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

CASE NO: GP26/2024

In the matter between:

SPECIAL INVESTIGATING UNIT	**Applicant**
and	
SANELE DLAMINI	**First Respondent**
NATIONAL LOTTERIES COMMISSION	**Second Respondent**
MOTHEO SPORTS AND ENTERTAINMENT FOUNDATION	**Third Respondent**
LIBERTY LIFE INSURANCE	**Fourth Respondent**

JUDGMENT

Introduction

[1] This is an urgent opposed interlocutory application. The Special Investigating Unit (SIU), the applicant, seeks to prohibit the first respondent, Mr Sanele Dlamini,

from withdrawing and/or in any way encumbering or prejudicing the value of his pension funds administered by the fourth respondent.

Parties

[2] The applicant is the Special Investigations Unit (SIU) established in terms of section 2(1)(a) (i) of the Special Investigating Units and Special Tribunals Act No. 74 of 1996. (the SIU Act).

[3] The first respondent is Mr Sanele Dlamini a former senior manager of the Grant operations of the National Lottery Commission. The second respondent is the National Lottery Commission (NLC) an organ of state of the Department of Trade and Industry. The third respondent is the Motheo Sports and Entertainment Foundation (the Motheo Foundation). The fourth respondent was initially cited as Liberty Life Insurance. Its citation was a source of dispute between the parties and is now finally cited as the Corporate Selection Umbrella Retirement Fund.

[4] At the outset, the SIU cited the fourth respondent as Liberty Life Insurance. On 23 April 2025 it served a Notice of Substitution to substitute Liberty Life Insurance as it was not administering the first respondent's pension fund. The notice advised that the pension fund benefits were in fact held by Liberty Corporate, a division of the Liberty Group Limited, a company registered under registration No 1957/O02788/06. The first respondent disputes these citations as well as the process adopted to substitute and submits any order this Special Tribunal makes, would be against the wrong entity and thus a nullity. On 29 April 2025, the SIU withdrew that notice and filed a further notice of substitution reflecting the fourth respondent as being the Corporate Selection Umbrella Retirement Fund. (Liberty)

Relevant background facts.

[5] The SIU has been mandated in terms of Proclamation 32 of 2020 by the State President, published on 6 November 2020 in Government Gazette number 43885 (the Proclamation) to conduct investigations in relation to serious maladministration in

connection with the affairs of the NLC. It also litigates for the retrieving of monies arising out of malpractices and maladministration in connection with the administration of state institutions.

[6] The SIU is litigating in the public interest and in particular on behalf of the NLC to recover losses that it suffered as a result of irregular and unlawful practices.

[7] The purpose of this urgent application is to ensure that pension funds that will be available to the first respondent will be preserved for purposes of execution should it's the claim against him succeed. The SIU believes the first respondent may be a man of straw.

[8] The SIU investigated the grant funding that was awarded to the Motheo Foundation. It is also investigated the processes followed by the NLC officials when reviewing and approving the project progress report submitted in connection with the Motheo Foundation grant and which on 7 February 2022 resulted in the second tranche of payment to it of R3million.

[9] The NLC had awarded the Motheo Foundation a grant amount of R9 million. Curiously on 14 April 2021 this grant of R9 million was preceded by the Motheo Foundation refusing the grant of funding to it of R70,000 by the NLC. After this refusal the grant funding projects manager of the NLC then moved to approve a proactive funding proposal. This is where the NLC or the Minister of Trade and Industry selects projects without an application by the grant requestor and proceeds to award a grant in its discretion. In this case it elected to grant an amount of R9million for the construction of a sports complex. This proactive funding was approved on 14 April 2021, being the same date on which the Motheo Foundation rejected NLC's offer of R70,000. After the payment of this second tranche the Motheo Foundation had already received grant funding in the total amount of R6 596 637,61.

[10] The first payment was made to the Motheo Foundation by the NLC into the First National Bank account of the Motheo Foundation which at that stage had a credit balance of only R291.00. The first payment was an the amount of R3 596 637,61.

[11] The SIU investigation revealed that the first amount of R3 596 637, 61 paid to the Motheo Foundation was not used for the funded project but was instead shared amongst several people and or entities as an undue gratification. That is the case pleaded in the main review proceedings instituted by the SIU against some 16 respondents including the first respondent.

[12] A term of the grant agreement provided that after the first payment, any further payments of the grant would only be made upon receipt of a satisfactory and approved progress reports. The second progress report which was co-signed as approved by the first respondent and one Ms Maodi has necessitated the launch of this application. It subsequently transpired that the second payment was unlawfully authorised.

[13] Ms Maodi of the NLC was assigned to the office of the CEO as the executive assistant whose responsibilities included various tasks in the office of the CEO. During this time, she got to know a Mr Sedibi, a member of the Motheo Foundation. In 2020 she became a business partner to him in an unrelated mining business. The investigation by the SIU revealed that the signatures of the first respondent and Ms Maodi confirmed the correctness of the progress report, thereby ensuring the release of the second tranche of money being R3million. It transpired that at that stage no work whatsoever has been carried out on the site.

[14] Prior to the signing of this progress report and on 24 October 2019 the Commissioner of the NLC signed a Service Level Agreement between the NLC and SRSQS Quantity Surveyors (Pty) Ltd (SRSQS) the 11th respondent in the main proceedings. This company was to deliver various services to the NLC which

included that it use its best endeavours to extend, protect and preserve the business interest of the NLC. SRSQS provided a progress report for the period 9 June 2021 to 30 November 2021 which purported to record the progress of the sports complex being the project funded by the NLC's grant to the Motheo Foundation. It confirmed progress on the sports project. It included purported proof of payments and purchases and 3 months of bank statements. All these documents were falsified as was a visual depiction of the alleged building site of the sports complex, a program of works including the pending invoices.

[15] The items mentioned in the Motheo Foundation's first progress reports was a complete fabrication of what was transpiring on the site as no work was ever done by the Motheo Foundation despite the assertions contained in the report by SRSQS. In the result the first progress report was entirely false.

[16] I do not refer to the alleged malfeasance of the other respondents in the main application. This urgent application is based on the alleged unlawful conduct of the first respondent.

[17] An analysis of the conduct of the first respondent shows that on or about January 2022 he was appointed as the senior manager: grant operations at the NLC head office and reported to the acting CEO. On 1 February 2022 Mr. Ramatsekisa of the NLC forwarded an email to Mr. Dlamini from Mr. Sidibe of the Motheo Foundation requesting the release of the second tranche of R3million to the Motheo Foundation. Mr Ramatsekisa claimed that he was happy with the progress report.

[18] At the time the email was received by the first respondent and the request to sign the progress report, nothing had been done on the site and the project had not even been started despite the first tranche of R3 596 637, 61 paid by the NLC to the Motheo Foundation.

[19] The first respondent instructed Ms Maodi to prepare the documents for the approval of the second tranche. She did not have the powers to review the project progress report and it was not her responsibility to do so. Nevertheless, she signed the project progress report as the reviewer and gave the document to the first respondent who co-signed the project progress report and approved it without taking any steps to review the veracity of its contents or visiting the site.

[20] On 11 December 2023 the NLC instituted disciplinary proceedings against the first respondent arising out of the investigations conducted by the SIU. Various findings were made against him namely that he had not visited the site prior to approving the project progress report. He had failed to properly review all the supporting documentation and failed to visit the site. This resulted in him not being able to assess for himself the Motheo Foundation's compliance with the grant funding agreement. He too was not authorized to conduct a review. The NLC submitted that his conduct in so approving the second tranche of payment was grossly negligent and exceeded his authority. The first respondent was charged and referred to a disciplinary inquiry.

[21] On 27 September 2024 the Chair of the Disciplinary Inquiry found the first respondent guilty on various of the charges. On 4 October 2024 he was summarily dismissed from his employment with the NLC. He noted his intention to appeal the outcome.

[22] The role of the NLC in these proceedings is as follows. On the 26th March 2025, the NLC filed an affidavit in support the SIU's relief. The NLC outlined the six charges of gross misconduct against the first respondent. He was summarily dismissed on the basis of charges 1,2 4 and 6. Charge 1 related to co-signing a progress report which authorised payment to Motheo Foundation. On charge 2 he was found guilty of providing a letter of recommendation on 19 August 2019 containing false statements and which resulted in a loss of R3million. Charge 4 related to the signing of a progress report despite it being non-compliant with the

grant agreement. It was found that he acted dishonestly and with gross negligence. Charge 6 relates to allegations of misconduct in relation to an AGSA audit.

[23] The issues that arise and argued in this application and material to the adjudication of the interim order

23.1. Condonation for the late filing of the affidavits;

23.2. Non joinder of the correct Liberty Life entity;

23.3. The delay by the SIU to launch this urgent application;

23.4. Whether the Special Tribunal can order a deduction in terms of section 37D (1)(b)(ii) of the Pension Act as it is not a court of law;

23.5. whether the causal connection between the loss to the NLC and the first respondent has been established.

Condonation for the late filing of affidavits

[24] On behalf of the first respondent some 104 pages were filed on the question of the SIU's late filing of its replying affidavit and heads of argument. He submitted that condonation should not be granted for the late filing of the SIU's replying affidavit and heads of argument. His attorney, Mr. Voyi, deposed to the affidavit on his behalf. He pointed out that the first respondent 's answering affidavit was two mins late whilst the SIU papers were one day late. The SIU described in detail why its papers were late and which included reasons for the delays. It submitted that the answering affidavit was served over a weekend, which meant the matter could only be addressed on a Monday and then a long weekend followed. The replying affidavit was one day late. I could not find any wilful delay on the part of the SIU. During the course of argument, the opposition on condonation by the parties became of no moment. I accepted the explanations from both parties and the matter proceeded. An enormous amount of time and resources was spent on the question of condonation. It could so easily have been avoided if the parties acted reasonably.

Non joinder of the correct Liberty Life entity holding the pension funds

[25] In the light of the incorrect citation of the entity holding the pension fund it was submitted by the first respondent that this was a fatal flaw on the part of the SIU. It was argued that no order can be made in the circumstances against an entity which was not holding the pension fund. It was submitted that the attempts to rectify the situation were also flawed. There should have been a formal joinder application and the mere notice of substitution did not suffice. It followed therefore that no order could be effective, thus his pension fund should not be interdicted.

[26] The SIU's error was an incorrect assessment as to which Liberty entity should be cited. The Liberty Life Group consists of many entities. It seems that the SIU had corresponded with one of the entities in the group of companies. This error was not brought to its attention. The SIU first cited Liberty Life Insurance. Thereafter and on 23 April 2025 it took the view the benefits were held by Liberty Corporate, a division of Liberty Group Limited, a company registered under registration No 1957/O02788/06 and not Liberty Life Insurance.

[27] When the SIU realised further that its notice of substitution was also wrong, on 29 May 2025 it filed a further notice of substitution and cited the Corporate Selection Umbrella Retirement Fund as the funds were held in that entity. In this case the SIU filed a notice of substitution which is found in Rule 15(1) of the Uniform Rules of Court.

[28] Rule 15(1) of the Uniform Rules provides for the substitution of the parties in certain circumstances. This Rule provides for the change of parties and no proceedings shall terminate solely by reason of the death, marriage or other change of status of any party unless the cause of such proceedings is thereby extinguished. This matter does not rely on change by reason of death, marriage or other change of status. The notice of substitution based on those causes do not apply. So, the use of Rule 15(1) of the Uniform Rules of Court is the incorrect process.

[29] Be that as it may, mistakes in pleadings are a common phenomenon. Obviously, there is the need for mistakes to be rectified in an economical and practical manner, while at the same time complying with the need for fairness and justice. As was stated in the case of *Essence Lading,* Marais AJ stated:

> "I think there would be no quarrel that where there is a conflict between the need for procedural pragmatism and the constitutional imperative of fairness and justice, the former is undoubtedly trumped by the latter.[1]

[30] In the same way that legal concessions cannot bind a court so too when an incorrect party is cited, the question of actual prejudice must be considered. An incorrect submission such as reliance on Rule 15(1) cannot bind a court. In *Matatiele*, the Court held that:

> "[i]t is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law".[2] In *Dengetenge*, this Court held that "a concession made by counsel on a point of law may be withdrawn if the withdrawal does not cause any prejudice to the other party".[3]

[31] As Marais AJ stated in *Essence Lading,* the consideration of prejudice must feature where there is a grant of an amendment which is really a substitution.

> "There is no rule cast in stone in this regard. The applicable general question is whether the amendment will result in an injustice that cannot be cured, in which event the amendment will be refused. The question whether the error is a mere misnomer, or the amendment is a substitution, plays a role in determining the possible prejudice."[4]

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[1] *Essence Lading CC v Infiniti Insurance Ltd And Another* 2024 (2) SA 407 (GJ) Broadly stated, it means that, in the absence of any prejudice to the other side, these applications are usually granted (see, for example, Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening) (infra n28) at 369F – I; Rosner v Lydia Swanepoel Trust 1998 (2) SA 123 (W) at 127D – H). As is pointed out in Devonia Shipping at 369H, the risk of prejudice will usually be less in the case where the correct party has been incorrectly named and the amendment is sought to correct the misnomer, than in the case where it is sought to substitute a different party. But the criterion remains the same: will the substitution cause prejudice to the other side, which cannot be remedied by an order for costs or some other suitable order, such as a postponement?

[2] *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 67.

[3] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC) at para 55.

[4] Ibid 1 para 63

[32] A misdescription can even be granted after judgment. In my view no prejudice or injustice has been established by virtue of the notices of substitution and the withdrawal. The process of establishing the correct entity holding the pension funds was a bona fide one. In the notice of substitution of 29 April 2025, the current entity referred to in the notice of substitution accords with the entity which the first respondent contends holds his pension fund.

[33] The SIU filed its notices of substitution when it could simply have sought to amend. It incorrectly relied on the process set out in Rule 15.1. There was no change in status as required in Rule 15(1). But ultimately the substance of the process must be considered and not the form. In my view a joinder application was unnecessary in the absence of prejudice and injustice to the first respondent. Accordingly, I find that the correct party was finally introduced to the process.

The delay by the SIU to launch this urgent application;

[34] On 14 October 2024 the SIU instituted the main civil proceedings. The SIU at that stage confirmed with Liberty that the first respondent had not sought to exit the pension fund. On the question of delay in launching this urgent application the SIU explained that by 21 February 2025, the first respondent had still not applied for withdrawal benefits from Liberty. The SIU had no knowledge when he would seek to withdraw the funds. On 28 February 2025 it took the precaution to launch the urgent application. The first respondent had appealed the decision of the Disciplinary inquiry. On 3 March 2025 his appeal was dismissed. On 12 March 2025 he applied for the withdrawal of his pension benefits. In the intervening period there had been various correspondence between the SIU, the NLC and the first respondent with Liberty about the pension fund but no formal withdrawal application was made until 12 March 2025.

[35] The first respondent submits that the urgent application should have been launched much earlier. He notes that the main application was launched on 14 October 2024. He contends that there is not a proper explanation why the SIU waited

over four months to launch this urgent application. He seeks that matter be struck from the roll. The first respondent wrote a letter to the Trustees of the Corporate Selection Umbrella Fund and protested the withholding of his pension savings. There was no satisfactory reaction from the Board of Trustees. He later received an e-mail from Liberty on 6 November 2024 wherein an administrator sought a response from him in regard to the NLC's allegations and also requested him to deal with the prejudice that he would suffer if his benefit was withheld. On 13th November 2024 his attorney addressed correspondence describing his prejudice. On 9 December 2024 he received the response again requesting a description of his possible financial prejudice. While all these discussions were in progress between the parties and Liberty, and no withdrawal application made, there was no need to launch the urgent application.

[36] I find that it would have been premature for the SIU to launch the application much earlier as the first respondent had not formally sought the withdrawal of his pension fund. He only did so on 12 March 2025 after his appeal to the finding of the Disciplinary award was dismissed. It was prudent on the part of the SIU to await the outcome of the various processes. Accordingly, I find that the filing of the urgent application on 28 February 2025 was timeous. It could not have filed its application to preserve the pension funds immediately after his dismissal as an appeal was pending.

Whether the Special Tribunal can order a deduction in terms of section 37D (1)(b)(ii) of the Pension Act as it is not a court of law.

[37] The SIU seeks to interdict the payout of the benefits from Liberty to the first respondent pending the final determination of the main proceedings. The NLC seeks to preserve the right to mitigate any damages that might arise out of his participation in the processing of the payouts.

[38] The right to interdict the payout of his pension benefit is founded on s 37D of the Pension Funds Act No 24 of 1956 as amended where a Fund may make certain deductions from pension benefits. In terms of s 37D(1)(b)(ii) (bb) an employer is entitled to deduct any amount due by a member on the date of his retirement or withdrawal from the fund compensation including any legal cost recoverable from the member in a matter contemplated in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member.[5] The section provides that a deduction may be made if

> "a judgment has been obtained against the member in any court including the Magistrates Court."

Underlining for emphasis

[39] On behalf of the first respondent it was submitted by Mr Voyi, his attorney that the Special Tribunal is not a court and the pending review application instituted in the Special Tribunal cannot order a deduction since the Special Tribunal is not a court of law as stated in *Ledla*. [6]

[40] It is common cause that the SIU's urgent application is predicated on s 37D(1)(b)(ii) (bb) of the Pension Funds Act. The first respondent submits that his conduct does not fall within the purview of the section. He was not found guilty of theft, dishonesty, fraud or misconduct. Therefore, no judgment can be obtained against him in this regard and therefore his pension fund should be released to him.

[41] This submission is not borne out by the outcome of the Disciplinary inquiry. It is undisputed that the first respondent was found guilty of gross negligence and that he had exceeded his authority in approving the payment of R3million. Charge 4

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[5] Section 37 D (1) (b) (ii) (bb) ... 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... (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;

[6] *Ledla Structural Development (Pty) Ltd v Special Investigating Unit* 2023 (6) BCLR 709; 2023 (2) SACR 1 (CC)

as recorded in the charge sheet referred to elements of dishonesty. He was found guilty of charge 4 without the carving out of a reference to dishonesty. If the Chair of the Disciplinary hearing wanted to carve out the element of dishonesty, he would have done so. The first respondent's conduct in charge 4 was described as gross misconduct with the elements of dishonesty fully pleaded and in respect of which he was found guilty. It was alleged in the particulars of charge 4 that he enabled fraudulent activities, that his conduct was dishonest, that he enabled the second tranche of R3million to be paid out and it led to irregular expenditure. It was pleaded in the alternative to charge 4 that the first respondent acted dishonestly, he was grossly negligent, he enabled the commission of corrupt activities, his conduct resulted in irregular expenditure, he failed to safeguard the interests of the NLC and the NLC suffered a loss of R3mill because of his conduct. Having been found guilty of charge 4, the element of dishonesty is clearly evident.

[42] At this stage it is unnecessary for the Special Tribunal to consider whether in the absence of a court order, the pension amount can be deducted, and it is not within the ambit and purport of this application that this aspect be determined. All that is sought at this stage is the preservation of any amounts standing to the credit of the first respondent with Liberty on an urgent basis, as he may be a man of straw. Both the SIU and the NLC submit that if the matter were to be heard in the normal course there may be no funds against which to execute.

[43] At this interim stage there is an overwhelming body of evidence against the first respondent to bring his conduct within the provision of the s 37D(1)(b)(ii) (bb) of the Pension Funds Act. Although there is no mention of fraud in respect of the charges he was found guilty of, the other elements of the section bring his conduct within the elements of provisions. It was argued that in the main application there is no mention of dishonesty. It was submitted that misconduct must contain an element of dishonesty and that the Special Tribunal is entitled to "peep" into the main application, and to note the omission, and then dismiss this application.

[44] The first respondent submits that the case law directs that the conduct must carry an element of dishonesty. He states the SIU is using a powerful instrument of the state against dismissed employees and this is unfair. His prejudice is significant. He is being deprived of his pension savings.

[45] The first respondent submitted that the SIU knows very well who the actual culprits are and are thus the actual debtors, yet it is going after him because he is a soft target. Because the Notice of Motion seeks that he repay together with the other respondents the amount R6million, this order cannot be granted in due course as there is no link to him for the payment of the first tranche. It cannot be recovered from him. Thus, the Notice of Motion is fatally flawed in seeking payment of R6mill against him when at best he was only linked, albeit wrongly, to the amount of R3million.

[46] The first respondent submits further that there is no legal action which has been brought in a court of law in relation to his pension funds and therefore the tribunal is not entitled to order the withholding of the payment of these pension savings. Accordingly, he claims that no cause of action has been made against him. The main application seeks a declarator and an order that R6 million be paid by all the respondents including him when he only authorised the second tranche of R3 million and therefore this claim is ill founded. He also emphasises that no cause of action based on theft, dishonesty, fraud or misconduct on his part has been made out in the main application. His conduct was based on his failing to review properly the progress reports and that he co-signed without authority to do so.

[47] Clearly the Chair of the Disciplinary inquiry found that the first respondent in his role as senior manager grant operations did not bestow upon him the authority to review progress reports and in the absence of the authorized reviewer it was irregular for him to sign off on the report and the same applied to his co-signatory Ms Maodi. She too had no authority to approve the review documents. In the circumstances the Chair found that the first respondent acted ultra vires his position. This led to the irregular approval of the payment and he was therefore found guilty of charge 4.

[48] Notwithstanding a full verdict of guilty on charge 4 he continues to assert that the Chair of the Disciplinary inquiry did not make a finding of dishonesty against him. He assesses the finding by the Chair as being neutral in relation to the requirement of fraud, theft or misconduct notwithstanding the finding of gross misconduct. All of this despite his own concession that he did have the powers to approve the progress report, as it was his responsibility and accordingly he did no wrong. Based on the charge and the finding of the Chair, I find that there is an element of dishonesty arising out of the facts of charge 4.

Whether a sufficient cause has been made out

[49] As a point in limine the first respondent contends that he does not enjoy the benefit of excussion. In other words, the benefit of excussion, means that he is not entitled to claim that the SIU first exhaust its remedies against the other respondents before proceeding against them. He contends that in the main application, it is clear that the third respondent received the funds. There was no suggestion that he received any funds. He was not part of any fraud or scheme to siphon off money from the NLC. He was not present when the project was approved. At that stage he was the provincial manager for the KZN office of the NLC. He asserts that he unfairly attracts blame for this entire saga for simply approving a payment of R3million to the Motheo Foundation. He submits the SIU knows what happened to the money and they are trying to recover money from him incorrectly. He argues that the money must be recovered from the principal debtors being the persons and entities who received the NLC money. Therefore, he should not be held liable on the flimsy grounds that have been relied upon.

[50] In asserts that he did not commit any irregular and unlawful practice in combination with the second and third respondents in the main application. He believes that he was authorized by the NLC as part of his responsibilities as the senior manager grant operations in the office of the chief operations officer to make the recommendation. He took over from Mr Ramatsekiso who had been performing the

same duties. Mr Ramatsekisa had also advised him that he was happy with the progress report.

[51] The first respondent based his approval of the progress report on the basis of the engineer's report, the narrative report, the financial report, visuals showing the site and work was in progress, invoices for expenditure and bank statements. There was also an e-mail from his predecessor Mr. Ramatsekisa expressing his satisfaction with the progress report.

[52] The first respondent states that he was the victim of the fraud as also the NLC. He was in no position to detect that a fraud was being committed. He had no reason to believe that the documents were falsified from an operational perspective as the IT system would not have detected that the documents were falsified as no forensic analysis were done at that stage. He certainly did not have the ability or capacity to conduct such an analysis at the time. Contrary to these assertions, the first respondent should have visited the site to see for himself. He did not need an IT system to detect that fact.

[53] To demonstrate that he was not in cahoots with the respondents, on 8 November 2022 after he visited the site he signed and approved that the grant be withdrawn and submitted to the finance department for recovery. He also had no knowledge of the relationship between Ms Maodi and Mr. Sidibe as this was not disclosed to him. He relied on the photos as evidence of the work done. Ms Maodi had done a checklist of all the documents in the progress report and she sought to have it records approved. She recorded that an amount of R3million was outstanding as per the second tranche He also denies that she did not have the power to review the report. It was part of her work as she worked in the office of the CEO.

[54] He accordingly denies that the SIU has established a prima facie right. He did not benefit from the fraud which was perpetrated.

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The submissions on behalf of the NLC

[55] In concise and persuasive argument, Ms Gaibie on behalf of the NLC submitted that the urgent application was brought timeously. It dovetailed with the outcome of the Disciplinary inquiry and the dismissal of the appeal. She also submitted that the first respondent accepts as his baseline that the second tranche was paid pursuant to his co-authorisation. There was clearly an element of dishonesty in the finding of gross misconduct against him. In referring to the judgment of Stegman J in Knox D'arcy [7] Ms Gaibie emphasised the following paragraph from the judgment:

> "It is a regular occurrence that, when there is a dispute over substantive rights, an interlocutory order is made, usually in the form of an interlocutory interdict, regulating the situation temporarily pending the final determination of the disputed rights. In the very nature of things, the temporary regulation of the situation often denies to both disputants the enjoyment of the full extent of the rights claimed by each of them respectively. When the dispute is finally determined by the decision of a court it can then be seen that the successful party suffered a truncation of his rights during the period that the dispute and decision were pending and were regulated by the interlocutory interdict. Inevitably that period of the truncation of the rights of the ultimately successful party is irreversible and to that extent final. However, that is not in itself a sufficient reason for refraining from making an interlocutory order or for treating interlocutory relief as if it were final relief (at 603G-604A)"

[56] Ms Gaibie submitted that it is not for the Special Tribunal to weigh the merits and make a finding in the main application at this stage. The following are factors which should be taken into account. It is undisputed that the money was paid out pursuant to the first respondent's report. Without his approval the payment would not have been made. He did not assess the veracity of the report. He could not rely on his predecessor's say so, on whether the report was satisfactory or not. The finding of guilty on charge 4 clearly means that there is an element of dishonesty as required by the relevant section in the Pension Act. There is therefore a solid basis to withhold the pension fund from him in the interim. The NLC also confirms that if the SIU is

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[7] *Knox D'arcy Ltd and Others v Jamieson and Others* 1995 (2) Sa 579 (W)

successful in the main application and the pension fund is not preserved, it would be a hollow order as there would be nothing to execute against.

Analysis

[57] This matter turns on whether the applicants had proven the requirements for the granting of an interim interdict. It is trite the following are the requirements for the grant of an interim interdict. These include a prima facie right (established, but open to some doubt), a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, a balance of convenience in favour of granting the interim relief and the absence of any other satisfactory remedy.

[58] The first respondent co-signed the progress report thereby intentionally and deliberately adopting a stance on its veracity which led directly to the payment of the second tranche of money being the R3million. The finding by the Chair of the Disciplinary inquiry and the failed appeal provides corroboration of the allegations by the NLC and the SIU to the effect that there was an element of dishonesty in the first respondent's conduct. By virtue of the finding in charge 4 and the failed appeal, at this juncture and having regard to the undisputed aspects of his conduct, the SIU has established a prima facie right. Whilst it may not be a 'killer point' at this stage the balance of convenience is in the SIU's favour. It has also established that there is a real prospect that any judgment obtained in the main application might mean a hollow judgment.

[59] The first respondent has not been able to contradict that view by demonstrating that he has sufficient assets to satisfy a judgment in due course. More particularly the SIU contends that having regard to the facts alleged in this matter, it has established a prima facie right that the money in the pension be protected at this stage If it is not protected in due course there will be no satisfactory remedy available to the SIU. This raises the spectre of a well-grounded apprehension of irreparable harm if the interim interdict is not granted. The prospect of a hollow judgment is

compelling as there would be no other satisfactory remedy such as executing against assets in due course.

[60] In *Trinity Asset Management* Cameron J in dealing the risk of harm emanating from the grant of an interim interdict stated:

> 'A good analogy is when an applicant at risk of harm seeks an interim interdict. 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.'[8]

[61] Following upon *Trinity Asset Management,* there is no 'killer point" in this matter. In weighing "prospects, probabilities and harm" the entire conspectus of facts as referred to above must also be considered. Although interdictory relief in question may result in a temporary infringement of the first respondent's right to his pension fund, the fund will hopefully continue to grow. The possible harm to the first respondent must be weighed against all the other factors referred to.

[62] Unterhalter AJ in *Eskom Holdings*[9] reiterated that:

> "there is a very long line of cases, stretching back to the authoritative pronouncement of our modern law in Setlogelo, has made it plain that a prima facie right, though open to some doubt, is the standard used to assess the applicant's prospects of success in obtaining final relief. The enquiry is of necessity provisional because the available evidence is usually incomplete, untested under cross-examination (where there are disputes of fact), and the case may yet be more fully developed"

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[8] *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132* (Pty) Ltd 2018 (1) SA 94 (CC) (2017 (12) BCLR 1562; [2017] ZACC 32), para 91

[9] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (4) SA 325 (CC) Para 64

[63] Unterhalter J drew attention to the fact that the required standard for an interim interdict has given rise to differing interpretations of the standard. He states that it is uncontroverted that an applicant seeking an interim interdict has provided "proof which, if uncontradicted at trial (here in the review), would entitle the applicant to final relief." The court will then consider the case of the respondent to decide whether it casts serious doubt on the case of the applicant. If it does, the standard is not met.

[64] In *Ferreira*[10] a majority of a full court considered this test to be too exacting. It held that the prospects of success of the claim for the principal relief, albeit weak, may nevertheless suffice. This is so because other requirements for the grant of an interim interdict may be strongly grounded and hence compensate for the weakness as to prospects.

[65] This approach in *Ferreira* is consistent with the test postulated by Cameron J in the case of *Trinity* referred to above, in particular with reference to the "prospects, probabilities and harm". In addition, while not a new test a court granting an interim interdict must be satisfied that there are good prospects of success in the main review. Unterhalter J referred to peeking at the main application and assessing the strength of and whether the required standard has been met. There ought to be a connection between the grant of interim relief and the likely outcome of the proceedings that will finally determine the matter.

[66] There are other factors that must be considered. There are issues of law that arise in the main application. In terms of the Pensions Act it is arguable that a Special Tribunal cannot order a deduction from a pension fund. Although the Special Tribunal is not a court of law – this is an assessment that must be made at that time.

[10] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1995 (2) SA 813 (W) A Full Bench consisting of Streicher J, Zulman J, Heher J

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The SIU Act does refer to the Special Tribunal having 'jurisdiction' to adjudicate upon any civil proceedings". [11]

[67] It is clear to me at this stage that the relief sought in the main application does have prospects of success. Furthermore, there are a number of options available to the SIU to ensure that a court orders the deduction. The proper interpretation of the relevant section in the Pension Funds Act is not something that provides a legal obstacle at this stage to the grant of an interim interdict.

[68] In this case whilst there are some interpretative issues in relation to whether the first respondent's conduct was culpable or not. Further analysis of this must be made in the main application. If the prospects, probabilities and harm are weighed up against the possible harm the first respondent may suffer, then the interim preservation of the pension fund is justified. The public interest is this matter is also an important consideration. Money belonging to the state has been lost. All this must be balanced against the first respondent's rights in relation to his pension fund. The value of his pension fund should not diminish whilst the main application awaits adjudication.

[69] A further consideration is whether in the main application the evidence presented is manifestly irresoluble on the affidavits. The SIU has proceeded by way of application and not by trial. In this regard weight must be attached to the concessions made the first respondent who has conceded his role in approving the progress report despite his exculpatory explanation. It is probable having regard to the undisputed facts that the matter may be capable of resolution on affidavit thereby supporting the contention that the prospects of success in the main application are

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11 Section 8 of the Special Investigating Units and Special Tribunals Act 74 of 1996 defines the Powers and functions of Special Tribunal 8(1) A Special Tribunal shall be independent and impartial and perform its functions without fear, favour or prejudice and subject only to the Constitution and the law. (2) A Special Tribunal shall have jurisdiction to adjudicate upon any civil proceedings brought before it by a Special Investigating Unit in its own name or on behalf of a State institution or any interested party as defined by the regulations, emanating from the investigation by such Special Investigating Unit, including the power to (a) issue suspension orders, interlocutory orders or interdicts on application by such Unit or party; (b) make any order which it deems appropriate so as to give effect to any ruling or decision given or made by it; and (c) make any order which it deems appropriate as to costs.

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good. I cannot make a finding on this at this stage, but in considering the merits of the main application, the probabilities and prospect of success as opposed to the harm to the first respondent, the grant of an interim interdict is justified.

[70] In applying the law to the facts as referred to above and considering the import of what Moseneke DCJ stated in OUTA and albeit that the facts in that case are distinguishable, he stated that it was unnecessary to fashion a new test for the grant of an interim interdict. [12] He did however opine as follows:

> "However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution. He noted that when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order ...

[71] In other words, a multiplicity of factors must be carefully weighed and an important consideration would be whether the harm apprehended by the first respondent amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. The probable effect on the first respondent must also be taken in to account. The money is not lost to the first respondent. He will have another chance in the main application and of course any appeals that he may pursue to defend his ownership and right to the pension fund. In other words, the right to his money will not be extinguished as a result of this interim interdict.

Conclusion

[72] It follows therefore that the SIU is entitled to an interim interdict.

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[12] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at para 41.

Costs

[65] The SIU has sought a costs order in its Notice of Motion if the matter is opposed. Since an interlocutory order is sought it would be imprudent to grant a costs order at this stage as the first respondent may well succeed in the main application. The issues between the parties have not been finally disposed of. Accordingly, a costs order is more appropriately dealt with in the main application.

Order

The following orders are granted:

1. The application for urgency is granted.
2. Pending the outcome of legal proceedings instituted in the Special Tribunal and any further legal process that may be instituted:
    2.1. the first respondent is interdicted from withdrawing and /or encumbering or prejudicing the value of the monies held or administered by Corporate Selection Umbrella Retirement Fund and which is due to the first respondent.
    2.2. the second to fourth respondents are interdicted and restrained from paying out to the first respondent and/or any other party/from doing anything that may in any other way encumber or prejudice the value of the money held or administered by it as pension fund benefits due to the first respondent.
3. The fourth respondent shall within 60 days of this order assess the value of the first respondent's pension benefit and notify the parties in writing of the value.
4. Leave is granted to the first respondent to apply on affidavit to this Special Tribunal should the value of his pension benefit exceed the applicant's claim and any estimated costs in case number GP26/2024 issued in this Special Tribunal.

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5. The costs of the application are reserved for determination in the main application

JUDGE M VICTOR
PRESIDENT OF THE SPECIAL TRIBUNAL

Appearances:

For the applicant:

Counsel: Adv. M S Mphahlele SC assisted by Adv. M Matlapeng.

Attorney: Ms S Zondi, The office of State Attorney, Pretoria.

For the first respondent:
Attorney: Mr Ndumiso P. Voyi assisted by N Mlangeni, Voyi INC, Attorneys.

Date of hearing: 30 April 2025

Date of judgment: 10 June 2025

Mode of delivery
This judgment is handed down by email transmission to the parties' legal representatives, up loading on Caselines and release to SAFLII and AFRICANLII. The time for delivery is deemed to be 14H00.