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)
HELD IN JOHANNESBURG

CASE NO.: **GP/20/2020**

In the matter between:

SPECIAL INVESTIGATING UNIT	Applicant
and	
JACOB BASIL HLATSHWAYO	First Respondent
THE GOVERNMENT EMPLOYEES PENSION FUND	Second Respondent
THE DEPARTMENT OF ARGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	Third Respondent
THE DIRECTOR GENERAL OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	Fourth Respondent

---

JUDGMENT

Mode of delivery: *this judgment is handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 12 pm on 15 June 2021.*

MODIBA J:

INTRODUCTION

[1] In this judgment, the Special Tribunal determines three applications.

[2] The first is an application brought by the Special Investigating Unit ("SIU") to interdict the second respondent, the Government Employees Pension Fund ("the GEPF") from paying the first respondent's, Basil Jacob Hlatshwayo ("Hlatshwayo") pension benefits, pending the determination of an action ("the interdict application") as well as other ancillary relief. Hlatshwayo filed a notice of intention to oppose. He is in default of filing an answering affidavit.

[3] The second is an application for a postponement ("the postponement application") brought by Hlatshwayo to enable him to file a replying affidavit in an application to compel the SIU, the third respondent, the Department of Agriculture, Rural Development and Land Reform ("the Department") and the fourth respondent, the Department's Director General ("the Director General") to discover certain documents in terms of sub rule 17(4) of the Rules of the Special Tribunal read with sub rule 35(12) and 35(14) of the Uniform Rules of Court ("the application to compel discovery"). The SIU opposes the postponement application.

[4] The third is the aforementioned application to compel discovery, also referred to in this judgment as the interlocutory application. The SIU opposes this application.

[5] For brevity, unless the context suggests otherwise, reference to the Department includes the Director General. The Department has not entered the fray in all three applications.

[6] It is apposite to deal with the postponement application first. Given the interlocutory nature of the application to compel discovery, it is pertinent that it is considered before the interdict application. Preceding all these, the background to the applications is set out.

BACKGROUND

[7] Until 12 October 2020, Hlatshwayo was employed by the Department as the Chief Financial Officer. During March 2020, in the wake of the Covid-19 National State of Disaster, Hlatshwayo was allegedly involved in the procurement of 400,000 surgical masks for the Department from a company called BlackDot (Pty) Ltd ("BlackDot") for an amount of R11,500,000. The SIU's cause of action arises from that procurement.

[8] In the action referred to in paragraph 1 of this judgment ("the action") the SIU seeks the contract awarded to BlackDot to be reviewed and set aside for lack of compliance with the applicable regulatory requirements. It seeks to recover from BlackDot and/ or Hlatshwayo the loss it has incurred as a result of the alleged irregular procurement, as well as other ancillary relief.

[9] On 17 December 2020, before it issued summons in the action, the SIU sought and was granted a rule *nisi* on an *ex parte* basis, returnable on 1 February 2021, preserving Hlatshwayo's pension benefits held with the GEPF, pending an action the SIU would institute within 30 days of the order. Regrettably for the SIU, it failed to comply with this condition, resulting in the rule *nisi* lapsing.

[10] When the rule *nisi* lapsed, the parties had fully ventilated the issues in the papers. Hlatshwayo had filed an answering affidavit opposing the confirmation of the rule *nisi*. The SIU had filed a reply.

[11] The SIU instituted the action on 4 March 2021 when it served summons on Hlatshwayo. It launched a new interdict application on 24 March 2021. This is the application referenced in paragraph 2 above. In the new interdict application, the SIU made no provision for a *rule nisi*. It seeks an interim interdict on notice to Hlatshwayo.

[12] In the notice of motion filed in the interdict application, provision is made for Hlatshwayo to file his answering affidavit on 31 March 2021. The SIU would file its reply on 05 April 2021. The interdict application was enrolled for hearing on 14 April 2021. On that date, Hlatshwayo had not filed an answering affidavit. He sought a postponement to obtain certain documents from the Department in order to answer to the founding affidavit. The Special Tribunal granted an order with the parties' consent. The order incorporates an order preserving Hlatshwayo's pension benefits pending the determination of the interdict application. It also makes provision for dates for filing further papers. Hlatshwayo would file his answering affidavit by 30 April 2021. The SIU would file its reply by 5 May 2021. The interdict application would be heard on 24 May 2021.

POSTPONEMENT APPLICATION

[13] By 24 May 2021, Hlatshwayo had still not filed his answering affidavit in the interdict application. His counsel sought a postponement informally from the bar to allow Hlatshwayo to reply to the SIU's answering affidavit in the application to compel discovery. Hlatshwayo's counsel submitted that Hlatshwayo could not file his replying affidavit in the application to compel discovery ahead of the hearing because the SIU only filed its answering affidavit on 20 May 2020.

[14] Granting the postponement application would effectively postpone the interdict application.

[15] It is trite that a party seeking a postponement seeks an indulgence and must show cause for interference with the other parties' procedural right to proceed and the general interest of justice in having the matter finalised. It lies entirely within the Special Tribunal's discretion to grant the indulgence sought. A postponement is not sought as a matter of right. The reasons for the party's unpreparedness for the hearing ought to be fully explained and should not be due to delaying tactics.[1]

[16] For the reasons that follow, Hlatshwayo has failed to show cause for the postponement.

16.1 This is the second application for a postponement Hlatshwayo brings, essentially for the same purpose. The first is referenced in paragraph 12 above.

16.2 Hlatshwayo's conduct in both the application to compel and the interdict application has been extremely dilatory.

16.3 No reasons are advanced as to why Hlatshwayo's replying affidavit in the application to compel discovery was not prepared and delivered at the very latest on the morning of the hearing.

16.4 The reasons for the need to file a replying affidavit are vaguely stated orally from the bar. In the answering affidavit, the SIU mainly raises legal points as a basis for opposing the application to compel discovery. Legal points hardly call for the filing of a replying affidavit as they stand to be dealt with by way of legal argument.

16.5 The other issues that the SIU raises – that Hlatshwayo failed to comply with the Special Tribunal's order by not filing his answering affidavit by 30 April 2021 and has not applied for condonation - hardly require a reply as they are common cause.

16.6 The last issue that the SIU raises, that it is not in possession of the required documents, also barely calls for the filing of a replying affidavit. Hlatshwayo was advised to this effect in an affidavit deposed to by the SIU investigator Rexon Masinga ("Masinga"), served on Hlatshwayo on 6 May 2021 in response to Hlatshwayo's request for discovery. Hlatshwayo fails to disclose in his founding affidavit filed in the application to compel discovery how he intends taking this issue further in his replying affidavit;

16.7 As will be apparent later in the judgment, the application to compel discovery is ill-fated. Therefore, if granted, the postponement application will only have a dilatory effect;

16.8 The fact that Hlatshwayo's pension fund is provisionally preserved and that the SIU stands to suffer no prejudice if the interdict application is postponed, does not accord Hlatshwayo the right to a postponement. It cannot be in the interest of justice that an application for interim relief pending an action remains pending for as long as the interdict application has been pending.

16.9 The prejudice that Hlatshwayo stands to suffer if he is not allowed time to file a replying affidavit is not demonstrated.

[17] For the aforementioned reasons, Hlatshwayo's second request for a postponement stands to be dismissed.

APPLICATION TO COMPEL DISCOVERY

[18] The SIU opposes the application for the following reasons:

18.1 The deponent to the founding affidavit lacks *locus standi*;

18.2 Hlatshwayo is out of time in filing his answering affidavit;

18.3 The SIU is not in possession of the requested documents;

18.4 Hlatshwayo has failed to seek a directive from the Special Tribunal for the Rules relating to discovery to be declared applicable in the interdict application in terms of sub rule 35(13) of the Uniform Rules of Court.

18.5 Sub rule 35(12) is only competent where the requested documents are referred to in the SIU's founding affidavit. The requested documents were not referred to in the SIU's founding affidavit.

18.6 Rule 35(14) is only competent where the requested documents are essential and not merely useful to Hlatshwayo. He has not taken the Special Tribunal into his confidence regarding why he requires the documents to file his answering affidavit.

18.7 Without explanation, Hlatshwayo requires documents beyond the procurement period and his tenure with the Department. The procurement occurred in March 2020. Hlatshwayo was dismissed on 12 October 2020. Yet, he requires documents up to April 2021.

Hlatshwayo's Attorney's Locus Standi

[19] The applicant's *locus standi* ground of opposition lacks merit. It is trite that the deponent to an affidavit does not require the authority of a cited party to depose to an affidavit. It is sufficient for the deponent to have personal knowledge of the facts deposed to.[2]

[20] Hlatshwayo's attorney clearly states in paragraph 3 of the founding affidavit that he is authorized to initiate the application to compel. A challenge to the authority to

launch legal proceedings on behalf of another is brought following the procedure set out in Rule 7 of the Uniform Rules of Court. This procedure has not been followed.

[21] Therefore, this ground of opposition stands to fail.

Hlatshwayo's conduct

[22] In this section of the judgment, in addition to Hlatshwayo's generally dilatory conduct in seeking discovery, failure by Hlatshwayo to seek condonation for the late filing of his answering affidavit in the interdict application, and the fact that he seeks to compel the discovery of documents that are not in the SIU's possession, is dealt with.

[23] The Special Tribunal takes a very dim view of Hlatshwayo's dilatory conduct in calling for the discovery of the requested documents for the reasons that follow.

[24] Before the rule *nisi* lapsed, Hlatshwayo filed a comprehensive answering affidavit without reference to the documents he now seeks discovered.

[25] The first time any mention is made of the requested documents is in an application for a postponement served and filed a few minutes before the hearing on 14 April 2021. There, he stated that he personally addressed an undated letter to the Acting Director General of the Department – which he attached to the founding affidavit - requesting certain documents. He alleges that the Department ignored the request. It begs the question why Hlatshwayo would personally address the request to the Department in the course of legal proceedings when he is represented by an attorney, junior counsel and at that stage, senior counsel. His

attorney only addressed a written request to the Department in a letter dated 15 April 2021.

[26] Hlatshwayo did not file a condonation application for the late filing of his answering affidavit. The Special Tribunal greatly indulged him on 14 April 2020 by urging the parties to agree to dates for the filing of further papers for two reasons:

26.1 Hearing the application on an unopposed basis on that day would have been highly prejudicial to Hlatshwayo as his senior counsel failed to appear under circumstances where no fault could be attributed to Hlatshwayo;

26.2 Hlatshwayo tendered the provisional preservation order referenced above. Therefore, the SIU stood to suffer no prejudice, if Hlatshwayo was granted an indulgence to file an answering affidavit late.

[27] The time frame by which Hlatshwayo had to file his answering affidavit was not imposed by the Special Tribunal. It was agreed between the parties under circumstances where, on his own version, the Department had ignored his request for the documents he contends he requires to compile his answering affidavit.

[28] His attorney allowed another week to lapse prior to resorting to formal mechanism for requesting the documents. He served a discovery notice on the SIU on 20 April 2021 and on the Department on 21 April 2021. On 26 April 2021, the Department replied to his request by providing some of the requested documents. On 6 May 2021, the SIU filed the affidavit deposed to by Masinga, referenced above. Hlatshwayo's attorney waited almost another week before instituting the application to compel discovery. It is dated 12 May 2021. It is not clear when it was

served. It was only filed on 20 May 2021 when the SIU filed its answering affidavit in the application to compel.

[29] In the application to compel discovery, Hlatshwayo seeks an order in terms of which the SIU and the Department are directed to deliver the requested documents within 10 days of the order. He flagrantly made provision for the *dies* that expire after the date reserved for hearing the interdict application under circumstances where he has not filed a condonation application for the late filing of his answering affidavit. By so doing, he impliedly attempted to impose a postponement of the interdict application.

[30] He failed to set the application to compel discovery down for hearing notwithstanding that the interdict application is under judicial case management and the presiding member of the Special Tribunal is always at the disposal of the parties to issue directives and hear interlocutory applications to unlock impediments to matters becoming ripe for hearing, to ensure that matters are disposed of expeditiously.

[31] Rather, Hlatshwayo waited until the date set for the hearing of the interdict application to argue the application to compel discovery.

[32] The fact that the SIU only filed its answering affidavit on 20 May 2021 is of no moment because:

32.1 The SIU filed Masinga's affidavit on 6 May 2020. Therefore, Hlatshwayo knew the SIU's position on the requested documents then. It is unclear why he is compelling the SIU to discover documents it does not have;

32.2 Interlocutory applications are normally based on common cause issues and turn on legal argument, hence Uniform Rule 6(11) provides that they are brought on notice, supported by such affidavits as the circumstances may require; but more importantly, they are set down at a time assigned by the Registrar or as directed by the presiding Judge.

[33] Hlatshwayo did not have to wait for any of the respondents to file an answering affidavit to set the application to compel discovery down for hearing. That he failed to expeditiously set the application down for hearing is consistent with his dilatory conduct dealt with above.

[34] Even more problematic for Hlatshwayo is the ill-fated nature of his application to compel discovery.

The merits

[35] As against the SIU, the application to compel is doomed to fail on one ultimate ground - the SIU is not in possession of the requested documents.[3]

[36] Failure by the Department to oppose the application does not present a walk in the park for Hlatshwayo. He must meet the requirements for discovery and persuade the court to exercise its discretion in his favour by allowing discovery. For the reasons that follow, Hlatshwayo fails in this regards.

Legal requirements regulating discovery

[37] The legal requirements outlined below provide guidance in an application of this nature.

[38] Discovery is a procedure through which parties call on each other to disclose documentary or recorded evidence at their disposal and relevant to the triable issues set out in the pleadings, to enable the parties to determine the factual issues that arise in a matter. The discovered evidence is also used in the leading and cross-examination of witnesses at the trial.[4]

[39] Discovery is regulated by Rule 17 of the Rules of the Special Tribunal. In the Uniform Rules of Court, discovery is regulated by Rule 35. The Rules of the Special Tribunal do not make provision for the procedures regulated in sub rule 35(12)[5] and (14)[6] of the Uniform Rules of Court. Sub rule 17(4) of the Rules of the Special Tribunal renders Rule 35 of the Uniform Rules of Court applicable to Special Tribunal proceedings *mutatis mutandis*. It is for that reason that Hlatshwayo relies on sub rule 17(4) read with sub rules 35(12) and (14);

[40] As a general rule, discovery is not part of the procedure for applications for the simple reason that in applications, disputes are determined on the basis of the affidavits filed by the parties. It is in the affidavits that triable issues and the evidence to sustain those issues are set out, supported by such annexures as are necessary to prove the averments made in the affidavits.

[41] In trial proceedings, triable issues are set out in the pleadings. The evidence at the disposal of a party is disclosed by way of discovery and adduced during the

trial. The key issue for the discovery and admissibility of evidence is relevance. Relevance is determined on the basis of the issues as defined in the pleadings. It is therefore logical that the right to discovery generally arises after pleadings have closed.

[42] The Uniform Rules of Court allow the following exceptions to the general rules referenced in paragraphs 38,40 and 41 above:

42.1 sub rule 35(13) opens the door for discovery to be permitted in applications as directed by the court;

42.2 sub rules 35(12) and (14) open the door for discovery to occur prior to close of pleadings, only in the limited circumstances dealt with below;

42.3 In *Hoerskool Fochville*[7], the Supreme Court of Appeal per Ponnan JA expressed a reservation as to whether an application to compel discovery should be approached on the basis of the onus that rests upon an applicant to establish his case. The following extracts from this decision is worth quoting:

> *"[18] In my view, the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.*

[43] The following issues arise from Hlatshwayo's application to compel discovery:

43.1 whether Hlatshwayo ought to have sought leave from the Special Tribunal prior to filing his notice in terms of sub rules 35(12) and (14);

43.2 whether Hlatshwayo's request meets the requirements in sub rules 35(12) and (14);

43.3 whether, when balancing the parties' interests, the Special Tribunal ought to exercise its discretion in Hlatshwayo's favour.

Whether Hlatshwayo ought to have sought leave from the Special Tribunal prior to filing his notice in terms of sub rules 35(12) and (14)

[44] Both the Department and the SIU responded to Hlatshwayo's request for discovery without questioning his right to seek the Special Tribunal's directive in terms of sub rule 35(13). The SIU raised the issue in its answering affidavit. It was contended on behalf of Hlatshwayo that sub rule 35(13) does not envisage that a directive should be sought by way of an application. It may be granted in these proceedings.

[45] Notably, Hlatshwayo did not pray for the directive in the notice of motion.

[46] Sub rule 35(13) provides as follows:

"The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications."

[47] The right of litigants to general discovery is provided for in sub rule 35(1). Ordinarily, this sub rule only applies in action proceedings.

[48] Sub rule 35(13) renders the discovery procedure applicable to applications when and to the extent ordered by the court. What the Rules envisaged here is an exception to the prohibition against discovery in application proceedings.

[49] Properly construed with reference to the language used in Rule 35, its purpose and the context, sub rule 35(13) does not apply when a party seeks discovery in terms of sub rule 35(12). An interpretation that it does apply is incongruous with the purpose of the application procedure where the triable issues that arise between the parties as well as the evidence relied on by the parties to sustain the issues that arise is set out in an affidavit supported by annexures. Ordinarily, reference to a document in an affidavit automatically entitles an opponent to the production of the document. There is nothing for the court to regulate by way of a directive in such a scenario, unless, as was the case in *Hoerskool Fochville*, there is a refusal to comply with a sub rule 35(12) notice and the requester resorts to compelling production of the requested documents by way of an application.

[50] Therefore, this Special Tribunal finds that, to the extent that he relies on sub rule 35(12), Hlatshwayo was not required to seek the Special Tribunal's directive in terms of sub rule 35(13).

[51] For the reasons articulated later in this judgment, this interpretation cannot be extrapolated to sub rule 35(14).

Whether Hlatshwayo's request meets the requirements for discovery in terms of sub rule 35(12)

[52] Hlatshwayo contends that he requires the outstanding documents that are referenced in the founding affidavit and/or relevant to the anticipated issues in the principal proceedings. The requested documents were not referred to in the SIU's founding affidavit; a requirement for a right to discovery in terms of sub rule 35(12). Relevance is not a requirement under this sub rule.

[53] Therefore, Hlatshwayo's request for discovery falls outside the scope of sub rule 35(12).

Whether Hlatshwayo's request meets the requirements for discovery in terms of sub rule 35(14)

[54] The following key issues arise from this sub rule:

54.1 there is no reference to application or affidavit in the wording used in the sub rule. The sub rule unequivocally only applies in actions;

54.2 the sub rule allows discovery prior to close of pleadings;

54.3 the overriding requirement is the relevance of the required documents or to an issue or a reasonably anticipated issue in the action.

[55] Since applications are excluded from the scope of this sub rule, where a party seeks to use the sub rule in an application, such a party would have to seek a directive in terms of sub rule 35(13) for the following reasons:

55.1 it would be absurd for the Uniform Rules to allow an exception in respect of general discovery under sub rule 35(1) and not allow it in terms of other sub rules relating to discovery where the sub rule, such as is the case with sub rule 35(14), only applies in actions.

55.2 leaving it open to the party seeking discovery to determine that the documents it seeks are relevant or may be relevant to an anticipated issue renders this sub rule open to the kind of abuse warned against in *Owners of the MV URGUP*[8] and *STT Sales*[9], specifically in applications where discovery is not permitted without the leave of the court.

[56] Rule 35(13) provides the necessary safeguard to prevent an abuse of sub rule 35(14) in applications. Hlatshwayo is not entitled to use sub rule 35(14) in an application without the Special Tribunal's leave. On the authority in *STT Sales*, there are no exceptional circumstances that warrant the extension of sub rule 35(14) in the interdict application.

[57] Further, Hlatshwayo has not established the relevance of the requested documents as required in sub rule 35(14).[10] He vaguely states that the documents are relevant to anticipated issues without stating what the anticipated issues are.

[58] Hlatshwayo requires the following documents from the Department:

58.1 all the minutes of the Departmental Circular 30 Steering Committee Meetings held between 1 March 2020 and 31 March 2021;

58.2 all documents, memoranda and/ or directives which established various departmental Task Teams for the period between 1 March 2020 and 31 March 2021;

58.3 all the minutes of the various departmental Task Teams for the period between 1 March 2020 and 31 March 2021;

58.4 the terms of reference of the various departmental Task Teams for the period between 1 March 2020 and 31 March 2021;

58.5 all documents, memoranda and/ or directives of the Logistics Task Team for the period between 1 March 2020 and 31 March 2021;

58.6 all presentations made to the Minister of Agriculture, Land Reform and Rural Development in respect of the National State of Disaster for the period between 1 March 2020 and 31 March 2021 and the minutes of meetings where the presentations were made;

58.7 email communications and memoranda the SIU exchanged with the Chief Director: Supply Chain Management in respect of the procurement of hygiene products for the period 1 March 2020 and 31 March 2021;

58.8 all documents relating to the expenditure of R20,000,00 which was appropriated for the procurement of hygiene products, including but not limited to the Procurement Deviation Report, relating to the procurement of disposal masks, cloth masks and soaps for the period between 1 March 2020 and 31 March 2021;

58.9 copies of all management letters and responses to the Auditor General South Africa in respect of the audit of farmers' relief since the National State of Disaster was declared until 28 April 2021;

58.10 all "in year reports (full) and returnable schedules" to the National Treasury in respect of the procurement and expenditure relating to the period of the National Disaster.

[59] An assessment of the SIU *prima facie* case against Hlatshwayo is that he allegedly flouted the applicable supply chain management regulatory requirements when he appointed BlackDot, in that:

59.1 he exceeded the delegations of authority in terms of which he is only limited to contracts with a monetary value of R500,000;

59.2 contrary to the prescribed procedure, he designated himself as the contact person for the bid. Consequently, the bids were emailed directly to him;

59.3 he evaluated and approved the bids, again contrary to the prescribed procedure;

59.4 he failed to contract with a contractor that it listed on the transversal contract list;

59.5 he accepted a bid price higher than that on the transversal contract list;

59.6 the specifications for the facial masks were not determined by the Department of Health;

[60] The above allegations relate to Hlatshwayo's direct role in the procurement. Hlatshwayo has failed to explain why he is unable to answer to the allegations. He has also not stated how the required documents will assist him to mount his opposition in the interdict application.

[61] He filed a detailed plea in the action without reference to the required documents.

Whether the Special Tribunal's Discretion should be exercised in favour of Hlatshwayo

[62] Hlatshwayo has not advanced persuasive reasons why the Special Tribunal's discretion should be exercised in his favour. This Special Tribunal is mindful of the prejudice that an individual litigating against the State faces when he is not able to access information that is in the possession of the State, which he requires to conduct his defence. Hlatshwayo is entitled to general discovery in the pending action. For the reasons that have already been stated, the prejudice that Hlatshwayo stands to suffer if discovery is disallowed under the current

circumstances is not demonstrated. To allow discovery under these circumstances would condone what appears to be flagrant abuse of the discovery procedure.

[63] Hlatshwayo's dilatory conduct is prejudicial to the public interest in the expeditious disposal of civil litigation for the recovery of losses arising from acquisitive acts.

[64] In the premises, the application to compel discovery stands to be dismissed.

THE INTERDICT APPLICATION

[65] It is trite that to succeed in this application, the SIU ought to establish:

65.1 a *prima facie* case against Hlatshwayo or put differently, reasonable prospects of success in the action;

65.2 a reasonable apprehension of harm if the interdict is not granted;

65.3 that the balance of convenience supports the granting of the interdict;

65.4 the absence of an alternative remedy.[11]

[66] The approach to this test is described in *Webster*[12] as follows:

> *"In an application for an interdict, the applicant's right need not be shown on a balance of probabilities; it is sufficient if such a right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts set out by the respondent which the applicant cannot dispute and consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondents should then be considered, and if serious doubt is thrown upon the case of the applicant he should not succeed.*

> *"In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to the relief is not shown, the court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted, subject, if possible, to conditions which will protect the respondent."*

[67] Counsel for Hlatshwayo argued the application on the SIU papers. To the extent that he relied on factual averments made from the bar, such averments are disregarded. It is trite that in applications, this is not how factual averments are advanced for adjudication.

[68] Counsel for Hlatshwayo contended that when regard is had to Hlatshwayo's plea, the SIU would not succeed in the action. Therefore, the interdict should not be granted. He urged the Special Tribunal to have regard to Hlatshwayo's plea.

[69] He further contended that:

69.1 the SIU has no prospects of success in the action because a completely different case is pleaded in the summons;

69.2 no relief is sought against Hlatshwayo in the action.

[70] The SIU's case against Hlatshwayo as set out in paragraphs 17 to 29 of the particulars of claim mirrors the allegations made against him in the interdict application in material respects.

[71] In the action, an order declaring that the agreement concluded between the Department and BlackDot is unlawful, invalid and of no force or effect as well as

an order in terms of which BlackDot is ordered to pay the Department R11,500,000 is sought.

[72] It is trite that in pleadings, a distinction is drawn between the particularity of the pleading and the substance of the entire cause of action.[13] This is why, to determine a cause of action, a pleading is read as a whole and not in isolated parts. In this case, specific relief against Hlatshwayo is clearly omitted from the prayer. The relief sought against Hlatshwayo appears in paragraph 34 of the particulars of claim. There, the plaintiffs state as follows:

> *"34. The first defendant's* (Hlatshwayo) *pension interest should therefore be declared forfeit to the State in order to allow the State and the second plaintiff to recover compensation from the first defendant, to the extent that it is unable to recover any funds from the fourth defendant* (BlackDot)*."* (Emphasis added)

[73] Paragraph 34 is an unequivocal order sought against Hlatshwayo in the event that BlackDot is unable to satisfy the judgment debt. Therefore, the contention that no relief is sought against Hlatshwayo is incorrect.

[74] The jurisdiction point raised in the plea is raised belatedly. Hlatshwayo has accepted the jurisdiction of the Special Tribunal by subjecting himself to it in the interdict application. Therefore, the jurisdiction point as raised in the plea has no bearing on this application. Be that as it may, it is paradoxical that the Special Tribunal would have jurisdiction in the interdict application based on the same cause of action as the action but, lack it in the action.

[75] Having read and considered the papers filed in the interdict application and in the action, this Special Tribunal is satisfied that the SIU has made out a case for an order as prayed for in the notice of motion for the reasons that follow.

[76] The allegations levelled against Hlatshwayo are referenced in paragraph 59 above. These present a *prima facie* case against Hlatshwayo. He has not put up facts to contradict these allegations or to explain how the interdict may prejudice him. Having regard to inherent probabilities, the SIU has good prospects of success in the action. This Special Tribunal is satisfied that the SIU meets the prescribed threshold for an interim interdict to be granted.

[77] The SIU has a well-grounded apprehension of harm. Section 217 of the Constitution requires that goods are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. The supply chain regulations relied upon by the SIU establish such a system. In *Tasima*[14]*,* the Constitutional Court observed that section 217 seeks to protect scarce public resources. The Constitutional Court went further to say, once those charged with the responsibility to procure public goods start operating outside the ambit of this section and the procurement system established pursuant to the section, corruption thrives. In *casu,* while the SIU does not allege that the tender is tainted with corruption, the allegations of irregularities it makes, even in the absence of corruption, if found to have occurred, may manifest a failure to protect public resources within the ambit of section 217.

[78] The *prima facie* irregular manner in which the bid was awarded, and Hlatshwayo's specific role in the procurement as alleged, violates material aspects of the procurement system as mandated in section 217 of the Constitution. The risk of loss to the state is inherent when goods are procured irregularly.

[79] Investigations into whether the goods were indeed delivered to the Department are ongoing.

[80] In *AllPay 2*[15], the Constitutional Court held that no one may profit from the violation of constitutional rights. Given the *prima facie* irregular manner in which BlackDot was awarded the bid, even if the goods were delivered, BlackDot would not be entitled to derive any profit from the bid. Such profits would constitute a *prima facie* unlawful use of public resources and a loss to the State. The SIU and the Department intend proving the loss the Department suffered as a result of Hlatshwayo's conduct in the pending action.

[81] The balance of convenience supports the granting of the interdict. Since Hlatshwayo no longer works for the Department, he is entitled to access his pension benefits from the GEPF. That he intends accessing his pension benefits is evidenced by his tender not to do so only pending the determination of the interdict application. If Hlatshwayo accesses his pension benefits while the action is pending, it will imperil the Department and the fiscus. In the event that the SIU is granted judgment against BlackDot and BlackDot is unable to satisfy the judgment debt, the SIU intends executing against Hlatshwayo's pension benefits to satisfy the judgment debt on the basis of his alleged misconduct. Therefore, interdicting the payment of Hlatshwayo's pension benefits provides security for the judgment debt. Hlatshwayo has not advanced reasons why the balance of convenience disfavour the granting of the interdict.

[82] The SIU has no alternative remedy. The GEPF can only withhold Hlatshwayo's pension benefits when so ordered in terms of a court order.

COSTS

[83] Hlatshwayo's dilatory conduct, as well as consistent and flagrant disregard for the Rules of the Special Tribunal, warrants that he should be mulcted with the costs of opposing the interdict application. As to the other applications, no reasons were advanced as to why costs should not follow the course.

[84] In the circumstances, the scope of the order as set out below is appropriate:

84.1 the costs of the interdict application to be limited at this stage to the costs of opposition;

84.2 the costs of the unopposed interdict application to be costs in the action;

84.3 the cost order to be inclusive of the costs of two counsel where so employed.

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

ORDER

1. The application for a postponement is dismissed with costs.

2. The first respondent Jacob Basil Hlatshwayo's ("Hlatshwayo) application to compel discovery is dismissed with costs.

3. The second respondent, the Government Employees Pension Fund is interdicted and restrained, pending the final determination of an action, including, all appeals and petitions, instituted by the Special Investigations Unit ("SIU") in the Special Tribunal, from making payment to Hlatshwayo, or any other party, any amount in respect of Hlatshwayo's pension benefits held under membership number 98092839.

4. The third respondent, the Department of Agriculture, Land Reform and Rural Development is interdicted and restrained, pending the final determination of an action, including, all appeals and petitions, instituted by the SIU in the Special Tribunal, from making payment to Hlatshwayo, or any other party, any amount which may be due and payable to Hlatshwayo.

5. The unopposed costs of the interdict application are costs in the action.

6. Hlatshwayo shall pay the costs of opposing the interdict application.

7. The costs of two counsel where so employed is allowed in respect of the costs payable in terms of paragraphs 1, 2, 5 and 6 of this order.

_____

JUDGE L. T. MODIBA

MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the applicant:	Adv. L Montsho-Moloisane SC assisted by Adv. PP Ferreira
Attorney for the applicant:	Ms S Zondi, Office of the State Attorney, Pretoria
Counsel the 1st respondent:	Adv. Manala
Attorney for the 1st respondent:	Mr B Seabela, Seabela Attorneys Incorporated
Date of hearing:	24 May 2021
Date of judgment:	15 June 2021

[1] LAWSA: 3rd Ed Vol 4 Par 593.

[2] *Rees and Another v Investec Bank Limited* 2014 (4) SA 220 SCA (28 March 2014) at paragraph 10 quoting *Maharaj v Barclays National Bank* 1976 (1) SA 418 at 423A-H

[3] *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 461B–E. See also *Centre for Child Law v The Governing Body of Hoerskool Fochville* 2016 (2) SA 121 (SCA) at paragraph 18.

[4] *STT Sales (Pty) Ltd v Fourie and 5 Others* 2010 (6) SA 272 (GSJ) (8 September 2010) at paragraph 14 and 16.

[5] Sub rule 35(12) provides:

> *"(12) (a) Any party to any proceeding may at any time before the hearing thereof deliver a notice in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to —*
>
> *(i) produce such document or tape recording for inspection and to permit the party requesting production to make a copy or transcription thereof; or*
>
> *(ii) state in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or*
>
> *(iii) state on oath, within 10 days, that such document or tape recording is not in such party's possession and in such event to state its whereabouts, if known.*
>
> *(b) Any party failing to comply with the notice referred to in paragraph (a) shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."* (Emphasis added)

[6] Sub rule 35(14) provides:

> *"After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to —*
>
> *(a) make available for inspection within five days a clearly specified document or tape recording in such party's possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof; or*
>
> *(b) state in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or*
>
> *(c) state on oath, within 10 days, that such document or tape recording is not in such party's possession and in such event to state its whereabouts, if known." (Emphasis added)*

[7] *Hoerskool Fochville* at *fn* 3

[8] *Owners of the MV URGUP v Western Bulk Carriers (Australia) and others* 1999 (3) SA 500 (C)

[9] See fn 4 supra

[10] *"(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape*

recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."

[11] Setlogelo v Setlogelo 1914 AD 221

[12] Webster v Mitchell 1948 (1) SA 1186 (W) at 1189

[13] *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836(W) at 899F/G

[14] *Department of Transport and Others v Tasima* (Pty) Ltd 2017 (2) SA 622 (CC) at paragraph 108

[15] *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* 2014 (4) SA 179 (CC) at para 33 and 39