



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

CASE NO: GP/08/19

In the application between:

SPECIAL INVESTIGATING UNIT	Applicant
and	
THE MINISTER OF CORRECTIONAL SERVICES	First Respondent
THE INDEPENDENT DEVELOPMENT TRUST	Second Respondent
SECELEC CONSULTING ENGINEERS (PTY) LTD	Third Respondent
BAKONE CONSULTING ENGINEERS (PTY) LTD	Fourth Respondent
BAKONE SECELEC CONSULTING JV	Fifth Respondent
MANYELETI CONSULTING SA (PTY) LTD	Sixth Respondent
SA FENCE AND GATE JV	Seventh Respondent

JUDGMENT

Administrative law – review of decisions to award tenders and contracts concluded pursuant thereto – whether the tenders and contracts should be declared invalid and set aside – just and equitable relief – whether the tenderers should be divested profits earned from invalid tenders.

Modiba J:

Introduction

- [1] The Special Investigating Unit (SIU) seeks to review and set aside various decisions in terms of which the Independent Development Trust (IDT) awarded tenders referenced DCSS F01 and DCSSF02 (the impugned tenders) for want of compliance with the applicable procurement laws and regulations. It also seeks consequential relief.
- [2] The SIU is a statutory investigation body established in terms of s 2 of the Special Investigating Units and Special Tribunals Act, 74 1996 (SIU Act). It investigated maladministration in the awarding of the impugned tenders as allegedly authorised by the President of the Republic of South Africa in terms of proclamation R28 of 2017 (the proclamation).¹ It brings this application in its name. It seeks relief to which IDT and/ or the Department of Justice and Correctional Services (the DCS) is entitled.
- [3] The first respondent is the Minister of Justice and Correctional Services (the Minister). He is the executive head of the DCS. He is authorised in terms of the General Law Amendment Act 62 of 1955 to institute or defend actions in his official capacity on behalf of DCS.
- [4] The second respondent is the IDT. It is an implementation agency listed under Schedule 2 of the PFMA.
- [5] The third respondent is Secelec Consulting Engineers (Pty) Ltd (Secelec). The fourth respondent is Bakone Consulting Engineers (Pty) Ltd (Bakone Consulting).

¹ Published in the Government Gazette No. 41055 on 18 August 2017.

The fifth respondent is cited as Bakone Secelec Consulting JV. It is a joint venture between Secelec and Bakone Consulting. These respondents are jointly opposing the application. They contend that Bakone Secelec Consulting JV should have been cited as Bakone Secelec which is the name reflected in the joint venture agreement concluded between Secelec and Bakone Consulting. Nothing turns on this issue as the correct entity has been cited albeit under a wrong name. Secelec, Bakone Consulting and other entities that comprise Bakone Secelec are duly incorporated with limited liability according to the company laws of the Republic of South Africa. I conveniently jointly refer to the third, fourth and fifth respondents as the Secelec respondents.

- [6] The sixth respondent is Manyeleti Consulting SA (Pty) Ltd (Manyeleti). It is also a company duly incorporated with limited liability according to the company laws of the Republic of South Africa.
- [7] The seventh respondent is SA Fence and Gate JV. It is a partnership between SA Fence and Gate (Pty) Ltd (SAGF), Raubex Construction (Pty) Ltd, Gordian Fence (Pty) Ltd and Mavundla Ironclad System (Pty) Ltd. All these partners are companies duly incorporated with limited liability according to the Company Laws of the Republic of South Africa. I conveniently refer to this party as SAFG.
- [8] In 2011, DCS appointed IDT as its implementing agent. Pursuant to that appointment, the IDT appointed the Secelec respondents and SAFG under tenders DCSSF01 and DCSSF02 respectively and concluded contracts with them to implement certain works on behalf of DCS. The SIU alleges that when DCS appointed IDT as its implementing agent and when IDT appointed service providers for DCSSF01 and DCSSF02, the applicable statutory and regulatory procurement provisions were not complied with.
- [9] DCS does not oppose the application. IDT does not only abide the Tribunal's order it agrees with the SIU's findings and the factual basis on which it seeks the impugned tenders reviewed. It only takes issue with the legal conclusion the SIU seeks drawn, that there was no legal basis for the appointment of IDT as implementing agent for DCS, an issue to which I will later return. Manyeleti

Consulting initially opposed the application. It later withdrew its opposition and filed a notice to abide the Tribunal's decision.

- [10] The Secelec respondents and SAFG oppose the application. I conveniently jointly refer to these respondents as the opposing respondents. They have raised various points *in limine*. They also oppose the application on the merits.
- [11] The background facts are elaborately set out in the SIU's founding. I succinctly set them out upfront to place the issues that arise for determination in a proper context. Thereafter, I consider the opposing respondents' points *in limine*, followed by the merits of the application. I then consider the question of just and equitable relief. Lastly, I consider the issue of costs. An order concludes the judgment.

Background facts

- [12] The background facts as set out in the SIU's founding papers are largely common cause because the opposing respondents effectively do not dispute them.
- [13] The SIU relies on the affidavits it obtained from several DCS and IDT officials during its investigations as well as the affidavit deposed to by its investigator assigned to investigate the impugned tenders. The relevant officials were involved in the awarding of the tenders, communicating with the opposing respondents before and after the impugned tenders were awarded and managing various aspects of the contracted works. The SIU also relies on reports the Auditor General (AG) and the National Treasury Department (National Treasury) conducted into the awarding of the impugned tenders. I conveniently refer to these reports respectively as the AG's report and the Nexus report.
- [14] The affidavits referred to in paragraph 13 above set out the facts and circumstances that led to the appointment of the IDT as an implementing agent and the appointment of service providers for the impugned tenders.
- [15] According to the SIU, during 2011, DCS sought an implementing agent for its projects. In January 2011 it made a presentation to the DCS on its service offerings.

Thereafter, a series of engagements between these parties ensued. These engagements culminated in DCS appointing IDT as its implementing agent on 16 August 2011. The appointment letter records that IDT would manage the implementation of security fencing, parameter fencing, intercoms and conditions audits and other infrastructure projects as prioritised by the National Building Advisory Committee. Additional services if required, as well as the financing of all projects would be described in a Memorandum of Agreement (the MOA) to be signed by the parties.

- [16] The MOA between the DCS and IDT was concluded on 10 October 2011. It reflects 19 October 2011 as its commencement date and 31 March 2014 as its expiry date. The parties subsequently extended the expiry date to 31 March 2017 by way of an addendum to the MOA. The reason for the extension is that some of the projects subject to the MOA were still pending.
- [17] In terms of the MOA, the available programme budget for 2011/2012 was R492 960 564.66. DCS would confirm an additional budgetary allocation in writing. The IDT would charge a 4% management fee. The management fee was negotiable. IDT would utilise its own procurement procedures and policies to procure and manage all service providers appointed under MOA. It would also comply with the requirements of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA), the supply chain management guidelines as contained in the Treasury Regulations to the PFMA and the requirements of the Construction Industry Development Board (CIDB).

The parties' respective cases

- [18] The SIU alleges that the contractual arrangement between DSC and IDT is unlawful because:
- (a) An organ of state may not exercise any power unless expressly provided for in law. There is no statutory provision that empowers DCS to appoint an implementing agent for its projects.
 - (b) IDT is required to invoke its emergency procurement provisions when DCS calls upon it to do so.

(c) The transfer of funds to IDT by DCS before any work is undertaken could constitute pre-payment, which is proscribed under National Treasury Regulations.

(d) IDT's appointment constitutes fiscal dumping which is also proscribed under National Treasury Regulations.

(e) DCS provided IDT with a list of service providers to be appointed under the impugned tenders, ostensibly dictating service providers to be appointed under the impugned tenders.

[19] The opposing respondents have not answered to these allegations because they are not privy to the processes that led to DCS appointing IDT as its implementing agent. They are therefore unable to dispute the above allegations. Notably, DCS has not put up a version. Nothing prevented it from filing an explanatory affidavit notwithstanding its decision not to oppose this application.

[20] The SIU alleges that the applicable procurement regulatory and statutory provisions were not complied with when IDT appointed service providers under the impugned tenders. The opposing respondents have raised the following points *in limine*:

(a) The Tribunal lacks jurisdiction to adjudicate legality reviews and to grant declaratory orders;

(b) The SIU lack *locus standi*;

(c) *Lis alibi pendens* (there are pending proceedings before another forum);

(d) Abuse of process and dispute of fact;

(e) Non-joinder;

(f) Hearsay evidence;

(g) Delay in bringing the application.

[21] The opposing respondents also oppose the application on the merits. While they dispute some of the grounds of review relied on by the SIU, the high water mark of their opposition is that they took it that IDT and DCS complied with all the applicable statutory and regulatory requirements when the tender was awarded, they are innocent tenderers who complied with all tender requirements as set out in the respective tender documents, they performed in terms of the relevant contracts at a huge costs and there is no evidence of fraud or corruption in the awarding of the

impugned tenders. If the Tribunal finds that the impugned tenders fall to be set aside as contended by the SIU, the opposing respondents further contend that they should not be divested of their accrued rights.

Points *in limine*

Jurisdiction of the Special Tribunal to adjudicate legality reviews and grant declaratory orders

- [22] SAFG JV and Manyeleti contend that the Tribunal lacks the jurisdiction to adjudicate legality reviews and grant declaratory orders.
- [23] This point *in limine* has been extensively raised by respondents in many matters that have come before the Tribunal. The first of these is *SIU v Ledla Structural Development (Pty) Ltd² (Ledla)*. The Tribunal judgment in *Ledla* culminated in a unanimous Constitutional Court decision, putting the issue to bed. The Constitutional Court held that the Tribunal derives jurisdiction over legality reviews from s 8(2) and s 4 read with the preamble to the SIU Act. These sections grant the Tribunal's wide powers over any civil proceedings as not to exclude legality reviews.³
- [24] I therefore find that there is no merit to this point *in limine*. It falls to be dismissed.

SIU's locus standi

- [25] The opposing respondents contend that the SIU lacks the requisite *locus standi* to institute review proceedings on behalf of the DCS and/or IDT. There is no merit to this contention. The SIU derives *locus standi* over this application from s 4 (1(c) read with s5(5) of the SIU Act. These provisions empower the SIU to institute civil proceedings in its own name and/or on behalf of an organ of state and seek the

² *Ledla Structural Development vs Special Investigating Unit* [2023] ZACC 8, 10 March 2023, para 63 to 68, (*Ledla*).

³ *Ledla* see fn 2 above at para 65.

relief that the organ of state is entitled to.⁴ The Tribunal in *Kim Diamond*⁵ interpreted this section to imply that in such a case, the defences that a respondent would have against an organ of state remain available to it as though that organ of state had instituted the proceedings itself.

[26] The opposing also take issue with the fact that the proclamation in terms of which the President authorised the SIU to investigate the impugned tenders does not expressly mention DCSSF01. Therefore, the SIU was not authorised to investigate it and as such, lacks the requisite *locus standi* to review that tender.

[27] Again, there is no merit to this contention. Properly interpreted with reference to the language used, the purpose of the proclamation, the context in which it was issued as well as the statutory provision in terms of which it was issued, the authority bestowed upon the SIU to investigate DCSSF02 extends to DCSSF01. The below text of the proclamation makes such an interpretation unescapable.

“(g) unlawful or improper conduct by any person, which has caused or may cause serious harm to the interests of the public or any category thereof, which took place between 1 November 2011 and the date of publication of this Proclamation or which took place prior to 1 November 2011 or after the date of publication of this Proclamation, but is relevant to, connected with, incidental or ancillary to the matters mentioned in the Schedule or involve the same persons, entities or contracts investigated under authority of this Proclamation, and to exercise or perform all the functions and powers assigned to or conferred upon the said Special Investigating Unit by the Act, including the recovery of any losses suffered by the State Institutions, in relation to the said matters in the Schedule.”

Lis Alibi pendens

[28] The opposing respondents contend that this application falls to be dismissed because there are pending proceedings in the High Court in which IDT seeks to review the decision to award DCSSF02 and where the opposing respondents claim

⁴ *South African Broadcasting Corporation SOC Limited v Mott MacDonald SA (Pty) Ltd* 29070/18 ZAGJ [8 December 2020] (Mott MacDonald).

⁵ *Special Investigating Unit v Kim Diamond (Pty) Ltd (Kim Diamonds)* 2004 (2) SA 173 (SpT).

payment of monies for services rendered under that tender, alleged to be due and payable.

[29] In its answering affidavit filed in the IDT review application, the Secelec respondents concede that this application ought to proceed as they it is dispositive of all the issues that arise in various pending legal proceedings. SAFG contends that the IDT has set out a different version in its supplementary founding affidavit from what it pleaded in its founding affidavit. Therefore, the IDT review must proceed because the SIU's application is an attempt by the SIU to assist the IDT by forum shopping.

[30] As contended on behalf of the SIU, the position adopted by the opposing respondents in their answering affidavits filed in this application is that this application should, notwithstanding the IDT's review application pending in the High Court, proceed. The application will stand or fall on its merits. Any perceived motive for bringing the application is irrelevant.

[31] For these reasons, this point *in limine* stands to fail.

Abuse of process and dispute of fact

[32] The opposing respondents contend that the SIU has attached a plethora of annexures without identifying which pages and/or passages in the attached documents it relies on. They further contend that this constitutes an abuse of process as they are expected to trawl through the documents to ascertain in what respect the SIU relies on them. The Secelec respondents also complain that the SIU has not attached the Auditor General's report. They also complain that the SIU has attached the full Nexus Forensic report.

[33] In response to these allegations, in its replying affidavit, the SIU has demonstrated by reference to paragraphs in its founding papers that these contentions lack merit. Further, in my view, it is very clear from the answering affidavits that the opposing respondents are unable to dispute most of the SIU allegations as they relate to failure by DCS, IDT and their respective officials to comply with the applicable

procurement prescripts. To the extent they have a basis for doing so, they have fully answered to the allegations against them. Therefore, in my view, this complaint is frivolous.

- [34] SAFG also contends that the SIU proceeded by way of motion proceedings whilst being fully aware that there was a foreseeable dispute of fact. As contended on behalf of the SIU, the chronology of events refutes this point *in limine*. SAFG contends that this dispute of fact is clear when regard is had to what it has stated in its answering affidavit to the IDT's founding and supplementary founding affidavit. However, the IDT application was filed in 2018. The SIU instituted its application on 2 December 2019. The IDT's supplementary founding affidavit was filed on 4 December 2019. SAFG JV's answering affidavit was filed in March 2020.
- [35] An irresolvable dispute of fact does not arise in the present application. The purported dispute of fact arises in the papers filed only when read against those filed in the IDT review application. Nothing prevented any other respondents from disputing the SIU version in this application based on the allegations in the IDT review application. They have not done so. Instead, they agreed with the SIU that the present application be heard as it is dispositive of all issues that arise in all pending litigation involving the impugned tenders.
- [36] Manyeleti also raised the same point in limine, which SAFG adopts. However, As contended on behalf of the SIU, Manyeleti did not expressly identify the disputed facts. It relies on Hangwani Stephen Ntsandeni's (Ntsandeni) affidavit in which he alleges that he informed the SIU's investigators that when he signed the appointment letter for Manyeleti, the IDT Tender Adjudication Committee (TAC) had already approved Manyeleti's appointment. Various documents relied on by the SIU reflects that Ntsandeni signed the letter in respect of the appointment of Manyeleti before TAC granted approval. In these proceedings, none of the opposing respondents dispute this allegation. Therefore, the purported dispute does not meet the requisite standard of a genuine dispute of fact.⁶ It also would not

⁶ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (2) All SA 512 (SCA) para 13.

survive the robust approach courts adopt to determine whether a genuine dispute of fact irreconcilable on the papers exist.⁷

[37] For the above reasons, this point *in limine* stands to fail.

Non-Joinder

[38] SAFG contends that the SIU seeks to recover the expenses incurred in the execution of the impugned tenders. This finding will directly affect the officials of DCS and IDT whom the SIU contends contravened the procurement prescripts. Since these officials are alleged to have conducted the procurement process, they ought to have been joined so that, if necessary, they could be subpoenaed and cross examined to explain under what circumstances they proceed as they did.

[39] As contended on behalf of the SIU, SAFG's contention does not meet the legal test for joinder as set out as follows in *Morudi*⁸:

[40] In my view, this is not the reason why these officials, of necessity, ought to have been joined. No relief is sought against them. Therefore, the relief sought in these proceedings can be given effect to without causing prejudice to them. As contended on behalf of the SIU, to the extent that they may be held liable in terms of the PFMA, that constitutes a separate cause of action. It does not render their joinder necessary.

[41] For the above reasons, this point in limine also stands to fail.

Hearsay

[42] The opposing respondents contend that the Nexus Forensic report and the AG's report is not confirmed by a confirmatory affidavit by their respective authors. Therefore, the reports constitute hearsay evidence.

⁷ *Soffianti v Mould* 1956 (4) SA 150 (E) at 154G-H. See also *Da Mata v Otto NO* 1972 (2) SA 858 (A) at 869D-E.

⁸ *Morudi and Others v NC Housing Services & Development Co Limited and Others* [2018] ZACC 32.

- [43] The SIU denies that the AG's report constitutes hearsay evidence. Its reliance on the authority in *Auditor General v MEC for Economic Opportunities Western Cape*⁹ to support this view is proper. There, the SCA held that as is the case with the reports of the Public Protector, the AG is one of the institutions established under Chapter 9 of the Constitution to strengthen constitutional democracy in the Republic. It is independent, and subject only to the Constitution and the law. It is impartial and exercises its powers and perform its functions without fear, favour or prejudice. Other organs of state are obliged to assist and protect it to ensure its independence, impartiality, dignity and effectiveness. Any interference with its functioning is prohibited. It is only accountable to the National Assembly.¹⁰ Therefore, its findings need not be deposed to as they are made pursuant to an impartial process.
- [44] I agree with the SIU that since the AG is governed in terms of the same constitutional provisions as the office of the Public Protector, her report need not be supported by an affidavit. Further, until set aside on review, her findings remain valid. However, her findings are not binding on this Tribunal. They only have corroboratory value.
- [45] However, the same cannot be said about the Nexus forensic report. The SIU conducted its own investigation and made its own findings. It contends that it only seeks to rely on the Nexus report to corroborate its findings. It ought to have obtained an affidavit from its auditors. Having failed to do so, the report falls to be struck out as contended by the opposing respondents.

The merits

- [46] I determine the merits under the following sub-topics:
- (a) Whether the appointment of IDT by DCS for the purpose of procuring services under the impugned tenders constitutes fiscal dumping?
 - (b) Whether the DCS and IDT are required by statute to procure goods and services through a procurement process?

⁹ *Auditor General v MEC for Economic Opportunities Western Cape* (case number 671/2020) [2021] ZASCA 133 [4 October 2021].

¹⁰ Section 181 of the Constitution.

(c) Whether there were irregularities in the awarding of the impugned tenders?

Whether there is no legal basis for the appointment of IDT as an implementing agent for DCS

[47] This is the only issue the IDT challenges. It is articulated in the SIU's heads of argument as follows:

"It is trite that no state organ can exercise any power unless expressly provided for in law and yet the appointment of the IDT by DCS is not made in terms of any law and none is even mentioned either in the Memorandum of Agreement or in the appointment letter."

[48] The IDT has in its heads of argument set out a proper statutory basis that underlies its role as implementing agent for other organs of state. There is therefore no merit to this contention. Hence, the SIU did not persist with it during oral argument.

[49] S 41(1)(h) of the Constitution provides that all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, coordinating their actions and legislation with one another, adhering to agreed procedures and avoid legal proceedings against one another. S 238 contemplates that organs of states may act as agents of each other. It provides that an executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed, or exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

Whether the appointment of IDT by DCS for the purpose of procuring services under the impugned tenders constitutes fiscal dumping?

[50] To establish the allegation that the appointment of IDT by DCS and disbursing R500 million to it to be spent during the last four months of 2011 constitutes fiscal dumping - to avoid remitting the unspent funds back to National Treasury - the SIU

relies on affidavits deposed to by Ntsandeni, Anthon Adlam (Adlam), Vendanth Jugath (Jugath), Daniel Nyamazane (Nyamazane) and Mr Robert Van Anraad (Van Anraad).

- [51] When the cause of action that grounds this application arose, Ntsandeni was employed as the Acting Executive: Program Management Services at IDT. Nyamazane was a consultant engaged as a facilities advisor to the National Commissioner of Correctional Services. Van Anraad was the Deputy Commissioner for facilities at DCS. Jugath was employed by IDT as a Programme Manager. Adlam was an official at Secelec.
- [52] These officials were interviewed by the SIU investigator Vhyldhum Kevin Reddy (Reddy) and deposed to affidavits. Reddy also deposed to an affidavit pertaining to his investigation of the impugned tenders. From these affidavits, the allegations set out below are set out.
- [53] Jugath informed Adlam that the contractors need to be appointed by end of January 2012 to have the funds committed before the end of the financial year. On 29 June 2011, Nyamazane prepared the MOU dated 29 June 2011 in which he recommended to the National Commissioner to engage the IDT as a supplementary implementing agent in procuring infrastructure services. The memorandum by Nyamazane purports to emanate from the DCS facilities directorate. This is misleading as Nyamazane was not an employee of the facilities directorate. At the time, the relevant official who ought to have prepared the MOU is Van Anraad.
- [54] Reddy also alleges that that Nyamazane's memorandum stated as its subject that the engagement of the IDT was intended to be a supplementary agent to assist the Department of Public Works (the DPW) in fast tracking delivery for the facilities project. He contends that this is misleading because the projects mentioned at paragraph 4 of Nyamazane's memorandum were not part of the procurement plan between the DCS and DPW for the relevant fiscal year. Therefore, DCS ought to not have appointed the IDT as supplementary implementing agent for projects that were not on the procurement plan for the fiscal year under review.

- [55] Reddy interviewed several DCS officials namely Ms Nandi Veronica Mareka, Ms Laura Susan Dekha Katenga and Ms Violet Mampuru who confirmed that historically and in the 2011/2012 fiscal year, DCS had been underspending its annual allocations for the sub programme: facilities. DCS would then allocate unspent funds to newly established projects that were not on the 2011/2012 procurement plan. This corroborates Ntsandeni and Jugath's evidence that the funds allocated to IDT for the project were committed towards the end of the financial year.
- [56] This conduct is implicitly prohibited by the provisions of National Treasury Practice Note 6 of 2007/2008 dated 18 April 2007 which provides that:
"Despite Treasury Regulation 16A6.4 being intended for cases of emergency or where goods and services are available from sole service providers, it has come to light that institutions are deliberating utilizing the provision to circumvent the required competitive bidding process in order to, among others, enter into contractual commitments or incur expenditure at the end of a financial year with the view to avoiding the surrender of unspent voted funds to the National/ Provincial Revenue Funds."
- [57] The conduct further contravenes the provisions of National Treasury Practice Note on Enhancing Compliance Monitoring and improving transparency and accountability in Supply Chain Management, dated 31 May 2011 (Practice Note 32 of 2011) which states as follows:
"... improper supply chain management practices at institutions are seriously undermining sound financial management, weakening the spirit and ethos of the PFMA and ultimately eroding scarce resources that are intended to improve service delivery. These improper practices include circumvention of official competitive bidding processes to, among others, enter into contractual commitments or incur expenditure at the end of a financial year so that the surrender of unspent voted funds may be avoided".
- [58] Van Anraad compiled a report to the Chief Operating Officer Ms Jolinga (Jolinga), setting out alleged irregularities in IDT. The report is attached to Kgeretle Frank

Lentsoane's (Lentsoane) affidavit. Lentsoane is Deputy Director: Employees Relations. According to him, when the service providers for the project were appointed, the MOA was not complied with in the following respects:

- (a) DCS was not part of the evaluation committee as required by clause 8.5;
- (b) DCS was not requested to approve the tender budget for the security fence contract awarded in December 2011, as required in terms of clauses 4.1. and 6.1.7;
- (c) Monthly steering committee meetings have not been held as required in terms of clause 13.1.3;
- (d) DCS was approached to approve the delaying of the intercom upgrade and perimeter and agricultural fencing programmes which decision had to be taken by the National Building Advisory Committee or the National Commissioner;
- (e) DCSSF01 initially required a budget of R31.3 million but R35 million was paid and this payment was processed without supporting information for the cancelled security contract;
- (f) Pressure was put on the CFO and DCS's finance department officials to make advance payments to IDT. According to Van Anraad, placing undue pressure on officials to process payments without proper supporting information is irregular;
- (g) Detailed implementation plans were not signed off by any of the parties i.e. DCS or IDT;
- (h) The DCS facilities and remand detention systems and security units were not consulted when the implementation plans were developed;
- (i) Programme budgets were not only utilised for services relating to security fencing and audits as agreed with DCS. A review of IDT's bank statements revealed that an amount of R 492 656.55 was paid to BG Sokhulu. No explanation for this payment has been offered.
- (j) The plan, which is an annexure to the MoA, requires that the DCS project committee should hold monthly meetings. This Committee had never held any monthly meetings.

[59] The opposing respondents' response to these allegations is a bare denial. The Secelec respondents claim ignorance of non-compliance with any applicable

statutory and regulatory procurement provisions. SAFG simply states that it fails to appreciate why and on what basis the SIU wishes to cause suspicion regarding the processes complied with by IDT when the regulatory basis for the SIU allegations is clearly set out. It further contends that it has nothing to do with these processes and therefore cannot comment thereon. The high-water mark of its response is that the payments IDT made to it were for invoices due, owing and payable by 30 March 2012. Therefore, it follows logically that the payments were processed on the last day of the financial year.

[60] I therefore determine this issue on the SIU version.

Irregularities in the appointment of service providers in respect of DCSSF01

Secelec respondents

[61] The SIU relies on Jugath's affidavit. Email correspondence exchanged between Jugath and Adlam on 10 November 2011 Jugath reflects that:

- (a) whereas Jugath sent Adlam an RFP on that day, the Secelec respondents knew at least from 2 September 2011 about the prison fencing project.
- (b) contractors need to be appointed by end of January 2012 and work commence quickly as funds had to be committed before the end of the financial year.
- (c) The Secelec respondents are registered members of PSIRA. All their engineers are registered with ECSA. They both have PI Insurance which could be increased if required by the IDT and have registered with IDT as suppliers and their tax affairs are up to date.

[62] According to Ntsandeni, on 21 November 2011 he submitted a request to the IDT's Tender Adjudication Committee (TAC) to approve the appointment of the Secelec respondents as professional consulting engineers for DCSSF01 through single sourcing. His motivation for the request was that certain level of expertise and skills are required to fast track the implementation process as requested by the client (DCS). On the same day, he appointed the Secelec respondents as the professional consulting engineers for DCSSF01. Adlam accepted the appointment in writing.

- [63] TAC only approved Ntsandeni's request on 7 December 2011 after raising several queries with Ntsandeni. In his responses to TAC, Ntsandeni never disclosed that he had already appointed the Secelec respondents. Therefore, Ntsandeni appointed them before TAC approved his request.
- [64] Secelec respondents' appointment under these circumstances is irregular because:
- (a) The IDT supply chain management (SCM) policy requires that when circumstances require a deviation from normal procurement processes, prior approval from TAC must be obtained.
 - (b) Single source procurement should only be used in exceptional circumstances when justified by the client's interests and the project, offers a clear advantage over competitive bidding and where rapid selection is required. Reasons for single selection must be recorded and approved.
- [65] The chronology of events as attested to by Ntsandeni and documents that relate to the appointment of the Secelec respondents reflects that all these requirements were not complied with. There was no emergency in appointing the Secelec respondents for DCSSF01. The process leading to its appointment unfolded over a year – starting with the appointment of IDT as DCS's implementing agent in January 2011. It was appointed to ensure that DCS funds are disbursed before the end of the financial year, a practice the National Treasury Regulations prohibits. The appointment was made before TAC granted approval on inaccurate facts.
- [65] Subsequently, IDT cancelled DCSSF01 after an investigation by National Treasury found that the procurement process followed in the appointment of the Secelec respondents was fraught with irregularities. When it gave the Secelec respondents written notice of cancellation of DCSSF01, IDT misrepresented the reason for the cancellation. It stated that the project was cancelled due to budget constraints and after reviewing other bids submitted for the project.

Services rendered and fees paid to the Secelec respondents under DCSSF01

- [66] IDT paid the Secelec respondents R35 623 799 for services rendered. In a close-up report these respondents submitted to IDT in July 2012, they state that they

performed stages 1, 2, 3 and 4 of the contracted professional services. They did not undertake stage 5 and 6 because the contract was cancelled.

[67] According to Ramgoolam Quantity Surveyors who were appointed under DCSSF02, the Secelec respondents did not perform stage 4 of the professional services because they compiled their drawings based on Google Maps and had not visited the contracted sites. When the sites were eventually visited the drawings and plans had to be changed. As a result, the Secelec respondents were not entitled to payment for stage 4. The Secelec respondents barely deny this allegation. It is trite that a bare denial does not constitute a denial in application proceedings. If the Secelec respondents reliably used Google Maps as it alleges, it begs the question why it was necessary to redraw the plans. As stated in paragraph 91 below, it was present at meeting where this was raised by the new service provider SAFG. In its answering affidavit, it did not address what transpired at this meeting. The SIU version that the plans as drawn by the Secelec respondents does not reflect critical features of the fence is reasonable and not far-fetched. I therefore accept it.

[68] When DCSSF01 was cancelled, specifications had been drafted by the Secelec respondents and tenders were received but no award had been made to contractors. Professional services the Secelec respondents were contracted to perform under DCSSF01 included drafting specifications, appointing a contractor to install the fences and a 453 page of Bill of Quantities on which service providers had to tender.

[69] In the close-out report, Adlam indicated that a full tender documentation set for 29 Correctional Centres on 15 Cites was issued on 22 November 2011. The tender document included, IDT Standard Conditions of Contract (183 pages), General Specifications for the Integrated Prison Security System (448 pages), General Maintenance specification for the Integrated Prison Security System (110 pages), 15 full schedules of quantities (690 pages) and a generic Sally Port Building Layout. According to the SIU, given the voluminous size of the tender document, it is unlikely that the Secelec respondents only took 1 day to prepare it after its appointment by Ntsandeni on 21 November 2011.

- [70] The IDT request for Secelec respondent's purchase order (POR0000065846) for R35 623 596.91 was created on 19 December 2011 and finalised on 22 December 2011. When it was created, since the Secelec respondents had only performed 50% of the work and DCSSF01 had been cancelled, it was not entitled to the full payment of the contracted amount. However, Ntsandeni's submission dated 5 December 2011 and signed on 6 December 2011 states that the purpose of the submission was to note the estimated value of the professional service provider.
- [71] On 28 February 2012, Tsheliso Mokhethi (Mokhethi), portfolio manager: Infrastructure at IDT, wrote a letter to Damons at DCS. In the letter, Mokhethi indicated to the DCS that payments to the Secelec respondents were only made for stages 1 to 4, namely inception, concept, design development and documentation and procurement, and thus the new professional services contract will start from stage 5 and as such no losses in terms of professional fees are expected. This was incorrect for the reason stated above.
- [72] On 19 March 2012, IDT and the Secelec respondents signed an NEC3 / PSP3 agreement. IDT and these respondents also signed a Professional Consultant Service Agreement Committee (PROCSA) agreement covering stages 5 and 6 of DCSSF01. Since the Secelec respondents had been fully paid for services contracted for DCSSF01, they were paid twice for stages 5 and 6.

Appointment of Manyeleti Consulting (Pty) Ltd as transaction advisor

- [73] On 21 December 2011, shortly after DCSSF01 was cancelled, the then Commissioner, Mr Tom Moyane (Moyane) wrote another letter to IDT advising that the tender must be urgently re-advertised as security at the prisons could not be compromised. On 3 January 2012, Ntsandeni received a memorandum from the then CEO for IDT stating that procurement processes must be set up to appoint a transaction advisor for the DCS security fencing project. In terms of this memorandum, the transaction advisor had to manage the entire procurement and implementation processes including but not limited to:
- (a) preparing tender documentation to be issued to the market. Yet, the Secelec respondents had prepared it under DCSSF01;

- (b) advertising and managing the briefing sessions;
- (c) evaluating the bids received; and
- (d) preparing the evaluation report for the IDT's consideration and approval.

- [74] In response to the CEO's memorandum, Ntsandeni prepared a submission to TAC on 4 January 2012 and signed it on 5 January 2012 requesting approval for the appointment of Manyeleti Consulting as a transaction advisor for DCSSF02. According to Ntsandeni, when he prepared the submission to TAC, he had already received an updated proposal by Manyeleti Consulting.
- [75] Like the appointment of the Secelec respondents under DCSSF01 where single sourcing was implemented without TAC's prior approval, Ntsandeni appointed Manyeleti on a single sourcing basis without TAC's prior approval, thereby contravening the IDT SCM Policy.
- [76] Manyeleti's appointment letter as transaction advisor for the DSCFF02 states that the scope of work should to ensure that all tender documentation complied with the necessary statutory requirements. However, when Cornelius Daniel du Toit (du Toit), a chief forensic investigator at the SIU, interviewed Solly Lamola (Lamola), the owner and director of Manyeleti, he informed the SIU investigating team that when he prepared Manyeleti's bid, he did not consider the IDT procurement policies and procedures. Since Manyeleti is not a state institution, he did not have to take the PFMA into consideration when evaluating bids. He conducted the evaluation, using his own criteria. He compiled two evaluation reports and presented the reports to the TEC on two different occasions. He handed all the tender documents to the IDT and kept none for records of the process.
- [77] Manyeleti was conflicted as it advised IDT in December 2011 on DCSSF01. Lamola attended the meeting between DCS, IDT and Treasury on 12 December 2011, as advisor to the IDT's CEO. As transaction advisor, Manyeleti may have advised IDT that DCSSF01 should be cancelled and re-advertised or had knowledge of the decision to cancel this tender. As such, Manyeleti unduly benefitted from its advice and/ or knowledge of the cancellation when it was appointed in respect of DCSSF02.

Fees paid to Manyeleti

- [78] Manyeleti was paid an amount of R11 662 633.87 for all services rendered under this appointment. The document trail in respect of the payment IDT made to Manyeleti reflects that its officials did everything possible to ensure that Manyeleti is paid by the end of the fiscal year.
- [79] Manyeleti undertook the contracted work over 42 days. Only Lamola and one Michael Teffo (Teffo), his junior, formed part of the Manyeleti team. According to 2012 DPSA rates, the highest possible rate for a consultant was R2 974.00 per hour.
- [80] According to Manyeleti's proposal, it had 6 consultants. The SIU contends that if each consultant worked 8 hours for 42 days, they would have worked for 336 hours per consultant and 2016 hours for 6 consultants for 42 days. If all 6 consultants charged at the highest rate of R2 974.00, multiplied by their total hours, R5 995 584 (excluding VAT) is the total amount Manyeleti ought to have charged. However, Manyeleti charged R10 230 381 (excluding VAT). The amount charged is excessive by R4 234 797.00.
- [81] According to the SIU, the amount ought to be repaid by Manyeleti, including any other sum that was paid to Manyeleti to which it was not entitled.
- [82] The above undisputed facts sustain the review of DCSSF02 in so far as it relates to the appointment of Manyeleti, as well as the SIU's claim that Manyeleti was excessively paid for DCSSF02.

The appointment of the Secelec respondents and SAGF by Manyeleti

- [83] According to the tender invitation, functionality would require 75% points to be evaluated for the price (90%) and BBBEE (10%). The briefing session of 19 January 2012 was compulsory. According to the attendance register, Secelec was represented. Its representative signed the register as Secelec Consulting Engineers. Bakone was not represented at the briefing session.

- [84] According to the Tender Evaluation Committee (TEC) minutes for SP02, 15 bids were received. 6 bidders were disqualified, 5 due to insufficient PI Insurance and 1 bidder due to insufficient proof of PI Insurance.
- [85] According to the affidavit du Toit obtained from Onismus Mokobane, the IDT TEC meeting regarding PSP02 was held on 10 February 2012. The TEC Chairperson invited Manyeleti to make their evaluation presentation before TEC. TEC would consider the presentation made by Manyeleti and make a recommendation to TEC in line with the agreed assessment criteria. Manyeleti informed the TEC that six (6) bidders were disqualified for insufficient Indemnity Insurance. 9 bids were further evaluated for functionality. 5 bidders did not attain the required 75 points. The Secelec respondents achieved the highest score and therefore recommended for appointment.
- [86] TEC followed this same process during evaluation of the contractor tender and the appointment of SAFG.
- [87] According to the SIU, the tender data as communicated to all bidders clearly stated that Professional Indemnity Insurance (PII) of R15 million was required as a pre-condition in order not to be disqualified, proof of the PII had to be attached to the bidder's proposal. The evaluation sheet of the Secelec respondents shows that the evaluator was mistaken when he or she stated that these respondents complied with the R15 million threshold for the PII. The policy schedule submitted by these respondents reflects a cover of R5.5 million. The schedule submitted by Bakone reflects a cover of R3 million. Therefore, Secelec, at the most, had an aggregate PII of R8.5 million which falls short of the R15 million required. Despite such shortage, it was not disqualified like other bidders. Even if this allegation is determined on Secelec respondents' version as it disputes it, the impugned tender would not survive this review because of the other overwhelming irregularities dealt with above.

Evaluation by Manyeleti of bids for DCSSF02

- [88] The tender briefing meeting for SF02 was held on 24 January 2012. The advertisement for the bid indicated that only joint venture bidders meeting grade 9

SQ as per the CIDB calculator will be considered. Three tenders were received for SF02 and only two bidders achieved the CIDB grade of 9 SQ. The third, being “Fastmove Electrical CC”, was disqualified. The TEC recommended SAFG because it obtained the highest score.

- [89] The TEC was convened on 21 February 2012 and SAFG was appointed on 22 February 2012 for SF02. The award of SAFG was predetermined because a report was sent to Moyane to approve the appointment based on an evaluation TED conducted. Moyane approved the request on the same day. However, TED only met a day after Moyane approved the appointment. Therefore, the TEC meeting feigned compliance as the IDT CEO had already determined who the preferred bidder on SF02 was.
- [90] SAFG was appointed on 22 February 2012 for SF02. However, it could not start the work as it did not have the correct measurements [due to the Secelec respondents having used Google Maps to draw the designs, thus making measurements were inaccurate]. As a result, SAFG could not order accurate quantities. This was discovered at a planning session held in February 2012 between SAFG, the Secelec respondents and DCS. This necessitated that Project Execution Plan (PrEP) visits be undertaken during 8 March 2012 to 23 March 2012, to do proper measurements and liaise with local teams regarding their needs.
- [91] The main finding of the site visits resulted in scope amendment because Google maps (which was utilised by Secelec) in respect of stage 4 only show, for example, one entrance on a prison site while in fact there were much more than one, which resulted in the need for more Sally Ports. An IDT Steering Committee (“Steercom”) was established between all relevant parties namely DCS, IDT, Secelec as consultant and SAFG as the contractor. The duties of the Steercom included approval of all subsequent change orders to the project.
- [92] The PrEP process resulted in significant impact on the budgets for each site due to inaccuracies in the original tender specifications. The increased costs were outside the allowable deviation as per tender regulations. Thus, the Steercom took a decision to put some of the facilities on hold, to ensure that they were still within the awarded budget. The budget for the initial tender increased with

R72 454 350.62 or 15.2%. However, this figure is somewhat distorted because the cost of 5 facilities were not included in the calculation as they had been placed on hold.

[93] Considering all sites, the total budget of DCSSF02 increased to R861 255 544.40. This escalation is 81% of the approved budget and way above the permitted 20% deviation as per treasury regulations. IDT's SCM manual at para 5.6.10 states that if the scope of works changes by more than 30% a new tender is required and the old tender must be cancelled. This was not done. Therefore, by permitting the changes, the Steercom not only contravened the National Treasury Instruction Note of the limitation of the deviation of 20%, but also contravened IDT's own SCM policy which caps the deviation at 30%.

[94] SAGF contends that paragraphs 6 to 30 of its answering affidavit deposed to by Geoffrey Edward Greyling (Greyling), raises material disputes of fact which are bona fide and are supported by the Annexures to Greyling's affidavit, not far-fetched and not contradicted by the SIU in its reply. Therefore, the Tribunal ought to accept its version. A close examination of these paragraphs reveals that SAGF only raises a dispute of fact in respect the SIU allegations regarding BBEE compliance. It does not raise a material dispute of fact in respect of the remaining alleged irregularities. It rather raises the following grounds of opposition:

(a) The composition of the SAGF joint venture as well as their credentials was at all materials times fully disclosed to the IDT. Further, SAGF complied with the tender requirements.

(b) All the extra work SAGF performed was conducted pursuant to written Change Control instructions emanating from the IDT. It was not aware that IDT and DSC had not complied with applicable statutory and regulatory requirements for changes to project scope and budget.

[95] These grounds of opposition are not sustainable. Ignorance on the part of SAGF is an irrelevant consideration. The alleged irregularities are material as they implicate the procurement values of fairness, equity, transparency, and competitiveness as set out in s217 of the Constitution.

[96] I therefore find that the SIU has made out a proper case of an order declaring the awarding of both tenders unlawful.

Just and Equitable Relief

[97] The SIU seeks just and equitable relief in the form of declaration of invalidity and setting aside of the decisions to award the impugned tenders and the contracts concluded pursuant to those decisions. The opposing respondents contend that in that event, they should not be divested of their accrued rights.

[98] The SIU contends that the conclusion that the declaration of invalidity must follow as a matter of course since has established the grounds of review as per findings made above is unavoidable. The Tribunal has no discretion but to declare the impugned tenders invalid. It may, in the wake of that declaration, craft what is a just and equitable remedy. In that regard, it wants the tenderers to be deprived of profits earned from the impugned tenders. These contentions are irrefutable. I make this finding aware of the judgement in *Special Investigating Unit v Phomella and Another*¹¹ (*Phomella*) where the SCA found that in All Pay II, the Constitutional Court did not establish the no-profit-no-loss principle. I disagree with this interpretation of All Pay II. Reasons for disagreeing with *Phomella* are fully set out in paragraphs 78 to 85 of the judgment in *Special Investigating Unit and Another v LNG Scientific (Pty) Ltd.*¹²

[99] Further, a proper case for repayment of moneys for works not done is also made out in the papers. S 8(2) empowers the Tribunal to order the repayment of these moneys as part of just and equitable relief.

[100] The opposing respondents' contentions that they are innocent tenders and that there is no evidence of corruption does not immunize them from the just and equitable relief contended for by the SIU. So is the fact that they carried out

¹¹ 2023 (5) SA 601 (SCA).

¹² *Special Investigating Unit and Another v LNG Scientific (Pty) Ltd* (GP03/2022) [2024] ZAST 1 (7 February 2024).

expensive works at a considerable cost as they are entitled to be compensated for related costs.

Costs

[101] No persuasive reasons have been advanced as to why costs should not follow the course.

[102] In the premises, I make the following order:

Order

1. The decision of the second respondent of 21 November 2011 and 7 December 2011 to award the tender referenced DCSSF01 (DCSSF01) to third, fourth and/or fifth respondent is reviewed and set aside.
2. The contract concluded between second respondent and third, fourth and fifth respondent pursuant to the awarding of DCSSF01 is reviewed and set aside.
3. The decision of the second respondent of 5 and 6 January 2012 to appoint the sixth respondent as transaction advisor for the tender referenced DCSSF02 (DCSSF02) is reviewed and set aside.
4. The contract concluded between second respondent and sixth respondent pursuant to the awarding of DCSSF02 is reviewed and set aside.
5. The second respondent's decision to award DCSSF02 to third, fourth and fifth respondent is reviewed and set aside.
6. The contract concluded between second respondent and third, fourth and fifth respondent pursuant to the awarding of DCSSF02 is reviewed and set aside.
7. The second respondent's decision of 22 February 2012 to award the seventh respondent DCSSF02 is reviewed and set aside.

8. The contract concluded between second respondent and the seventh respondent pursuant to the awarding of DCSSF02 is reviewed and set aside.
9. The third to seventh respondent shall render the full accounts of all the payments they received under DCSSF01 and DCSSF02 and reasonable expenses incurred under these tenders, supported by necessary vouchers (accounts).
10. The accounts shall be debated by the applicant and third to seventh respondent.
11. The third to seventh respondent shall pay whatever profits earned from the abovementioned contract upon debatement of the accounts.
12. Any party may approach this Tribunal on supplemented papers as necessary, for any ruling in respect of just and equitable relief.
13. The costs of this application including the costs consequent upon the employment of two counsel, shall be paid by the third to seventh respondent.



JUDGE L.T. MODIBA
PRESIDENT OF THE SPECIAL TRIBUNAL

Appearances:

Counsel for the applicant: Adv JA Motepe SC, assisted by Adv K Ramaimela.

Attorney for the applicant: Ms S Zondi, Office of the State Attorney, Pretoria.

Attorney for the second respondent: Mr T.K Lepinka, Weavind and Weavind Inc.

Counsel for the third, fourth and fifth respondents: Adv S Symon SC, assisted by Adv X Stylianou.

Attorney for the third, fourth and fifth respondents: D Bitcham, Ramsay Webber Inc.

Attorney for the seventh respondent: Mr. D Reddy, Biccari Bollo Mariano Inc.

Date of hearing: 24 November 2023

Date of judgment: 29 July 2024

Mode of delivery

This judgment is handed down by email transmission to the parties' legal representatives, uploading on Caselines and release to SAFLII and AFRICANLII. The date and time for delivery is deemed to be 10 am.