

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

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

[Handwritten signature and date 2/3/22]

CASE NO:5232/2021

In the matter between:

MPHAPHULI CONSULTING (PTY) LIMITED

APPLICANT

And

SPECIAL INVESTIGATING UNIT

FIRST RESPONDENT

ADVOCATE JAN LEKHOA MOTHIBI

SECOND RESPONDENT

FETAKGOMO-GREATER TUBATSE MUNICIPALITY

THIRD RESPONDENT

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

FOURTH RESPONDENT

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

FIFTH RESPONDENT

MINISTER OF FINANCE

SIXTH RESPONDENT

MINISTER OF MINERAL RESOURCES AND ENERGY

SEVENTH RESPONDENT

ESKOM HOLDINGS

EIGHTH RESPONDENT

MEC: DEPARTMENT OF COOPERATIVE GOVERNANCE

HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS LIMPOPO

PROVINCIAL GOVERNMENT

NINTH RESPONDENT

JUDGMENT

MULLER J:

- [1] The applicant applied to review and set aside a report of the first respondent, the Special Investigating Unit.¹ In addition, the applicant claimed a declaratory order that the investigation by the SIU was unlawful and that it was not included in the terms of reference of proclamation No R52 of 2014.² It also claimed a declaration that all steps taken by all the respondents following on the report are unlawful and be set aside. And an order that the respondents to stop all the steps taken against the applicant which resulted from the report.
- [2] It also bears mentioning at this early stage that counsel for the applicant abandoned the relief claimed in prayers 3 and 4 of the notice of motion.
- The SIU is a juristic person which is established in terms of section 13(1) of the Special Investigating Units and Special Tribunals Act, Act 74 of 1996.³
- [3] The applicant is a company who describes itself as a company whose business it is to provide hope to rural communities through accelerated delivery of electricity services to rural communities by utilizing the Integrated National Electrification Programme which is a grant funded by the Department of Mineral Resources and Energy (7th respondent).
- [4] The applicant stated that it was appointed by the GTM as a consultant on 28 February 2012 to render services for accelerating delivery of electricity to communities in its area of jurisdiction. A professional services contract was entered into on 29 August 2015 between the applicant and GTM for the provision of professional engineering procurement construction services and

¹ Hereinafter "the SIU".

² Government Gazette 37884 dated 1 August 2014.

³ Hereinafter the "SIU Act".

management services for the delivery of accelerated electrical services. It was called "Operation Mabone."

- [5] From the deponents narration of the events leading up to the appointment of the applicant no mention is made that a proper tender process had been followed.
- [6] The contract price initially was for the electrification of 19 500 households at a price of R168 856 689.07. An addendum was entered into on 22 January 2014 in terms whereof the households were increased to 13 325 households for increased contract price of R 231 912 217.61. A second addendum was signed on 15 December 2014 which increased the households to 19 178 for an amount of R326 496 722.00.
- [7] Trouble started in August 2016 when GTM refused to pay for services rendered. The parties resorted to mediation, which failed. The applicant instituted proceedings in this court for recovery of the amounts owing. On 18 November 2016 GTM was ordered in terms of a judgment issued by this court to pay the applicant;
- (1) R3 549 892.89
 - (2) R21 129 421.29
 - (3) R1 810 184.48
 - (4) R14 692 073.42

[8] Application for leave to appeal was refused on 6 March 2017 by the SCA. Subsequently GTM terminated the contract. That order stands until set aside.⁴

[9] The GTM is still indebted to the applicant in the amount of R9 765 850.89. The applicant instituted action under case number 6949/2019 for the recovery of the said amount. The action is still pending. The applicant says that the SIU is stalling the action.

The applicant has all the remedies in terms of the rules at its disposal to bring the case to conclusion and cannot be heard to complain if it is supine in the conduct of the litigation instituted by it. There is no need to say anything on the merits of the action save to make it clear that since this court in due course will dispose of the action any comment at this stage will be unwise.

[10] The first issue which the court is called upon to decide is whether the proclamation is sufficiently wide to include an investigation into the propriety of the contract entered into with the applicant.

[11] The second issue is whether the Promotion of Administrative Justice Act 3 of 2006⁵ is applicable. Counsel on behalf of the applicant has emphasised during argument that reliance is squarely placed upon PAJA as the basis for the review and setting aside of the report of the SIU. Counsel specifically disavowed any reliance on legality as the basis for the review application.

APPLICABILITY OF THE PROCLAMATION

⁴ *Municipal Manager OR Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3 (14 February 2022) par 23-24.

⁵ Hereinafter "PAJA".

[12] The SIU Act provides for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money and also any conduct which may seriously harm the interests of the public. The SIU may institute and conduct civil proceedings in any court of law or a Special Tribunal in its own name or on behalf of State institutions.⁶ The President, in terms of section 2, may establish a SIU whenever he deems it necessary, on the grounds referred to in section 2(2):

"The President may exercise the powers under subsection (1) on the grounds of any alleged-

- (a) serious maladministration in connection with the affairs of any State institution;⁷
- (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 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combatting 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."

⁶ Preamble to the SIU Act.

⁷ "**State institution** means any national or provincial department, any local government, any institution in which the State is the majority or controlling shareholder or in which the State has a material financial interest, or any public entity as defined in section 1 of the Reporting by Public Entities Act, 1992 (Act No 93 of 1992)."

- [13] When the President is satisfied that the establishment of an SIU is justified, he issues a proclamation which must set the terms of reference of the SIU and the particulars regarding the establishment of the SIU.⁸

The functions of the SIU are listed in section 4(1), which states:

“The functions of a Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in section 2 (1)-

- (a) to investigate all allegations regarding the matter concerned;
- (b) to collect evidence regarding acts or omissions which are relevant to its investigation;
- (c) to institute and conduct civil proceedings in a Special Tribunal or any court of law for-
 - (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such State institution;
 - (ii) any relief relevant to any investigation; or
 - (iii) any relief relevant to the interests of a Special Investigating Unit;
- (d) to refer evidence regarding or which points to the commission of an offence to the relevant prosecuting authority;
- (e) to perform such functions which are not in conflict with the provisions of this Act, as the President may from time to time, request.
- (f) From time to time as directed by the President to report on the progress made in the investigation and matters brought before the Special Tribunal concerned or any court of law;
- (g) upon conclusion of the investigation, to submit a final report to the President; and
- (h) to at least twice a year submit a report to Parliament on the investigations by and the activities, compositions and expenditure of such Unit.”

⁸ Section 2(3) of the SIU Act.

[14] The source of the power of the President (the 4th respondent) to issue proclamation, is the SIU Act. The President exercised that power when he issued proclamation R52/2014 dated 1 August 2014 in terms whereof he granted the SIU the right and authority to investigate the affairs of the Greater Tubatse Local Municipality.⁹ The terms of reference are set out in the proclamation and allowed for a wide variety of matters to be investigated by the SIU which took place between 11 March 2004 and the date of the publication of the proclamation on 1 August 2014 or which took place prior to 11 March 2004 or even after the date of the proclamation, which are relevant to, connected with, incidental to or ancillary to the matters referred to in the schedule to the proclamation or which involve the same persons, entities or contracts investigated under authority of the proclamation and which include recovery of any losses suffered by the GTM in relation to the matters mentioned in the schedule. The relevant provisions of the schedule are:

“The procurement of and contracting for goods, works or services by or on behalf of the Municipality and payments made in respect thereof in a manner that was-

(a) not fair, competitive, transparent, equitable or costs-effective; or

(b) contrary to-

(i) applicable legislation;

(ii) applicable manuals, guidelines, practice notes or instructions issued by the National Treasury; or

(iii) manuals, policies, procedures, prescripts, instructions or practices of or applicable to the Municipality, and related irregular, fruitless or wasteful expenditure incurred by the Municipality.

⁹ Hereinafter “the GTM”.

(2)

(3)....

(4)....”

- [15] The clear purpose of the proclamation is to cast the net extremely wide for purposes of investigation. It stands to reason that the SIU may follow up all leads in the process of the investigation of the affairs of the GTM in connection with all procurement of and contracting for goods, works or services on behalf of the GTM and in respect of payments made by the GTM in respect of those contracts.
- [16] The SIU must perform a fact finding exercise and is authorised to perform all the functions and powers assigned to it by the SIU Act including taking the necessary steps to recover any losses suffered by the GTM by instituting proceedings in a Special Tribunal or a court of law for a determination.
- [17] The SIU is obliged to report to the President upon conclusion of its investigation. Such a report dated 9 September 2019 was submitted to the President.
- [18] Section 4(1)(g) does not require that a recommendation be made to the President. A recommendation, if made by the SIU in its report, is not binding on the President, nor anyone else. A recommendation made to the President is superfluous since it is an obligation of the SIU to institute and conduct civil proceedings for relief, if necessary under the circumstances.¹⁰

¹⁰ Section 4(1)(c)(i), (ii) and (iii) of the AIU Act.

- [19] It is important to recall that civil proceedings have been instituted in 2017 to recover the amount of R3 175 041.39 and R73 287 766.50 under case number 7226/2017 from the applicant.
- [20] The argument of counsel for the applicant, as I understand it, is that the contractual relationship between the applicant and the GTM was not covered by the terms of reference contained in the proclamation.
- [21] The powers to investigate in terms of the proclamation are very wide in its terms which may include a wide variety of contracts for the procurement of goods works and services concluded in the periods stated in the proclamation.
- [22] It is understandable. The whole purpose of the investigation is not to leave any proverbial stone unturned to uncover widespread acts of fraud, maladministration, corruption and malfeasance. And to achieve the intended purpose wide powers were accorded to the SIU to enable it to achieve the intended purpose. The investigation conducted with reference to the applicant fell well within the ambit of the schedule and the terms of reference. The investigation was directed at the procurement of and contracting with the applicant for goods, works or services by or on behalf of the Municipality and payments made in respect thereof in a manner that was not fair, competitive, transparent, equitable or costs-effective.
- [23] I am of the considered view that there is no substance in the first point raised by the applicant. The report, as far as it concerns the applicant, and on a proper reading thereof, is nothing more than a report on the facts and a brief description of the steps that were taken by the SIU to recover losses. Civil proceedings were instituted well before the date on which the report saw the

light of day. This court will in due course determine if there is any substance in the claim by the SIU after consideration of all the relevant facts.

- [24] The first point is dismissed. I turn to consider the second issue whether PAJA, on the facts, is applicable.

APPLICABILITY OF PAJA

- [25] The SIU is similar to a commission of inquiry.¹¹ A commission of inquiry, as was observed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹² is primarily an investigative body whose responsibility is to report to the President.¹³ It was held that:

“The Commissions Act provides that, once a commission has been appointed, the President may confer upon that commission the power to summon and examine witnesses, to administer oaths and affirmations and to call for the production of books, documents and objects. Failure to comply with a subpoena issued by a commission is a punishable offence. If these powers are not conferred, the commission will have no powers beyond those enjoyed by any individual or State agency conducting an investigation. The Commission Act may only be made applicable to a commission of inquiry if it is investigating a matter of public concern.”

- [26] The SIU enjoys no powers to summon and examine witness, to administer oaths or affirmations and to call for the production of objects, books and documents as provided by section 3(1) of Commissions Act and it cannot stray beyond the boundaries set by the SIU Act and the proclamation. Although a commission of inquiry, is generally not entitled or empowered to take any action

¹¹ *Special Investigating Unit v Nadasen* 2002 (1) SA 605 (SCA) par 5.

¹² 2000 (1) SA 1 (CC) par 162-163.

¹³ *Bell v Van Rensburg* NO 1971 (3) SA 693 (C) 705F; *S v Mulder* 1980 (1) SA 113 (T) 120E.

as a result of its findings, the SIU is specifically empowered¹⁴ to institute proceedings in its name in a Special Tribunal or a court of law against the parties concerned for the recovery of what is due as a result of its investigation and the evidence obtained.¹⁵

[27] There is no doubt that the SIU is an organ of state for purposes of PAJA who exercised a public power. This court is called upon consider the entire report in the context of the proclamation and relevant surrounding circumstances to determine if the report constitutes administrative action as contemplated by PAJA. The focus is whether action taken by the SIU is administrative action. It is defined as follows:

“Administrative action means any decision taken, or any failure to take a decision, by-

- (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct, external legal effect, but does not include...”

The requirements were explained in *Sokhela and Others v MEC for Agriculture and Enviromental Affairs (Kwazulu-Natal)*¹⁶as:

“That requires a consideration of the action in question, against the requirements of the definition of ‘administrative action’ in PAJA. There are even requirements, namely that there must be (i) a decision, (ii) by an organ of State, (iii) exercising a public power or performing a public function, (iv) in terms of

¹⁴ Section 4(1)(c) of the SIU Act.

¹⁵ Section 4(1)(a) and (b); 5(5) and 5(7) of the SIU Act.

¹⁶ 2010 (5) SA 574 (KZP) par 60.

any legislation, (v) that adversely affects someone's rights, (vi) which has a direct, external legal effect, and (vii) that does not fall under any of the exclusions listed in s 1 of PAJA.”

[28] A decision in terms of PAJA¹⁷ is:

“Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

- (a) making, suspending, revoking or refusing to give, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.”

[29] In *Gamevest Pty Ltd v Regional Land Claims Commissioner, Northern Province and Mpumulanga, and Others*¹⁸ it was stated:

“What is an *administrative act* for the purpose of justiciability? There is no neat, ready-made definition in our case law, but in *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) Corbett CJ at 93A-B required, for common-law review, the non-performance or wrong performance of a statutory duty or power; where the duty/power is essentially a decision-making one and the person or body concerned has taken a decision, a review is available.”¹⁹

[30] Section 4(1)(c) of the SIU Act is an empowering provision obligating the SIU to recover all monies due to GTM by instituting and conducting civil

¹⁷ Section 1.

¹⁸ 2003 (1) SA 373 (SCA) par 12.

¹⁹ *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) par 22.

proceedings for relevant relief and to choose the *forum* in which to institute such proceedings. It bears notice that it is not institution of civil proceedings in this court that the applicant seeks to review and set aside, but rather the report which makes reference to that decision to do so, taken two years earlier by the SIU.

- [31] Counsel on behalf of the first and second respondent has pointed out that the relief claimed is too wide and vague and encompasses the entire report whilst the report also deals with other entities and other issues over and above the issues which relate to the applicant. Other entities, apart from the applicant, who were also under investigation are also referred to in the report. These entities are not parties before court. When confronted with this difficulty counsel on behalf of the applicant suggested that the court should have regard to the report insofar as it relates to the applicant.
- [32] It seems upon reflection to be prudent to rather have regard to the section of the report devoted to the applicant, instead of non-suiting the applicant on the basis of the non-joinder of the other entities who were under investigation and mentioned in the report.
- [33] Section 4.1.6 of the report (with sub-headings) contains the report relevant to the applicant. The purpose of the report if read as a whole is to inform the president of the reason for the investigation; a summary of the background facts leading to the contractual relationship between the applicant and the GTM as well as subsequent developments. The findings, recommendations as well as the outcomes are set out under separate subheadings. The recommendations
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are not recommendations at all, but is the conclusion reached, with regard to the evidence gathered, as a result of the investigation. It reads as follows:

“Recommendations: This therefore rendered the entire appointment of Mphaphuli irregular. In respect of this aspect, the SIU is of the view that the difference of **R5 000.02** per household between the Municipality and VDM contracts must be recovered from Mphaphuli. The value of this amount is R73 287 766.50.”

- [34] It will be recalled that the SIU instituted proceedings in this court to recover the amount mentioned above prior to the report being signed and forwarded to the President. Under the sub-heading “Outcomes” it is reported that action has been instituted on 24 October 2017 to recover the amount mentioned above.
- [35] It was held in *Smit v Kwanonqubela Town Council*²⁰ that:
- “The launching of legal proceedings is not an administrative act but a procedural act open to any member of the public.”
- [36] It is to be noted that the SIU is obligated in terms of the empowering provision to institute legal proceedings to obtain relief that the State institution concerned is entitled to including claiming to recover losses or damages or the prevention thereof. The SIU is a statutory created entity who has no powers except those given to it by the SIU Act.
- [37] In *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd*²¹ the court followed *Smit v Kwanonqubela Town Council* and held that the decision to institute action to collect payment for arrear services is not administrative action on the basis that it:

²⁰ 1999 (4) SA 947 (SCA) par 10.

²¹ 2001 (4) SA 661 (W).

“...lacks the requisite finality to attract administrative justice rights. The decision to recover payment is a preliminary or interlocutory step having no determinative effect on the parties rights. The issue of summons, as I have already held, is not administrative act..”²²

- [38] I find that the report does not constitute administrative action with the result that PAJA finds no application on the facts. The contention is also that the content of the report showed that a decision has been made that the applicant overstated its claims for services rendered, which is defamatory in nature. The observations or opinions set out in the report formed the basis of or rationale for the decision to institute proceedings. It should nevertheless be accepted that the report negatively affects current business and future business dealings of the applicant. The right to human dignity is inherent to any person. Every person has the right to have his dignity respected and protected.
- [39] The constitutional obligation to foster public administration that is accountable, effective, efficient and free of corruption must be weighed up against the prejudice suffered. It is the overarching aim and purpose of the SIU Act is to achieve this obligation by investigation of corrupt practices and maladministration and report to the President. The SIU is obliged, if it believed to have uncovered the commission of a crime to report and to refer the evidence of the crime to the relevant National Prosecuting Authority.²³ It follows from these observations that the opinions and views held by the SIU are not final or determinative.²⁴ A final determination will be made in due course by this court. The report thus do not have a direct external effect for the same reason.

²² Par 14.

²³ Section 4(1)(d) of the SIU Act.

²⁴ *Masuku v Special Investigating Unit and Others* (unreported) Case no P55372/2020 dated 12 April 2021 (GP) par 17.

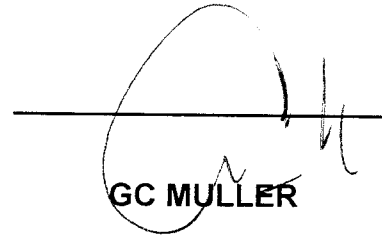
[40] Finally, even if I am wrong in my view that PAJA is not applicable; the common cause facts are that the applicant has instituted action against GTM for recovery of the amount outstanding in respect of the services rendered to GTM. The SIU, likewise, has instituted proceedings against the applicant for the recovery of amounts allegedly not due to the applicant. When counsel was confronted with the proposition that the order will have no practical effect counsel pointed out that the deponent to the founding affidavit is a businessman and that he as well as the business of the applicant inclusive of other business activities suffer as a result of the recommendation and contents of the report which is defamatory. The applicant averred that in its investigation the SIU failed to consider the facts and also failed to interview certain officials from National treasury, ESCOM and certain officials from the municipality. The failure to do so was the cause for a biased report.

But, as previously stated civil proceedings were instituted by the applicant as well as the SIU, long before the report came into being. The decision to institute legal proceedings was only an initial step in a multi-staged process that followed the decision. Setting aside a section of the report which is applicable to the applicant will, in my view, not have any effect on the pending litigation.

[41] The application falls to be dismissed. The costs should follow the result. There is no reason why the rule that the successful party is entitled its costs should not be followed. Both parties employed two counsel.

ORDER

The application is dismissed with costs, which costs shall include the costs consequent upon the employment of two counsel.



GC MULLER

JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE