



**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: KN03/2022

In the joinder application between:

Special Investigating Unit	Applicant
and	
All-Out Trading (Pty) Ltd	Thirty-second Respondent
Tusokuhle Farming (Pty) Ltd	Thirty- third Respondent
Azwakele Trading and Projects (Pty) Ltd	Thirty- fourth Respondent
Sithokozile Khalipele Mkhize	Thirty- fifth Respondent
Cedar falls Properties 34 (Pty) Ltd	Thirty-sixth Respondent
Sirela Trading (Pty) Ltd	Thirty-seventh Respondent

In the matter between:

Special Investigating Unit	Applicant
and	
Digital Vibes (Pty) Ltd	First Respondent
Tahera Ahmed Saeed Mather	Second Respondent

Naadhira Mitha	Third Respondent
Radha Hariram	Fourth Respondent
Zwelini Lawrence Mkhize	Fifth Respondent
Dedani Daluxolo Sphelele Mkhize	Sixth Respondent
Thamizhanban Pillay	Seventh Respondent
First National Bank Ltd	Eighth Respondent
Glacier Financial Services (Pty) Ltd	Ninth Respondent
Sygnia Financial Services (Pty) Ltd	Tenth Respondent
Amods Attorneys	Eleventh Respondent
WT Graphics & Designs (Pty) Ltd	Twelfth Respondent
Suhaila Mather	Thirteenth Respondent
Strategeewhiz (Pty) Ltd	Fourteenth Respondent
Suhaila Mather Consulting (Pty) Ltd	Fifteenth Respondent

Composit Trade and Investments 02 (Pty) Ltd	Sixteenth Respondent
Bevels Communications Advertising and Digital Media (Pty) Ltd	Seventeenth Respondent
Mateta Projects (Pty) Ltd	Eighteenth Respondent
Mkokwana Events Management (Pty) Ltd	Nineteenth Respondent
Wasim Ahmed Mather	Twentieth Respondent
SP Attorneys Inc	Twenty-first Respondent
Shiraz Hoosen	Twenty-second Respondent
Saloojees Chemist CC	Twenty-third Respondent
Hasina Kathrada	Twenty-fourth Respondent
Yenziwe Sokhela	Twenty-fifth Respondent
Welcome (MDU) Mthethwa	Twenty-sixth Respondent
Makhosazana Mthethwa	Twenty-seventh Respondent
Sotobe Media (Pty) Ltd	Twenty-eighth Respondent
Royal Bhaca Projects ((Pty) Ltd	Twenty-ninth Respondent
Director General for the National Department of Health (Representing The National Department of Health for the Republic of South Africa)	Thirtieth Respondent
Khubane Patricia Ngobese	Thirty-first Respondent

JUDGMENT

Application for joinder – whether the Special Investigating Unit (SIU) makes out the case for joinder.

The test for joinder – whether the respondents have a direct and substantial interest that may be prejudicially affected by the Court's judgment in the proceedings in which the proposed respondents are sought to be joined. *Johannesburg Society of Advocates v Nthai* 2021 (2) SA 343 (SCA) at [31] applied - whether the SIU's cause of action against the proposed respondents is so patently unfounded that even if it has disclosed a course of action, it would not obtain the relief it seeks against the proposed respondents in the review application. *Mercantile Bank Ltd V Carlisle and Another* 2002 (4) SA 886 (W) at 889I-J.

Held: the SIU's allegations against the proposed respondents meet the test for joinder of the proposed respondents. If granted, the order sought against the proposed respondents cannot be carried out without prejudicially affecting them.

The facts appear in the judgment.

Mode of delivery: *this judgment was handed down electronically by circulation to the parties' legal representatives by email, uploading on Caselines and publishing on Saflii. The date and time of delivery is deemed to be 10am on Wednesday 13 April 2022.*

MODIBA J:

INTRODUCTION

- [1] The Special Investigating Unit (SIU) seeks to join All-Out Trading (Pty) Ltd (All Out Trading), Tusokuhle Farming (Pty) Ltd (Tusokuhle), Sithokozile Khalipele Mkhize (Sithokozile Mkhize), Cedar Falls Properties 34 (Pty) Ltd (Cedar Falls) and Sirela Trading (Pty) Ltd (Sirela) to the review application as the thirty second to thirty third and thirty fifth to thirty seventh respondents respectively. In the event that the joinder application is granted, the SIU also seeks the consequential

amendment of its notice of motion in the review application to give effect to the order in the joinder application.

- [2] In the review application, the SIU seeks to have two contracts the National Department of Health (NDOH) awarded to Digital Vibes reviewed and set aside for lack of compliance with the applicable constitutional, statutory and regulatory provisions. The first contract is the National Health Insurance (NHI) contract. The second is the Covid 19 media campaign contract. NDOH made payments to Digital Vibes in the amount of R150,002,607.80 comprising of R25,022,534 paid in respect of the NHI contract and R124,980,073 in respect of the Covid19 contract.
- [3] In the review application, the SIU also seeks to hold Digital Vibes, Tahera Mather (Ms. Mather), Naadhira Mitha (Ms. Mitha) Radha Hariram (Ms. Hariram) and Dr Zwelini Lawrence Mkhize (former Minister Mkhize) jointly and severally liable for the repayment of approximately R150 million NDOH paid Digital Vibes.
- [4] For convenience, I refer to this application as the joinder application. I refer to the review application as such. Where I need to jointly refer to the two contracts, I refer to them as the impugned contracts. Where I need to distinguish between them, I refer to them as the NHI contract and the Covid 19 contract respectively. I jointly refer to the respondents in the joinder application as the proposed respondents. Where I need to distinguish between the proposed respondents, I refer to them individually by their names.

- [5] In this judgment, I first outline the relevant background to the joinder application. Then, I set out the test for joinder. Then, with reference to the parties' respective contentions, I determine whether the SIU makes out a case for joinder. An order that gives effect to the findings I make in this judgment, concludes the judgment.

BACKGROUND TO THE JOINDER APPLICATION

- [6] On 17 June 2021, the SIU sought and was granted an order preserving funds held in several accounts at various financial service providers. It did so on the basis that the funds are *prima facie*, unlawful proceeds derived from the Covid 19 contract NDOH unlawfully and irregularly awarded to Digital Vibes. The Tribunal granted the order on an *ex parte* basis.
- [7] The *ex parte* order makes provision for the respondents cited in that application to apply for the reconsideration of the *ex parte* order on notice to the SIU. None of them have done so. The *ex parte* order also required the SIU to institute a review application within 30 days of the order. The SIU has complied with this requirement. It instituted the review application on 29 July 2021.
- [8] On 13 September 2021, the SIU sought on an *ex parte* basis, the joinder of Ms Khubane Patricia Ngobese (Ms Ngobese) to the review application. The order was granted, the SIU having established *prima facie* that, Ms Ngobese received an amount of R6,000 from a party related to Digital Vibes, the amount is derived from

payments Digital Vibes received from NDOH pursuant to the Covid 19 contract, the circumstances under which the payment was made evidences potential corruption in the form of gratification to induce or reward Ms Ngobese - at the time employed by NDOH as a senior administration officer - for irregularly authorizing NDOH payments to Digital Vibes.

- [9] Ms Ngobese could also apply for the reconsideration of the *ex parte* order. She has not done so. In the review application, the SIU seeks to recover the amount of R6,000 from Ms Ngobese.
- [10] On 19 October 2021, the SIU instituted the present joinder application. It seeks to join the proposed respondents to recover from them monies that allegedly flowed from NDOH through Digital Vibes. The proposed respondents are opposing the joinder application on the basis I will elaborate on shortly.
- [11] All Out Trading, Azwakele and Sithokozile Mkhize seek condonation for the late filing of their answering affidavits. The SIU does not oppose the condonation application. I am satisfied that these proposed respondents have established good cause for the condonation. It therefore stands to be granted with costs against these respondents as applicants.

THE TEST FOR JOINDER

[12] The joinder of a party is a preliminary matter to be dealt with ahead of the merits.¹

[13] The test for joinder is trite. The joinder of a party is necessary if that party has a direct and substantial interest that may be prejudicially affected by the Court's judgment in the proceedings in which the proposed respondents are sought to be joined.²

[14] All that the SIU is required to establish at this stage is the possibility of such an interest as, in most cases, such a decision could not be made until the issues between the parties, including the proposed respondents, have been fully ventilated.³

[15] When applying the above test, I am guided by the approach followed in *Carlisle*, quoted below:

*"The third party notice and annexure must be examined, as one would pleadings in an action, to ascertain whether it is excipiable in that it does not disclose a cause of action. If it is, then the joinder would be refused. If it is not excipiable, then the totality of the allegations in the affidavits must be examined to see whether the case sought to be made against the third party is so patently unfounded, notwithstanding that the pleading may pass the excipiability test, that it ought not to be allowed to proceed to a trial."*⁴

¹ *Khumalo Wilkins* 1972 (4) SA 470 (N) at 475.

² *Johannesburg Society of Advocates v Nthai* 2021 (2) SA 343 (SCA) at [31].

³ See *Nthai* at fn1.

⁴ *Mercantile Bank Ltd V Carlisle and Another* 2002 (4) SA 886 (W) at 889I-J where the court relied on *MCC Contracts (Pty) Ltd v G Coertzen and Others* 1998 (4) SA 1046 (SCA) at 1049J - 1050A

[16] Therefore, in the present application, I examine the founding and supplementary affidavits the SIU filed in the review and joinder applications to ascertain whether it discloses a cause of action against the proposed respondents. Since I find that it does, I then examine the totality of the allegations in all the affidavits filed to see whether the case the SIU seeks to make against the proposed respondents is so patently unfounded that even if it has disclosed a course of action, it would not obtain the relief it seeks against the proposed respondents in the review.

WHETHER THE SIU MAKES OUT THE CASE FOR JOINDER

[17] The SIU alleges that the proposed respondents have a direct and substantial interest in the review application. It premised its cause of action against the proposed respondents for the alleged receipt of unlawful proceeds of the Covid 19 contract in unjustified enrichment, alternatively on section 172(1)(b) of the Constitution. The SIU contends that the proposed respondents have no right to retain the proceeds of the Covid 19 contract. Hence, it seeks orders against them for the repayment of the proceeds.

[18] The SIU further contends that the monetary orders it seeks against the proposed respondents cannot be carried into effect unless the proposed respondents are joined to the review application as parties.

[19] To understand the reason why the SIU seeks the joinder of the proposed respondents, it is important to understand the SIU's case in the review application

and in the joinder application as set out in the founding and supplementary affidavits filed in support of these applications. I briefly outline it below.

[20] In November 2019, NDOH awarded the NHI contract to Digital Vibes to provide communication services in respect of the proposed NHI. The appointment is alleged to be unlawful and irregular for the reason already stated. In March 2020, NDOH extended the scope of the NHI contract to include the Covid19 media campaign. This is the contract referenced the Covid 19 contract in this judgment. The extension is also alleged to be unlawful and irregular for substantially similar reasons. It is not necessary for the purpose of the present application to delve into the grounds of review relied on by the SIU as elaborately explored in its founding papers as the proposed respondents have not set out any grounds on which they intend opposing the review and setting aside of the impugned contracts in the event that they are joined to the review application.

[21] Soon after its appointment by NDOH, Digital Vibes allegedly appointed Ms Tahera Mather and Ms Naadhira Mitha as consultants on the NHI contract. The SIU alleges that its investigation revealed that although in law Digital Vibes belongs to Ms Hariram, she allowed Ms. Mather and Ms Mitha to run the Digital Vibes business affairs in respect of the impugned contracts, thus using it as a fronting company to disguise Ms Mather and Ms Mitha's involvement in the impugned contracts.

[22] The allegations in the review application focused on the grounds of review and how the funds NDOH paid Digital Vibes in terms of the impugned contracts flowed from

Digital Vibes to Ms Mather, Ms Mitha, their families and companies associated to them, purportedly for services rendered, when no services had been rendered. The said companies include the eighteenth respondent, Mateta Projects (Pty) Ltd (Mateta Projects).

[23] Further investigations by the SIU have unearthed a further flow of funds from Mateta Projects to various members of the Mkhize family and companies associated with them. These findings are the basis for the SIU's case in the joinder application.

[24] It is important to understand the alleged matrix of relationships between the persons implicated in the review application and the proposed respondents. To this I now turn.

[25] Dr Zwelini Lawrence Mkhize was the incumbent Minister of Health when the SIU's cause of action in the review application arose, hence reference to him in this judgment as former Minister Mkhize. He is alleged to have influenced the awarding of the impugned contracts to Digital Vibes. Ms. Mather is former Minister Mkhize's long-time personal friend and former spokesperson. Ms Mitha is Ms. Mather's niece. She also has a personal relationship with former Minister Mkhize for many years, having worked with him as his personal Assistant. Ms Mather is also a personal and close friend of former Minister Mkhize's son, Dedani Mkhize. Dr May Mkhize is married to former Minister Mkhize. Sithokozile Mkhize is former Minister Mkhize's daughter-in-law. She is married to Dedani Mkhize.

- [26] Welcome Mthethwa (Mr. Mthethwa) is married to Makhosazana Mthethwa (Ms Mthethwa). Ms Mthethwa is a former employee of the African National Congress (ANC). She worked in the information and publicity department at the ANC's Luthuli House Head Quarters where she allegedly met Ms Mather in 2012.
- [27] It is also important to understand the ownership of the other entities implicated in the case the SIU makes in the review application and seeks to expand on in the joinder application.
- [28] Mr. Mthethwa is the sole director in Mateta Projects. It is common cause that Mateta Projects received payment from Digital Vibes in the amount of R10,6 million. According to Mr. Mthethwa, the payment was for certain deliverables rendered in respect of the Covid 19 contract.
- [29] Dedani Mkhize is the sole director in All Out Trading. Mr. Sokhela is the sole member in Sirela Trading. Mr. Sokhela is also a co.-director and 50% shareholder with Dedani Mkhize in Tusokuhle. Dr May Mkhize is the sole director in Cedar Falls. Cedar Falls acquired Cedar Falls farm in 2005. Sithokozile Mkhize is the sole director in Azwakele.
- [30] From the amount of R10,6 million Mateta Projects received from Digital Vibes, it paid money in a series of transactions, allegedly for the benefit of the son of Ms Tahera Mather and specified members of the family of former Minister Mkhize and their associated companies. The payments Mateta Projects made to members of

the family of former Minister Mkhize and their associated companies are common cause between the parties. They are detailed below.

[31] Between June and October 2020, Mateta Projects allegedly paid R570,000 to All Out Trading. On 27 August 2020, Mateta Projects paid R350,000 the bank account of "T Gani". Talha Gani immediately paid this amount to All Out Trading.

[32] Mateta Projects also paid R3,795,000 to Sirela Trading, referenced 'Consultation service'. From this amount, Sirela Trading paid the below amounts for the alleged benefit of Dedani Mkhize and Dr May Mkhize: R170,000 to All Out Trading and R1,888,727.84 to Ithala Bank. The latter payment was traced to have been allocated to a loan account held with Ithala Bank in respect of a loan Ithala Bank advanced to Dr May Mkhize's Cedar Falls for the acquisition of Cedar Falls farm. Hence the SIU alleges that the payment was made for the benefit of Dr May Mkhize. R586, 272.16 remains to the credit of Sirela Trading.

[33] Mateta Projects is also alleged to have paid R1 255 000 to Tusokuhle in a series of payments between 24 and 26 October 2020.

[34] On 24 November 2020, Mateta Projects paid R650,098.00 to Adluli Projects for the shop fitting of Sithokozile Mkhize's Tammy Taylor Nails Salon in Pietermaritzburg. Azwakele Trading and Projects (Pty) Ltd (Azwakele) had made certain payments to Adluli Projects. The SIU sought to claim R650,098.00 from Sithokozile Mkhize and Azwakele jointly and severally. Hence, initially, the SIU sought the joinder of

Azwakele as the thirty fourth respondent. The SIU no longer persists with Azwakele's joinder as it has become common cause that it is Sithokozile Mkhize and not Azwakele who received the payment it sought to jointly recover from Azwakele and Sithokozile Mkhize. It is from Sithokozile Mkhize that the SIU decisively seeks to recover this amount.

[35] In its notice of motion dated 19 October 2021, filed in the joinder application, amended as necessary to exclude Azwakele, the SIU seeks to recover from each of the proposed respondents these amounts.

[36] The SIU alleges that these payments constitute undue gratifications as defined in the Prevention and Combating of Corrupt Activities Act⁵ for the illegal exercise of constitutional obligations and/ or abuse of authority by former Minister Mkhize for influencing the awarding of the impugned contracts to Digital Vibes. According to the SIU, the payments would have raised suspicions if made directly by Digital Vibes to Dedani Mkhize, his wife Sithokozile Mkhize and their associated companies. The SIU further alleges that Mateta Projects' bank account was merely used to obscure the source of these payments as removed from the payments NDOH made to Digital Vibes.

[37] In respect of the benefit to Cedar Falls, the SIU alleges that the flow of funds from NDOH to Digital Vibes is further obscured by the payment Mateta Projects made to Sirela Trading, which Sirela Trading onward paid to Ithala Bank.

⁵ Act 12 of 2004.

Opposition by Sirela Trading and Tusokuhle

[38] Mr. Sokhela deposed to the answering affidavit in the joinder application on behalf of Sirela Trading and Tusokuhle. In his answering affidavit, he explains his extensive farming experience and longstanding business relationship with Dedani Mkhize which culminated in their acquisition in 2011 of Cedar Falls from Dr May Mkhize as 50% shareholders each. He also expounds on the substantial funding Sirela Trading and he made available to both Cedar Falls and Tusokuhle since Dedani Mkhize and he acquired Cedar Falls farm.

[39] On the basis of this background, Mr Sokhela contends that the payments Sirela Trading made to All Out Trading and Tusokuhle, as well as the payment Sirela Trading made to Ithala Bank were made in the ordinary course of these parties' business and that these entities are innocent victims of the alleged illicit flow of funds from NDOH to Digital Vibes. He further contends that the SIU is overzealous to try and recover from Sirela Trading and Tusokuhle as Mateta Projects has repaid the amount it received from Digital Vibes. Therefore, there is no longer any obligation on Mateta Projects to repay the money the SIU is claiming from both Mateta Projects and the companies to which the funds it derived from Digital Vibes flowed.

[40] Therefore, Mr. Sokhela further contends, the SIU's continued pursuit of Sirela Trading and Tusokuhle by way of this joinder application will result in double

payment to the SIU, to which it is not entitled in terms of the enabling legislation⁶ or section 172(1)(b) of the Constitution.

[41] Mr. Sokhela also disputes what he contends is speculation by the SIU as to the purpose of the repayment by Mateta Projects. He explains the commercial basis for the payments as set out below.

[42] Mr. Sokhela alleges that he met Mr. Mthethwa socially in 2018. Mr. Mthethwa shared with him his aspirations to own a farm. This led to Mr Sokhela leasing a farm to Mr. Mthethwa while Mr. Mthethwa put measures in place to acquire his own farm. The rental for the lease of the farm would be a vat inclusive amount of R2,300,000 for a period of twelve months. Mr. Mthethwa allegedly acquired cattle between May 2020 and December 2020 from various suppliers including Sirela Trading. The cattle grazed on Mr. Sokhela's farm.

[43] As a result, during 2020, Mthethwa paid R3,795,000 to Sirela Trading for livestock and farming costs. This is the amount in respect of which the SIU implicates Sirela Trading in the alleged illicit flow of funds from Mateta Projects, derived from the payment Digital Vibes received from NDOH.

[44] During 2021, Mr. Mthethwa allegedly approached Mr. Sokhela for assistance to resolve the financial problems he was facing as a result of the allegations against him in the review application. Mr. Sokhela agreed to purchase all of Mr. Mthethwa's

⁶ The Special Investigating Units and Special Tribunals Act 74 of 1996.

livestock and refund the amount he had paid in respect of the lease of the farm. Between June and August 2020, Mr. Sokhela paid R8,652,000 to Mr. Mthethwa in this regard. Mr. Mthethwa also asked Mr. Sokhela for a loan to recover the shortfall of the amount he intended paying to the SIU. Mr. Mthethwa undertook to repay Mr. Sokhela when he is refunded for the work he has done in terms of the Covid 19 contract.

[45] Mr. Sokhela denies participating in the Covid 19 contract and receiving any payment from Digital Vibes, Mr. Mthethwa and his company Mateta Projects unlawfully. He contends that he has fully accounted for and repaid the amount of R3,795,000 received from Mateta Projects which was for a business transaction completely unrelated to Digital Vibes.

[46] Mr. Sokhela further alleges that in 2011, Dedani Mkhize and he acquired Cedar Falls farm, owned by Cedar Falls. Pursuant to the acquisition, they reached an agreement with Dr May Mkhize, with Ithala Bank's concurrence, that the loan Dr May Mkhize took with Ithala Bank to acquire Cedar Falls farm would remain held by Cedar Falls. Similarly, the following securities Dr May Mkhize put in place to secure the loan would remain in place notwithstanding the acquisition of Cedar Falls farm by Mr. Sokhela and Dedani Mkhize: (a) the bond registered against Cedar Falls farm in Ithala Bank's favour, (b) Dr May Mkhize's surety and (c) former Minister Mkhize's insurance policy, ceded to Ithala Bank.

[47] According to Mr. Sokhela, between 2011 and 2020, Sirela Trading paid approximately R10,800,000 towards Cedar Falls farm. Dedani Mkhize and he subsequently established Tusokuhle in 2019. Tusokuhle now houses Dedani Mkhize and Tusokuhle's shares in Cedar Falls. Therefore, Tusokuhle owns Cedar Falls farm. Between 2019 and 2020, Mr. Sokhela paid R1,220,000 from Sirela Trading to Tusokuhle towards Cedar Falls farm's operating costs.

[48] According to the SIU, Mateta Projects made the repayment to it to avoid further enquiry into the flow of funds to the family of former Minister Mkhize and the companies associated with them. To this allegation Mr. Sokhela contends that even if the money Mateta Projects repaid derives from other sources that constitute the R150 million, the payments Mateta Projects received from such sources are all subject to the principle of commixtio as they have not been demonstrated to have been held in any identifiable fund.

Opposition by All Out Trading and Sithokozile Mkhize

[49] Mr. Dedani Mkhize and Ms. Sithokozile Mkhize not only confirm Mr. Sokhela's version, they have also aligned themselves to the basis on which Mr. Sokhela resists the joinder of Sirela Trading and Tusokuhle.

Opposition by Cedar Falls

[50] Similarly, in the answering affidavit filed to resist the joinder of Cedar Falls, Dr May Mkhize also confirms the version set out by Mr. Sokhela in so far as it relates to Cedar Falls and her. She too contends that the amount Sirela Trading paid to Ithala

Bank was paid in the ordinary course of business dealings between Cedar Falls, Mr. Sokhela, Tusokuhle and she. She further contends that, to the extent the money is tainted with turpitude, Mateta Projects has repaid it.

Analysis and findings

[51] Whether (a) the repayment by Mateta Projects absolves the proposed respondents from liability, (b) the payments were made in the ordinary course of business, and/or (c) the proposed respondents are innocent of the flow of funds between NDOH and Digital Vibes stand to be determined in the review application once the issues between the parties are fully ventilated. The SIU has set out the basis on which it will genuinely dispute these grounds of opposition.

[52] The proposed respondents have presented inconsistent versions regarding the basis for Mateta Projects' repayment to the SIU. Although the proposed respondents contend that Mr. Mthethwa has repaid the amount Mateta Projects received from Digital Vibes, Mr. Mthethwa has not accepted liability for the amount Mateta Projects received from Digital Vibes. Mr. Mthethwa is adamant that Mateta Projects received the amount for the work he has done on the Covid 19 contract and has reserved the right to claim fees due for the alleged work. This Mr. Sokhela confirms in his answering affidavit filed in the joinder application. There is no basis at this stage to conclude, as contended by the proposed respondents, that Mr. Mthethwa has repaid to the SIU the amount Mateta Projects received from Digital Vibes.

[53] Given that Sirela Trading only received R3,795,000 from Mateta Projects, it does not make business sense why Mr. Sokhela advanced to Mateta Projects over R7,7 million more than Mateta Projects received from Sirela Trading. The purported refund of the rental in respect of lease of Mr. Sokhela's farm and grazing fees, given that Mr. Mthethwa has had benefit of the lease for almost two years and that his cattle have grazed on Mr. Sokhela's farm also does not make business sense.

[54] With reference to documents filed by Sirela Trading and Tusokuhle in response to the SIU's request for discovery in terms of Uniform Rule 35(12), the SIU intends disputing Mr. Sokhela's version that Dedani Mkhize and he acquired Cedar Falls farm from Dr May Mkhize in 2011 and that Sirela Trading made the payment to Ithala Bank in the ordinary course of a long standing business relationship with Dedani Mkhize consequent upon their acquisition of Cedar Falls farm.

[55] Bearing in mind that:

55.1 the loss to NDOH which the SIU seeks to recover in the review application is R150 million and not limited to the R10,6 million Mateta Projects received from Digital Vibes;

55.2 Sirela Trading is the source of the funds Mateta Projects repaid to the SIU, the basis of which, *prima facie*, is devoid of logic and business sense;

55.3 none of the other proposed respondents have repaid to Mateta Projects the amounts they received from it;

- the SIU is entitled to recover from the proposed respondents the amounts prayed for in the proposed amendment to the notice of motion.

[56] If Mr. Sokhela's version is rejected and the SIU's version is accepted, the SIU may on the authority in *Perry N.O.*,⁷ succeed in establishing one of the basis on which it seeks the impugned contracts to be reviewed and set aside, and on which it seeks to recover monies from the proposed respondents, namely that the relevant payments constitute gratification for the illegal exercise of constitutional obligations and/ or abuse of authority by former Minister Mkhize. In the alternative, the SIU may for the same reason succeed in obtaining just and equitable relief against the respondents in terms of section 172(1) of the Constitution.

[57] It has become trite that in respect of the section 172(1) of the Constitution, courts enjoy a wide discretion to grant just and equitable relief, bound only by considerations of justice and equity. If the proposed respondents are of the view that it is not just and equitable under the prevailing circumstances for the Tribunal to order the repayment sought by the SIU, they will have an opportunity to advance this argument in the review once all the issues between the parties have been fully ventilated.

[58] The SIU need not establish its case on a balance of probabilities at this stage. The criticism levelled against the principles in *Perry N.O.*, as contended to have been

⁷ *First National Bank v Perry N.O.* [2001] 3 All SA 33 (A) at [25].

applied in *Trustees, Estate Whitehead*⁸ stand to be determined in the review application.

[59] Having regard to the causes of action the SIU relies on, not being *rei vindicato*, the *commixtio* defence is unsustainable.

[60] Therefore, the SIU's allegations against the proposed respondents meet the test for joinder. If granted, the order sought against the proposed respondents cannot be carried out without prejudicially affecting them.

[61] In the premises, the following order is made:

ORDER

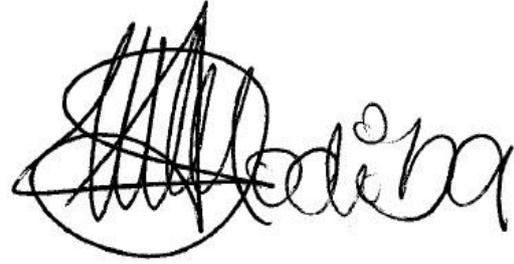
1. Condonation for the late filing of the answering affidavit by the thirty second, thirty fourth and thirty fifth respondents is granted with costs against these respondents.
2. In terms of Rule 28 of the Tribunal Rules, as read with Rule 10 of the Uniform Rules of Court, the proposed respondents (save for the thirty-fourth respondent) are joined as the thirty-second, thirty-third, thirty-fifth, thirty-sixth and thirty-seventh respondents in the review application dated 29 July 2021 under case number KN 03/2021, as supplemented by the affidavit dated 1 October 2021 (the review application).

⁸ *Trustees, Estate Whitehead v Dumas and Another* 2013 (3) SA 331 (SCA) at 337E-G

3. The Applicant is granted leave to amend the notice of motion in the review application by adding additional rows to the table in Prayer 6 in the manner below (and that the headings in the main application reflect the proposed respondents as the thirty-second to thirty-seventh respondents in the review application):

32 nd Respondent	All Out Trading (Pty) Ltd	R1 090 000.00
33 rd Respondent	Tusokuhle Farming (Pty) Ltd	R1 255 000.00
35 th Respondent	Ms. Sithokozile Khalipele Mkhize	R650 098.00
36 th Respondent	Cedar Falls Properties (Pty) Ltd	R1 888 727.84
37 th Respondent	Sirela Trading (Pty) Ltd	R586,272.16

4. The applicant shall file the amended pages of the notice of motion in the review application by Thursday 21 April 2022.
5. The proposed respondents are ordered to pay costs of the applicant jointly and severally, the one paying the other to be absolved.
6. The legal costs payable in terms of this order shall include the costs of three counsel where so employed.



JUDGE L. T. MODIBA
MEMBER OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the applicants: Adv. B. Roux SC assisted by Adv. I. Currie and J. Singh

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

Counsel for the 32nd, 34th and 35th respondent: Adv. J.E. Howse SC assisted by Adv. W.A.J. Nicholson

Attorney for the 32nd, 34th and 35th respondents: Mr J. Wills, J Wills & Associates

Counsel for the 33rd & 37th respondents: Adv. G.D. Harpur SC

Attorney for the 33rd & 37th respondents: Mr. M.E. Biyela, Biyela Attorneys

Counsel for the 36th respondent: Adv. C.J Pammenter SC

Attorneys for the 36th respondent: Mr. T. Mbili, T.L. Mbili Attorneys

Date of hearing: 08 March 2022