




IN THE SPECIAL TRIBUNAL
REPUBLIC OF SOUTH AFRICA

(HELD AT BOOYSENS MAGISTRATES' COURT, JOHANNESBURG)

CASE NO: GP/03/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
17/11/20	
DATE	SIGNATURE

In the matter between

SPECIAL INVESTIGATING UNIT

TRANSNET SOC LIMITED

and

LINYENGA HERBERT MSAGALA

BONOLO MATHULO MSAGALA

LINYENGA HERBERT MSAGALA N.O.
(in his capacity as Trustee of the
Msagala Investment Trust)

ROBERTO JORGE MENDOCA VELOSA N.O.
(in his capacity as Trustee of the
Msagala Investment Trust)

LINYENGA HERBERT MSAGALA N.O.
(in his capacity as Trustee of the Msagala

First Applicant

Second Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent



Residence Trust)

ROBERTO JORGE MENDOCA VELOSA N.O.
(in his capacity as Trustee of the Msagala
Residence Trust)

Sixth Respondent

LINYENGA HERBERT MSAGALA N.O.
(in his capacity as Trustee of the
Msagala Family Trust)

Seventh Respondent

ROBERTO JORGE MENDOCA VELOSA N.O.
(in his capacity as Trustee of the
Msagala Family Trust)

Eighth Respondent

LINYENGA HERBERT MSAGALA N.O.
(in his capacity as Trustee of the Msagala
Share Trust)

Ninth Respondent

ROBERTO JORGE MENDOCA VELOSA N.O.
(in his capacity as Trustee of the
Msagala Share Trust)

Tenth Respondent

TRANSNET RETIREMENT FUND

Eleventh Respondent

Application heard on: 3 November 2020

Judgment delivered on: 17 November 2020

This judgment was delivered electronically by circulation to the parties' legal representatives via email. The date and time for hand- down is deemed to be 10h00 on Tuesday 17 November 2020.

JUDGMENT

MOTHLE J

Introduction

[1] Acting in terms of Section 1(a) of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("the Act"), the President of the Republic of South Africa ("the President") established a Special Investigating Unit ("SIU"), in order to investigate acts of serious maladministration in connection with the affairs any of State Institution, mismanagement of State assets and public funds; and any conduct which may seriously harm the interests of the public. The primary objective or mandate of the SIU investigations, is to recover or claim, through civil proceedings, loss of public funds by the State, as a result of acts of malfeasance and graft, listed in section 2 of the Act.¹

¹ "(2) The President may exercise the powers under sub-section (1) on the grounds of any alleged –

- (a) Serious maladministration in connection with the affairs of any State institution;
- (b) Improper or unlawful conduct by employees of any State institution;
- (c) Unlawful appropriation or expenditure of public money or property;
- (d) Unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
- (e) Intentional or negligent loss of public money or damage to public property;
- (f) Offence referred to in Part 1 to 4, or Section 17, 20 or 21 (insofar as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences was (sic) committed in connection with the affairs of any State institution; or
- (g) Unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof."

[2] Each investigation conducted by the SIU is preceded by the President issuing a proclamation, whose terms constitutes the instruction to SIU, concerning the specific scope and focus of the investigation. In conducting each investigation, the SIU derive their powers from the Act, and may institute proceedings in their own name or on behalf of a State institution.²

[3] Section 1(b) of the Act also empowers the President to establish a separate structure, a Special Tribunal ("the Tribunal"), whose power is to adjudicate the civil proceedings emanating from investigations by the SIU. The Tribunal functions essentially as a civil court with its own published rules of conduct of civil proceedings. Its decisions are appealable to the Full Court of a Division of a High Court. In March 2019, the President established and constituted the Tribunal.³

Background

[4] The case in issue in this judgment, was triggered by the President issuing Proclamation 11 of 2018 published in the Government Gazette 41561 of 6 April 2018.⁴ This Proclamation instructed and mandated the SIU to investigate certain allegations relating, amongst others, to the contracting or procurement of goods and services by Transnet SOC Limited ("Transnet"), as

² Proclamation 16 of 2019, published in the Government Gazette 42338 of 29 March 2019.

³ In terms of Proclamation 16 of 2019, published in the Government Gazette 42338 of 29 March 2019, the present Tribunal consists of a retired Judge of the High Court as the Tribunal President and seven High Court Judges still in active service, appointed as members of the Tribunal from various Divisions of the High Court.

⁴ Further amendments to the scope of this Proclamation were made in terms of Notice R3 of 2020 published in the Government Gazette 42972 of 31 January 2020.

well as any unlawful or improper conduct by any person or entity in relation to these allegations.

[5] The terms of the SIU investigation included any undisclosed or unauthorised interests which employees, officials or agents of, amongst others, Transnet, may have had in contractors, suppliers or service providers bidding for work, or conducting business with Transnet, or to whom contracts were awarded by Transnet, and the extent of any actual or potential benefits derived directly or indirectly by such employees from such undisclosed or unauthorised interest.

[6] In this regard, the SIU investigated a project of Transnet known as the New-Multi Product Pipeline Project, established for the construction of a pipeline for the high pressure transportation of liquid petroleum products from Durban to Heidelberg. This project was managed by Mr. Linyenga Herbert Msagala ("Mr. Msagala"), the first respondent, at that time employed by Transnet as the Group Chief Executive: Transnet Capital Projects. It was during his incumbency as Group Chief Executive, that in 2015, IGS Consulting Engineering CC (IGS), whose sole member was Mr. Sipho Sithole ("Mr. Sithole"), was awarded a service contract in the project, and further contracts at a later stage.

[7] On 30 July 2020, after conducting the investigation, the SIU and Transnet (the applicants), lodged an urgent *ex parte* application before the

Tribunal. The applicants sought as relief, an order by the Tribunal to preserve or freeze certain assets belonging to Mr Msagala and five Trusts in which he served as a trustee, and were directly under his control. The Trusts were cited and represented by the trustees, as third to tenth respondents. Further assets sought to be preserved included those registered in the name of Mr. Msagala's daughter, Ms. Bonolo Mathulo Msagala, the second respondent.

[8] The applicants further sought an order that should the Tribunal find any assets belonging to the respondents to be proceeds of Unlawful activity, such assets should be forfeit to the State in terms of Rule 26 of the Tribunal Rules. To that end, the Tribunal should appoint a *curator bonis* to report on the valuation of the assets. The applicants further requested an interdict, prohibiting the Transnet Pension Fund from paying any pension due to Mr. Msagala, pending action proceedings to be instituted against him. At the time of the urgent application, Mr. Msagala was no longer in the employment of Transnet.

[9] In support of the application, the applicants in the founding affidavit alleged that between January 2015 and December 2016 (the two-year period), and during his employment with Transnet, Mr Msagala, directly and through his Msagala Investment Trust, received various cash payments of amounts in excess of R18 million from IGS and Mr. Sithole.

[10] The applicants allege further that the cash payments received by Mr. Msagala and his Trust occurred after IGS had contracted with Transnet as a service provider in 2015. Thus the cash payments amounting in excess of R18

million constituted '*secret profits made at the expense of Transnet, and paid as a corrupt bribe, gratification, kickbacks and/or improper benefits*'. Consequently, by receiving these payments from an entity conducting business with Transnet, whilst being employed by the latter, Mr Msagala was involved in Unlawful activities. The applicants further alleged that from the unlawful and secret profits, Mr. Msagala and his Trusts acquired assets which included vehicles and residential properties, which were all proceeds of Unlawful activity as defined in Rule 3 of the rules of the Tribunal.

[11] The Tribunal granted the application as an interim order, in the form of a *rule nisi*, calling upon the respondents on the return date, to show cause why the interim order should not be made a final order.

[12] Mr. Msagala, also acting on behalf of the second to the tenth respondents, delivered an answering affidavit before the return date, opposing the application. In essence, Mr. Msagala denied that he or his Trusts received any payment from IGS and/or Mr. Sithole. He further alleged that neither he nor the Trusts were involved in unlawful activity; and that the assets he and the respondents had acquired, were not proceeds of unlawful activity and as such, should not be declared forfeit to the State.

[13] Mr. Msagala alleged that in addition to his salary and bonuses from Transnet, the income he received during the two-year period, came from profits in the following businesses: the transport business; letting and hiring of tents and chairs for events; farming; purchasing vehicles at an auction, repairing and

re-selling them; purchasing and renovating residential properties for lease; consulting and other businesses that were not identified. Mr. Msagala alleged that since 2009 he had been involved in private businesses, which he started from the income received from Transnet. In 2009 he purchased three properties which he leased for rental income. In 2010 he acquired cattle from farmworkers and catering equipment for rental. In 2011 he received income from accommodation and rental for catering business. He had bought an additional property in Vereeniging. On 21 January 2013, Mr. Msagala was appointed as a strategic consultant by Thulanda Consultants from where he earned additional income. The one-page contract for five years does not provide details of his place of work, work description and hours. During all this time, Mr Msagala was employed by Transnet.

[14] Between 2014 and 2015, Mr. Msagala alleges that he entered into video gaming as a business and transportation of school children. He adds that during the entire period of the operation of the businesses, he was still employed with Transnet and receiving salaries and bonuses.

[15] Mr. Msagala does not explain how much time he devoted to growing his businesses between 2009 and 2014 when during the same time he had been employed fulltime with transnet.

[16] Mr. Msagala also alleged that an arbitration had found him not guilty on various charges arising from these allegations. I return to the arbitration issue later in the judgment.

Issues for adjudication

[17] In essence, central to the disputes in the application were two questions; first, whether Mr. Msagala and his Trusts received payments of amounts in excess of R18 million from IGS and/or Mr. Sithole, as unlawful gratification, kickbacks and secret profits. Secondly, whether the assets acquired by Mr. Msagala and the respondents he represented were proceeds of unlawful activity and should be ordered forfeited to the State.

[18] In their alternative to the main application, the applicants had prayed that should the Tribunal find that there were disputes of fact between their version and that of the respondents, the application should be referred to oral evidence. For reasons that are apparent later in this judgment, the Tribunal found that the respondents' version did not raise genuine dispute of facts that would be material to the relief sought by the applicant. The respondents' defences to specific allegations were devoid of particulars, far-fetched and clearly untenable⁵, such that the dispute could, as indeed was, resolved on the papers.

The law

[19] Transnet is a State Owned Company, incorporated in accordance with the company laws of the Republic of South Africa. It is a public entity and an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996. Transnet is also a State institution as defined in section 1 of the Act.

⁵ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-5.

[20] Mr. Msagala as Chief Executive at Transnet, was a prescribed officer as contemplated in section 66(10) of the Companies Act 71 of 2008 (*“the Companies Act”*), read with Regulation 38 of the 2011 Companies Regulations. Section 76 of the Companies Act requires of a prescribed officer not to use his position to gain an advantage for himself or another person. Similarly, Mr. Msagala as a senior employee in Transnet, was a public officer as defined in section 1 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PRECCA).⁶

[21] The applicants further contend that the breach of these duties amounts to unlawful activities as defined in rule 3 of the Special Tribunal Rules. Rule 3, which deals with the definition or interpretation of terms, defines that Unlawful activity:

‘Shall mean acts of serious maladministration in connection with the affairs of the State or any of its organs; improper and unlawful conduct by employees of any State institution, unlawful appropriation or expenditure of public money or property; intentional or negligent loss of public money or damage to public property; unlawful or improper conduct by any persons which has caused or may cause serious harm to the interests of the public and includes offences referred to in Part 1 to 4 of Section 17, 20

⁶“public officer” means any person who is a member, an officer, an employee or servant of a public body, and includes- (a) any person in the public service contemplated in section 8(1) of the Public Service Act, 1994 (Proclamation No. 103 of 1994); (b) any person receiving remuneration from public funds; or (c) where the public body is a corporation, the person who is incorporated as such, but does not include any- (a) member of the legislative authority; (b) judicial officer; or (c) member of the prosecuting authority.

or 21 of Prevention and Combating of Corrupt Activities Act, No. 12 of 2004 (PRECCA).’

[22] Section 17 of PRECCA as an Unlawful activity applies to instances where:

‘Any public officer who, subject to subsection (2) acquires or holds a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body, is guilty of an offence.’

The arbitration and other hearings

[23] Before evaluating the conspectus of the evidence presented to the Tribunal, it is apposite to deal with the *res judicata* defence by Mr. Msagala, meaning that he had previously been acquitted by an arbitration of the charges relating to the allegations in this application.

[24] Being concerned with apparent evidence of Mr. Msagala being in possession of large sums of money and accumulated property, Transnet appointed Nexus Forensic Services, a private investigating firm, to conduct an investigation. The Nexus report, dated 13 October 2017, found that Mr. Msagala unduly and improperly influenced the procurement of various contracts that were awarded to IGS, in exchange for him receiving gratification from IGS to his benefit.

[25] Transnet instituted an arbitration against Mr Msagala, conducted in terms of section 188A of the Labour Relations Act 66 of 1995. There were various charges levelled against Mr. Msagala, including the allegation that he had acted unlawfully in receiving payment from IGS or Mr. Sithole. The arbitrator acquitted Mr Msagala of the charges for lack of evidence. Mr Msagala had not testified in this arbitration.

[26] The Tribunal was informed that Transnet initially lodged an appeal against the arbitration award but later withdrew it. Transnet, strengthened by new evidence from SIU, instituted an internal disciplinary inquiry. Mr. Msagala raised a defence of *res judicata*, namely that the arbitration had already tried and acquitted him of the charges. The chairperson of the disciplinary inquiry dismissed the defence. Mr. Msagala then withdrew his participation in the disciplinary enquiry and tendered a letter of resignation, with immediate effect. The disciplinary enquiry found Mr. Msagala guilty on one charge, which finding led to his dismissal by Transnet. Mr. Msagala in his answering affidavit before the Tribunal, had also raised the same defence of *res judicata*.

[27] The arbitration which acquitted Mr. Msagala was held in 2017. It preceded the SIU investigation, which only commenced after the President issued the 2018 Proclamation. Consequently, SIU was not a participant in the arbitration. As it appears later in this judgment, the SIU investigation, conducted in terms of the provisions of the Act, obtained access to the bank statements and copies of cash deposits in the accounts of the IGS, Mr. Sithole and his Trusts as well as those of Mr. Msagala and his Trusts. This evidence that was

uncovered by SIU was not before the arbitration. Therefore, the Arbitrator did not have the opportunity to consider the evidence of the bank transactions. Consequently, Mr. Msagala's acquittal of the charges at the arbitration is not a competent defence to the new evidence uncovered by the SIU investigation.

[28] The parties also referred the Tribunal to the judgment of the High Court, Gauteng Local Division, Johannesburg, before Mr. Justice Vally,⁷ which found that Mr. Msagala had an improper relationship with IGS and Mr. Sithole and played a role in facilitating that IGS should be awarded contracts by Transnet. The High Court had been approached to cancel all contracts that Transnet had awarded to IGS.

[29] Even though there were adverse findings against Mr. Msagala in the judgment of the High Court, he was not cited as a party in that application. The findings were made without him having had an opportunity to be heard. Further, the evidence considered by the High Court was not presented before the Tribunal. The Tribunal concluded that it would be unwise to accept the judgment of the High Court as evidence in this application.

The evidence

[30] The applicants presented the evidence concerning the details of the payments. SIU investigators conducted an analysis of bank records of IGS and

⁷ Transnet SOC Limited v IGS Consulting Engineers CC and Others [2019] ZAGPJHC 527.

Mr. Sithole and those of Mr. Msagala and his Trusts. The investigation found that Mr. Msagala received funds and/or undisclosed profits in the amount of R18,460,020.02, which were deposited into various bank accounts (his own personal bank account or those of the Trusts he controlled), between the period 1 January 2015 and 31 December 2016. These payments were effected in the form of cash either at an ATM or in the branches of the various banks.

[31] During the same two-year period, there were 190 cash cheques above R5 000.00, issued from IGS account. Of these 190 cash cheques, the investigation could identify 25 cheques that were cashed, which correspond in amounts, dates and timing to the various deposits made into Msagala Investment Trust bank account.

[32] The 25 cheques are referred to in the founding affidavit, each with the date, cheque number and amount. The founding affidavit, corroborated by copies of source documents such as cheques from the record, stated thus:

'On 3 February 2016, six IGS cheques of R1 million each totalling R6 million were cashed.⁸ Two deposits of R3 million each totalling R6 million were made into the Msagala Investment Trust bank account; On 22 April 2016, eight cheques⁹ of various amounts totalling R6,531,000.00 were cashed from IGS bank account. Three cash deposits totalling R5,606,000.00 were made into the Msagala Investment Trust bank account. Some of the cheques were endorsed either 'S V Sithole' or 'Sipho Sithole' at the back. There were five cheques of R1 million each. These cheques corresponded to the amount deposited to the credit of Mr. Msagala; On 9 February 2016, one IGS

⁸ Cheque numbers: 102829; 102830; 102831; 102832; 102833 and 102834.

⁹ Cheque numbers: 102854; 102855; 102856; 102857; 102858; 102859; 102861 and 102862;

cheque of R1 million was cashed. There is no corresponding deposit into any of Msagala's bank accounts, but the cheque in question, cheque No. 102835, was, according to the investigators, endorsed on the back "*H Msagala 0748964846 – 0829249786 at Sipho Sithole – 9h45.*" The cell phone numbers stated were respectively those of Mr. Msagala and Mr. Sithole.'

[33] There was further evidence that the following payments were made by Mr. Sithole from his Trusts:

'From Sithole Family Trust on behalf of Mr. Msagala, namely On 5 December 2015 there was an internet payment of R140,000.00 with the reference "*Loan Titling Herbert Msagala*"; From the Akani Residence Trust of which Mr Sithole is the sole signatory, on 15 September 2015 an interbank payment to Strauss Scher Inc. attorneys, was effected by this Trust, for the amount of R50,000.00. That attorney's firm did the conveyancing work for the transfer of the residence property acquired by Mr Msagala in Steyn City / Dainfern."'

[34] The evidence revealed that IGS and Mr. Sithole also made payments on behalf of Mr. Msagala when he purchased certain residential properties. The property on Portion 3 of Erf 1025, Harrismith, one of the two properties registered in the name of Ms Bonolo Msagala, Mr Msagala's daughter, was purchased on 16 November 2015 for R 820 000. The purchase price was made in cash, in the amount of R 540 000 and the balance paid by IGS in the amount of R 300 000.

[35] In his opposing papers, Mr. Msagala does not specifically respond to the damning allegations concerning each of the 25 cash cheque payments by IGS

and Mr. Sithole, which, on the evidence, correlate with deposits into the Msagala Investment Trust bank account. To each of the allegations of payment, Mr. Msagala generally and repeatedly pleaded a bare denial. He maintained the version that the deposits were from his business enterprise. He dismissed the correlation with the IGS cash cheques as coincidence.

[36] Apart from the one payment of R300 000.00, Mr. Msagala offered no explanation for the payments made by IGS and Mr. Sithole's Trusts on his behalf, for the purchases of immovable property. Concerning the amount of R300,000.00, paid by IGS as the balance payment for his daughter's property in Harrismith. Mr. Msagala avers that he came to know Mr. Sithole, who is a friend to his brother, when at the request of his brother, "*a few years ago*", he loaned Mr. Sithole R300,000.00. Therefore, the payment made by Mr. Sithole for the R 300,000.00 as balance payment of the purchase price on the property at Harrismith was, according to him, a repayment of that loan.

[37] The Tribunal was not persuaded by Mr Msagala's version for these transactions. Firstly, the deposits he allegedly made from his businesses into his and the Trusts' bank accounts, 25 of these correlated with the 25 cash cheque transactions on the dates alleged by the applicants. While it could not reasonably be expected of him to have confirmed or denied the veracity of the 25 cash cheques from IGS and Mr. Sithole, he certainly was in a position to explain the correlating deposits in his and the Trusts bank accounts. The transactions cannot seriously be explained-away as coincidences.

[38] Secondly, throughout the answering affidavit, and apart from the payment of R300 000.00 made by Mr. Sithole of his behalf when he purchased property for his daughter at Harrismith, Mr Sithole denies ever receiving money from IGS or Mr. Sithole. Mr. Msagala does not explain the other payments made on his behalf to the conveyancers and the cash cheques endorsement of both their particulars and cell phone numbers.

[39] Thirdly, Mr Msagala attached some pages of excerpts from some of his bank accounts statements, as proof that he purchased vehicles from Burchmores. He missed the point. At issue in this application was the source of the funds he employed as capital for the businesses. Mr Msagala does not explain where he derived the large capital that he employed in these businesses, which could yield such large cash deposits of R 6 million in a day.

[40] Fourthly, Mr. Msagala had alleged that he was involvement in a number of businesses from 2009. He does not explain how, where and when did he successfully operate these businesses, including a consulting business, while being employed by Transnet on a full time basis?

[41] Fifth, Mr. Msagala does not produce documentation in the of financial statements to prove the amounts he allegedly earned from each business and where these amounts were kept until his large deposits emerged in 2015. On record, apart from his salaries and bonuses, the additional sources leading to the large cash deposits appear in the two-year period.

[42] Sixth, and related to the preceding paragraph, three of Mr. Msagala's Trusts were registered in 2015, within the two-year period and the fourth in 2017, immediately following the two-year period. The registration of the Trusts appeared to coincide with the receipt of payments from IGS and Mr. Sithole.

[43] Seventh, apart from the interbank transfers, the payments from the accounts of IGS or Mr. Sithole were made in cash cheques, some of which had the endorsement for payment to Mr. Msagala, with his ID Number and signature appearing therein. The amounts in the transfers as identified do not include salaries and bonuses received by Mr Msagala during his employment with Transnet.

[44] Eighth, Mr. Msagala does not name the entities under which the businesses were operating and what the turnover was in each business, with reference to financial statements and source documents such as lease agreements, invoices or receipts. All his businesses appeared to have operated on a cash basis with no records.

[45] Mr. Msagala on his own version admitted that he knew Mr. Sithole '*a few years ago*' when he loaned him R300 000.00. He did not present any supporting or verifying affidavit from either his brother and/or Mr. Sithole in regard to this loan. Mr. Msagala also failed to disclosure to Transnet, that when in 2015 IGS first contracted with the business unit of which he was the Chief Executive, he had advanced a private loan to Mr. Sithole. On his own version, the loan repayment occurred after IGS had obtained the contract with Transnet.

[46] Mr. Msagala in his position as Group Chief Executive, was a prescribed officer as contemplated by section 66 (10) of the Companies Act. He thus had a duty, in terms of section 75 (6) of the Companies Act, to disclose to Transnet his relationship with Mr. Sithole and the alleged loan and subsequent payments received from him and IGS in the two-year period. He failed to disclose his relationship with Mr. Sithole. Mr. Msagala, on his own volition, had made a written offer to the board to explain the sources of the funds in his bank accounts. When invited to do so, he reneged. His version as to the source of funds was disclosed for the first time in the answering affidavit in these proceedings.

[47] Having failed to provide an explanation of the specific cash deposits made into his and his Trusts bank accounts, which correlated with IGS/Mr. Sithole's cash cheque payments, Mr. Msagala failed to rebut the evidence presented by the applicants. The balance of probabilities favour the applicants' version of events.

[48] In that regard, the Tribunal finds that between 1 January 2015 and 31 December 2016, Mr. Msagala and his Trusts, unlawfully received from IGS and/or Mr. Sithole, who were in contract with Transnet, a total amount of R 18 460 020.00, made out from various payments. The payments were received at the time Mr. Msagala was employed by Transnet as Group Chief Executive and public officer in charge of a business unit project of Transnet. Mr. Sithole, then known to Mr. Msagala, acting on behalf of IGS, had in 2015 acquired contracts

with Transnet, through the business unit of which Mr. Msagala was Group Chief Executive.

[49] Considering the conspectus of the evidence in these proceedings, the Tribunal finds that Mr. Msagala was engaged in unlawful activity as defined in Rule 3 of the Tribunal Rules, read with section 17 of PRECCA. Mr. Msagala is also found to have acted in contravention of sections 75 and 76 of the Companies Act by failing to disclose to his employer, the payments he received from Mr. Sithole and IGS. The application should thus succeed and the *rule nisi* confirmed.

Forfeiture

[50] Rule 36 of the Tribunal provides thus:

'26. Forfeiture Orders

At the conclusion of the proceedings and on final determination of the dispute, depending on the outcome on the unlawful activities of the Respondent or the Defendant, as the case may be, the Tribunal may make a final order for forfeiture to the State, of the property held under a preservation order or the interdict order where the Respondent has been found to have participated in unlawful activities.'

[51] In the interim order granted by the Tribunal on 30 July 2020, the respondents were ordered to show cause why, if it is found that they were engaged in Unlawful activities, the goods mentioned in Schedule "A" and placed under the preservation order, should not be forfeited to the State. The Tribunal finds that the respondents were involved in Unlawful activities.

[52] There is indeed evidence that during the two-year period, Mr. Msagala purchased vehicles and residential properties. The *curator bonis*, appointed in terms of the interim order, filed a report, indicating the value of the properties identified in the preservation order and found in possession of Mr. Msagala and/or his relatives and/or Trusts. The Curator valued the properties in excess of R15,000,000.00.

[53] Having found that Mr Msagala and his trusts were involved in unlawful activities, the Tribunal hereby declares the property listed in Schedule "A" attached to the interim order and as valuated by the *curator bonis* to be forfeited to the State.

[54] In the interim order, the Transnet Pension Fund, the eleventh respondent, was interdicted from effecting pension payment to Mr Msagala, pending action proceedings to be instituted by the applicants for damages suffered by Transnet. I was informed by counsel that such action has already been instituted and is being defended by Mr Msagala and the respondents. The parties have joined issue on the pension dispute and the trial court is seized with the matter. There is thus no need to interfere with the interdict at this stage.

Costs

[55] In determining the costs, the Tribunal has to consider the tardy manner by which the respondents conducted their case. The Interim order was granted

on 30 July 2020, with the return day of the rule nisi set for 29 September 2020. The respondents had August and September 2020 to deliver their answering affidavit, and could only do so, submitting a 340-page answering affidavit about a week before the return date. There was no explanation or condonation application for non-compliance with the order. On 29 September the rule nisi had to be extended to 3 November 2020 to enable the applicants to file a replying affidavit.

[56] The applicant delivered the replying affidavit on 16 October 2020 and the heads of argument a week later on 22 October 2020. It was only on the morning of the hearing, on 3 November 2020 in the Judge's chambers, that counsel for the respondent handed in their heads of argument. The hearing was as a result delayed for about 20 minutes for applicants' counsel and the presiding Judge to peruse the respondents' heads of argument. No explanation for this conduct was forthcoming from the respondents.

[57] In paragraph 43 of the founding affidavit, the applicants, for reason of prolixity and not to unduly burden the urgent application, had tendered to the respondents and the Tribunal, the records and annexures in support of the allegations in the affidavit. In answer to paragraph 43, the respondents wrote: "*The contents hereof are noted.*" On 3 November during argument, counsel for the respondent questioned the status of the tendered documents. The Tribunal ruled that the respondents, having failed to request the tendered record before the hearing, will be allowed access thereto, only on condition they first explain

to the Tribunal why they failed to request the record before the hearing. The applicants submitted the record as directed.

[58] The respondents' counsel delivered a written submission purporting to attack the records; contrary to the response deposed to in the answering affidavit. The respondents, clearly in contempt of the Tribunal's directive, failed to provide an explanation as to why they did not access the records prior to the hearing and deal with the content thereof in the answering affidavit. Such tardy and unprofessional approach to the practice of law is untenable.

[59] The Tribunal rules are there for a reason; to ensure that the proceedings are conducted in an orderly, fair and efficient manner. It is not open to a litigant to choose when to comply with the Tribunal rules and directives and when not to. The respondents' conduct calls for censure. A punitive cost order is thus warranted in this case.

Conclusion

[60] The following order is made:

- (1) The preservation order granted as a *rule nisi* on 30 July 2020 is hereby confirmed.
- (2) The interdict imposed on the Transnet Pension Fund not to pay out the pension of Mr Msagala remains and is extended until the

conclusion of the action proceedings instituted against Mr Msagala in the Tribunal.

- (3) The properties mentioned in Schedule "A" to the 30 July 2020 preservation order, which includes movable and immovable properties and as confirmed and evaluated by the *curator bonis*, is declared forfeit to the State, to the extend not exceeding R18, 460, 020.02.
- (4) The respondents are ordered to pay the costs of these proceedings on an attorney and client scale, including the costs of the applicants' two counsel.



Judge SP Mothle

Judge of the High Court
Member of the Special Tribunal

Appearances

For the applicants:

Adv. PM Kennedy SC

Assisted by:

Adv. G Ngcangisa

Instructed by:

Bowman Gilfillan Attorneys

For the respondents:

Adv. H Louw

Instructed by:

Snyman Attorneys

