REPUBLIC OF SOUTH AFRICA

IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2(1)(b) OF

THE SPECIAL INVESTIGATING UNITS AND THE SPECIAL TRIBUNALS ACT, ACT 74 OF 1996

CASE NO: NW/07/2020

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SIGNATURE **DATE: 20 July 2020**

In the matter between:

SPECIAL INVESTIGATING UNIT First Applicant

MEC FOR THE NORTH WEST DEPARTMENT OF HEALTH Second Applicant

And

ANDREW THABO LEKALAKALA First Respondent

GOVERNMENT EMPLOYEES PENSION FUND Second Respondent

GOVERNMENT PENSIONS ADMINISTRATION AGENCY Third Respondent

JUDGMENT

SIWENDU J

INTRODUCTION

[1] This application was launched as an urgent application in March 2020 by the Special Investigating Unit ('SIU') together with the MEC for the Department of Health, North West Province as the second applicant. An interdict is an extra-ordinary remedy, and the Tribunal must in the exercise its discretion grant the relief judiciously**.**

[2] The SIU is mandated by the President of the Republic of South Africa in terms of Proclamation No. 42 of 2019, published on 12 July 2019 in Government Gazette 42577 (the 'Proclamation') to conduct an investigation into the affairs of the North West Department of Health ('NWDOH') and the Free State Department of Health ('FSDOH').

[3] The first respondent, Dr Andrew Thabo Lekalakala, is a medical doctor and the former Head of Department for the Department of Health in the North West Province. On 13 January 2020, he was dismissed from his employment after he was found guilty of alleged acts of gross misconduct and irregular award of a contract(s).

[4] The applicants seek an order for interdictory relief to prevent and restrict the payment of the pension benefit that stands to the credit of the first respondent held with the Government Employees Pension Fund (the 'GEPF'). The interim relief is sought pending the final determination, including all appeal and petition

processes, of an action to be instituted by the applicants against the first respondent in the Special Investigating Unit, Special Tribunal.

[5] The second respondent (the GEPF) and the third respondent – the Government Pensions Administration Agency are charged with the administration, management and processing of the government employee pensions and benefits payable respectively in terms of the Government Employees Pension Law 21 of 1996 (as amended). They are cited only in so far as they may have an interest in these proceedings. The applicants do not seek a cost order against them. They do not oppose the application.

[6] The delay in disposing of the application was occasioned by the worldwide Covid-19 Pandemic. Consequently, at the hearing, urgency was not contested. What remains is the determination of the merits of the application for the interim interdict.

BACKGROUND

[7] The first respondent, in his capacity as the erstwhile head of the Department of Health, North West Province was charged and found guilty of gross negligence and misconduct pertaining to the award of a contract and, as I understand it, the mismanagement of the affairs of the Department.

[8] The SIU's founding affidavit deposed to by Mr Dieta, the Chief Forensic Investigator for the SIU, claims there was intentional, wrongful and unlawful conduct by the first respondent. It reveals that ongoing investigations into the first respondent's conduct and other employees pertains to:

8.1. An irregular award of contract to Buthelezi EMS and its associated companies for the provision of patient transportation services and construction-related services.

8.2. The breach of the prevailing procurement prescripts and on terms which are to the detriment of the Department.

8.3. The allegation that he caused the Department to participate in the aero-medical contract which was secured by the Free State Department of Health in terms of Treasury Regulation 16A6.6, whilst the needs of the Department did not match that of the Free State Department of Health. It is claimed there were no demonstrable discounts or benefits for the Department in light of there being 'a transversal contract' with lesser rates than the contract that the Department secured under his watch.

[9] It is common cause on the papers that the contract pertaining to the award of a contract to Buthelezi EMS and its associated companies does not form part of the Proclamation authorising the investigation. The SIU states that it will be applying to the President to include the irregular awarding of the 'Mediosa' contract to Gupta-linked companies. It is a further common cause that there are criminal proceedings pending against the first respondent which were initiated in December 2019. He was arrested and released on bail.

[9] The application for interim relief was precipitated by an email received from the GEPF on 16 March 2020. It gave the applicants 14 days to obtain an interdict, failing which the benefits would be released to the first respondent ***upon*** receipt of his exit documents. It is believed that the first respondent initiated the process of a payment of his pension fund benefits.

[10] The applicants allege that there is good reason to believe that the first respondent will dissipate the monies paid out to him, and they do not hold security for the judgment they hope to obtain to recoup the losses and/or damages suffered as a direct consequence of the conduct of the first respondent.

[11] Even though the first respondent resigned from his employment on 11 December 2019, the Premier of North West sought to revoke the resignation. The first respondent has challenged his dismissal and the reasons before the Public Health and Social Development Sectorial Bargaining Council. The case is currently pending.

[12] The first respondent refutes the allegations against him and claims that if there were irregularities found, some of the decisions to award the tenders were

made by the Bid Adjudication Committee, and not by him. He states that where he made appointments, he did so within the law. He is confident he will ultimately be acquitted and the dismissal and findings will be set aside.

[13] He claims to have successfully challenged his suspension. He relies on the success achieved before the Labour Court, and the punitive cost order he obtained on 16 January 2020 to indicate his innocence**.**

[14] He further tenders an alternative plea, in terms of Rule 23(7) of the Rules of the Tribunal. I deal with this aspect later in the judgment.

LEGAL PRINCIPLES

[15] The first issue arising, is the source of power to grant the relief pertaining to the pension fund. The SIU evokes s 37D(1)(*b*) of the Pension Fund Act 24 of 1956 (the 'Act') to support the interdict. The section states that:

> **37D Fund may make certain deductions from pension benefits**
>
> (1) A registered fund may-
>
> (b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of-
>
> (i) *(aa)* a loan granted by the employer to the member for any purpose referred to in section 19 (5) *(a)*; or
>
> *(bb)* any amount for which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member for any purpose referred to in section 19 (5) *(a)*,
>
> to an amount not exceeding the amount which in terms of the Income Tax Act, 1962, may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule to that Act; or
>
> (ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph *(bb)*) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which-
>
> ***(aa)* the member has in writing admitted liability to the employer; or**

(bb) **judgment has been obtained against the member in any court, including a magistrate's court,**

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned;

[16] I observe that the application was not accompanied by the GEPF Rules which need to be read in conjunction with the provisions of the Act. I take account that the second and third respondents have not opposed the relief or suggested the granting of the order will violate the Rules of the Fund. There are jurisdictional facts the applicants must meet before it can evoke this section. Section 37D(1)(*b*)(ii) read with s 37A preserves the right of a member of a pension fund against any deduction or reduction of benefits, save where:

16.1. the member has in writing admitted that he is liable to the employer for compensation as a result of damage caused to the employer by reason of theft, dishonesty, fraud or misconduct by the member; or

16.2. if a court (criminal or civil) ordered the member to pay compensation to the employer as a result of damage caused to the employer by reason of theft, dishonesty, fraud or misconduct by the member.

[17] It was raised with the applicants during argument that the section refers to a 'deduction' being made as opposed to a 'withholding'. On a literal meaning, it does not appear to accord with the relief that is sought. Secondly, the ability to ***deduct*** is predicated on an admission of liability by a member or the existence of a prior judgment by a court or a magistrate's court. It was not contended the decision of the disciplinary inquiry constitutes a judgment.[1]

[18] As is evident from the papers, the dismissal decision is before the bargaining council, it may take years before a court pronounces on it. Given the absence of an admission of liability or a judgment in respect of the allegations against the respondent which remain pending, counsel for the SIU (Adv. Ramashoba)

[1] The meaning of a judgment or an order was succinctly set out by Harms AJA in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A). It means a decision which, generally, is final in effect and not susceptible of alteration by the court of first instance, is definitive of the rights of the parties, and has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

correctly conceded that other than the finding of the disciplinary inquiry, there are is no judgment which brings the application to the four corners of the legislation. She however argued that interpreted purposively, this section includes the power to withhold a payment of a member's pension benefit, pending the determination or acknowledgment of such member's liability.

[19] Even though she cited no authority in the Heads of Argument or during argument to support this view, the Tribunal has established that the view accords with what was expressed by the Supreme Court of Appeal in *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen*,[2] which held as follows:

> 'Such an interpretation would render the protection afforded to the employer by s 37D(1)(*b*) meaningless, a result which plainly cannot have been intended by the legislature. It seems to me that to give effect to the manifest purpose of the section, its wording must be interpreted purposively to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgment of such member's liability. The Funds therefore had the discretion to withhold payment of the respondent's pension benefit in the circumstances. I dare say that such discretion was properly exercised in view of the glaring absence of any serious challenge to the appellant's detailed allegations of dishonesty against the respondent.'

[20] It seems to me that the Rule Promulgated by the Tribunal provide an easier recourse to the applicants for the relief sought as the Tribunal Rules are specially designed for matters as the current one. Be that as it may, I address the requirements of an interdict.

THE INTERDICT

[21] The requirements for an interim interdict which the applicants must satisfy, are:

(a) a prima facie right, albeit open to some doubt;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

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[2] *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA 1 (SCA) para 19.

(c) the balance of convenience must favour of the granting of the interim relief; and

(d) there is no other satisfactory remedy.

[22] The most important consideration is the establishment of the prima facie right. Before dealing with the merits, I make some procedural observations about the management of the application. The Rules of the High Court and the Special Tribunal apply to proceedings before it at times conjointly. This would affect Rules about pleadings and affidavits. Accordingly, in applications evidence is procured through affidavits which is evidence on oath.

[23] The founding affidavit by Mr Dieta, refers to the deponent as a 'she. While purportedly commissioned before a commissioner of oaths, whose designation and rank is referred to as 'Captain', it does not disclose the area of service. In addition, the applicants failed to file a confirmatory affidavit to support averments made in respect of the MEC for the Department. In an attempt to cure this, the affidavit by the Administrator of the Department, Ms Jeanette Hunter, was filed through a supplementary affidavit. This is without seeking the leave of the Tribunal, but ask for condonation for same. I am minded to mention the decision in *Absa Bank Ltd v Botha NO and Others*,[3] where the court held that:

'…where the commissioner of oaths certifies that the deponent has acknowledged that "he" knows and understands the contents of the declaration, but from the declaration itself it is apparent that the deponent is a female, because she declares as much, then the Court would be unable to place reliance on the certification of the commissioner of oaths because *ex facie* the affidavit it would be unclear whether the deponent is a male or a female. Hence, the Court would be unable give effect to the "presumption of regularity" for purposes of assuming that the declaration was sworn to (or affirmed) and signed in the presence of the commissioner of oaths.'

[24] On this score the SIU risked having its case dismissed on account of this technical error. I observe further that unlike the decision in *Botha* above, the current proceedings are largely based on common cause facts about the

[3] *Absa Bank Ltd v Botha NO and Others* 2013 (5) SA 563 (GNP); (39228/12) [2013] ZAGPPHC 163 (7 June 2013) para 10.

allegations against the first respondent. Subject to whether there has been substantial compliance with the Regulations, a court has a discretion to refuse an affidavit which does not comply with the Regulations. The deponent has attempted to cure the error in the replying affidavit. I exercise my discretion to admit the affidavit but address this issue in respect of costs to encourage greater precision by the applicants in future.

[25] Turning to the merits, I am of the view that the main hurdles for the applicants pertain to the satisfactory establishment of (1) a prima facie right; and (2) the balance of convenience. There is no doubt that given the first respondent's explanation about his current responsibilities and dire financial circumstances, exacerbated by the fact that he is unemployed, dissipation of the pension payout will occur and if ultimately successful, the applicants will have a hollow victory.

Prima Facie Right

[26] The SIU is required to establish a prima facie right on a balance of probabilities. That case must be made out in the founding affidavit. In so far as the finding of the disciplinary inquiry, in *Graham v Park Mews Body Corporate*,[4] the High Court stated as follows:

> 'There seems to be a general rule that findings of another tribunal cannot be used to prove a fact in a subsequent tribunal. I also see no logical reason why the application of this rule cannot be extended to the findings, orders and awards of other tribunals, so as to exclude the opinion of triers of fact in these proceedings in civil or criminal matters'

[27] Even though some of the irregularities were already the subject of a disciplinary inquiry, other than the bald reference to the allegations in respect of the award of the two contracts, there is little disclosed about their nature and broad issues involved. Curiously, the following information has not been disclosed:

(a) The status and progress of the investigation;

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[4] *Graham v Park Mews Body Corporate & Another* 2012 (1) SA 355 (WCC) paras 58-64.

(b) The length of time required to institute the action;

(c) The status and progress of the criminal charges; and

(d) The value of the pension.

[28] Nevertheless, the SIU contends that the irregularities and maladministration *led to the Department being placed under administration*. A report will be issued to the President 'in due course'. Counsel for the SIU was emphatic that current investigation points to the first respondent's role as an accounting officer where serious maladministration were found in connection with the affairs of the Department of Health, leading to the Proclamation No. 42 of 2019. The first respondent's responsibility arises because he was the accounting officer who failed to ensure that maladministration and irregularities were prevented.

[29] The SIU claims his liability flows from his capacity as the accounting officer and Head of the Department. It is claimed he owed a fiduciary duty to perform his duties in a proper and professional manner, in compliance with laws and without negligence. That is the extent of the contentions on the issue.

[30] In *Edcar Rubber Liners CC and Others v Rema Tip Top Holdings SA (Pty) Ltd and* Others,[5] Van der Linde J captures the views of Holmes J in *Olympic Passenger Service (Pty) Ltd v Ramlagan*,[6] which were approved by the Constitutional Court, and are apt in this case.[7] It was held as follows:

> "It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. **In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion,**

[5] *Edcar Rubber Liners CC and Others v Rema Tip Top Holdings SA (Pty) Ltd and Others* (24615/2015) [2016] ZAGPJHC 169 (24 June 2016) paras 4-8.
[6] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) 382 (D) at 383D.
[7] *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) para 25.

to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted." (Emphasis added)

[31] The Tribunal is not placed in the position to assess prospects of success. In view of this, I am driven to investigate other considerations.

Irreparable Harm

[32] The well-grounded apprehension of harm is the dissipation of the pension fund against which to recoup the Department losses. The test is set out in *Trinity Asset Management (Pty) Ltd v Grindstone Investments*,[8] where Cameron J stated:

'When the facts are unclear, the interdicting court must weigh prospects, probabilities and harm. But when the respondent, who is sought to be interdicted, has a killer law point, it is just and sensible for the court to decide that point there and then. The court is in effect ruling that, whatever the apprehension of harm and the factual rights and wrongs of the parties' dispute, an interdict can never be granted because the applicant can never found an entitlement to it.'

[33] There is potential harm to the applicants even though the weight of the first respondent's defence remains untested – not of his own doing, I add. As already stated, on the objective facts and on the first respondent's version, his current financial circumstances will result in the dissipation.

Balance of Convenience and relative prejudice

[34] The relative prejudice to both parties must be considered if the interdict is granted or refused come to consideration. Usually this will resolve itself into a

[8] *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limite*d 2018 (1) SA 94 (CC) para 91.

consideration of the prospects of success in the main action and the balance of convenience – the stronger the prospects of success, the less need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him**.**

[35] The first respondent refutes and challenges the claims against him. He disputes the alleged irregularities in respect of the Mediosa contract, because there is no evidence that such contract was declared irregular by the Auditor-General.

[36] He claims to be surviving on savings, which has been depleted. He has dependents and university fees due. He is unable to pay his debts and will not be able to do so in future unless he receive his pension pay-out. He has not practiced as a registered medical doctor since 2007, because he assumed managerial positions over the years. He will need to re-register with the Health Professions Council of South Africa and also to open up his own surgery and require funds to survive.

[37] Other than the University expenses and the costs of the motor vehicles, the personal circumstances of the first respondent were not supported by independent objective evidence. The connection between the first respondent and the dependant for which fees are claimed was not clearly established.

[38] The applicants argued that in the event of the action to be instituted and recovery for damages against the first respondent is found to be unsuccessful, the first respondent will still be entitled to his full pension fund benefit together with the growth and/or dividends and interests on the said pension interest. He therefore cannot claim any real prejudice. His personal circumstances cannot outweigh the unlawful appropriation, expenditure or loss of public money or property suffered due to his failure in his role as an accounting officer.

[39] Even though the value of the pension relative to the cost of the alleged irregularities is a drop in the ocean, it is essential that if allegations are found true, the first respondent should not benefit from the maladministration, gross misconduct and/ or negligence.

[40] The dictum in *Highveld Steel* is instructive on this score where the court observes that:

> 'Considering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that pension funds exercise their discretion with care and in the process balance the competing interests with due regard to the strength of the employer's claim. They may also impose conditions on employees to do justice to the case.'[9]

[41] Even though I expressed dissatisfaction with the procedural missteps and the thin content of the Founding Affidavit:

(a) There are grave allegations against the first respondent**.**

(b) He does not dispute that the Department over which he presided is under administration.

(c) This has prejudicial public consequences.

(d) There are criminal charges pending against him.

(e) On the current facts, there is no substantive prejudice arising from the applicants' procedural missteps.

[42] Since the application is merely interlocutory and the effect of the granting the relief is only temporary and not finally decisive, I am empowered to grant relief for the interdict upon a degree of proof less exacting than that required for the grant of a final interdict.

[43] Considering the above, it is imperative that I fashion a relief that encourages the applicants to:

(a) Procure the extension of their powers to the investigation and proclamation timeously

(b) Complete the all investigation timeously, and

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[9] *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA 1 (SCA) para 20.

(c) Given the national importance of cases the first applicant is charged with, an order that encourages greater precision and vigilance.

Accordingly, I grant the following order:

1. That the second and third respondents (the Government Employees Pension Fund and Government Pensions Administration Agency) be restrained and interdicted from paying out the entire pension benefit portion held by the second and/or third respondents and standing to the Pension Fund credit of the first respondent (Andrew Thabo Lekalakala) pending the action to be instituted by the applicants against the first respondent in the Special Investigating Unit, Special Tribunal.

2. The first applicant is ordered to:

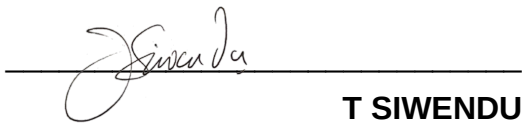
   (a) procure the extension of its powers in terms of the Proclamation within 30 days of this order, or earlier;

   (b) finalise its investigation within 60 days of this order, or earlier; and

   (c) institute the action proceedings within 20 days of the completion of the investigation.

3. In the event of the failure by the applicants to comply with orders 2(a), (b) and (c), the first respondent may approach the Special Tribunal on the same papers (supplemented as is necessary) for a reconsideration of the order.

4. The applicants are entitled to **one quarter** of the costs, excluding the costs of the supplementary affidavit, on a party-and-party scale.



T SIWENDU

Date of hearing:	9 July 2020
Date of judgment:	10 July 2020

Appearances:

Counsel for the First Applicant:	Adv. M Ramoshaba
Instructing Attorneys:	State Attorney
	C/O Leepile Attorneys Inc
Counsel for the First Respondent:	Adv. M M Mojapelo
Instructing Attorneys:	Kgaugelo Baloyi Inc