



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

**CASE NO: GP01/2023**

In the matter between:

**SPECIAL INVESTIGATING UNIT**

Applicant

and

**FLYFOFA AIRWAYS (PTY) LIMITED**

First Respondent

**SOUTH AFRICAN AIRWAYS SOC LIMITED**

Second Respondent

**THE MINISTER OF PUBLIC ENTERPRISES**

Third Respondent

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**JUDGMENT**

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**FORTUIN J:**

## **A. INTRODUCTION AND RELIEF SOUGHT**

1. This is an application by the Special Investigating Unit ("the SIU") to review and set aside, on the ground of legality, the decision of the Second Respondent, South African Airways SOC Limited ("SAA"), to conclude an addendum to a Dry Lease Agreement with the First Respondent, Flyfofa Airways (Pty) Ltd ("Flyfofa"), and to recover R85,340,863.00 (Eighty Five Million Three Hundred and Forty Thousand Eight Hundred and Sixty Three Rand) paid to Flyfofa under that addendum.

2. The addendum in question was signed on or about 1 July 2019. It extended, for a further 36 months, an existing arrangement under which Flyfofa supplied SAA with a B737-300F freighter aircraft ("MSN 24278"). It did, however, do more than extend a lease term.

3. On the SIU's version, SAA ceded its own domestic overnight freighter operations to Flyfofa. It restructured the arrangement so that SAA would purchase space on, and compensate Flyfofa for the use of, an aircraft operating under Flyfofa's own Air Operator's Certificate. This was done without a fresh, specifically recorded deviation from SAA's ordinary competitive procurement processes and without the prior approval of the National Treasury. It is the SIU's contention that the transaction required such approval.

4. In its amended Notice of Motion now before the Tribunal, the Applicant seeks the following relief:

- a. an order reviewing and setting aside SAA's decision to conclude the addendum on the ground of legality;
- b. a just and equitable order under section 172(1)(b) of the Constitution;
- c. a declarator that SAA is not liable to Flyfofa for any further amount;
- d. an order that Flyfofa render a full debatement of account of amounts received and value rendered under the addendum, subject to audit by the SIU's auditors, and repay any amount found to represent unjustified profit, with interest; and
- e. costs, including the costs of two counsel.

5. Flyfofa opposes the application in its entirety. It denies that the conclusion of the addendum was unlawful and denies that it misrepresented anything to SAA. It contends that it dealt with SAA in good faith and is not to be penalised for irregularities (if any) in SAA's own internal processes. In its most recent papers, Flyfofa contends that the SIU's application should fail, or at least the SIU's own explanation for its delay should not be condoned, because of the length of time the SIU took to institute these proceedings after the addendum was concluded.

6. SAA has filed a notice to abide the decision of the Tribunal. No relief is sought against the Third Respondent, the Minister of Public Enterprises, who has neither opposed the application nor filed a notice to abide.

## **B. THE PARTIES**

7. The applicant is the SIU, an independent statutory body established under section 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("the SIU Act"), acting here pursuant to Proclamation R.2 of 2020 (Government Gazette No. 42979 of 31 January 2020).

8. The First Respondent is Flyfofa, a private company. SAA, the Second Respondent is a Schedule 2 public entity under the Public Finance Management Act 1 of 1999 ("the PFMA") and the Third Respondent is the Minister, cited in his capacity as the executive authority responsible for SAA.

## **C. COMMON CAUSE BACKGROUND FACTS**

9. The historical relationship between SAA and Flyfofa is central. SAA previously needed cargo freighter capacity and its dealings with Flyfofa have a longer history than the impugned addendum alone. It is necessary to sketch that history. The issue to be determined before this tribunal is the dispute over whether SAA's 2015 authorisation to deviate from ordinary procurement was lawfully extended to the 2019 transaction. The following is common cause on the papers, save where I indicate otherwise.

10. From 2012, SAA experienced recurring difficulty sourcing suitable short-term freighter aircraft through open tender. Between 2014 and 2015, at least three attempts to procure freighter capacity through competitive processes (in August 2014, December 2014 and March 2015) failed to produce a compliant, deliverable aircraft.

11. On 17 September 2015, the SAA Board, by resolution 2015/B53, re-approved SAA Cargo's fleet plan and approved a deviation from SAA's standard aircraft-procurement process, described in the resolution as a risk-mitigation measure. The Company Secretary's own contemporaneous note on that resolution records that she was "NOT satisfied" that a maintenance plan was in place for the aircraft to be sourced under it.

12. In March 2016, Flyfofa was one of several parties invited to make presentations to SAA's Cross Functional Sourcing Team. In terms of an affidavit by Mr Bertus Steyn, SAA's then Manager of Operational Purchasing and Aircraft Acquisitions, it is common cause that the other respondents' documents were reportedly stolen in a burglary at his office. It is also common cause that Flyfofa's own financial position at the time was recorded by SAA's own assessment as "high risk". They had no audited financial statements, a solvency ratio of 0.1, and losses in the two preceding financial years. Flyfofa's Supplementary Affidavit does not dispute those figures.

13. SAA and Flyfofa concluded a series of short-term wet-lease arrangements during 2016. On 3 November 2016, the Dry Lease Agreement itself, for two B737-300F aircraft over three years was concluded. This Dry Lease Agreement is not under review. What is under review is the addendum concluded on 1 July 2019, extending the arrangement (in respect of aircraft MSN 24278) for a further 36 months at a total value of R85,340,863.00, and restructuring it along the lines described in paragraphs 2 and 3 above.

14. It is common cause that no open, competitive tender preceded the conclusion of the 2019 addendum. It is also common cause that no fresh National Treasury approval was sought for it. What is disputed is whether either of those things was necessary.

15. Flyfofa's position, developed mostly in the Supplementary Affidavit of its director, Mr Thabo Fisha, is that SAA's own Supply Chain Management Policy permitted deviation for urgent operational needs. Moreover, the 2015 Board resolution's deviation authority was appropriate to cover the 2019 addendum. Lastly, that National Treasury consent is sometimes required for a deviation but was not required here because SAA's own internal deviation process was properly followed.

16. The following further background fact is important and will be discussed further below. Between December 2018 and August 2019, one of the leased aircraft (registration ZS-TGG) was grounded for operational reasons, and Flyfofa is said to have continued receiving payment during the grounding, sourcing a substitute aircraft from a third party, Interlock Freight Services. Flyfofa now admits the grounding and the substitution.

17. The SIU's own position on the relevance of this episode has however not been consistent. I deal with the consequence of that inconsistency in the discussion below.

18. It is further common cause that the procedural history of the application itself has also been protracted.

19. On 7 May 2026, Advocate A R van der Merwe withdrew as Flyfofa's counsel of record. This occurred while this judgment was being edited. Nothing in Flyfofa's case is therefore affected by it.

**D. IN LIMINE ISSUES**

20. The following in limine issues will be discussed below:

- a. which of the several affidavits filed on each side are properly before the Tribunal;
- b. whether the SIU's delay in instituting these proceedings should be condoned;
- c. whether the SIU's one-business-day-late Supplementary Founding Affidavit should be condoned;
- d. whether Flyfofa's own, informally sought condonation for the late filing of its Supplementary Affidavit should be granted; and
- e. Flyfofa's Rule 30(2)(b) objection to the Amended Notice of Motion.

**a. Which papers are properly before the Tribunal**

21. The SIU's position, taken in its Supplementary Replying Affidavit, is that the Supplementary Founding Affidavit "substitutes" the original Founding Affidavit in its entirety. Flyfofa's own papers do not accept that premise.

22. I do not accept the SIU's "complete substitution" position. A party cannot unilaterally render its own earlier sworn allegations pro non scripto by simply filing a

further affidavit that covers similar ground in more detail, particularly where, as here, the respondent has already filed a substantive answer to the original affidavit and would be prejudiced by having that answer declared moot after the fact.

23. I am satisfied that fairness, and the interests of justice, are best served by treating the original Founding Affidavit and the Supplementary Founding Affidavit as collective, and, correspondingly, by treating Flyfofa's original Answering Affidavit and its Supplementary Affidavit as together constituting Flyfofa's answer. I have accordingly read the papers holistically rather than exclude any one of them.

**b. The SIU's delay in instituting proceedings**

24. The addendum was concluded on 1 July 2019. The application was lodged on 22 February 2023. This amounts to a delay, from conclusion of the impugned transaction to institution of proceedings, of three years and eight months. Flyfofa, in Mr Fisha's Supplementary Affidavit, opposes condonation of this delay, relying on **Gqwetha v Transkei Development Corporation Ltd**<sup>1</sup> for the proposition that unreasonable delay in seeking review offends both the interest of the respondent in finality and the public interest in the certainty of administrative action.

25. These principles were applied and further refined in **Ferris v First Rand Bank**<sup>2</sup>, where the Constitutional Court held as follows:

*'In Bertie Van Zyl this Court held that lateness is not the only consideration in determining*

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<sup>1</sup> 2006 (2) SA 603 (SCA)

<sup>2</sup> 2014 (3) SA 39 (CC)

*whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it. As the interests of justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.'*

26. The principles later laid down in **Buffulo City Municipality v Asla Construction (Pty) Ltd**<sup>3</sup> are equally applicable. I find that I have to apply the following guiding principles:

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

27. Gqwetha and all the abovementioned matters require me to enquire whether the delay was unreasonable, and if so, whether it should nonetheless be condoned having regard to the fullness of the explanation given, the extent of the delay, the prospects of success, and the balance of prejudice. The SIU's explanation for the delay, as set out in its Supplementary Founding Affidavit, accounts, month by month, for the period from December 2019, through the disruption occasioned by the change in counsel between 2020 and 2021, the Covid-19 lockdown, at least six identified rounds of drafting and redrafting of the application between October 2021 and December 2022, and the final settling of the papers in January 2023.

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<sup>3</sup> 2019 (4) SA 331 (CC)

<sup>4</sup> Supra, at para 121

28. I am satisfied that this is a case of slow but continuous progress by the SIU. The delay is substantial, and the explanation for parts of it, in particular, why the SIU's own preliminary investigation was only completed by June 2022 from the December 2019 disclosure, is not fully spelled out.

29. Flyfofa has not identified any specific prejudice flowing from the delay. Weighed against the public interest in examining the expenditure of R85 million of a public entity's funds without a demonstrated competitive process, and having regard to the prospects of success on the procurement-law grounds addressed below, I am satisfied that the balance favours condonation.

30. I accordingly condone the delay in the institution of these proceedings.

**c and d Condonation for the late supplementary affidavits**

31. The SIU's Supplementary Founding Affidavit and Flyfofa's Supplementary Affidavit were filed slightly late.

32. Both delays are minor set against the delay already condoned in paragraph 30 above, and no specific prejudice has been shown to flow from either.

**e. The Rule 30(2)(b) objection**

33. Flyfofa's notice in terms of Rule 30(2)(b), dated 4 June 2025, objects to the Amended Notice of Motion filed on 26 May 2025 for the lack of a prior notice of intention

to amend. I do not consider the Rule 30(2)(b) objection to have any substance, and I do not uphold it.

#### **E. ISSUES FOR DETERMINATION**

34. The issues remaining for determination are the following:
- a. whether SAA's decision to conclude the 1 July 2019 addendum was lawful, having regard to section 217 of the Constitution, the PFMA, the Treasury Regulations and SAA's own Supply Chain Management Policy;
  - b. whether Flyfofa made material misrepresentations inducing SAA to contract;
  - c. if the addendum is reviewed and set aside, what remedy is just and equitable; and
  - d. costs.

#### **F. THE APPLICANT'S CASE**

35. The SIU's case as pleaded, is that the 2019 addendum was concluded in breach of section 217 of the Constitution, sections 38(1)(a)(iii) and 38(2) of the PFMA, Treasury Regulations 16, 16.3, 16A.6.1, 16A.6.3 and 16A.6.4, and National Treasury Instruction Note 3 of 2016/17. This because of the following:

- a. no open or competitive process preceded it;
- b. the 2015 Board deviation authorisation, granted for a different and materially narrower transaction, could not lawfully be stretched to cover the 2019 addendum;

- c. it was not specifically recorded, motivated and approved as a deviation in its own right;
- d. no National Treasury approval was sought, whether under Regulation 16A.6.1 or, on the SIU's characterisation of the addendum as effecting a public-private partnership, under Regulation 16.3; and
- e. it was not reported to the National Treasury within the time prescribed in the applicable instruction notes.

36. The SIU further contends that Flyfofa misrepresented that it owned, or would acquire, the aircraft fleet necessary to perform the contract, and that this misrepresentation induced SAA to contract with it in the first place.

37. In respect of remedy, the SIU's primary position as reflected in the amended Notice of Motion is no longer, as originally pleaded, an order for repayment of the full R85,340,863.00, but a debatement-of-account as follows. Flyfofa is to render a full account within 30 days and the SIU's auditors entitled to audit it within a further 60 days if disputed, and Flyfofa to pay over any profit shown by that account within 14 days, together with interest. The SIU seeks costs on the party-and-party scale, including the costs of two counsel, and, in its most recent papers, wasted costs against Flyfofa.

## **G. FLYFOFA'S CASE**

38. Flyfofa does not dispute the underlying factual chronology, the conclusion of the various agreements, or that the sums claimed were in fact paid. Its defence can be summarised as follows:

- a. It was not privy to, and had no duty to police SAA's own internal procurement and deviation processes;
- b. The 2015 Board resolution and SAA's own Supply Chain Management Policy clauses permit deviation for urgent operational needs, and it properly authorised the addendum;
- c. While it accepts the general legal proposition that a procurement deviation can require National Treasury consent, it maintains that SAA's own internal deviation process was properly followed on this occasion;
- d. It made no misrepresentation, since the contract required only that it have lawful authority and control to lease and operate the relevant aircraft, not that it owns the aircraft outright;
- e. It dealt with SAA throughout in good faith, such that it should not, as an innocent third party, be penalised. Consequences or disgorgement for any irregularity lies at SAA's own door.

39. It bears noting that, on the assessment of Flyfofa's papers as a whole, its Answering Affidavit is for the most part in the form of a bare denial. Mr Fisha's Supplementary Affidavit is considerably more detailed, but even it consists mostly of

denials. No documentary evidence is provided e.g. no proof of ownership for either aircraft, or no correspondence with National Treasury contradicting the SIU's evidence that no approval was sought, has been placed before the Tribunal by Flyfofa.

40. Flyfofa's own papers deal with its "innocent bystander" defence to some degree. First, it deals with the SIU's account of the pre-Flyfofa 2014 bridging-solution process, Mr Fisha's Supplementary Affidavit describes that process as having been "executed in a manner that circumvented the required competitive processes" and as "irregular, procedurally flawed, and lacked transparency". He further maintains that mere Board approval does not cure such irregularities. Second, Flyfofa's own papers accept the general legal principle that National Treasury consent can be a legal requirement for a procurement deviation.

41. Flyfofa does not deal with the SIU's version that the addendum constitutes a public-private partnership for purposes of Treasury Regulation 16.3.

## **H. THE APPLICABLE LEGAL FRAMEWORK**

### **i. Sec 217 of the Constitution**

42. Section 217(1) of the Constitution requires that an organ of state contracting for goods or services do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. SAA, as a Schedule 2 public entity, is bound by this requirement in respect of its own procurement, and its Supply Chain Management Policy must itself give effect thereto.

43. The overarching piece of legislation in respect of procurement is **section 217 of the Constitution**, which specifically deals with procurement; It reads as follows:

*'217. Procurement*

*any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*

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

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

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

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

**ii. Public Finance Management Act (PFMA)**

44. The Public Finance Management Act 1 of 1999 ("the PFMA") was enacted with the following aims:

- a. to regulate financial management in the national government and provincial governments;
- b. to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively;
- c. to provide for the responsibilities of persons entrusted with financial management in those governments; and
- d. to provide for matters connected therewith.

45. Section 38(1)(a)(iii) of the PFMA reads as follows:

*“38. General responsibilities of accounting officers*

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

*(a) must ensure that that department, trading entity or constitutional institution has and maintains—...*

*(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;*

46. Section 38(2) reads as follows:

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

### **iii. Instruction Note 3**

47. National Treasury SCM instruction note 3 of 2016/17 states that accounting officers/accounting authorities must only deviate from inviting competitive bids in cases of emergency and sole supplier status. These deviations do not require the approval of the relevant treasury. Emergency procurement may occur when a serious and unexpected situation poses an immediate risk to health, life, property, or the environment, calling an agency to action, and there is insufficient time to invite competitive bids.

48. The emergency procurement provisions provide for accounting officers/authorities to procure the required goods or services by other means, such as price quotations or negotiations, in accordance with Treasury Regulation 16A.6.4.

49. Instruction Note 3 of 2016/17 caps the permissible variation or expansion of an existing contract, without a fresh competitive process, at 15% or R15 million (whichever is the lower) for goods or services other than construction.

#### **iv. Regulation 16**

50. Treasury Regulation 16A.6.1 prohibits material deviation from an institution's supply chain management system without prior written approval; Regulation 16A.6.3 permits procurement by other means, without competitive bidding, only where competitive bidding is impractical in the specific case and the reasons for deviating are recorded and approved.

51. Regulation 16A.6.4 requires written notification to the National Treasury, within thirty days of any deviation so approved.

52. Regulation 16.3 separately prohibits an accounting authority from proceeding with a public-private partnership without the National Treasury's prior written approval at each relevant stage.

#### **v. The SIU Act**

53. Finally, the SIU Act prescribes the powers and functions of this Tribunal. Section 8 reads as follows:

*'8 Powers and functions of Special Tribunal*

(1) *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.'*

54. As stated earlier, the SIU's case is based on the principle of legality. The applicable case is **State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd**<sup>5</sup>. In **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council**<sup>6</sup> and **Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA**<sup>7</sup> it was stated that this principle requires, at minimum, that the exercise of public power be rationally connected to the purpose for which the power was conferred, and be exercised within the bounds of the empowering framework. See in this regard section 217, the PFMA and the Treasury Regulations.

#### I. SPECIAL TRIBUNAL'S REMEDIAL POWERS

55. The principle of legality is relevant as this review is brought in terms of this principle. As held in **Ledla Structural Development (Pty) Ltd and Others v Special Investigations Unit**<sup>8</sup> ("**Ledla**")<sup>9</sup>, this Special Tribunal is empowered to consider and decide reviews of procurement decisions brought under the principle of legality.

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<sup>5</sup> 2018 (2) SA 23 (CC)

<sup>6</sup> 1991 SA 374 CC

<sup>7</sup> 2000 (2) SA 674 (CC)

<sup>8</sup> 2023 (2) SACR 1 (CC).

<sup>9</sup> CCT 319/21 [2023] ZACC 8

## J. DISGORMENT OF PROFITS

56. The position in respect of the legal effect of an unlawful decision pending its review, and the position of a party who has contracted and performed under it, was at issue in **Oudekraal Estates (Pty) Ltd v City of Cape Town**<sup>10</sup> where it was held as follows:

- a. that such a decision exists in fact and may have legal consequences until set aside; and,
- b. **Holdings (Pty) Ltd v CEO, SASSA (Allpay 2)**<sup>11</sup> the default remedial consequence is that the contracting party is not entitled to retain profit made under the unlawful contract. This is however subject to the interests of justice enquiry under section 172(1)(b).

57. I find it essential to list the development of our law post **Allpay 2**, supra, where it was held that a party who has contracted and performed in good faith is not to be treated as a wrongdoer, and that any disgorgement or restitution ordered against it must have regard to value genuinely provided.

58. The powers included in the Tribunal's arsenal are contained in section 8(2) of the SIU Act. They include the powers to:

- a) Issue suspension orders, interlocutory orders or interdicts on application by such Unit or party;

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<sup>10</sup> 2004 (6) SA 222 (SCA)

<sup>11</sup> 2014 (4) SA 179 (CC)

- b) Make any order, which it deems appropriate so as to give effect to any ruling or decision given or made by it; and
- c) Make any order which it deems appropriate as to costs.

59. The issue of remedy in the review of administrative actions has been at the centre of numerous judgments in our courts recently. The **Allpay II** matter had laid down the guiding principles since 2014. The proper interpretation of the **Allpay II** judgment had, however, recently been discussed in the matter of **Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others**<sup>12</sup>.

## K. DISCUSSION

### a. Lawfulness of the addendum

60. It is common cause that no competitive process preceded the conclusion of the 2019 addendum. The issue to be determined is whether the 17 September 2015 Board deviation authorisation, or SAA's own Supply Chain Management Policy provisions permitting deviation for urgent operational need, made provision for this specific deviation.

61. I am not persuaded that they were. The 2015 authorisation was given for the original 2016 dry-lease award. The 2019 addendum, on the common cause facts between the parties, was a materially different transaction. This transaction did the following: It

- i. ceded SAA's own domestic overnight freighter operations to Flyfofa,

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<sup>12</sup> [2025] ZASCA 179.

- ii. restructured SAA's payment obligation from a conventional lease rental into a purchase-of-space and compensation-for-use-of-space arrangement including "ownership costs,". On Flyfofa's own admission, it did so on terms whose introductory clauses were settled at SAA's request to reflect this changed operational scope.

62. A deviation authorisation granted for one transaction does not automatically extend to a later transaction that differs from the first in scope and structure.

63. The value of the 2019 addendum i.e. R85,340,863.00 over 36 months, also exceeds, by a considerable margin, the threshold at which National Treasury SCM Instruction Note 3 of 2016/17 permits an existing contract to be varied or expanded without a fresh competitive process. It is common cause that this threshold is 15% or R15 million, whichever is the lower, for non-construction goods and services. On the papers before me, no contrary conclusion can be drawn.

64. It is common cause, on the evidence of Mr Khomotso Chadi, SAA's Risk and Compliance Manager, that no National Treasury approval was sought for the 2019 addendum. Flyfofa's answer is not that Treasury approval was sought and given, nor that its own SCM Policy dispensed altogether with the need for such approval. Its answer is rather that its own SCM Policy deviation provisions were properly invoked internally by SAA.

65. In my view, this is not an answer to the requirement. I accept the SIU has established on the papers that a deviation of this kind required both a specifically recorded and approved deviation. If, as the SIU contends, the addendum in substance restructured the parties' arrangement into something resembling a public-private partnership for the operation of SAA's own freighter route, then National Treasury approval was required in terms of Regulation 16.3. This is not disputed by Flyfofa.

66. I find, accordingly, that SAA's decision to conclude the 1 July 2019 addendum was not taken in accordance with a system that was fair, equitable, transparent, competitive and cost-effective as section 217(1) of the Constitution requires. Moreover, it was not authorised by any deviation properly recorded, approved and reported in accordance with Treasury Regulation 16A.6 and National Treasury Instruction Note 3 of 2016/17. The decision was accordingly unlawful and falls to be reviewed and set aside on the ground of legality.

**b. Misrepresentation**

67. The SIU's allegation that Flyfofa misrepresented that it owned, or intended to acquire, the aircraft fleet necessary to perform the contract, is denied. Flyfofa's position is that the contract required only that it have lawful authority and control to lease and operate the relevant aircraft, not that it own them.

68. This version is not farfetched or untenable. No proof of ownership has been placed before this Tribunal by either party. The dispute therefore remains. It is trite that motion proceedings are not the proceedings to resolve a dispute of fact. That would require oral evidence. This Tribunal has not heard any oral evidence.

69. I accordingly make no finding that Flyfofa misrepresented its position as to ownership. In my view, the review and setting-aside of the addendum in paragraph 66 above does not depend on the establishment of this allegation.

70. In the SIU's Replying Affidavit it disclaimed reliance on the allegations of the grounding of the aircraft for purposes of the relief sought. I need not resolve that tension for purposes of the review itself as my finding on unlawfulness does not depend on the ZS-TGG issue. In my view, it may, however, have a bearing on the accounting exercise I order below. This, to the extent that Flyfofa was paid for a period during which the contracted aircraft was not in fact available and no adequate performance is shown.

**c. Remedy**

71. Having found the addendum unlawful, I must determine what order is just and equitable under section 172(1)(b) of the Constitution. The SIU no longer seeks as its primary remedy, an order for repayment of the entire R85,340,863.00. In its amended Notice of Motion, it seeks a debatement of account.

72. Flyfofa did render real performance under the addendum. The supply and operation of freighter capacity over an extended period, does not justify an order requiring

repayment of the whole contract price, without taking into account the actual value provided. This is also no longer sought.

73. At the same time, **AllPay 2**, supra, establishes that a party may not simply retain profit made under a contract later found unlawful. A debatement of account, audited if disputed, with repayment of any profit shown, properly balances these two considerations. In conducting or reviewing that account, the parties should, in my view, specifically address the period during which aircraft ZS-TGG was grounded, and whether payment continued during that period without adequate performance. I make no finding on that question now, for the reasons given in paragraph 68 above. It is, however, relevant to what, if anything, constitutes unjustified profit.

**d. Costs**

74. The SIU has succeeded on the central issue i.e. the lawfulness of the addendum. It has, however, not succeeded on its misrepresentation allegation. The applicant, in my view is still substantially successful. Costs should accordingly follow the result on the ordinary party-and-party scale. Given the volume and complexity of the record, I consider the employment of two counsel to have been reasonable.

75. I do not consider it necessary to invoke the principle in **Biowatch Trust v Registrar Genetic Resources**<sup>13</sup>. The SIU has succeeded.

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<sup>13</sup> 2009 (6) SA 232 (CC)

76. No costs order is made for or against SAA, which has abided, or the Minister, against whom no relief was sought.

**L. STEPS TO BE TAKEN AGAINST INDIVIDUALS RESPONSIBLE FOR THE IMPUGNED DECISION**

77. This tribunal found that the decision by SAA, acting through its Board, to conclude the addendum, was unlawful. Nothing is said about the personal conduct of any individual member of the Board as no individual board member is a party to this application and none of them has had the opportunity to be heard. No evidence was presented on which members were present at, or voted in favour of the decision to adopt the addendum. No finding is therefore made in this judgment against any named individual.

78. The SAA (Second Respondent) is referred to the following legal avenues in terms whereof personal accountability of any director or official involved in the decision can be pursued:

- 78.1 Financial misconduct proceedings in terms of sections 81 to 86 of the Public Finance Management Act 1 of 1999. Given that the SAA's Board constitutes its "accounting authority" for purposes of the Act, this should be initiated by the SAA itself, or at the instance of the National Treasury or the Third Respondent, who is the Minister. Not by this Tribunal.
- 78.2 An application in terms of section 162 of the Companies Act 71 of 2008 for an order declaring a director delinquent, or placing a director on probation, on the grounds set out in section 162(5);

- 78.3 Further investigation or civil recovery proceedings the instituted by the Applicant itself against individual officials under sections 4 and 5 of the SIU Act. This to be done separately from the relief sought before me.
- 78.4 Referral to the National Prosecuting Authority or the Directorate for priority Crime Investigation, should the Applicant consider that the facts disclose conduct falling within the Prevention of and Combatting of Corrupt Activities Act 12 of 2004; and
- 78.5 Internal governance steps by the SAA's shareholder, including consideration of the continued suitability for office of any director who remains on the Board and was responsible for the decision. This lies within the power of the Minister as executive authority responsible for the appointment of SAA's directors.

79. It bears noting that no relief was sought in these proceedings against any Board members. I do not therefore make any order in this regard. I am however of the view that the following needs to be stated.

80. The SAA is a public entity under the PFMA. Section 195(1) of the Constitution requires public administration to be accountable and to maintain a high standard of professional ethics. Section 217 of the Constitution requires an organ of state contracting for goods or services to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

81. Those obligations do not end when the tender is awarded. As the Constitutional Court observed in **MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd** <sup>14</sup> :

*"82 ...It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."*

82. Measured against this standard, the SAA Board's conduct in this matter calls for criticism by this tribunal.

83. This conduct has a cost, and it is not only a cost to the SAA alone. This is a cost to the public.

84. As stated above, I make no finding against any board member. I do however make recommendations in paragraphs 85.12 and 85.13 of the order below.

#### **M. ORDER**

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

85.1 The delay by the Applicant in instituting these proceedings is condoned.

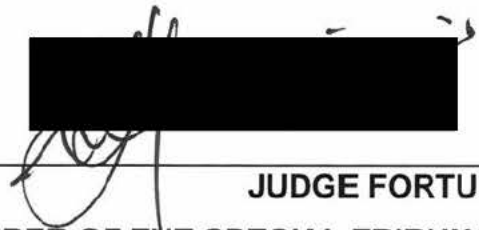
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<sup>14</sup> 2014 (3) SA 481 (CC) para 82

- 85.2 The late filing of the Applicant's Supplementary Founding Affidavit, and the late filing of the First Respondent's Supplementary Affidavit, are each condoned.
- 85.3 The First Respondent's notice in terms of Rule 30(2)(b), dated 4 June 2025, is dismissed.
- 85.4 The decision of the Second Respondent to conclude the addendum to the Dry Lease Agreement dated on or about 1 July 2019 with the First Respondent, in respect of aircraft MSN 24278, is reviewed and set aside.
- 85.5 It is declared that the Second Respondent (SAA) is not liable to the First Respondent, or to any other person or entity, for the payment of any further amount pursuant to the addendum referred to in paragraph 77.4 above.
- 85.6 The First Respondent shall, within 30 (thirty) days of this order, deliver to the Applicant's attorneys of record a full and debated account, supported by underlying documents, of all amounts received from the Second Respondent under the addendum referred to in paragraph 77.4, and of the costs properly and actually incurred by the First Respondent in rendering performance under it, including a specific account of the period during which aircraft ZS-TGG was grounded and of any substitute performance rendered during that period.
- 85.7 Should the Applicant dispute the account rendered under paragraph 6, it may, within 60 (sixty) days of receipt of that account, cause it to be audited by an auditor of its choice, and the First Respondent shall afford that auditor reasonable access to its books and records for that purpose.

- 85.8 The First Respondent shall, within 14 (fourteen) days of the debatement of the account under paragraphs 76.6 and 76.7 (whether by agreement or by audit), pay to the Applicant any amount shown by that account to constitute profit or unjustified enrichment retained by the First Respondent under the addendum, together with interest thereon at the rate of 11% per annum from the date of this order to the date of payment.
- 85.9 Any party may approach this Tribunal on the same papers, duly supplemented, if necessary, in the event of any dispute as to the implementation of paragraphs 76.6 to 76.8.
- 85.10 The First Respondent shall pay the Applicant's costs, including the costs of two counsel where so employed, on the party-and-party scale C.
- 85.11 There is no order as to costs as between the Applicant and the Second or Third Respondents.
- 85.12 The Registrar shall transmit a copy of this judgment to the Minister (Third Respondent), as the executive authority responsible for the appointment of the SAA's (Second Respondent) directors and the Chairperson of the SAA's Board, for consideration of whether any of the steps identified in paragraph 78 above should be taken against any person who was a member of the SAA's Board at the time the 2019 addendum was concluded by way of resolution 2015/B53.

85.13 The Minister shall, within 90 days of the date of this order, file with the Registrar of this Tribunal a short report confirming whether the steps in para 85.12 has taken place, and if so, what the outcome was.

  
[REDACTED]  
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**JUDGE FORTUIN**  
**MEMBER OF THE SPECIAL TRIBUNAL**

**Appearances:**

For the Applicant: Adv TJB Bokaba SC  
Adv M Rakgoale  
Instructed by: State Attorney, Pretoria

For the First Respondent: Adv R van der Merwe  
Instructed by:

**Date of hearing: 7 & 23 July 2025**

**Date of judgment: 11 September 2026**