



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF
SECTION 2 (1) OF THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996
(REPUBLIC OF SOUTH AFRICA)**

CASE NO: GP/20/2020

In the matter between:

Special Investigating Unit

First Plaintiff

The Minister In The Department Of Agriculture,
Land Reform and Rural Development

Second Plaintiff

and

Jacob Basil Hlatshwayo

First Defendant

Government Employees Pension Fund

Second Defendant

Acting Director-General: Department of
Agriculture, Land Reform &
Rural Development

Third Defendant

Black Dot Property Consulting (Pty) Ltd

Fourth Defendant

JUDGEMENT

Summary

Civil trial – whether the plaintiff’s case as pleaded and augmented by the evidence led made out a case for the first defendant to be found liable based on contract, delict or the Public Finance Management Act 1 of 1999. Held – the plaintiff’s case as pleaded and augmented by the evidence led fails to establish any liability on the part of the first defendant.

MODIBA J:

INTRODUCTION

[1] The Special Investigating Unit (“SIU”) and the Department of Agriculture, Rural Development and Land Reform (“the Department”) as joint plaintiffs seek an order declaring an agreement concluded between the Department and the fourth defendant, Black Dot Property Consultants (“Black Dot”) in April 2020 unlawful and invalid and set aside as it fails to comply with a variety of applicable statutory and regulatory provisions.

[2] In combined summons dated 25 February 2021, in addition to the declaratory relief described above, the plaintiffs sought repayment of an amount of R11 million from the first defendant, the Department’s erstwhile Chief Financial Officer (“CFO”) Jacob Basil Hlatshwayo (“Mr Hlatshwayo”) and Black Dot, being the full amount the Department paid Black Dot in terms of the impugned agreement. In amended particulars of claim dated 6 July 2021, in addition to the declaratory relief described in paragraph 1 above, the plaintiffs itemised the monetary relief they seek against Black Dot and Mr Hlatshwayo into three claims referenced claims 1 to 3. I will detail these claims at pertinent points in the judgment.

[3] Initially, both Mr Hlatshwayo and Black Dot opposed the action. For reasons I will shortly articulate, the trial only proceeded in respect of Mr Hlatshwayo.

[4] The trial was enrolled for 6 to 10 February 2023. On 5 February 2023, Mr Hlatshwayo filed a notice of motion, supported by affidavit styled, ‘Interlocutory application’. He sought to have the application heard at the commencement of the trial. He did not afford the plaintiffs an opportunity to answer to the application. When

the Tribunal convened to hear the trial on 6 February 2023, the plaintiffs expressed their intention to oppose the application. It is for this reason that I issued directives for the filing of further papers. The parties complied with these directives.

[5] I later directed that I will hear arguments in the interlocutory application during the closing arguments in respect of the trial. I further directed the parties to file written heads of argument addressing both the issues in the trial and in the interlocutory application. I am grateful to the parties for their valuable assistance.

[6] This judgment addresses issues in the trial in respect of Mr Hlatshwayo and disposes of his interlocutory application.

THE TRIAL

[7] Although in their respective pleas, the first defendant denied that the impugned agreement was concluded pursuant to an irregular procurement process, at the trial he no longer persisted in opposing the declaratory relief sought by the plaintiffs. He articulated his changed position in an opening and witness statement his counsel handed up at the commencement of the trial.

[8] At the commencement of the trial, with Black Dot's consent, counsel for the plaintiffs handed up a draft order to be made a Tribunal's order. Black Dot had made an offer on the terms set out in the draft order which the SIU accepted, settling all disputes between the plaintiffs and Black Dot. If made a Tribunal's order, the draft order would dispose of the relief declaring the impugned agreement unlawful and setting it aside. It would also dispose of monetary claims 1 and 3.

[9] The plaintiffs and Black Dot had not placed any information before the Tribunal to satisfy itself that the draft order agreed to between the parties is in accordance with

the principles set out in *Buffalo City*¹. I directed the plaintiffs to file this information by 27 February 2023. It did not comply with this directive.

[10] Since the terms of the draft order had a bearing on the remaining issues in the trial to be determined between the plaintiffs and Mr Hlatshwayo, I stood the trial against Black Dot down to consider the draft order at the end of the trial and permitted the trial to proceed only in respect of the relief claimed against Hlatshwayo.

[11] On 1 March 2023, I convened the Tribunal to deal with issues arising from the draft order. The SIU and Black Dot sought more time to return to the negotiation table. It is for this reason that this judgment only addresses issues that arose in the trial in respect of Mr Hlatshwayo. The trial in respect of Black Dot will proceed separately in the event that the Department and Black Dot do not file an agreed draft order that disposes of the remaining issues in the trial in the public interest and in accordance with the law.

[12] The following two witnesses testified on behalf of the plaintiffs:

12.1 *Oreokame Harry Choche* (“Mr Choche”) - He is the Chief Director: Supply Chain Management in the Department. When the impugned procurement occurred, he reported directly to Mr Hlatshwayo who was at the time the Department’s Chief Financial Officer (“CFO”);

12.2 *Boitumelo Sephoti* (“Ms Sephoti”) - She is the Director: Information Technology Audit in the Department. Her team undertook an internal audit of the impugned procurement as authorised by the third defendant, the Department’s Director General and the Internal Audit Committee. At all material times when the plaintiff’s alleged cause of action arose, Petrus Shabane (“Mr Shabane”) was the incumbent Director General in an acting capacity.

¹ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 23 - 25.

[13] The plaintiffs had filed witness statements in respect of these witnesses. The witnesses confirmed their respective statements on record during the trial. They then elaborated on their evidence in respect of the narrow issues that remained for determination between the plaintiffs and Mr Hlatshwayo. At the end of the evidence of these witnesses, the plaintiffs closed their case.

[14] Mr Hlatshwayo closed his case without leading any evidence.

[15] The plaintiffs' alleged cause of action relates to the procurement of surgical masks the Department undertook in 2020 to curb the spread of the Covid-19 pandemic. It is common cause that on or about 20 April 2020, the Department through Mr Hlatshwayo as its then CFO, procured 400,000 surgical masks from Black Dot for an amount of R11 million.

[16] In their amended particulars of claim, the plaintiffs have pleaded claim 2 in respect of which they seek to hold Mr Hlatshwayo solely liable as follows:

“Claim 2:

“27. The goods were received, by the second plaintiff, under the management and/or direct, alternatively indirect, control and oversight of the first defendant.

“28. Notwithstanding, in writing, acknowledging receipt of 400,000 3-ply surgical face masks, Black Dot only delivered 337 000 3 – ply surgical face masks, alternatively subsequent to delivery of the goods, 63 000 of the 3-ply surgical face masks delivered by Black Dot are unaccounted for.

“29. By virtue of the conduct of the first defendant, the second plaintiff, and the state as a whole, has suffered damages in the amount of R1 811 250.00. The aforesaid amount calculated at a cost of R28.75 per 3 – ply surgical face mask.”

[17] Mr Hlatshwayo did not file a consequential plea after the plaintiffs filed their amended particulars of claim. He contends that paragraph 19 of his plea filed during May 2021 sets out his defence to claim 2. There, he pleaded as follows:

“19. The First Defendant denies that the procurement of goods from the Fourth Defendant was without value or substance to the State, and specifically pleads that the Fourth Defendant delivered the procured PPE’s to the Department and that such PPE’s were distribution amongst Farm Workers for use in the prevention of the spread of Covid-19.” (sic)

[18] It follows that the following issues stand to be determined between the plaintiffs and Mr Hlatshwayo:

18.1 whether the 400,000 surgical masks procured in terms of the impugned agreement were delivered to the Department;

18.2 whether the 400,000 surgical masks procured in terms of the impugned agreement were fully accounted for.

Whether the procured surgical masks were delivered

[19] In its amended particulars of claim, the plaintiffs allege that Mr Hlatshwayo acknowledged receipt of 400 000 surgical masks when Black Dot only delivered 337 000 such items to the Department. An internal audit investigation subsequently conducted by Ms Sephoti’s team found that contrary to what is alleged in the particulars of claim, only 12,410 surgical masks could not be accounted for. Invariably, the plaintiffs would not be able to establish the alleged loss of 63,000 surgical masks for which they sought to hold Hlatshwayo accountable in claim 2. They would only establish a loss of R310,250 in respect of the 12,410 surgical masks allegedly not accounted for.

[20] Both Mr Choche and Ms Sephoti did not adduce any evidence to establish this allegation.

[21] Mr Choche was not available when the surgical masks were delivered. Accordingly, he did not participate in the counting of the surgical masks when they were delivered and does not know how the distribution occurred. Around the time the procurement took place, he walked past the stores area and observed Mr Hlatshwayo and another official named Mr Tau Nyaku (“Mr Nyaku”) counting the surgical masks. Mr Hlatshwayo signed a delivery note confirming that 400,000 surgical masks were delivered to the Department. Mr Nyaku co-signed it.

[22] Mr Choche testified that under normal circumstances, the Department’s purchasing office receives procured items. The client must also sign to confirm that it received the procured items. The SCM unit does not have a clerk at stores where procured items are received. When making a payment to a supplier for the procured items, the SCM unit only relies on the signed delivery note as confirmation that the procured items were received.

[23] During Ms Sephoti’s cross examination, it emerged that she was not provided with the delivery note when she and her team audited the impugned procurement process. She saw the delivery note for the first time during the trial. After evading questions that elicited this answer for a while, she ultimately conceded that if she had obtained the delivery note during the internal auditing process, she would have found that 400,000 surgical masks were delivered to the Department.

[24] From Ms Sephoti’s evidence, despite reiterating repeatedly that her audit findings are evidence based, it was clear that she and her team accepted the contents of the documents in respect of the procurement process as furnished to her by Mr Choche without any further investigation. During her evidence, she baldly made reference to interviews with Departmental officials but did not take the Tribunal into her confidence regarding who the interviewer and the interviewee were, the purpose of the interviews and the evidence elicited during the interviews. She only mentioned that she contacted Mr Nyaku for information on the impugned procurement process.

Mr Nyaku could not assist her as he was on study leave. He referred her to Mr Choche who provided her with the required information both orally and written.

[25] Given the methodology she followed during the internal auditing process, it is highly probable that Ms Sephoti would have accepted the delivery note without any further investigation regarding whether the 400,000 surgical masks were indeed delivered to the Department. As it turned out, Mr Nyaku co-signed the acknowledgement of receipt together with Mr Hlatshwayo. Although Ms Sephoti interviewed him, she simply accepted that he could not be of assistance as he was on study leave. She did not enquire on his role during the impugned procurement process despite the fact that she had been furnished with an acknowledgement of receipt reflecting that Mr Nyaku personally distributed the 44,000 surgical masks to the Gauteng Province.

[26] In light of the concession Ms Sephoti made as set out in paragraph 23 above, there is no evidentiary basis on which the Tribunal may find that the plaintiffs have established the allegation that the 400,000 masks were not delivered to the Department.

Whether the procured surgical masks were accounted for

[27] Assuming that 12,410 surgical masks were indeed not accounted for, it was contended on behalf of Mr Hlatshwayo that the plaintiffs have not set out a cause of action based on the law of contract, delict or employment that would justify the imputation of Mr Hlatshwayo's liability to the Department for these items.

[28] To succeed on a cause of action based on the law of contract, the plaintiffs had to allege the existence of a contract, its terms, breach of the contractual terms by Mr Hlatshwayo, attempts taken to remedy the breach and relief claimed to remedy the breach. To succeed on a cause of action based on delict, the plaintiffs had to allege wrongful conduct Mr Hlatshwayo committed intentionally or negligently through

omission or commission, which caused the plaintiffs foreseeable harm. The plaintiffs' particulars of claim contain no such allegations. The evidence adduced by their witnesses also does not cure these defects in the plaintiffs' particulars of claim.

[29] Belatedly during oral argument, counsel for the plaintiffs sought to hold Mr Hlatshwayo liable for breach of s 38 of the Public Finance Management Act² ("PFMA"). This provision sets out the general responsibilities of an accounting officer. The plaintiffs' counsel placed reliance on s38(e) which holds an accounting officer responsible for the management including the safe-guarding and maintenance of the assets and liabilities of the Department. But Mr Hlatshwayo is not the Department's accounting officer as defined in s 36(2)(a) of the PFMA. Neither had National Treasury designated him as such in terms of s36(3)(a) of the PFMA. Mr Shabane was the incumbent accounting officer when the plaintiffs cause of action arose.

[30] The plaintiffs' counsel resorted to s45(e) of the PFMA which extends the responsibilities s38(e) imputes to accounting officers to other officials in the Department. But a cause of action based on Mr Hlatshwayo's duties as a Departmental official in terms of s38(e) of the PFMA is not pleaded. The fact that in his plea, Mr Hlatshwayo pleaded non-compliance by the Department with the relevant provisions of the PFMA for causing the Department to incur fruitless and wasteful expenditure, this does not amount to an admission of liability on his part and cannot be used to hold him liable.

[31] Determining the nature of Tribunal's proceedings with reference to the provisions of the Special Investigating Unit and the Special Tribunals Act³ and the duty of the SIU as the plaintiff, the Tribunal in *Kim Diamonds*⁴ held that:

"3.7 The words 'justiciable civil dispute' mean, in my view, that there must exist a cause of action which would be cognisable as a civil dispute between the parties in any Court of law. It has been held that the plaintiff's claim must be fully pleaded by

² Act 1 of 1999.

³ Act 74 of 1996.

⁴ *Special Investigating Unit V Kim Diamonds (Pty) Ltd* 2004 (2) SA 173 (SPT)

'pleading material facts whereby the cause of action appears clearly to enable the other party reasonably and fairly to plead thereto'.

See *Konyn and Others v Special Investigating Unit* 1999 (1) SA 1001 (Tk) at 1019A – B”

[32] The SIU has failed to fulfil the above duty. In any event, it is improper for a plaintiff to attempt to augment the defects in its case by resorting to the defendant’s pleaded case. It is trite that the plaintiff bears the onus to prove its case on a balance of probabilities.⁵

[33] Even more problematic for the plaintiffs is their attempt to rely on hearsay evidence to prove that 12,410 surgical masks were not accounted for. Ms Sephoti’s evidence is based largely on hearsay evidence. Save in respect of Mr Nyaku who she personally spoke to, she did not personally interview provincial officers regarding the surgical masks the Department dispatched to provinces. During the internal auditing process, it appears that she and her team mainly relied on the Covid-19 travel permits which were allegedly given to officials who transported the surgical masks to the various provinces and a dispatch note signed by the official who collected the surgical masks the Department dispatched to the Gauteng provincial office which appear at pages 176 to 184 of the plaintiffs bundle of discovered documents. The number of surgical masks allegedly dispatched to provinces is reflected on these documents. Ms Sephoti’s team tallied the relevant figures and concluded that the sum figure represents the number of surgical masks that were dispatched to the provinces. This is how she determined the shortfall of 12,410 masks.

[34] It was argued on behalf of the plaintiffs that Mr Hlatshwayo should be held liable for the surgical masks that were not accounted for because he was solely responsible for dispatching the surgical masks to the provinces and the Covid-19 travel permits were signed on behalf of Mr Hlatshwayo. But not all the Covid-19 travel permits were signed on behalf of Mr Hlatshwayo. Two were signed by Mr Nyaku, reflecting that he

⁵ Pillay v Krishna 1946 AD 946 (952- 953)

probably personally dispatched some of the masks to the provinces. Yet Ms Sephoti never questioned him regarding his role in the process. None of the persons who dispatched, transported and/ or transported the surgical to the respective provinces were called to corroborate her evidence.

[35] When interrogated on her investigation of the storage and dispatching process, she simply answered that when she called for the relevant documents, they were not provided to her.

[36] I therefore find that the plaintiffs have not pleaded a proper cause of action to hold Mr Hlatshwayo liable for the 12,410 surgical masks that were allegedly not accounted for. They have not led admissible evidence on which to augment the weaknesses in their case against Mr Hlatshwayo as pleaded. They have also failed to establish that 12,410 surgical masks were not accounted for.

[37] In the premises, the plaintiffs' cause of action based on claim 2 falls to be dismissed.

DISCHARGE OR VARIATION OF THE PENSION INTEREST

[38] On 14 April 2021, the plaintiffs sought and were granted an order on an *ex parte* basis preserving Mr Hlatshwayo's pension benefits held with the second defendant the Government Employees Pension Fund ("GEPF"). Subsequently, Mr Hlatshwayo unsuccessfully opposed the confirmation of the preservation order. In the result, his pension benefits remain preserved. In the interlocutory application filed on 6 February 2023, he seeks a discharge or variation of the preservation order because it no longer serves any purpose. Alternatively, he relies on changed circumstances. In their answering affidavit filed in opposition to this application, the plaintiffs initially denied that Mr Hlatshwayo has made out a case for the preservation order to be discharged or varied.

[39] During oral argument, it was conceded on behalf of the plaintiffs that if the plaintiff's action against Mr Hlatshwayo fails, then the preservation order falls to be discharged.

[40] The narrow issue for determination in the interlocutory application is whether Mr Hlatshwayo has made out a case for the variation or discharge of the order in terms of which his pension benefits are preserved.

[41] The dismissal of the plaintiffs' claim against Mr Hlatshwayo renders the relief he seeks in his variation application moot. His pension fund was preserved pending this action. With the plaintiffs' claim against him falling to be dismissed, the order granted on 17 December 2020 preserving his pension interest falls to be discharged.

COSTS

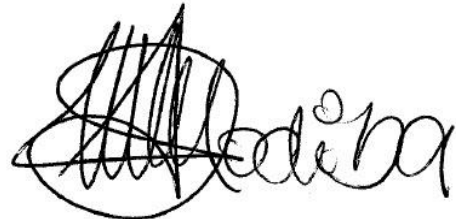
[42] It is trite that costs follow the event. Therefore, ordinarily, Mr Hlatshwayo would be entitled to the costs of the action. The plaintiffs seek Mr Hlatshwayo held liable for the wasted costs on two occasions when the trial was postponed due to Mr Hlatshwayo's non-compliance with Tribunal Directives. Mr Hlatshwayo contends that it is just and equitable that each party bears its own legal costs to avoid an elaborate exercise of identifying and quantifying costs occasioned by each party. I agree with Mr Hlatshwayo that it is just and equitable that each party bears its own legal costs.

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

ORDER

1. By agreement between the plaintiffs and the first defendant, the agreement concluded between the second plaintiff and the fourth defendant on 20 April 2020 falls to be declared invalid and set aside.

2. The plaintiffs' action against the first defendant in respect of claim 2 is dismissed;
3. The first defendant shall bear his costs of suit.
4. The preservation order granted by the Tribunal on 17 December 2020 is discharged.
5. The trial in respect of the issues that arise for determination between the plaintiffs and the fourth defendant is postponed *sine die*.



JUDGE L.T. MODIBA
PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the applicant:	Adv. L Montsho-Moloiwane SC assisted by Adv. PP Ferreira
Attorney for the applicant:	Office of the State Attorney, Pretoria
Counsel the 1st respondent:	Adv. Manala
Attorney for the 1st respondent:	Seabela Attorneys Incorporated
Date of hearing:	6,7,8 and 15 February 2023

Date of judgment:

15 March 2023

Mode of delivery: *this judgment is handed down by sending it by email to the parties' legal representatives, loading on Caselines and release to SAFLII and AfricanLII. The date and time for delivery is deemed to be 10 am.*