



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2
(1) OF THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1999
(REPUBLIC OF SOUTH AFRICA)**

HELD VIRTUALLY

CASE NO: GP/17/2020

In the matter between:

THE SPECIAL INVESTIGATING UNIT

First Applicant

NATIONAL DEPARTMENT OF PUBLIC WORKS

Second Applicant

AND INFRASTRUCTURE

and

CALEDON RIVER PROPERTIES (PTY) LTD

First Respondent

t/a MAGWA CONSTRUCTION

PROFTEAM CC

Second Respondent

JUDGMENT

Mode of delivery: this judgment was handed down in open court at 09:30am on 26 February 2021 and electronically circulated to the parties' legal representatives by email.

HEADNOTE:

Legality review - the Special Investigating Unit and the National Department of Public Works and Infrastructure (“Public Works”) seek to review and set aside the contracts concluded between Public Works and Caledon River Properties (Pty) Ltd t/a Magwa Construction (“Caledon River”) and, Profteam CC (“Profteam”) for the construction of a 40km borderline infrastructure project between the Republic of South Africa and the Zimbabwe Border Post colloquially known as the Beitbridge Border Fence Project on account of alleged irregularity and unlawfulness arising from breach of s217 of the Constitution, the Public Finance Management Act, the Treasury Regulations, the Disaster Management Act and the Disaster Management Regulations.

Point of law – constitutional jurisdiction – Calendon River and Profteam question the status of the Special Tribunal and its jurisdiction to make a declaration of constitutional invalidity in terms of s172(1) of the Constitution. Paragraph 1, 3, 8, 9, 10, 15.

Held - the Special Tribunal is a court of a similar status to the High Court as envisaged in s166(e) of the Constitution. Paragraph 29, 31, 33, 36, 57.

Held - the Special Tribunal has jurisdiction to make a declaration of constitutional invalidity in terms of s172(1) of the Constitution. Paragraph 61-68.

MODIBA J:

INTRODUCTION

[1] The issue that has come up for determination in this application is whether the Special Tribunal is a Court as defined in s166(e) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), capable of granting relief in terms of s172 of the Constitution.

[2] The first respondent, Caledon River Properties (Pty) Ltd t/a Magwa Construction (“Caledon River”) and the second respondent, Profteam CC (“Profteam”) raised the issue as a point of law in an application in which the first applicant, the Special Investigating Unit (“SIU”) seeks to review and set aside the contracts concluded between the second applicant, the National Department of Public Works and Infrastructure (“Public Works”) and the respondents respectively (“the contracts”).

[3] The issue is being determined separately from the rest of the issues in the application at the respondents' request, having persuaded the Special Tribunal that opposing the application on the merits will result in wasted legal costs in the event that the respondents' point of law is upheld. They are yet to file papers to oppose the application on the merits.

BACKGROUND

[4] On 23 July 2020, acting in terms of s2(1)(a)(ii) of the Special Investigating Units and Special Tribunals Act¹ ("the Act"), the President of the Republic of South Africa ("the President") published proclamation R23 of 2020 ("the referral proclamation"), referring the procurement and implementation of a 40km borderline infrastructure project between the Republic of South Africa and the Zimbabwe Border Post colloquially known as the Beitbridge Border Fence Project to the SIU for investigation. The procurement led to the conclusion of the contracts.

[5] For reasons that are not relevant for the purpose of determining the point of law, the SIU and Public Works allege that their investigations reveal that the conclusion of the contracts is unlawful, irregular and inconsistent with the Public Works procurement obligations in terms of s217 of the Constitution, the Public Finance Management Act ("PFMA"),² the Treasury Regulations,³ the Disaster Management Act ("the DMA")⁴ and the Disaster Management Regulations.

[6] Although in their notice of motion, the SIU and Public Works did not specifically pray for an order declaring the contracts to be constitutionally invalid and merely seek an order reviewing and setting aside the contracts as irregular and unlawful, in paragraph 51 of their founding affidavit, the SIU and Public Works articulate a request to the Special Tribunal to declare the contracts to be irregular and inconsistent with the Constitution, the PFMA, the Treasury Regulations, the DMA and the Disaster Management Regulations.

¹ Act 74 of 1996

² Act 1 of 1999

³ Promulgated in Government Gazette No. 27388 and came into effect on 15 March 2005

⁴ Act 57 of 2002

[7] A declaration of constitutional invalidity which follows an enquiry into the constitutional validity of the conduct of the implicated organ of state and officials falls within the purview of s172 of the Constitution. This is what gave rise to the respondents' legal question.

THE RESPONDENTS' POINT OF LAW

[8] Essentially, the respondents are attacking the jurisdiction of the Special Tribunal to review and set aside the contracts on account of unconstitutionality. Although the respondents have raised the same point of law, there are nuanced differences in how they have articulated it.

[9] Caledon River contends that:

9.1 the Special Tribunal is not a Court as defined in s166 of the Constitution and therefore incapable of granting relief in terms of s172 of the Constitution.

9.2 s2(1)(b) of the Act does not create jurisdiction for the Special Tribunal to review unconstitutional actions based on its alleged constitutional invalidity;

9.3 the legislator, in defining the status of the Special Tribunal, did not enact it as a Court as provided for in s166(e) of the Constitution. In the absence thereof, despite it being presided over by a Judge of the High Court, it does not render it a Court as defined by the Constitution;

9.4 as a result, the Special Tribunal does not have the powers granted to a Court to review the constitutionality of the conduct, or lack thereof, complained of by the Applicants;

9.5 the Special Tribunal does not have jurisdiction to grant the relief relating to the review of the actions of the officials and Minister of the Department of Public Works;

[10] Profteam contends that:

10.1 the Special Tribunal has been established by presidential proclamation, as opposed to an Act of Parliament. It is also not recognised in terms of an Act of Parliament as required by s166(e) of the Constitution;

10.2 deciding constitutional matters is reserved for the High Court, Supreme Court of Appeal, the Constitutional Court and Courts of similar status. Declaring, reviewing and setting aside a contract for want of constitutional validity falls outside the jurisdiction of the Special Tribunal.

[11] While Caledon River seeks costs on an ordinary scale in the event that its jurisdiction point is upheld, Profteam seeks costs on the punitive scale because the SIU instituted the application in the Special Tribunal knowing that the Special Tribunal lacks jurisdiction over the matter.

[12] It was submitted on behalf of Caledon River that *Ledla*⁵ is palpably wrong as there is no Act of parliament that established or recognizes the Special Tribunal. Criticism was leveled particularly at *Ledla* for failing to apply the rules for statutory interpretation as expounded by the Supreme Court of Appeal (“SCA”) in *Endumeni Municipality*.⁶

[13] Profteam relied on *Ngcinwana*⁷ and *Nadasen*⁸ to substantiate its contentions.

[14] The SIU contends that the Special Tribunal is a Court as envisaged in s166(e) of the Constitution and does have jurisdiction to grant the relief sought. It was argued on behalf of the SIU that the distinction between constitutional and non-constitutional matters is illusory.

[15] It follows that the following issues arise from the respondents’ point of law:

15.1 whether the Special Tribunal is a Court of law as referred to in s166(e) of the Constitution? This Special Tribunal finds that it is;

⁵ *Special Investigating Unit v Ledla Structural Development (Pty) Limited and 39 Others* Special Tribunal Case No: GP07/2020. Judgment delivered on 10 December 2020

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

⁷ *Special Investigating Unit v Ngcinwana and Another* 2001 (4) SA 774 (E)

⁸ *Special Investigating Unit v Nadasen and Another* 2002 (4) SA 605 (SCA)

15.2 ancillary to the above question is whether it matters that s2(1) of the Act empowers the President to establish the Special Tribunal by proclamation in the Government Gazette. This Special Tribunal finds that it matters not;

15.3 whether the Special Tribunal has the jurisdiction and powers to make a declaration of constitutional invalidity in terms of s172 of the Constitution? This Special Tribunal finds that it does.

[16] Although a study of the Act does not reflect a specific reference to the constitutional jurisdiction of the Special Tribunal, as demonstrated below, the Special Tribunal is part of the matrix of courts that are recognised in terms of the Constitution and the Superior Courts Act.⁹ S170 of the Constitution specifically demarcates the constitutional jurisdiction of 'other Courts' referred to in s166(e). For convenience, in this judgment, these courts are referred to as s166(e) Courts. The Special Tribunal falls within this rubric of courts. Further, s172(1) of the Constitution recognises the constitutional jurisdiction of courts when acting 'within their power'. It is for these reasons that the respondents' point of law is considered with specific reference to the applicable legislative framework and judicial authorities relied on by the parties. When interpreting the applicable provisions, this Special Tribunal is guided by the trite approach to statutory interpretation set out in *Endumeni Municipality*.

[17] The legislative framework referenced in this judgement is chapter 8 of the Constitution, the Superior Courts Act and the Act. Unless otherwise specified or suggested by the context, in this judgment, all references to statutory provisions are references to the Act.

⁹ Act 10 of 2013

The Constitution

[18] Chapter 8 of the Constitution regulates courts and establishes a system for the administration of justice. S165¹⁰ enumerates factors that are central to the exercise of judicial authority by the courts.

[19] S166¹¹ makes provision for different courts. Ss167, 168 and 169 provide for the jurisdiction and other matters pertaining to the courts that are specifically listed in s166, with the exception of the Magistrates' Court. S166(e) is considered elaborately below with reference to the issue framed in 9.1, 9.3 and 10.1 above. As already alluded to above, s170¹² restricts the jurisdiction of section 166(e) Courts. S171 makes provision for the promulgation of legislation to regulate the functioning of courts. S172 provides for the powers of courts in Constitutional matters. Ss170 and 172 are also considered elaborately below with reference to the issue framed in 9.1, 9.2, 9.4, 9.5 and 10.2 above. S180¹³ provides that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution.

¹⁰ **Judicial authority**

165. (1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

¹¹ **Judicial system**

166. The courts are—

(a) the Constitutional Court;

(b) the Supreme Court of Appeal;

(c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;

(d) the Magistrates' Courts; and

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

¹² **Court procedures**

171. All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

¹³ **Other matters concerning administration of justice**

180. National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including—

(a) training programmes for judicial officers;

(b) procedures for dealing with complaints about judicial officers; and

[20] This Special Tribunal finds that both the Superior Courts Act and the Act constitutes the national legislation referred to in s171 and 180 of the Constitution.

The Superior Courts Act

[21] The Superior Courts Act was enacted in furtherance of ss171 and 180 and Item 16 (6) (a) of Schedule 6 to the Constitution.¹⁴ The purpose of ss171 and 180 is described in paragraphs 19 and 20 above. Item 16 (6) (a) of Schedule 6 to the Constitution provides for the enactment of legislation as soon as practical after the Constitution took effect, to rationalize the legislation that regulate all the courts with a view to establishing a judicial system suited to the requirements of the Constitution.¹⁵

[22] In terms of s 2(2) of the Superior Courts Act¹⁶, the Superior Courts Act is relevant when assessing Chapter 8 of the Constitution. S2(3) of the Superior Courts Act provides that its provisions relating to superior courts other than the Constitutional Court, the Supreme Court of Appeal or the High Court of South Africa are complementary to any specific legislation pertaining to such courts, but in the event of a conflict between the Superior Courts Act and such legislation, such legislation must prevail. In this regard, the Superior Courts Act references s166(e) Courts to the extent that s166(e) applies to courts of a similar status to the High Court. Since this Special Tribunal finds that the Special Tribunal is a s166(e) Court, it follows that the Superior Courts Act is complementary to the Act. The Act takes precedence in the event of a conflict.

(c) the participation of people other than judicial officers in court decisions.

¹⁴ **Courts**

16 (6) (a) As soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.

¹⁵ See also s2 of the Superior Courts Act which sets out its objects.

¹⁶ **2 Objects and interpretation of Act**

(2) This Act must be read in conjunction with Chapter 8 of the Constitution, which contains the founding provisions for the structure and jurisdiction of the Superior Courts, the appointment of judges of the Superior Courts and matters related to the Superior Courts.

[23] The provisions in the Constitution and the Superior Courts Act referenced above refute the opening statement in *Ngcinwana*¹⁷ that the Special Tribunal does not fit in easily into the constitutional and legislative system of justice administration.

Special Investigating Units and Special Tribunals Act

[24] The Act was enacted for the following purposes:

24.1 to provide for the establishment of SIUs for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public;

24.2 to provide for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by SIUs;

24.3 to provide for matters incidental to the two purposes set out above.¹⁸

[25] The Act came into operation on 20 November 1996.

[26] In terms of s2(1)(a)(i) read with s2(2), the President holds the discretion to establish the SIU whenever he deems it necessary due to any of the following grounds (“s2(2) grounds”):

26.1 serious maladministration in connection with the affairs of any State institution;

26.2 improper or unlawful conduct by employees of any State institution;

26.3 unlawful appropriation or expenditure of public money or property;

26.4 unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;

¹⁷ At paragraph 1 of the judgement.

¹⁸ See the preamble to the Act.

26.5 intentional or negligent loss of public money or damage to public property and the commission of specified criminal offences in connection with the affairs of any State institution;¹⁹ and

26.6 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

[27] In terms of s2(1)(b), whenever he deems it necessary, the President may, also by proclamation in the Government Gazette, establish one or more Special Tribunals to adjudicate upon civil proceedings emanating from any investigation of any particular SIU.

[28] S7 provides for the composition of the Special Tribunal. S8 sets out the powers of the Special Tribunal. S9 provides for matters relating to the Special Tribunal's procedure and evidence. S10 provides for public hearings. S11 provides for the promulgation of regulations. These provisions are dealt with below with reference to the issues under consideration.

Is the Special Tribunal a Court as referred to in s166(e) of the Constitution?

[29] Contrary to the finding in *Ngcinwana* and in accordance with the SCA's decision in *Nadasen* as well as the Special Tribunal's decision in *Ledla*, this question is answered in the affirmative, supported with reasons set out below.

[30] This Special Tribunal finds that Profteam's reliance on *Nadasen* is misplaced as that judgment does not support Profteam's contention that the Special Tribunal is not a court. At paragraph 10 of the judgment, the SCA held that:

“the Tribunal consist of a Judge and has in general terms the powers of the High Court in relation to matters falling within its terms of reference (ss7,8,9). Appeals lie against a judgment of the tribunal to the Full Court or to this Court (s8(7))”

¹⁹ These are offences referred to in Part 1 to 4, or s17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act 12 2004. They relate to the taking of a private interest in a State contract or public investment by a public official or being an accomplice or accessory after the effect to the taking of such an interest.

[31] Therefore, *Nadasen* is not only the prevailing authority for the proposition that the Special Tribunal is a court, it is also authority for the proposition that the Special Tribunal is a court of similar status to the High Court as envisaged in s166(e). *Ngcwinana*, being a decision of a court below the SCA is not authority on this issue. Further, as demonstrated below, the statements in *Ngcwinana* relied on are only obiter and not binding.

[32] Needless to say, this Special Tribunal with respect disagrees with the obiter statements. The High Court Division in the Eastern Cape in *Ngcinwana*, scathing in its criticism of the SIU and the Special Tribunal, negated the need for these institutions. It was hardly necessary for the court to pronounce on the need for these institutions as that question carried no relevance to the very narrow issue of the jurisdiction of the SIU and the Special Tribunal which the court was invited to consider. This path of deliberation, led the court in *Ngcinwana* to conclude that the composition, competence and procedures of these institutions as set out in the Act do not fit in easily into the judicial and administrative system of government created by the Constitution. As already alluded to above, this Special Tribunal finds that the Special Tribunal as provided for in the Act fits in well into the system of courts and administration of justice created by the Constitution and substantiated in the Superior Courts Act.

[33] The Special Tribunal bears the hallmarks of a court endowed with judicial authority as envisaged in s165 of the Constitution. S165 of the Constitution determines what a court is. It is an institution vested with judicial authority.²⁰ Courts function independently, subject only to the Constitution and the law which they apply impartially and without fear, favour or prejudice.²¹ Interference with the functioning of courts is prohibited.²² The Special Tribunal enjoys these features.

[34] S8(1) provides for the independence of the Special Tribunal, as well as the performance of its functions impartially and without fear, favour or prejudice, subject only to the law and the Constitution. The preamble to the Act, ss2 and 8(2), make reference to the Special Tribunal's judicial authority over civil litigation emanating from SIU investigations.

²⁰ S165 (1) of the Constitution

²¹ S162(2) of the Constitution

²² S163(3) of the Constitution

[35] The Act specifically recognises the parallel jurisdiction of other courts over matters falling within the jurisdiction of the Special Tribunal.²³ Contrary to the argument advanced on behalf of the respondents, this clearly does not detract from the Special Tribunal's jurisdiction. If the legislature intended demarcating the extent and/ or bounds of the jurisdiction the Special Tribunal, the legislature would have specifically set out the extent of the of Special Tribunal's jurisdiction in the Act.

[36] S166 of the Constitution specifically gives recognition to the Constitutional Court, Supreme Court of Appeal, High Court and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa as well as the Magistrates' Court. Relevant for the purpose of the respondents' point of law is the recognition the Constitution bestows upon 'other courts' in s166(e). This is the convenient place to quote s166(e):

"166. The courts are —

(a) ...

(b) ...

(c) ...

(d) ...

"(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts."

[37] It is reflected in the plain language used in this section that the Constitution accords a s166(e) Court with one of two statuses. A s166(e) Court either has a status similar to the High Court or the Magistrates' Court. The Act is almost bereft of provisions that support a conclusion that the Special Tribunal is a court of similar status to the Magistrate's Court. On the contrary, the Act is replete with provisions that support a conclusion that the Special Tribunal is a court of similar status to the High Court.

[38] The Special Tribunal is headed by the Tribunal President appointed in terms of s7(1). Only a sitting or retired Judge of the High Court may be appointed to this position. Although additional members of the Tribunal may be drawn from the ranks of legal practitioners, the Magistracy and Judges, only Judges of the High Court may preside over Special Tribunal

²³ See s5(5) of the Act

matters.²⁴ This accords with the status of the orders of the Special Tribunal in respect of the enforceability and appealability of the orders as provided for in the Act.

[39] The use of the word ‘appointed’ in s7(1) and (3) with reference to Judges and Magistrates is actually a misnomer. When acting in terms of these provisions, the President does not appoint Judges or Magistrates. He has no such statutory authority. The word more suited to describe the powers the President derives from s7(1) and (3) is ‘designate’ or ‘assign’. When exercising his powers in terms of these provisions, the President designates or assigns Judges and Magistrates who are already duly appointed in these offices.

[40] These officials come to the Special Tribunal clothed with the judicial authority to adjudicate cases instituted in the Special Tribunal. By accepting the designation, Magistrates only serve in an auxiliary capacity as they are never allocated matters to preside in alone. However, contrary to the argument advanced on behalf of Profteam having relied on *Ngcinwana*, when seating in the Special Tribunal, Judges exercise the same judicial authority bestowed upon them when they took the Judges oath of office at the time of appointment as Judges of the High Court, subject to the jurisdiction of the Special Tribunal as set out in the legislative framework referenced in this judgement. They are no less Judges when seating in the Special Tribunal as contended on behalf of Profteam.

[41] As is the case with the High Court, the process of the Special Tribunal runs throughout the Republic.²⁵ Special Tribunal judgments and orders are executable as if they are judgments or orders of the High Court with jurisdiction in a specific area.²⁶

[42] Special Tribunal judgments are appellable to the Provincial Division of the High Court. Such appeals are dealt with as judgments of the High Court sitting as the court of first instance in that the appeals lie with the Full Court of the Provincial Division of the High Court with jurisdiction over the matter comprising of three Judges.²⁷

[43] The only difference between High Court appeals and Special Tribunal appeals is that s8 (7) does not specifically provide for the Special Tribunal to grant leave to appeal. Further, the

²⁴ S7(1) read with s7(2), s7(3) and s9 (2)(a)

²⁵ See s9(7) of the Act and s42(2) of the Superior Courts Act

²⁶ S7(9) of the Act

²⁷ S8(7) read with 16 (1) (a) (1) of the Superior Courts Act 10 of 2013

section does not provide for direct appeal against a Special Tribunal judgment to the Supreme Court of Appeal in the event that leave to appeal is denied by the Special Tribunal. The latter omission is catered for in s16 (1)(c) of the Superior Courts Act. It provides that any appeal against a decision of a court of similar status to the High Court lies to the Supreme Court of Appeal upon such leave being granted by such other court (read Special Tribunal) or the Supreme Court of Appeal.

[44] The omission in s8(7) dealt with above does not obliterate the Special Tribunal's compelling High Court features dealt with above.

[45] Special Tribunal proceedings are generally open to the public unless a case is made out for the public to be excluded and the presiding Judge makes an order to that effect.²⁸ The proceedings are recorded. The evidence of witnesses is received under oath or affirmation.²⁹

[46] A glaring feature that the Special Tribunal shares with the Magistrate's Court is its lack of inherent jurisdiction in the 'general sense'. This is consistent with the *ad hoc* nature of the Special Tribunal, established for a specific purpose. The legislative intent is not to create another High Court but to create a focused specialised court of a similar status to the High Court to deal only with civil litigation emanating from SIU investigations.

[47] It is notable that the orders which the Special Tribunal may make within its jurisdiction are not limited by statute. S8(2) affords the Special Tribunal the power to make any order to give effect to any ruling or decision it has made. In this regard, there is a measure of inherent jurisdiction not enjoyed by the Magistrate's Court which the Special Tribunal enjoys over civil litigation instituted by the SIU in the Special Tribunal. Hence reference above to lack of inherent jurisdiction in the 'general sense'.

[48] It is trite that government is the largest procurer of goods and services. Its procurement expenditure runs into millions and billions of rands. The harm caused to the fiscus when goods and services are procured irregularly and unlawfully is substantial. Since money is liquid and capable of quick dissipation, it is important that litigation for the recovery of losses incurred as a result of unlawful and irregular procurement is finalized expeditiously. It is without a

²⁸ See s10 of the Act

²⁹ See s9(5) of the Act

question that having a dedicated court dealing with civil litigation for the recovery of such losses will result in the expeditious disposal of the litigation.

[49] Having stated that, it is also notable that unlike is the case with the Magistrates' Court, the Act does not limit the monetary jurisdiction of the Special Tribunal. This accords with the status of the Special Tribunal as a court of similar status to the High Court because the civil litigation for the recovery of losses incurred as a result of irregular and/ or unlawful procurement typically falls beyond the monetary jurisdiction of the Magistrates' Court. The current matter is a case in point. The monetary value of the Beitbridge Border Fence Project is R40m.

[50] The power of the Special Tribunal to make any order in terms of s8(2) includes declarations of constitutional invalidity in terms of section 172(1) of the Constitution. As demonstrated below, this interpretation is reinforced by the fact that s170 of the Constitution specifically recognises the constitutional jurisdiction enjoyed by s166(e) Courts and that section 172(1) specifically empowers courts to make declarations of constitutional invalidity *within their power*. (Epmphasis added)

Whether it matters that the s2(1)(b) empowers the President to establish the Special Tribunal by proclamation in the Government Gazette?

[51] S2(1)(b) grants the President the discretion to establish the Special Tribunal by proclamation in the Government Gazette.

[52] S2(1)(b) charecterises the Special Tribunal as *an adhoc* court, that will be brought into operation to deal with the cohort of civil litigation that s2 envisages. The *ad hoc* nature of the Special Tribunal would make it cumbersome for the President to approach Parliament to enact legislation to establish the Special Tribunal when the need for its existence arises and to pass a repealing legislation to terminate the Special Tribunal when the need for it ceases to exist. Therefore, the proclamation is only a mechanism for giving effect to the legislative intent to establish the Special Tribunal. This mechanism is a rational and practical one. There is no statutory or constitutional prohibition against the use of such a mechanism to establish a court. In fact, by providing that a court is a court when it is recognised in terms of an Act of parliament in s166(e), the drafters of the Constitution left the room open for the use of such a mechanism to bring a s166(e) Court into existence.

[53] On 31 July 2001, the President exercised his powers in terms of ss2(1)(a) and (b) when he published Proclamation R118 (“the founding proclamation”), establishing the SIU and the Special Tribunal.³⁰ The existence of the need to establish the SIU and the Special Tribunal as set out in s2(2) is without a question as incidents of maladministration particularly in the area of public procurement are reported in various media platforms daily.

[54] It is not the respondents’ case that by publishing the proclamation, the President acted *ultra vires*. An attack on the constitutional validity of s2(1)(b) is also not part of the respondents’ case.

[55] The Act is the enabling statutory instrument for the Special Tribunal as foreshadowed in ss171 and 180 of the Constitution as well as s2(3) of the Superior Courts Act. As already pointed out, the Act provides for the existence, jurisdiction, composition, functioning and procedures of the Special Tribunal, the promulgation of the Special Tribunal rules as well as other matters incidental to the functioning of the Special Tribunal. This interpretation is consistent with how the President exercised his powers as evident from the founding proclamation.

[56] In the founding proclamation, the President only gave effect to s2(1)(a) and (b), set out the terms of reference for the SIU as required by s2(3) and provided for the continued investigations of matters referred to the SIU in terms of previous proclamations.³¹ Notably, the founding proclamation states nothing more. Therefore the proclamation is not the enabling instrument for the Special Tribunal.

[57] By conferring judicial authority upon the Special Tribunal over matters emanating from SIU investigations as well as providing for its functioning, the Act also recognises the Special Tribunal as a section 166(e) court with a status similar to the High Court.

[58] The fact that the SIU and the Special Tribunal have one enabling statute should not lead to the conflation of the distinct institutional and jurisdictional independence of these institution as reflected in *Ngcinwana*.³² So is the fact that the President utilized one proclamation to establish the SIU and the Special Tribunal.

³⁰ Proclamation R118 was published in Government Gazette no. 22531 on 31 July 2001

³¹ See paragraph 2 to 6 of Proclamation R118

³² At 777A.

Does the Special Tribunal have the power to make a declaration of constitutional invalidity in terms of s172(1) of the Constitution?

[59] S170 of the Constitution determines the constitutional jurisdiction of other courts as well as the extent of such jurisdiction. (*Emphasis added*) S170 provides:

“Other courts

“170. All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.” (*Emphasis added*)

[60] The Courts referred to in ss167, 168 and 169 of the Constitution are the Constitutional Court, the Supreme Court of Appeal and the High Court respectively. S170 specifically confers constitutional jurisdiction on courts other than the Constitutional Court, the Supreme Court of Appeal and the High Court. By excluding these courts, which are specifically listed in s166(a) to (c) and by distinguishing ‘a court of a status lower than the High Court’ it appears that reference to “other courts” in s170 is reference to ‘other courts’ in s166(e) because it is in the latter section where a distinction between a court of a status similar to a High Court and a court of a status similar to a Magistrate’s Court is drawn.

[61] The legislative intent in s170 of the Constitution is clear from the literal formulation used in this section. The constitutionality of an Act of Parliament or the conduct of the President is excluded from the jurisdiction of a court of a status similar to a Magistrates’ Court. This is the only restriction imposed by the Constitution on s166(e) courts. By implication, in matters falling within its jurisdiction, a court of a similar status to a High Court enjoys general constitutional jurisdiction in matters falling within its power including jurisdiction over the constitutionality of an Act of Parliament or the conduct of the President. In this regard, s170 is consistent with s172 of the Constitution.

[62] S172 of the Constitution provides:

“Powers of courts in constitutional matters

“172 (1) When deciding a constitutional matter within its power, a court—

“(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

“(b) may make any order that is just and equitable, including—

*“(i) an order limiting the retrospective effect of the declaration of invalidity; and
 “(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*

“(2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.” (Emphasis added)

[63] It is notable the unlike in s170, in s172 of the Constitution makes no reference to the type or status of a court. This implies that in matters within their power, courts generally have constitutional jurisdiction subject to the restrictions reflected in s170. This accords with the Constitutional Court’s observation in *Dikoko*³³ relied on by counsel for the SIU that a distinction between a constitutional matter and a non-constitutional matter is illusory in a country where the principle of constitutional supremacy is in force, rendering a law or conduct that is inconsistent with the Constitution invalid and of no effect. As demonstrated below, such a distinction is starkly illusory in public procurement matters that fall within the jurisdiction of the Special Tribunal.

[64] In terms of s8(1), the Special Tribunal functions subject to the law and the Constitution. S217(1) of the Constitution sets out the constitutional principles that regulate public procurement. S217(1) requires that goods and services are procured in accordance with a system which is fair, equitable, transparent, competitive and cost effective. S217(2) recognizes the powers of an organ of state to implement a procurement policy to achieve specified objectives of s217(1) while s217(3) provides for the enactment of national legislation to set out a framework for such a policy. The legislation referenced here is the PFMA. The referenced procurement policies include the Treasury Regulations and the Public Works procurement policy relied on by the SIU in its cause of action against the respondents.

[65] When organs of state contract in a manner that is inconsistent with s217(1) of the Constitution and in the event that the President issues a proclamation in terms of s2(1)(a)(ii), the investigative and adjudicative jurisdiction of the SIU and the Special Tribunal as provided for in s2 of the Act is ignited. This solidifies the SIU and the Special Tribunal as specialized bulwarks of s217 of the Constitution and the primary and subsidiary legislation enacted pursuant to s217(2) and (3) respectively.

³³ *Dikoko v Mokhatla* 2006 (SA) 235 (CC) at paragraph 123.

[66] When constitutional issues arise in such matters, the jurisdiction of the Special Tribunal is not ousted. This interpretation is consistent with the principle of constitutional supremacy as observed in *Dikoko*.

[67] It follows that when exercising its mandate in terms of s2(1)(b) the Special Tribunal enjoys constitutional jurisdiction in terms of s172(1) of the Constitution. Further, the Special Tribunal's constitutional jurisdiction in matters within its powers in terms of s172(1) is consistent with the powers conferred upon the Special Tribunal in terms of s8(2) to issue suspension orders, interlocutory orders or interdicts on application by the Unit or such other authorised party³⁴ and *to make any order* which it deems appropriate so as to give effect to any ruling or decision given or made by it.³⁵ (*Emphasis added*)

[68] A contrary interpretation of s172 as suggested by the respondents does not accord with the literal formulation of this section read with ss166(e) and 170 of the Constitution, is at odds with the purpose of the Act as set out in its preamble as well as the Special Tribunal's jurisdiction as set out in s2 and will strip the Special Tribunal of the essence of its jurisdiction, leading to untenable consequences that could not have been intended by the legislature when it enacted the Act.

CONCLUSION

[69] This Special Tribunal concludes that:

69.1 the respondents' point of law is not supported by the legislative framework and judicial authorities dealt with above;

69.2 the Special Tribunal is a court with status similar to the High Court as defined in section 166(e) of the Constitution, capable of granting relief in s172 of the Constitution;

³⁴ S8 (2)(a)

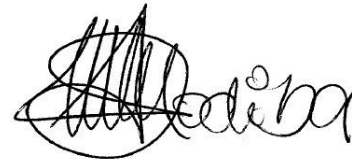
³⁵ S8 (2)(b)

69.3 s2(1)(b) read with ss8(1) and (2) of the Act as well as ss166(e), 170 and 172 of the Constitution creates the jurisdiction of the Special Tribunal to review unconstitutional actions based on its alleged constitutional invalidity.

[70] Therefore, the respondents' point of law stands to be dismissed. It is appropriate to apply the trite rule in respect of legal costs, that the respondents as unsuccessful parties bear the costs of the SIU as the successful party.

ORDER

1. The point of law raised by Caledon River Properties (Pty) Ltd t/a Magwa Construction and Profteam CC is dismissed with costs.



JUDGE L. T. MODIBA
MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the applicant:	Adv. Ishmael Semenya SC assisted by Adv. Nicole Mayet, instructed by the Office of the State Attorney, Pretoria
Counsel for the 1 st respondent:	GJ Scheepers SC, instructed by Louw Le Roux Inc
Counsel for the 2 nd respondent:	E L Theron SC, instructed by Alant, Gell and Martin Inc
Date of hearing:	26 January 2021
Date of judgment:	26 February 2021