regulations. Following the AGSA'S initial submission of her MI report to the SIU, she made further adverse findings against the Municipality.

[43] These findings are that the Municipality unilaterally changed the specifications for the required generators as per the BOQ of Themak on more than one occasion. The Municipality did not record the changes or refer to the Bid Specification Committee or Bid Adjudication Committee for review or approval. According to the 27 November 2019 tender, the required generators were supposed to be 50KVA. However, the payment

certificate issued to Rensh and the variation order recorded the generators required as 100KVA. Despite all this, the generators supplied by Rensh were 137KVA.

Issues

[44] To the extent that the Respondents have alleged that the delay in launching this application was unreasonable, caused them prejudice, it is poorly explained, and that it should not be excused, the application for condonation of the SIU must take precedence over the other issues. This must be the first to attend because it could be dispositive of the matter, depending, of course, on the outcome. Other issues that stand for adjudication are the jurisdiction of this Tribunal and whether this application is a legality review.

[45] If the SIU succeeds in its condonation application, the starting point will be to determine whether its award of the bid to Rensh and the subsequent conclusion of the contract, flowing from the bid, contravened Section 217 of the Constitution and other legal cannons governing the procurement processes of Organs of State. Central in this regard will be the way the Municipality awarded the bid and concluded the contract. This will place Regulation 36 of the SCM Policy of the Municipality into sharp focus.

Legal Framework

[46] Section 217 of the Constitution governs the procurement of goods and services by Organs of State. Subsection (1) provides that when Organs 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. The legal position is that when Organs of State, like the Municipality, procure goods and services, they are enjoined, in terms of Subsection (1) of the Constitution, to act in the manner prescribed in the Subsection.

[47] Section 217(3) of the Constitution further provides that national legislation must be enacted to provide a framework within which these constitutional imperatives may be realised. Flowing from the aforesaid provision, the Legislature has enacted the Preferential Procurement Policy Framework Act, 5 of 2000 ("the PPPFA") whose objectives are, among others, to give effect to Section 217 of the Constitution by preferring certain categories of identified people in government procurement projects. The preamble to the PPPFA aims *"To give effect to s 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in Section 217(2) of the Constitution."*

[48] In terms of Section 1 of the PPPFA, a Preferential Procurement Policy is one that is contemplated in s 217(2) of the Constitution. Procurement policies of Organs of State must be compliant with Section 217 of the Constitution and must be implemented within the framework prescribed by national legislation. The national legislation contemplated in Subsection (3) of Section 217 is the PPPFA and should be read in conjunction with Part 1 of Chapter 11 of the Local Government: Municipal Finance Management Act, 56 of 2003.

[49] In terms of Section 152(1) of the Constitution, the constitutional objectives of local government are—

"(1) …

(a) to provide democratic and accountable government for local communities.

(b) to ensure the provision of services to communities in a sustainable manner.

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in Subsection (1)."

[50] Section 217(2) of the Constitution acknowledges that a procurement system may provide for categories of preference and for the advancement of categories of certain groups of persons. Giving effect to Section 217(3) of the Constitution *supra* is the PPPFA, which lays down that Organs of State must determine their preferential procurement policies based on a points system.

[51] Among those is Section 2(1)(g), which provides that once bids have been scored in terms of the PPPFA:

> "2. Framework for implementation of preferential procurement policy—
>
> (1) An organ of state must determine its preferential procurement policy and implement it within the following framework:
>
> (a) …
>
> (g) any contract awarded on account of false information furnished by the tenderer to in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have."

[52] The purpose of the SCM Manual is to give effect to the procurement policy contemplated in Section 217(2) of the Constitution and as prescribed in the PPPFA. SCM Policy 12.21 – Ngaka Modiri Molema District Municipality provides as follows:

> "12.21. Deviation from, and ratification of minor breaches of procurement processes—
>
> (1) The Municipal Manager may:
>
> (a) dispense with the official procurement processes established by this policy and to procure any required goods and/or services through any convenient process, which may include direct negotiations, but only:

(i) in an emergency.

(ii) if such goods and/or services are produced or available from a single provider."

[53] Regulation 36 of the Municipal Supply Chain Management Regulations deals with deviation from SCM, and it provides:

"(1) a supply chain management policy may allow the accounting officer-

(a) to dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only-

(i) in an emergency

…

(v) in any other exceptional case where it is impractical or impossible to follow the official procurement processes; and

(b) to ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature."

[54] Regulation 16A.6.4 provides that if, in a specific case, it is impractical to invite competitive bids, the Accounting Officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the Accounting Officer or accounting authority. Considering the provisions of this Regulation, the Court in *Chief Executive Officer, South African Social Security Agency, and others v Cash Paymaster Services (Pty)*[2] held that a material requirement of regulation 16A.6.4 is that "there must be rational reasons for the decision" not to comply with a Supply-Chain Policy.

[2] *Chief Executive Officer, South African Social Security Agency, and others v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) at para 21.

[55] In *Department of Transport v Tasima (Pty) Ltd*[3], the Court stated that in a case of an emergency or where there is only one supplier who can provide goods or services, the regulation permits a deviation from inviting competitive bids in terms of a fair, transparent and cost-effective tendering process. Explaining that the word 'impractical' is context specific, the Court in *Rain Chartered Accountant Incorporated v South African Social Security Agency*[4] held that:

> "To use the hackneyed but useful legal phrase, what is impractical must surely depend on the circumstances of each case. In some instances, impracticality may manifest in absolute impossibility to engage in a competitive bidding process. Below that there may be a range of what constitutes impracticality. At the centre though must be the question whether a competitive bidding process is well and sensibly suited for the circumstances. A dictionary meaning of 'impractical' is 'not adapted for use or action; not sensible'. Ultimately what is impractical is a matter of a judgement call to be made by the organ of state concerned. But what the organ of state may decide is not unbounded; it must be informed by the operative word – 'impractical'. And that is an objectively accessible notion."

[56] Instruction Note 3 of 2016, passed on 19 April 2016, gives guidance on measures to prevent and counter abuse in supply chain management systems. It was extant and applicable at the time the department procured goods and services from Themak. It provides for the registration, investigation, reporting, and remedying of complaints of irregularities in Supply Chain Management. Paragraph 8 of Instruction Note 3 concerns deviations from the normal bidding process. Paragraph 8.1 provides that an Accounting Officer must not deviate from inviting competitive bids except in cases of emergency. An emergency procurement, per paragraph 8.2, may occur when there is a serious or unexpected situation that poses an immediate risk to health, life, property, or

[3] *Department of Transport and Others v Tasima (Pty) Ltd* - 2017 (2) SA 622 (CC) ("Tasima (Pty) Ltd") at para 22.
[4] *Rain Chartered Accountant Incorporated v South African Social Security Agency* [2021] ZACC27;2021(11) BCLR 1225 (CC) at para 30.

environment, which calls an agency to action, and there is insufficient time to invite competitive bids.

[57] Paragraph 8.4 states that the Accounting Officer must invite as many suppliers as possible and select the preferred supplier using the competitive bid committee system. Paragraph 8.5 says that any other deviation will be allowed in exceptional circumstances, subject to the prior written approval of the relevant treasury. In *Rain supra,* the Court explained the relationship between regulation 16A.4.6 and paragraph 8 of Instruction Note 3:

> "That said, paragraph 8 of Treasury Instruction Note 3 sheds light on what is 'impractical'. Paragraph 8 deals with deviations. 'Impractical' must be read in the light of this paragraph, which accords in some respects with what I have just said. In paragraph 8.1, the note states that an Accounting Officer must only deviate from a competitive bidding process in cases of emergency and sole supplier status.' The first of those concepts is defined as occurring 'when there is a serious and unexpected situation that poses an immediate risk to health, life, property, or environment, which calls an agency to action, and there is insufficient time to invite competitive bids. The second occurs 'when there is evidence that only one supplier possesses the unique and singularly available capacity to meet the requirements of the institution.' Paragraph 8.5 provides that 'any other deviation will be allowed in exceptional cases subject to the prior written approval from the relevant Treasury.' Paragraph 8.5 serves to indicate that deviations may be made in situations that are wider than just those typified in paragraph 8.1. And this harks back to the point that at its widest impracticality, which – in terms of Treasury Regulation 16A.6.4 – is the jurisdictional fact for deviation, is an objectively accessible notion."

[58] Treasury Practice Note 8 of 2007 sets out threshold values for goods and services that must undergo competitive processes. 3.4.3 of the Practice Note prescribes:

> "Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority

> may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved, and the reasons for dispensing with the prescribed competitive bidding process."

[59] The above is the legal background against which the alleged irregularities will be evaluated. If the facts demonstrate that these facets of legal canon were breached in any manner, this Tribunal will have no choice but to declare the award of the bid and subsequent contracts constitutionally invalid, review and set them aside. However, before delving into the assessment of the merits, it is appropriate to first attend to the other matters raised by the Respondents.

Undue Delay

[60] The Respondents have vehemently contended that the SIU has unreasonably delayed launching this application. Moreover, the SIU has failed to furnish a reasonable account covering the entire period of its delay. It is only in those circumstances where the SIU is found to have given a satisfactory explanation of the undue delay that this Tribunal can consider granting the application for condonation. The Respondents do not believe that this is a legality review. As such, the delay should be assessed in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), which, unlike legality, has a time bar of 180 days from the date of acquisition of knowledge of an administrative decision, beyond which a party must apply for condonation.

[61] The Respondents argue that the ‘high water mark’ of the SIU in seeking condonation is a dysfunctional system of providing instructions to Counsel within the Office of the State Attorney. The Respondents further contend that this does not excuse the *Lackadaisical* way the SIU went about giving instructions. In fact, state the Respondents, it was not in the interest of justice to delay this matter for so long. There is no justification why it took the SIU more than four years - from the occurrences in March 2020 to April 2024. This was in circumstances where all the evidence was available to the SIU as far back as September 2022. Prior thereto, the AGSA had investigated this matter in 2021.

[62] Persisting that this review is in terms of PAJA, the Respondents maintain that the application has been filed out of the six-month statutorily permitted period and was not instituted for approximately eighteen months after the Applicant was aware of all the facts relevant to this matter. The Tribunal does not have the authority to condone the statutory non-compliance provided for in PAJA, which should be the yardstick here. The Tribunal cannot create rules with the intention and purpose of circumventing statutory and common law requirements. For those reasons, the Respondents have urged this Tribunal to refuse to exercise its wide discretion to grant condonation in favour of the SIU.

[63] I have already referred to the *Ledla* case supra, where the Constitutional Court makes it clear that this Tribunal has authority to decide matters of legality, it being inconsequential that it is not a Court. Accordingly, the SIU was not time-barred by Section 7 of PAJA to launch this application within 180 days. The Tribunal has the authority to condone the late launching of this application. As such, this application falls to be adjudged in terms of the provisions of Rule 14 of the Rules of this Tribunal and not Section 7 of PAJA, the Respondents’ persistent attempt to talk its application into existence here notwithstanding.

[64] I turn to condonation as applied in legality reviews. The starting point is Rule 14 of this Tribunal, which provides:

> "14. Extension of time, Removal of Bar and Condonation—
>
> (1) In the absence of agreement between the parties, the Tribunal may, upon application on notice and on good cause shown, make an order extending any time prescribed by these Rules.
>
> (2) Any such extension may be ordered. However, the application therefore is not made until after expiry of the time prescribed or fixed, and the Tribunal may make any order as it seems meet in that regard.
>
> (3) The Tribunal may, on good cause shown, condone any non-compliance with these Rules."

[65] A legality review does not have a time-bar within which it must be launched. However, and like a review under PAJA after the expiry of the 180 day period, a condonation application must be brought within a reasonable time. The Supreme Court of Appeal ("SCA") in *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality*[5], held that:

> "[18] A legality review, unlike a PAJA review, does not have to be brought within a fixed period. However, whilst the 180-day bar set by s 7(1) of PAJA (which may be extended under s 9) does not apply to a legality review, in both the yardstick remains reasonableness. It is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to either overlook the delay or refuse a review application in the face of an undue delay.
>
> [19] The test for assessing undue delay in the bringing of a legality review application is: first, it must be determined whether the delay is unreasonable or undue (this is a factual enquiry upon which a value judgment is made, having regard to the

[5] *Altech Radio Holdings (Pty) Ltd and Others v Tshwane* City 2021 (3) SA 25 (SCA) (Altech Radio") at paras 18 – 20.See also *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* - 2019 (4) SA 331 (CC) at para 56.

circumstances of the matter); and, second, if the delay is unreasonable, whether the court's discretion should nevertheless be exercised to overlook the delay and entertain the application."[6]

[66] The SIU admits that there has been a delay in launching this application, but has implored this Tribunal to weigh the delay in the factual context in which it happened. I am therefore obliged to consider how it came about that the SIU launched this application so late and to determine whether such background facts constitute a justification for this Tribunal to exercise its discretion to excuse the delay.

[67] Tersely, it can safely be surmised that by 28 September 2022, the SIU was in possession of all the relevant information that could have allowed it to launch this application. That conclusion is inescapable if regard is had to the date of 28 September 2022, being one on which the senior investigator referred the matter to the SIU. The Respondents' criticism is that if that was the position, why did the SIU wait for eighteen months before launching the application in April 2024?

[68] The SIU states that at the start of COVID-19 and its aftermath, it experienced an upsurge in litigation stemming from criminal activities that surfaced, requiring the SIU to investigate. This was the background against which the President promulgated the Proclamation. The SIU soon encountered a backlog in executing instructions to appoint attorneys and Counsel in various matters and paying for such services. Some of these

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[6] Ibid. The Court in *Altech Radio* goes on to state:

"[20] As it was recently put in *Valor IT v Premier, North West Province and Others*:

> 'Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a "factual, multi-factor and context-sensitive" enquiry in which a range of factors — the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits — are all considered and weighed before a discretion is exercised one way or the other.'

representatives refused to take further instructions when the SIU failed to settle their fees promptly. This frustrated urgent cases that demanded immediate attention.

[69] As a result of the above, the SIU recruited attorneys to assist in the resolution of the problems. Additionally, to fast-track the process, it seconded its own attorney to the Office of the State Attorney. However, this did not yield the desired results immediately. Faced with these difficulties, the SIU endeavoured to avoid the challenges associated with the Office of the State Attorney by appointing private attorneys on Service Level Agreements. The AGSA called this process into question as she believed that it was unlawful. A different controversy materialised when the SIU contested the AGSA's finding while simultaneously seeking to progress its matters.

[70] To have matters that required litigation back on track, on 6 July 2023, the SIU cancelled the appointment of private firms of attorneys. It reverted to the Office of the State Attorney on 30 August 2023. The SIU alleges that these internal processes are not only commonly accepted as elaborate in nature but also known to be laborious. Usually, they involve the invitation of Counsel to complete the tender documents, and a panel of attorneys to discuss them and select one. Thereafter, provide the appointed Counsel with files and consult with him or her and the SIU's officials. This only occurred in early December 2023, before the beginning of the recess period, and again approximately three weeks after the recess period, on 6 February 2024.

[71] The issue is whether the facts supplied by the SIU are reasonable and with good cause. If they are, the ground is fertile for this Tribunal to exercise its discretion in favour of condonation. In the case of *Kwasa Food Suppliers*[7], this Tribunal held that the second stage of the inquiry entails a determination of the following factors:

71.1 The nature of the decision to be reviewed;

[7] *Special Investigating Unit v Kwasa Food Suppliers (Pty) Limited and Others* (EC 02/2024) [2025] ZAST 3 (12 February 2025)

71.2 The duty to review in terms of the relevant empowering legislation;

71.3 The consequences of setting aside the decision to be reviewed;

71.4 The potential prejudice to the affected parties;

71.5 The court's ability to grant just and equitable relief; and

71.6 The interests of justice.

The Nature of The Decision to Be Reviewed

[72] The decision to award the tender to Rensh was invalid and irregular because the Municipality had invited certain service providers to submit bids. Those service providers responded by completing bid documents and submitting their bill of quantities. No one, including those service providers who participated, knows what happened to the process. All that they know is that Rensh, a company that was never part of the process, was preferred. Rensh did not even submit a bill of quantities but used one that was prepared by Themak, which amounted to R36 million. While that was the amount of the bill of quantities, Rensh surprisingly decreased it to R26 Million.

The Duty to Review in Terms of The Relevant Empowering Legislation

[73] In terms of the SIU Act, the SIU is authorised to launch civil proceedings to review and set aside decisions unlawfully made and to seek damages where appropriate. However, the SIU is not seeking damages at this stage.

The Consequences of Setting Aside the Decision to be Reviewed

[74] The decision under review is one where the Department irregularly and unlawfully appointed Rensh on a deviation brought about by an emergency. There was never such an emergency as the situation that the Municipality sought to resolve by appointing Rensh on a deviation that prevailed before the advent of COVID-19. The AGSA and the Standing Committee on Public Accounts ("SCOPA") reported that the work that has been executed does not square up with the amount spent – large amounts have been expended for very little work. The consequences will be like the *status quo ante*. Reviewing and

setting aside will ensure adherence to the rule of law, which has been undermined by Rensh's appointment.

The Potential Prejudice to the Affected Parties

[75] The Municipality has expended public funds in an attempt to resolve an unbearable situation that has been with the community for a while. Prejudice against the Municipality will necessarily follow because it has not received value for the money it has paid to Rensh. Rensh was irregularly appointed; consequently, it cannot be prejudicial to it where the legality of its appointment is concerned.

The Tribunal's Ability to Grant Just and Equitable Relief

[76] The SIU seeks relief that the award of the tender be reviewed and set aside. In addition, that the Tribunal grants just and equitable relief. It is manifest from the admitted facts of this matter that the award to Rensh was irregular and unlawful. As such, in terms of Section 8(2)(b) of the SIU Act, it will be just and equitable for this Tribunal to review and set aside the award of the tender.

The Interest of Justice

[77] The Municipality had meant to repair the water and sewage infrastructure of the community, which was disintegrating. There was no indication at the time of the hearing of this application that the project was complete. Moreover, the Municipality totally disregarded the service providers it had invited to bid in favour of Rensh, a party that had not been requested to participate in the bidding process. The procurement process was not fair, equitable, transparent, competitive, or cost-effective as required by the provisions of Section 217 of the Constitution. Against that backdrop, it will be in the interests of justice to review and set aside the award of the tender.

[78] Other factors for consideration when determining whether to grant condonation for the delay are: the nature of the relief sought, the extent and the cause of the delay, the

effect of the delay on the administration of justice, the reasonableness of the explanation for the delay and the importance of the issue raised.

[79] Another important factor for consideration here is the presence of prospects of success. This, particularly with and in mind of the unashamed manner in which the Municipality breached Section 217 of the Constitution when awarding the tender to Rensh. It unfairly abandoned the process of procuring services from other service providers without advising them. It appointed a party that had neither completed any tender documents nor submitted a BOQ. There was no competition at all because only one service provider was selected without the advantage of comparison.

[80] There was no transparency as it is only the Municipality and Rensh that know what led to the appointment. Lastly, the award could not have been cost-effective as the Municipality deprived itself of the opportunity to select a party with the best offer. Besides, by the time the SIU began to investigate this matter, two other institutions, the SCOPA and AGSA, had found the procurement of the services of Rensh to have flouted the provisions of the Constitution and other legal prescripts governing the procurement process of Organs of State.

[81] From the account furnished for the delay in launching the application, the SIU was not responsible for the delay. Most of the difficulties it confronted especially between 28 September 2022 to April 2024 when the application was issued, were external from its sphere of influence. Under the principle of legality, a party must launch the application within a reasonable time. Given what had transpired in this matter, the delay is justifiable.[8]

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[8] *South African Broadcasting Corporation SOC Limited and Another v Former Chief Operating Officer: Motsoeneng and Others* (GP01/2021) [2022] ZAST 23 (18 October 2022) at para 63.

[82] Other critical factors when considering delay are public policy, certainty, and finality of a matter.[9]The use of State funds for public benefit must be done in a lawful and procedurally fair manner. No party can be given an advantage over the other. There is a duty on officials in office to comply fully with the procurement laws. It is therefore a matter of public policy that the unlawful conduct that occurred in awarding the tender be authorised. The Municipality was mindful that it could not justify the deviation on the emergency of COVID-19 because the situation existed before and the Municipality had been made aware of its existence hence it had embarked on a procurement process which it mysteriously abandoned in favour of Rensh.

[83] The matter is enormously important to the Community of Ditsobotla, whose dignity and other human rights have been ripped off by the Municipality's officials, the Respondents, Themak and Makola. It will not sit well with the public for this matter to be finalised without affording the SIU opportunity to levy any evidence before this Tribunal, especially as it concerns issues of corruption and misappropriation of public funds.

[84] Was the decision, although unlawful, made in good faith? The Municipality, as a government institution that deals with bids month-in and month-out, was alive to the fact that it had abandoned a lawful procurement process to which several parties had responded. To date the parties who submitted bids remain in the dark why the process the Municipality initiated was never implemented. Given that the Municipality awarded the bid to a party that was never part of the procurement process to the exclusion of those who followed the legal process, it cannot be said that it did so in good faith.[10]

[85] Losada's appointment of Themak on 19 November 2019 on a project that did not have a number, yet, for: *"professional services for the operation and maintenance of bulk*

[9] *SIU v MEC Department of Transport supra. Special Investigating Unit v Member of the Executive Council for the Department of Transport, Kwazulu-Natal and Another* (KN/01/2021) [2024] ZAST 2 (27 February 2024) at para 51.
[10] *South African Broadcasting Corporation SOC Limited and Another v Former Chief Operating Officer: Motsoeneng and Others* (GP01/2021) [2022] ZAST 23 (18 October 2022) at para 64.

wastewater infrastructure for a period of 36 months was not without significance." The plan was that Themak would be used as and when required by the Municipality during the period of the appointment. Themak knew this when it accepted the appointment on 17 January 2020. Needless to state that this happened before the arrival of COVID-19. On 20 January 2020, Rasool of the Municipality instructed Themak to commence with the assessment of four (4) critical pump stations and the wastewater treatment plant in Ditsobotla. Themak was requested to produce a BOQ in line with its assessment of the plants and pump stations for repairs. When Rasool issued this instruction to Themak, the five potential service providers had already provided the Municipality with BOQs, yet, a party which did not bother to submit a BOQ was preferred. That could not have been in good faith especially in the absence of reasons.

[86] Themak observed its instruction and conducted the assessment. It produced the technical assessment report detailing the work to be carried out as well as the amount to be paid for such work. The BOQ amounted to R36 923 045.77. It invoiced the Municipality for an amount of R3 882 665.37 for its consulting services. The director of Themak, Makola confirmed this in an affidavit. On 27 November 2019, the Municipality published a tender on e-Tender through the Department of National Treasury under Bid Number: NMMDM 19/20/15 PWBS (A). On 5, 9 and 10 December 2019, five service providers submitted their BOQ's to the Municipality for the work to be carried out in terms of the tender requirements to repair and maintain water pump stations and wastewater treatment facility at Ditsobotla.

[87] Rensh was not one of the five service providers the Municipality had requested to submit BOQs. In any event, this was even before the Municipality instructed Themak to commence with the consultancy work. On 7 March 2020, Rasool telephoned Cader to provide a quotation for the repair and maintenance on all facilities where Themak had already produced a BOQ in Ditsobotla. In response, Rensh produced a quotation for an amount of R25 884 435.75. In her affidavit, Cader states that she was telephonically

contacted. There was no written contract concluded with the Municipality, nor was there a letter appointing Rensh. This begs the question, why did the Municipality instruct Themak to produce a BOQs where five companies had already done so?

[88] Following the declaration of the National State of Disaster in mid-March 2020, Rasool prepared a memorandum on 23 March 2020 requesting that Rensh be appointed using Regulation 36 of the SCM to do urgent/emergency repairs at the four pump stations and one wastewater treatment plant in Ditsobotla as per the BOQ prepared by Themak. The deviation memorandum for an amount of R25 823 883.40 for these quoted projects was recommended by the Chief Financial Officer, Mphato and was approved by Losaba.

[89] Rasool’s memorandum fails to give reasons for finding Rensh to be a suitable service provider as against the other five, which furnished their BOQs in compliance with Bid Number NMMDM 19/20/15 PWBS (A). In motivating for the deviation, Rasool states that the COVID-19 pandemic was the overriding consideration for the invocation of Regulation 36, but he omits to touch on the reasons that persuaded the Municipality to single out Rensh as a preferred service provider.

[90] Everything said about the above, how could COVID-19 be the dominant factor in the consideration of the emergency deviation invoked in terms of Regulation 36 when this situation prevailed even before the declaration of the National State of Disaster by the President of the Country? This is contrived and demonstrates that the use of the Regulation was inappropriate and unlawful. It further shows that it was invoked to sidestep the legally recognise procurement process. Thus, there could not have been any talk of good faith on the part of the Municipality when it made the decision as the violation was deliberate.

[91] The discretion of this Tribunal in deciding whether to condone a delay is broad. The reasons furnished for the delay in this matter constitute good cause for this Tribunal

to exercise its discretion in favour of condonation. In the circumstances of this application, it is befitting for this Tribunal to frown upon the process by which the Municipality appointed Rensh. To the extent that the award of the tender and the subsequent conclusion of the contract were irregular and invalid, this Tribunal is authorised to exercise its discretion in favour of condonation. The preliminary point fails.

Irregular Step Notice - Rule 30A Application

[92] The second preliminary point, which the Respondents submitted must be addressed before the merits, pertains to the abovementioned Rule. The irregular step rule applies in this matter because Rule 28(1) of the Tribunal Rules states that: "If a situation for which these Rules do not provide arises in proceedings or contemplated proceedings, the Tribunal may adopt any procedure that it deems appropriate in the circumstances, including the invocation of the High Court Rules." The applicability of the Uniform Court Rules to this matter, where necessary, is contested by neither party.

[93] Before plunging into it, it will be instructive to first give a background on how the Respondents came to raise it as an issue. The Respondents served their answering affidavit on 29 July 2024. The SIU's replying affidavit was due for service within 10 days of the service of the answering affidavit. The 10-day period lapsed on 12 August 2024. The SIU only served its replying affidavit on 31 October 2024 and has not applied for condonation for the late service. The affidavit is therefore more than two months late. The Respondents claim that they have been prejudiced because of the SIU's failure to serve the replying affidavit timeously and have implored this Tribunal to refuse to admit the affidavit into evidence.

[94] In response to the Respondents, the SIU admits that while it has served the replying affidavit more than two months late, it was not under obligation to apply for condonation for the late service. According to the SIU, it served the replying affidavit when it did because following the service of the answering affidavit, the parties engaged

in settlement negotiations. When the negotiations collapsed, the SIU enquired if the Respondents would still be proceeding with the irregular step application but was met with silence. In any event the Respondents' Rule 30A, submitted the SIU, was not perfected as it was not followed by an application for dismissal after the expiry of the 10-day period stipulated in the Rule.

[95] Rule 30A is headed: "Non-compliance with Rules and Court Orders". It provides that:

> "(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—
>
> (a) that such rule, notice, request, order or direction be complied with; or
>
> (b) that the claim or defence be struck out.
>
> (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."

[96] I agree with the SIU that the Respondents have failed to take forward the matter of the irregular step alleged to have been committed by the SIU when it served the replying affidavit. The 10-day period within which they should have applied for dismissal has come and gone. The matter has been argued as if there had not been the irregular step notice. To cry foul in circumstances where the matter has proceeded this far is too late and besides, I am at loss how the Respondents can claim prejudice. They, themselves, abandoned the process that would have led them to the dismissal. Even after the SIU had asked whether they intended to proceed they still sat back and did nothing. In the result the *point in limine* must fail.

[97] In attacking the case of the SIU, the Respondents have adopted the 'spray and pray' approach hoping that one of the points raised will be sufficient to have the application dismissed. Consistent with this, they have raised numerous points, some of which are in fact settled law as this Tribunal or Courts have pronounced themselves on the interpretation of the statutory provisions governing this Tribunal. That said, I am still obliged to fully address them and decide on each and every one.

Non-Suited Relief

[98] Here the argument of the Respondents is that the relief sought in paragraphs 3 to 5 of the notice of motion is factually and legally non-suited. Paragraph 4 seeks relief to declare the contract the parties concluded on 7 March 2020 *null and void*. The Respondents say that the contract was not concluded on that day. The Municipality only requested a quotation on 7 March 2020. Following receipt of Rensh's quote, the Municipality issued a purchase order to it on 26 March 2020 requesting it to begin to deliver the works in terms of a deviation of emergency as contemplated in Regulation 36. Thus, according to the version of the Respondents, the contract was concluded on 26 March 2020.

[99] Conversely, the SIU argues that the contract was entered into on 7 March 2020 when the Municipality asked Cader to supply it with a quote. The issuing of the purchase order by the Municipality on 26 March 2020, contends the SIU, should be understood as confirmation of a contract concluded on 7 March 2020. The granting of the amendment in favour of the SIU has superseded this debate on the precise date of the conclusion of the contract, making any discussion on this gratuitous. That said, factually and looking at the principles of offer and acceptance, the quotation represented an offer to the Municipality, and the latter implicitly accepted it by issuing the purchase order on 26 March 2020.

[100] The Respondents also contend that this matter is instituted in the Tribunal in terms of the provisions of Section 8 of the SIU Act and is as such, a creature of statute, a quasi-judicial forum with statutory powers. The Tribunal cannot set aside the Municipality's administrative action, and the SIU does not seek such appropriate relief. Section 8 of the SIU Act headed: *"Powers and functions of Special Tribunal"* does not provide the Tribunal with such powers and functions. I have already referred to Section 8(2)(b) of the SIU Act, which categorically states the Tribunal has the power to 'make any order' to give effect to its decisions or ruling. Accordingly, the argument that the Tribunal lacks authority to hear an application for the review or setting aside of an administrative action taken by the Municipality is fallacious and stands to be rejected.

[101] Another strange argument of the Respondents is that the Tribunal cannot review and set aside the award and resultant contract. The Respondents' reason is that there is no practical remedy to set aside a contract that is fully executed and finalised four years ago. They regard the launching of this application as an abuse of process. This argument must be rejected for the simple reason that, without first declaring the impugned decision constitutionally invalid, the SIU cannot claim back any monies unlawfully paid to any juristic or non-juristic entity. I perceive no impediment to allow a claim arising from a contract that was concluded and finalised four years ago if it is brought on the legality principle. Accordingly, this argument is flawed and is dismissed.

Declaratory Relief

[102] The Respondents contend that the SIU's allegation that Section 8 of the SIU Act provides the Tribunal with wide powers is nonspecific and baseless. The wide powers do not include an inherent jurisdiction to be found. The powers of the Tribunal are contained within the Act, which does not include powers to review and set aside administrative actions of an organ of state. The High Court, continues the argument, is the primary forum for judicial review in terms of PAJA. If a matter falls under PAJA and there is no

specialised tribunal with review powers, the High Court is the appropriate and only forum to hear and adjudicate upon review applications.

[103] The Respondents are totally misguided in their approach to the declaratory relief. Firstly, they are persistent that this is a PAJA review when all is considered in this matter, and in terms of the *Ledla case supra*, this is a legality review. Secondly, Section 8(2) of the SIU Act is specific as far as what this Tribunal can do. It 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, including the power to-
>
> (a) issue suspension orders, interlocutory orders, or interdicts on application by such Unit or party;
>
> (b) make any order which it deems appropriate 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."

[104] Section 8(2)(b) is sufficiently wide to give this Tribunal the power to 'make any order which it deems appropriate so as to give effect to any ruling or decision given or made by it.' I am therefore at a complete loss why the Respondents seek to limit the power of this Tribunal to make review orders. Paragraph (b) of Subsection (2) expressly provides that the Tribunal can 'make any order'. I regard this as adequately wide to accommodate declaratory orders of the nature sought by the SIU in this matter. Section 8(2)(b) therefore authorises the Tribunal to make any order that would advance the purpose of the Act or decision at which it arrives. Accordingly, if the award together with the subsequent contract are found to have been unlawful for want of compliance with the Constitution or any of the procurement prescripts, this Tribunal would have power to declare it constitutionally invalid.

[105] There is also no merit to the argument that the relief the SIU seeks would be academic and incapable of being granted. I agree with the SIU that the declaratory relief is the legal basis through which the Tribunal can order recovery of assets or monies lost to illegal, unlawful and corrupt practices. This Tribunal has authority in terms of Section 2 of the SIU Act, to deal with issues involving unlawful and illegal conduct; serious maladministration in connection with the affairs of any State Institution; (b) improper or unlawful conduct by employees of any State Institution; (c) unlawful appropriation or expenditure of public money or property; (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property. The Respondents' contention is rejected as lacking in merit.

Statement and Debatement of Account

[106] The Respondents argued that the SIU is not entitled to a debatement and rendering of an account from Rensh. The duty, they maintain, may arise from a limited set of circumstances. It may occur from a fiduciary relationship parties have towards each other. These include partners, agents and trustees or a contractual obligation. Examples of these would be an attorney's mandate or a statutory duty. In this regard, the Respondents referred this Tribunal to the matter of *Absa Bank Ltd v Janse van Rensburg*[11]. The duty, as they understand it, does not arise in this matter. As such, Rensh is not obliged to debate and render an account to the SIU.

[107] Similarly, assert the Respondents, the SIU is not entitled to the relief that Rensh be directed to submit its audited financial statements to the SIU. The Respondents' assertion in this regard seeks to diminish the submission of Rensh's audited financial statements. This must be rejected because the submission of the audited financial statements is the necessary corollary of the debatement exercises to determine whether the monies received from the Municipality regarding the alleged unlawful contract accord with the works.

[11] *Absa Bank Bpk v Janse van Rensburg* - 2002 (3) SA 701 (SCA) at paras 15-16.

[108] The Respondents have correctly identified the applicable case law insofar as debatement and rendering of an account is concerned yet, they persist that the SIU is not entitled thereto. The SIU is enabled to seek the relief it wants because Section 4(1)(c) of the SIU Act allows it to do so. The Section provides:

> "The functions of a Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in Section 2 (1)-
>
> (a) …
>
> (b) ….
>
> (c) To institute and conduct civil proceedings in a Special Tribunal or any court of law for-
>
> (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a state institution.
>
> (ii) any relief relevant to any investigation; or
>
> (iii) any relief relevant to the interests of a Special Investigating Unit."

[109] The SCA in *Absa Bank Ltd v Janse van Rensburg supra*, a case mentioned by both Counsel, held that:

> "It is now settled law that in order to succeed in a claim for delivery and debatement of an account, the person seeking such an order must establish that a fiduciary relationship existed between the parties; or that there was a contractual agreement between the parties; or that there is a statutory obligation on the other party to deliver and debate the account."[12]

[110] It is common cause that this whole controversy in this matter emanates from the contract the parties concluded. The SIU is in terms of Section 4(1)(c) empowered by SIU because the contract concluded between the Municipality, an Organ of State, and Rensh

[12] As translated from the original Afrikaans text, at para 13.

is alleged to be in contravention of the Constitution. Accordingly, the basis of the debatement is the contract contemplated in *Absa Bank Ltd v Janse van Rensburg supra*. The Respondents' contention cannot stand, and it is rejected as devoid of any merit.[13]

Administrative Action Sought to be Reviewed is not a Legality Review

[111] The Respondents flatly deny that this application is based on the principle of legality. They assert that stripped of its veneer, the basis of the application is PAJA and not a legality review. In justification of that approach, the Respondents argue that the appointment by Purchase Order, approval of Regulation 36 Deviation and decision to launch this application, which the SIU is challenging, are administrative decisions. They contend further that a competent Court would not hesitate to set aside the decision to launch it. I agree that given that argument, it is somewhat strange that there is currently no application for such a relief. Due to the Respondents' persistence that this is a PAJA review, the Respondents are at cross purposes with the SIU. It should suffice to state that the Respondents are misguided in their approach and that the *Ledla* case *supra* is not distinguishable, as the Respondents would have this Tribunal believe on whose behalf the SIU launch this review in terms of Section 4 of the SIU Act.

Regulation 36 of the SCM-Policy

[112] The Respondents persist that the appointment of Rensh by the issuing of a written purchase order is valid as the Municipality had complied with Regulation 36 of the policy. The Respondents argue further that to contradict the appointment, the SIU must seek relief to overturn Regulation 36, or alternatively, the application of Regulation 36 by the Municipality. Further, alternatively, the SIU ought to reverse the decision of the Municipality to implement Regulation 36. The fact that the contract was executed, finalised and all obligations arising therefrom discharged, refutes any such invalidity *ex post facto*.

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[13] See also *Victor Products (SA) (Pty) Ltd v Letelier Manufacturing* (Pty) Ltd 1975 (1) SA 961 (W) at 963

[113] The essence of the SIU's case in this regard is that the Municipality should not have invoked the provisions of Regulation 36 as the circumstances did not present an emergency. The evidence levied before this Tribunal suggests that what the Municipality and the Respondents refer to as an emergency needing the immediate intervention of Rensh has always existed even before the onset of COVID-19. The Municipality and Respondents took advantage of the advent of COVID-19 that brought with it a genuine emergency. The use of Regulation 36 of the Municipality's SCM was as such, engineered to suit the emergency to seize the opportunity to access funds irregularly.

[114] This whole process of appointing Rensh on an emergency deviation was contrived. The Municipality dismally failed to explain why, if there was an emergency, it did not appoint from those potential service providers which had submitted BOQs. It also does not state anything on why it thought Rensh was, even though it did not tender, stood out as the most appropriate to carry out the works. The Municipality would further not state why it utilised a BOQ prepared by Themak, a company that did not submit any bid documents and BOQ, instead of using those from the invited companies. Even more staggering is that when this bid was initially published on 27 November 2019, the Municipality did not mention any emergency associated with the project yet; shortly after the declaration of the National State of Disaster, the emergency suddenly materialised, albeit with very little physical evidence of change.

[115] This was clearly in violation of Section 217 of the Constitution insofar as the fact that the decisions of the Municipality were unfair, inequitable, non-transparent, non-competitive and not cost-effective. The Constitutional Court in *Tasima (Pty) Ltd, supra,* stated that: "*in a case of an emergency or where there is only one supplier who can provide goods or services, the regulation permits a deviation from inviting competitive bids in terms of a fair, transparent and cost-effective tendering process*."[14] The facts of this current matter do not fit this mould because there was no emergency, the

[14] *Department of Transport and Others v Tasima (Pty) Ltd* - 2017 (2) SA 622 (CC) at para 99.

Municipality had, without furnishing any reasons, simply abandoned a legitimate procurement process in favour of the irregular appointment of Rensh. The Municipality's actions have violated all the provisions of Section 217 of the Constitution and all those prescripts that govern the procurement process in every manner possible.

[116] In appointing Rensh, the Municipality never alleged that it was impractical or impossible to follow the normal official procurement processes, as required by Regulation 36. The Municipality's failure to explain its choice in Rensh leads to an inescapable inference that its officials preferred to appoint it because there was connivance to loot the funds of the Municipality. The Court in *Rain Chartered Accountant Incorporated supra* stated that the word, 'impractical', is context specific. While the words must be assessed in a given context, I am unable to do so because the Municipality does not lay out such background that would allow this Tribunal to make a value judgment of what prevailed at the time other than the false reason that the declaration of the National State of Disaster had intervened in the ordinary course of events, bringing about the emergency. My evaluation of the situation is that there was nothing preventing the Municipality from engaging in a normal competitive bidding, a process it had mysteriously abandoned.

Failure to Plead a Delictual Claim

[117] According to the Respondents, the SIU is suggesting that Rensh is guilty of a delictual action known as disgorgement of secret profits. The Respondents allege that the requirements of such an action, which is a delict upon which a claim for damages may be based, would consist in the SIU averring and proving that:

117.1 Breach of a duty of good faith;

117.2 Rensh had such a duty; and

117.3 Rensh breached the duty.

[118] This need not occupy this Tribunal for long because the claim pursued by the SIU is clearly not based on delict. The simple fact is that the SIU derived power to launch this application from Section 4(1)(c) read with Section 8(2)(b) of the SIU Act. To seek to pigeonhole and label it a 'delictual claim' for purposes of criticising and rejecting it takes the case of the Respondents no further. The SIU Act allows the SIU to claim damages where it is found that a transaction was constitutionally invalid. This is one such matter consequently, the SIU had the power to pursue this claim in the manner it did.

[119] The notion that the Respondents cannot be ordered to repay the amount invalidly paid to Rensh on the ground that it is impossible to distinguish it from what constitutes unlawful payment or profits made from the transaction is an issue that cannot carry favour with this Tribunal. I agree with the SIU that such an approach is fallacious and undermines the ability of the SIU and, ultimately, this Tribunal, to make that judgment. Indeed, the relief is competent, practical, often sought and generally granted by this Tribunal where the evidence is established.

[120] To the extent that the Respondents may be implying that the length of time that has elapsed before the launching of this application means that the records upon which the SIU wishes to rely for the relief it seeks are not available anymore, it needs to be stated that Rensh is in any event obliged to keep its records for a minimum period of five years. Accordingly, if the Tribunal finds it fitting, it will be entitled to order production of those audited financial statements for analysis and determination of the funds unlawfully expended.

Jurisdiction of the Tribunal in a Review

[121] The Respondents assert that the Tribunal is not vested with the necessary jurisdiction to hear the review and setting aside orders, with the consequential declaratory or just and equitable relief. This argument has been addressed elsewhere in this judgment, but for what it is worth, I reiterate that this Tribunal derives its authority to entertain this

matter from the SIU Act, specifically Section 8(2)(b). In doing so, the Tribunal will neither be usurping the review powers of the Judiciary, which are exclusive to High Courts, nor will it be creating laws and jurisdiction of its own. Instead, it will be fulfilling its functions and powers bestowed upon it by the SIU Act and confirmed by the *Ledla case supra*.

[122] The Respondents maintain that this Tribunal is an extension of the SIU. As such, it should not be permitted to hear matters due to the principle of judicial deference towards the decisions of the executive. This argument is extraordinary and is disappointing that the Respondents hold such an estimation of the Tribunal. I agree with the SIU that this Tribunal must reject it with the disdain it deserves because the SIU Act draws a distinction between the SIU and this Tribunal. To that end, it declares that: *"A Special Tribunal shall be independent and impartial and perform its functions without fear, favour or prejudice and subject only to the Constitution and the law."*

[123] Besides, the functions of this Tribunal are undoubtedly separate and distinct from those of the SIU whose primary purpose is to investigate corruption matters and to bring them before the Tribunal for hearing. The argument to judicial deference is completely inappropriate in circumstances where a Tribunal such as the present has been established to deal with matters involving fraudulent, illegal, and unlawful or improper decision or conduct of Organs of State that causes loss of money or assets to the State. This Tribunal has authority to hear this matter, the argument of judicial deference raised by the Respondents aside.

Piercing the Corporate Veil

[124] Here, the argument of the Respondents is that since the decision of the Municipality to use emergency deviation by issuing Regulation 36 has not been challenged and invalidated, the contract between Rensh and the Municipality cannot be illegal. The Respondents conclude that if the contract is not reviewed or set aside, there is

no basis to pierce the corporate veil. As such, the ancillary relief is legally incompetent. Regarding piercing the corporate veil for Cader to be liable to the Municipality, jointly and severally with Rensh for the losses suffered by the Municipality, the argument is that the issue is exclusively regulated by Section 20(9) of the 2008 Companies Act.

[125] The SIU has not laid the necessary grounds that will permit this Tribunal to lift the corporate veil, continue the Respondents. It has neither made a case for personal liability in its founding affidavit in terms of Section 424(1) of the Companies Act, 61 of 1973 nor has it provided reasons why Cader should incur personal liability for any debts of Rensh. For these reasons, the Respondents deny that the corporate veil should be pierced. This can only be done in circumstances where the corporate personality of Rensh was fraudulently abused during the conduct of its business or its affairs. In this regard, Counsel for the Respondents referred to several cases as authority, most notably, City Capital SA Property Holdings Ltd v Chavonne's Badenhorst ST Clair Cooper.[15]

[126] The Respondents' argument that Regulation 36 should be challenged and set aside before the contract is declared invalid has been exhaustively discussed. I see no need to repeat it here. The Respondents would have this Tribunal believe that Section 20(9) of the Companies Act is the only suitable means by which to seek piercing of the corporate veil. That is misleading because piercing the corporate veil is also a common law remedy available to combat fraud. As will be seen below, the Companies Act is not the only source for the piercing of the corporate veil. There have been instances where piercing of the veil happened in a context different from that of the Companies Act – common law.

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[15] *City Capital SA Property Holdings Ltd v Chavonne's Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA) at paras 27-30. Paragraph 28 reads:

> "[28] Section 20(9) of the 2008 Act provides a statutory basis for piercing the corporate veil. On its plain wording, s 20(9) permits a court to disregard the separate juristic personality of the company where its incorporation, use or an act performed by or on its behalf 'constitutes an unconscionable abuse of the juristic personality of the company as a separate entity'. The term 'unconscionable abuse' is not defined in the 2008 Act and must therefore be given its ordinary meaning."

[127] In the case of *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others*[16], the Court held that:

> "The corporate veil may be pierced where there is proof of fraud or dishonesty or other improper conduct in the establishment or the use of the company or the conduct of its affairs and in this regard it may be convenient to consider whether the transactions complained of were part of a 'device', 'stratagem', 'cloak' or a 'sham'."

[128] Thus, the lifting of the corporate veil can be applied in cases where there are instances of commercial abuse or fraud by the directors of companies and the use of corporate forms to avoid legitimate obligations. When there is fraud, dishonesty or other improper conduct, policy dictates that the court engage in a balancing exercise. The court considers the circumstances and facts of each case to determine whether, in the appropriate case, it is right to disregard the corporate personality and apportion liability where it belongs.[17]

[129] From the aforegoing I must determine whether the facts in this matter are perfect for the lifting of the corporate veil. It will be sufficient to lift the corporate veil if the SIU establishes that Rensh and Themak were used to commit fraud. When Rensh was awarded the bid and subsequently entered into the contract with the Municipality, Cader knew or ought to have known that something was amiss. The bid awarded to it did not emanate from a legitimate tender procurement process as is the position with all Organs of State. Accepting that Rensh thought that it was being appointed on emergency deviation, surely as a party conducting business in Mahikeng, Province of North West, it would or ought to have known that there had been a tender published by the Municipality inviting potential bidders to complete bid documents and submit BOQs and that it was not part of those.

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[16] *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* (FB) (unreported case no 7095/2008, 4-6-2009), quoting with approval *The Shipping Corporation Of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A) at 556 C – F, at para 11.
[17] Ibid.

[130] If it were being appointed on the same bid, there could not have been any emergency because the situation prevailed before the onset of COVID-19 or the declaration of the National State of Disaster. If all this information was at Rensh's disposal, the fact that the Accounting Officer, Losaba and the Chief Financial Officer, Mphato, still went ahead to approve the emergency deviation without raising any questions suggests that Rasool, Losaba, Mphato and Cader were all colluding to defraud the Municipality. The evidence before this Tribunal is that Cader's husband has done some work for the Municipality in the past yet, a company headed by Cader, with no experience in the area, is awarded the bid and contract. Given this, it is not far-fetched to surmise that Rensh was set up for the use of its juristic personality so that it may have separate liability from its shareholders – Cader.

[131] Another obvious instance of fraud where Rensh was utilised as a vehicle concerns the purchase and sale of the generators. Rensh had to deliver and install four 100KVA, 8kW diesel generators at a rate of R250 000 (excluding VAT). Each site was to be provided with one such generator. The purpose of the generators was to assist in the maintenance of the Wastewater Treatment Plants. In violation of the variation order approved on 16 April 2020, Rensh procured and delivered 137 KVA diesel generators at a revised amount of R550 000.00 (excluding VAT) for which it submitted an invoice and received payment. There is no proof that this was sanctioned by the relevant committee.

[132] When the AGSA confronted the Accounting Officer, Losaba, in February 2021 with this finding, the response she received was that the 100KVA generators were not available at the time of procurement, in consequence of which the Municipality chose the 137 KVA with an output of 100kw. This was an unadulterated lie as there is nothing from the Municipality and Respondents supporting that answer before the AGSA's finding and communication to Losaba. The falsity of the aforegoing is further exposed by the affidavit of the owner of the shop where these generators where purchased, Mr Fourie.

According to his affidavit, the 100KVA 8KW diesel generators were available at the time.

[133] The alteration of the initial specification and purchase price of the generators must have been the joint creation of Cader, on behalf of Rensh, and the Municipality, represented by Rasool, Losaba and Mphato. All of them would have colluded to use Rensh to consummate their fraud against the Municipality. This explains the willingness of Losaba to lie about the availability of the generators and the disinterest in the modification in the specification and purchase price of the generators. Rensh was as such used to accomplish fraud.

[134] The AGSA also made further adverse findings against the Municipality which required Losaba to respond fully as the Accounting Officer. The AGSA reported to Losaba that she visited the project sites to verify the work done against payment certificate for various pump stations and a sewage treatment plant forming part of the contract on 10 December 2020 and 28 January 2021. Her findings were that she noticed that some items were claimed on the payment certificate even though there was no indication that work had been performed on site.

[135] Turning to contingencies, she recorded that the payment certificate accommodated even those that had in fact been claimed on all the sites. That said, there was no documentary proof of additional work done to support the expenditure on the contingencies. Additionally, the AGSA stated that during her site visit, there was also no obvious extra work performed on all sites. The AGSA's finding of no additional scope of work having been done on all the visited sites, was confirmed by the municipal representatives and the contractor. The total amount for the contingencies claimed and paid (including VAT) is R4 314 072.63.

[136] Having discovered these discrepancies, the AGSA notified the Municipality on 4 February 2021 and invited comments. These inconsistencies arose during the AGSA's audit of the Financial Statements/the Annual Performance Report/Compliance with Legislation of the Municipality's compliance with legislation for the year ended 30th of June 2020. When the AGSA ultimately received the Municipality's response on 15 September 2021, she found it dissatisfactory, as it was inadequate or incorrect and contained aspects that were misleading.

[137] The point of the AGSA's report is that Rensh was deeply involved in defrauding the Municipality. The fact that the officials of the Municipality paid for some of the items appearing on the payment certificate for the different pump stations and sewage plant, even though there was no evidence of work having been carried out for them, strongly suggests that both the Municipality and Rensh had wanted the Municipality to pay for that false information. The Municipality honoured the payments to its detriment.

[138] A similar result was realised with the unlawful and irregular alteration of the prices of the generators. The Municipality was made to pay a higher amount in circumstances where it could have paid far less. This benefited Rensh and placed the Municipality at a disadvantage. This is a clear instance of criminality where Cader used Rensh to defraud the Municipality. In these circumstances or contexts therefore, piercing of the corporate veil must be permitted to expose the directors and/or shareholders of Rensh, the actual perpetrators of the fraud, to assume liability.[18]

[139] A further instance of fraud involving the officials of the Municipality, Rensh and Themak is where the latter issued a variation order for R3 751 376.50 on 15 April 2020. The reason furnished by Themak for the variation order was that it would cover additional work. This contradicted the reason supplied by the Municipality's Bulk Treatment Works Manager - the request for approval of the variation order addressed to

[18] Ibid.

the Accounting Officer was because there was a site hand-over to Rensh in March 2020 and that there would be additional work to be done. This further work to be done was not part of the BOQ.

[140] The above said, at paragraphs 6.1.2 and 6.1.3 of the Project Close-Out Report, Themak records that there was no application for the variation order. As though that was not enough, on 22 April 2020, Themak issued a Close-Out Report and a Completion Certificate stating that the work was completed at the pump stations. This was false as it later transpired that the three (3) 137 KVA generators were installed on 13 May 2020, long after the Close-Out Report and the advance payment had been unlawfully made to the Respondents. Once again, Themak was actively involved in this corrupt activity and had enabled it. The AGSA's Notice of Material Irregularity has identified and quantified the outstanding or undelivered work at an estimated amount of R5 555 650.00 (including VAT).

[141] Another discrepancy arising from Themak's Variation Order and the Project Close Out Report is that, again on 15 April 2020, Themak prepared and signed a Variation Order for approval by the Municipality's Accounting Officer. The concerns the AGSA had raised about the Variation Order's updated specifications involving: the unblocking of the sewerage outfall and a rising main is that it was indicated that the work would not require a period of more than ten days.

[142] Notwithstanding that this was impossible, the Municipality paid for all the ten days as the variation order was approved on 16 April 2020 and Rensh is alleged to have completed the work six days thereafter on 22 April 2020. This suggests that Rensh could have only worked for seven days or less, considering that Rensh's invoice was issued on 20 April 2020. It is manifest that all the Respondents, except for the Municipality, aided by the officials of the latter, actively stole money from the Municipality. Shocked by

these irregularities, the AGSA issued, over the course of 2020, at least two Notices of MI against the Municipality to which the Accounting Officer failed to respond as required.

[143] Again, these anomalies notwithstanding, the officials of the Municipality approved the variation and deviation orders without any controversy. The Municipality's authorisation of the variation and deviation orders was unlawful, unreasonable and irrational. Any argument contrary to the SIU having demonstrated that Cader has misused Rensh to commit the fraud is rejected as bereft of merit. The lifting of the corporate veil of Rensh and Themak is inevitable and necessary in these circumstances.

Superannuation

[144] The contention of the Respondents here is that while the SIU may have started legal proceedings against the Respondents timeously, it has delayed in its prosecution of the case subsequently. This argument is in line with the definition of superannuation. The Respondents add that litigants have a right to finality in matters. If this does not happen, fairness to both parties is compromised and is prejudiced by the indifference of a litigating party failing to take the case forward. That said, it is not only to the prejudice of a Respondent that matters are delayed but the courts too become affected. The Respondents conclude that it is in the interests of justice that all parties be allowed to have a fair and expeditious hearing.

[145] The SCA in *Cassimjee v Minister of Finance*[19] held that a Respondent must show the existence of the following requirements to succeed with the defence of superannuation:

145.1 Delay in the prosecution of an action;

145.2 The delay must be inexcusable; and

145.3 The delay must seriously prejudice the Defendant, the Respondents in this instance.

[19] *Cassimjee v Minister of Finance* -2014 (3) SA 198 (SCA) at paras 11-12.

[146] As is evident from the aforegoing, some of the reasons required to avert the dismissal of Superannuation or Condonation are similar. However, the two are distinct because in matters brought under the principle of legality, condonation is sought for late launching of a review application. The Respondents' complaint in this matter, for example, is that this Tribunal should dismiss this application as the delay in launching it is unjustifiable. Conversely, with superannuation, the inexcusable delay concerns failure to prosecute the matter post issuing and delivery of the papers.

[147] I have therefore assumed, correctly so, that in raising superannuation, the Respondents are complaining about the delay that occurred after April 2024, the time when the SIU launched this application. While that assumption may be correct, the Respondents have not demonstrated the occurrence of delay from the time this application was launched. I too could not find any evidence of a serious delay worth raising superannuation. The only delay raised is in respect of the period before commencement of this application, which cannot be accommodated under superannuation. I find it inexorable to conclude that the Respondents have raised superannuation in circumstances where it is irrelevant. Accordingly, the defence must fail, and I find no need to deal with the other cases to which the Respondents have referred this Tribunal.

Hearsay Evidence

[148] The Respondents contend that the SIU's case is contingent on the findings of the AGSA and various BOGs from different companies. Without confirmatory affidavits from the AGSA or any purported experts with personal knowledge to validate the SIU's averments, the evidence is hearsay, and they urge this Tribunal to refuse its admission. Quantity Surveyors commonly prepare the BOQs. These documents constitute the opinion of the Quantity Surveyors and therefore fall into the category of inadmissible hearsay evidence unless confirmed by the author. The Respondents then proceed to refer

to paragraphs of the SIU's affidavits; this Tribunal should strike out and disregard those paragraphs.

[149] The SIU's response to the hearsay argument is appropriate – it is incorrect that the SIU has largely relied on hearsay evidence. The SIU, in referring to the BOQs, has not ascribed any version to any of the persons who submitted the BOQs in respect of the tender issued by the Municipality on 27 November 2019. Confirmatory affidavits would not be required in instances, such as the present, where all the SIU did was to utilise the BOQs as a demonstration of the existence of a process.

[150] Like in the case of the BOQs, the SIU has used the reports of the AGSA to confirm the presence of a fact. Apart from this, the documents are public documents published on the AGSA's websites. Besides, it would be unconscionable to demand the AGSA to depose to confirmatory affidavits in all the applications where various institutions rely on her reports. Such a demand would be an unreasonable one on the office of the AGSA. Everything said above, it is extraordinary that the Respondents place reliance on the very documents of the AGSA they seek to declare hearsay. This is disingenuous. In the result, the hearsay argument lacks merit and is dismissed.

[151] The Respondents, together with the officials of the Municipality, have colluded to defraud the Municipality. The Municipality, through Rasool, abandoned a legitimate procurement process that commenced with the publishing of the tender on 27 November 2019. The Municipality unjustifiably invoked the provisions of Regulation 36 of the Municipality's SCM Policy to unlawfully appoint Rensh, claiming that there was an emergency when the situation existed prior to the declaration of the National State of Disaster. This was in violation of Section 217 of the Constitution.

[152] The award of the bid and the resultant conclusion of the contract with Rensh was not fair, equitable, transparent, competitive and cost-effective as required by Section 217

of the Constitution and all the other legal prescripts governing the procurement of goods or services by an Organ of State. These prescripts have been discussed above particularly when discussing the prospects of success under condonation. Accordingly, I see no need to repeat them here.

Declaration of Invalidity

[153] Section 172 of the Constitution provides:

> "When deciding a constitutional matter within its power, a court –
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including –
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[154] The consequences of parties deliberately contravening procurement processes to enrich themselves invariably have far reaching and unbearable repercussions on the very communities the projects are meant to uplift. In this matter, it has been found that the quality of the work performed by Rensh was not per the BOQ of Themak. The amount originally set aside for the project has ballooned but the community finds itself in the same unendurable and disadvantaged situation. It is deeply troubling and unfortunate that the officials of Organs of State who are often the enablers and perpetrators of the fraud against the Municipalities never face the consequences of their deeds. If they do, the public seldom know the outcome.

[155] It has become natural that where the findings are that the Constitution has been contravened and the procurement processes undermined, as is the case here, this Tribunal is in terms of Section 172(1)(a) of the Constitution, directed to declare the award of the bid to Rensh unconstitutional, unlawful and invalid. In doing so, I am following in the

footsteps of a plethora of case authorities, among which the *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*[20], where the Constitutional Court held that:

> "We concluded earlier that, in awarding the DoD agreement, SITA acted contrary to the dictates of the Constitution. Section 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution. The award of the contract thus falls to be declared invalid."

Just and Equitable Remedy

[156] The relief the SIU seeks is that once this Tribunal has condoned the late launching of this application, declared the award of the Tender and the resultant contract to Rensh invalid, reviewed and set aside, it must direct:

156.1 Rensh to submit its audited financial statements for the year 2019 – 2020 and 2020 - 2021 within 15 days of this order;

156.2 Rensh to conduct a debatement exercise to determine all monies received from the Municipality in respect of the unlawful contract, as well as the actual, reasonable and lawful out-of-pocket expenses that Rensh may be able to prove that it has incurred in rendering the services within 30 days of the submission of the audited financial statements;

156.3 The Respondents to pay all the monies that are due to the Municipality within 15 days of the determination of the statement and debatement exercise;

156.4 That the corporate shield of Cader be pierced and that she be liable for the loss that she and Rensh caused to the Municipality;

156.5 That the corporate shield of Makola be pierced and that he be liable for the loss that he and Themak caused to the First Respondent;

[20] State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited [2017] ZACC 40; 2018 (2) SA 23 (CC) at para 52.

156.6 The Respondents to pay to the Municipality the profit made by them from the execution of the contract with the Municipality, within 30 days after the determination thereof from the statement and debatement;

156.7 Themak and Makola to pay to the Municipality monies paid to them in respect of the above contract;

156.8 The Respondents to pay to the Municipality the amount determined from the debatement, and the monies received by Themak and Makola, with interest calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, from the date of this application until the date of final payment;

156.9 All the Respondents, except for the Municipality, to pay the costs of this application at a scale as between an attorney and client, jointly and severally, the one paying the others to be absolved, in the event of opposition by them.

[157] The Respondents assert that the relief the SIU seeks under Section 172(1)(a) and (b) may only be granted by a competent court and not the Tribunal. They argue further that the approach as aforesaid was confirmed by the Constitutional Court in *Electoral Commission v Mhlophe*[21] when it held that:

> "Section 172(1)(b) clothes our courts with the remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresoluble good situations."

Against that backdrop, the Respondents conclude that this Tribunal has no jurisdiction to grant a relief of a constitutional damage's nature, as sought by the SIU.

[158] This Tribunal has no difficulty with the case authority cited by the Respondents, as it is correct. However, the Respondents' reference to it is in vain. I say this because the *Ledla* case has long confirmed that while this Tribunal is not a Court, it nonetheless has

[21] Electoral Commission v Mhlope and Others - 2016 (5) SA 1 (CC) at para 132.

the power to decide legality matters. See para 70 of the case quoted above. The Respondents' persistence in contesting the power of this Tribunal to make a just and equitable remedy is confounding, and it is rejected.

[159] The Respondents further argue that the services rendered by Rensh have been finalised. As such, so continues their argument, it will be academic, moot, and impractical to review, set aside, or remit the decision to appoint Rensh long after the fact. A reference to cases dealing with mootness is misguided because this is not such a case. The power of the Tribunal to declare an award and subsequent conclusion of a contract is contained in the SIU Act. It is neither here nor there that Rensh finalised the work a while back. This is a remedy that is often requested and granted by this Tribunal.

[160] The fact that any recourse the Respondents may have against the Municipality may have prescribed cannot be a bar to the declaration of invalidity, the review, and the setting aside of the award of the bid and contract. The Respondents should not have , in the first place, connived to defraud the Municipality. In any event, this Tribunal doubts that the Respondents can, in the circumstances of this case, have such a recourse. Accordingly, their protestations are disregarded as devoid of any merit. Everything considered above, I find the following order befitting:

Order

[161] The following order is made:

1. The SIU's late launching of this application is condoned;
2. The decision of the Department to conclude a contract with Rensh for the provision of the services of wastewater treatment works in the Ditsobotla Local Municipality is reviewed and set aside;
3. The contract concluded between the Department and Rensh on 7 March 2020, *alternatively,* on 26 March 2020 is declared constitutionally invalid and null and void *ab initio*;

4. Rensh is directed to submit its audited financial statements for the period, 2019 - 2020 and 2020 – 2021, within 15 days of this order;
5. Rensh is further directed, within 30 days of the submission of the audited financial statements, to conduct a debatement exercise to determine all monies received from the Department in respect of the unlawful contract, as well as the actual, reasonable and lawful out of pocket expenses that Rensh may be able to prove that it has incurred in rendering the services;
6. Rensh and Cader are directed to pay all the monies that are due to the Department within 15 days of the determination of the statement and debatement exercise;
7. Cader's corporate shield is pierced and she is personally liable for the loss that she and Rensh caused to the Department;
8. Makola's corporate shield is pierced and he is liable for the loss that he and Themak caused to the Department;
9. Rensh and Cader are directed to pay to the Department the profit made by them from the execution of the contract with the Department, within thirty days after the determination thereof from the Statement and Debatement;
10. Themak and Makola are directed to pay back to the Department monies paid to them in respect of the contract;
11. Rensh and Cader are ordered to pay to the Department the amount determined from the debatement, and the monies received by Themak and Makola, with interest at the applicable legal interest in terms of the Prescribed Rate of Interest Act, 55 of 1975, from date of this order until the date of final payment;
12. Rensh and Cader are liable for the costs of this application as at the Scale between party and party Scale B, jointly and severally, the one paying the others to be absolved.

JUDGE BA MASHILE

MEMBER OF THE SPECIAL TRIBUNAL

Appearances

Counsel for the Applicant:	Adv T Machaba SC and Adv SJ Maisela
Instructed by:	State Attorney, Pretoria
Counsel for 2nd & 3rd Respondents:	Adv J de Beer and Adv T.I Ngwana
Instructed by:	Denga Incorporated
Date of Judgment:	31 March 2026

Mode of delivery

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