



**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 Number: **GP/09/2022**

In the ex parte application by:

SPECIAL INVESTIGATING UNIT

Applicant

In the matter between:

SPECIAL INVESTIGATING UNIT

Applicant

and

DUDUZILE BABALWA MOYO

First Respondent

ESKOM PENSION AND PROVIDENT FUND

Second Respondent

JUDGMENT

Summary – application for reconsideration of interim order granted ex parte to preserve pension benefits of a former employee of Eskom – whether the first respondent (the former employee) has made out a case for reconsideration and dismissal of the application – whether the SIU has proven the four requisites for interim relief and whether the former employee has cast serious doubt upon the SIU's factual averments pertaining to a prima facie right.

Held: the former employee and the first respondent in the application failed to persuade the Tribunal that the interim order should be reconsidered and the application be dismissed – accordingly the application for reconsideration is dismissed and the order of 28 September 2022 confirmed.

DAFFUE J:

INTRODUCTION

[1] A former employee of Eskom is accused of having received an unauthorised gratification in the total amount of R24 584 000.00. The Special Investigating Unit (SIU) intends to claim this amount by way of action procedure from the ex-employee. In order to ensure that it does not eventually end up with a hollow and meaningless judgment, it obtained an order in the absence of the respondent parties to preserve the benefits to be paid out by the Eskom Pension and Provident Fund to the ex-employee. In the present proceedings the court is requested to reconsider the order made in this regard.

THE PARTIES

[2] The applicant is the SIU, an organ of State established in terms of Proclamation R 118 of 2001 and referred to s 2(1)(a)(i) of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the SIU Act). The SIU acts herein in terms of Proclamation R 11 of 2018, authorising it to conduct an investigation into the affairs of Eskom.

[3] The first respondent is Ms Duduzile Babalwa Moyo (Ms Moyo), previously employed by Eskom.

[4] The second respondent is Eskom Pension and Provident Fund (the Fund). The Fund is currently in possession of the proceeds of Ms Moyo's pension fund benefits.

THE ORDER OF 28 SEPTEMBER 2022

[5] The SIU brought an ex parte application on an urgent basis for the preservation of Ms Moyo's pension fund benefits in the Fund pending finalisation of action proceedings for the recovery of the sum of R24 584

000.00. On 28 September 2022 Pillay J granted an order in terms of Part A of the notice of motion which reads as follows:

'Having read papers for the applicant it is ordered that:

1. That this application proceeds as an urgent interdict in terms of Rule 12 of the Rules for the Conduct of the Proceedings of this Tribunal, Honourable Court, dispensing with the forms and services provided.
2. That pending finalisation of Part B of the notice of motion –
 - 2.1 The first respondent is restrained and interdicted from withdrawing her pension benefit held with the second respondent.
 - 2.2 The second respondent is interdicted and restrained from paying out the first respondent's pension benefit due to her:
3. That the relief as set out in paragraphs 2.1 and 2.2 shall operate as interim relief with immediate effect pending finalisation of Part B.
4. The first respondent may apply for a reconsideration of the order in terms of Tribunal Rule 12(9).
5. Costs are reserved.
6. The applicant, its legal representatives as well as the personnel of the Special Tribunal may only disclose this order to the media after it has been served on the Respondents.'

[6] The SIU followed a strange procedure and did not seek an order that the interim relief would operate pending finalisation of the action to be instituted, but pending finalisation of Part B of the notice of motion still to be applied for which reads as follows:

'Part B

Be pleased to take notice that at a date and time to be arranged with the Registrar of the Tribunal or so soon thereafter as the matter may be heard, the applicants will apply to this Honourable Tribunal for an order in the following terms:

1. That the orders granted in paragraphs 2.1 and 2.2 should be confirmed pending finalisation of the action proceedings against the first respondent, to be instituted within 60 days.
2. That the costs of this application be borne by the first respondent and second respondent jointly and severally, one paying and the others to be absolved, including costs of Part A.
3. That the Tribunal grants the applicants further and/or alternative relief.'

I shall deal with this strange methodology again later herein.

RECONSIDERATION OF THE ORDER OF 28 SEPTEMBER 2022

[7] Rule 12 of the SIU rules, dealing with urgent relief, stipulates in sub-rule 9 thereof as follows:

'A person against whom an order was granted in his or her absence in an urgent application may, on notice to the applicant and/ or other interested parties set the matter down for reconsideration of the said order.'

This sub-rule is in line with High Court rule 6(12)(c). I shall deal with reconsideration of orders granted ex parte under the next heading, but merely wish to mention at this stage that although the Registrar of the Tribunal set the matter down as a reconsideration application of the order of 28 September 2022, it is apparent from Ms Moyo's answering affidavit and notice of opposition that she did not have reconsideration in mind, but intended to oppose the application. She did not file a notice seeking reconsideration of the order and nowhere in her answering affidavit is it mentioned that the order of Pillay J should be reconsidered. However, Adv LM Hodes SC who appeared for Ms Moyo, accepted that I was dealing with a reconsideration of the order of 28 September 2022 as he submitted during oral argument that a proper case has been made for reconsideration, that the order of 28 September 2022 ought not to be confirmed, but that the application ought to be dismissed with a punitive costs order.

[8] Notwithstanding the manner in which Ms Moyo approached the matter, there can be no doubt that I was in essence requested to reconsider the order granted on 28 September 2022.

THE LEGAL PRINCIPLES PERTAINING TO RECONSIDERATION OF COURT ORDERS

[9] The purpose of SIU rule 12(9) and High Court rule 6(12)(c) is obvious and that is to afford aggrieved parties a procedure to readdress an injustice and to

address any prejudice, actual or potential, to them against whom orders were made in their absence and with disregard to the *audi alteram partem* rule.

[10] As is the case in the High Court, and as indicated above, persons against whom orders were granted in their absence by the Tribunal, may on notice to the applicant set the matter down for reconsideration of such order. The party giving notice does not have to file an affidavit and may wish to argue that the papers relied upon by the applicant did not make out a case for the relief obtained. In such a case the matter is then argued on the original papers. However, a party seeking reconsideration is not confined to the aforesaid route and may decide to file an answering affidavit in which event the applicant is entitled to deliver a reply thereto. In such a case and unless a preliminary point is argued at the outset that the founding affidavit does not make out a case for relief, the court dealing with the reconsideration proceedings must consider all the factual material placed before it.¹ Therefore, the court considering reconsideration has the benefit of the facts contained in all the affidavits filed by the parties as well as argument from both sides. This is what I intend to do insofar as Ms Moyo did not confine herself to giving notice and arguing the matter on the case presented by the SIU to Pillay J.

[11] Adv Poswa-Lerotholi SC submitted, when asked about the strange procedure of having a Part A and B in the notice of motion, that this was customary in the Gauteng High Court in the event of applications brought ex parte. Such a procedure is unheard of in the Free State and to the best of my knowledge also in other Divisions of the High Court. Mr Hodes also confirmed that he was not aware of such a practice in Gauteng. The effect of the procedure adopted by the SIU is that the application may well have to be re-enrolled on a date and time to be arranged with the Registrar as well as the respondents for confirmation of the interim orders already granted. This is apparent from the prayers to be sought in Part B of the notice of motion quoted above, but to my mind this is an unnecessary and extremely cumbersome procedure. Once an order is granted in these proceedings, the Tribunal will, in my view, be *functus*

¹ Afgrj Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in liquidation) [2019] ZASCA 67; [2019] 3 All SA 321 (SCA) paras 12 – 14.

officio. Notwithstanding this observation, I do not have to concern myself with the further steps to be taken by the SIU, save to say that I would have expected the order obtained in Part A to provide for interim relief pending finalisation of action proceedings to be instituted against Ms Moyo within 60 days from the date of the order. Bearing in mind that Part B of the notice of motion still has to be adjudicated, the period within which action proceedings have to be instituted has not started to run yet, alternatively, so it might be argued, the 60 days shall only start to run from the date of confirmation of the order of 28 September 2022.

EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY THE PARTIES

[12] The well-known requisites for an interlocutory interdict are the following:

- a. a *prima facie* right;
- b. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- c. a balance of convenience in favour of the granting of the interim relief; and
- d. the absence of any other satisfactory remedy.

[13] Before the evidence is evaluated it is apposite to quote the accepted test to be applied to establish whether a *prima facie* right has been proven as enunciated by a Smalberger JA in *Simon NO v Air Operations of Europe AB and Others*:²

'Insofar as the appellant also sought an interim interdict *pendente lite* it was incumbent upon him to establish, as one of the requirements for the relief sought, a *prima facie* right, even though open to some doubt (*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189). The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed. (*Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688B--F and the numerous cases that have followed it.)'

² 1999 (1) SA 217 SCA at 228 g – h.

[14] Although mentioned in the context of applications for final relief on motion, the Supreme Court of Appeal held in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*³ that when respondents sign answering affidavits, they commit themselves to the contents thereof, inadequate as that may be, and they will only in exceptional circumstances be permitted to disavow them. Consequently, there is a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which the client disputes and to reflect such disputes fully and accurately in the answering affidavit. In my view the same principle should apply in cases where interim relief is sought by an applicant.

[15] Mr Hodes raised several points in order to convince me that the order of 28 September 2022 shall be reconsidered, the application dismissed and a costs order be granted against the SIU. These are:

- a. the SIU did not fulfil its duty of good faith, bearing in mind the ex parte application;
- b. the SIU failed to explain the basis for claiming that Ms Moyo received an unauthorised gratification of R24 584 000.00;
- c. the SIU failed to institute action within 60 days and as no action was instituted on/or before 14 December 2022, the application shall be dismissed – he also referred to the different timeframes given in the affidavits and the notice of motion;
- d. the SIU failed to show that it would suffer any prejudice if the relief was not granted;
- e. the SIU should have disclosed how the monies flowed from Eskom to the various entities;
- f. no case has been made out for interim relief.

[16] There is in submission no reason to find that the SIU did not act in good faith. It explained that a detailed investigation had been undertaken and as a result thereof it had been established that Ms Moyo created a convoluted structure of entities involving members of her family and friends to receive funds

³ 2008 (3) SA 371 (SCA) at para 13.

emanating from Eskom and paid to Tamukelo Business Enterprise CC (Tamukelo), the contractor who delivered services to Eskom. She was charged, but did not want to participate in her disciplinary hearing and elected to resign. Notwithstanding that, she was ultimately convicted in her absence and discharged. Although she has not applied for payment of her pension fund benefits at the stage when the application was launched, there can be no doubt that she would have applied for such benefits, was it not for the application and the order granted. On her version she is presently unemployed and logic dictates that she needs her pension benefits to survive.

[17] Mr Neave, the principal forensic investigator of the SIU involved in the relevant investigations, deposed to the SIU's founding affidavit. He initially stated in his founding affidavit that as a result of Ms Moyo's unlawful activities, she had received payments in the sum of R24 584 000.00.⁴ This must be seen in proper context as Mr Neave clearly explained in the remainder of the founding affidavit to which I shall return soon. Ms Moyo responded to these averments and pointed out that she did not receive any payment of R24 584 000.00, that no such amount had been deposited into her banking accounts at any given time during her employment with Eskom and that she did not receive any secret profit as there has been no collusion between any entity and herself. She also made the point that although a bundle with documents had been presented to her during the internal disciplinary hearing, this bundle did not contain any bank statements evidencing payments to her. She also denied receiving any payment from Tamukelo, the entity that contracted with Eskom.⁵

[18] Ms Moyo accepted the SIU's version of the *dramatis personae*, save to deny that Ms Zenzile Carol Sanderson was married to Mr Lloyds Muzi Sambo (Sambo). Sambo operated the contract on behalf of Tamukelo with Eskom.⁶ It is apparent that her brother, Mr Anani Sanelisiwe Dlamini (Dlamini) and her friend and cousin, Ms Tandiwe Gloria Nzama (Nzama) are the trustees of the

⁴ Founding affidavit para 16 and repeated in para 23.

⁵ Answering affidavit paras 5 - 7 and 16 & 17.

⁶ Founding affidavit paras 40 - 59 and her response thereto: Answering affidavit paras 33 - 54.

Onalerona Trust. This trust bears the middle name of one of Ms Moyo's children. Both her children, Onalerona and Tshimologo are the beneficiaries of this trust. They were about two and four years old when the trust was created in 2012. At that stage Dlamini was 23 years old and a student.⁷ It is highly improbable that Dlamini would bother to create a trust at such a young age whilst he was not even employed. Nzama is the sole member of Tshimologo Trading and Projects CC (Tshimologo CC). This CC bears the middle name of Ms Moyo's other child, Tshimologo.

[19] The total amount paid by Tamukelo (in some instances by using Phuwanda Trading CC as a conduit to make irregular payments) to the Onalerona Trust and Tshimologo CC is R24 584 000.00 of which R4 584 000.00 was paid to Tshimologo CC and R20 000 000.00 to Onalerona Trust. This flow of funds was fully explained by Mr Neave based on cash flow analyses from various bank accounts who made it clear that Phuwanda's account was in several instances used to channel funds from Tamukelo to the entities mentioned above.⁸ The SIU's uncontested evidence is accepted. Ms Moyo's bare denials did not assist her at all.

[20] Ms Moyo's version that her brother, Dlamini, created the Onalerona Trust of his own accord without any instruction or knowledge from her and listing her children as beneficiaries as he did not have children of his own is so improbable and far-fetched that it should be rejected as false. According to her, Dlamini informed her about the state of affairs only after her suspension and thus more than 10 years after the creation of the trust, it being created in January 2012.⁹ According to her she also has no knowledge why her friend and cousin, Nzama, registered Tshimologo CC and co-founded the Onalerona Trust with her brother. On her version she was also unaware of any payments received by this close corporation and/or the Onalerona Trust. She alleges that she has enquired from her brother about payments received who informed her that these payments were for services rendered between Onalerona and Phuwanda. This is not only hearsay as the brother's

⁷ See letter by the trustees to the Master of the High Court: record p 190.

⁸ Founding affidavit paras 69 - 91 and annexure "FA15" read with annexure "FA16".

⁹ Record pp 193 - 215.

confirmatory affidavit is lacking, but vague to the extreme. It is rejected as improbable and false.

[21] Ms Moyo tried her best to down-play her role as contracts manager. She was part of the Eskom team presenting the negotiations strategy of Tamukelo's contract to the R300 Mil Tender and Procurement Committee. She not only managed the Tamukelo contract, but also approved payments to Tamukelo, although not on her own, but in conjunction with other senior personnel. It is evident that she was prohibited from advancing herself against the interests of Eskom and to avoid conflict of interest between herself and her employer, to act in good faith and honestly as is expected from someone in management. Consequently, she also signed several declarations of interest and on the SIU's version these expose the extent Ms Moyo has deceived Eskom. Although, Ms Moyo denied that Sambo is her brother-in-law as alleged by the SIU, there is clear evidence of serious non-disclosures and violation of Eskom's policies relating to conflict of interest, inter alia, bearing in mind what I found earlier herein.

[22] I have already criticised Ms Moyo for being vague and presenting an improbable and far-fetched version. I reiterate that she needed to cast serious doubt upon the SIU's case in order for me to hold that a prima facie right has not been established. In this regard cognisance must be taken of the fact that she was at all relevant times before the filing of the answering affidavit in possession of evidence to support her version, alternatively the issues raised by the SIU pertaining to the flow of funds were particularly within her knowledge or the knowledge of her friend and cousin, Nzama and her brother, Dlamini. Although the onus of establishing a prima facie right remains upon the SIU as applicant, it is generally accepted that less evidence will suffice where the matter is peculiarly within the respondent's knowledge.

[23] I am satisfied that there is a well-grounded apprehension of irreparable harm if the interim order is to be set aside. Although the SIU presented evidence that Ms Moyo is the owner of immovable property valued in excess of R12 million and an expensive motor vehicle, she denied this. She failed to state that she

would be in a position to settle any judgment that might be granted against her in these proceedings. If her pension fund benefits are to be released to her, it would be easy to dispose thereof, bearing in mind the time it will take to obtain judgment and the fact that she is on her own version unemployed. Any judgment to be obtained by the SIU would be a hollow judgment.

- [24] The balance of convenience favours the SIU. If the prejudice to the SIU is weighed if the interim order is set aside against the prejudice of Ms Moyo if the order is confirmed, I am satisfied that the balance of convenience favours confirmation of the order of 28 September 2022. Ms Moyo is a qualified and experienced person and there is no reason why she cannot obtain employment in order to support herself and her children.
- [25] There is no other satisfactory remedy available to the SIU and consequently the fourth requisite for the granting of interim relief has been proven. Insofar as I have a discretion even in the case of a finding that all four requisites have been proven, I am satisfied that there is no reason why the order of 28 September 2022 shall be reconsidered and set aside.
- [26] Mr Hodes also submitted that the application for reconsideration should succeed and the application for interim relief be dismissed insofar as the SIU failed to institute action within 60 days from the date of the order of 28 September 2022. There is no merit in this submission, bearing in mind the order quoted fully above. The period of 60 days is set out in Part B of the notice of motion and as indicated earlier, no order has been made yet in respect of Part B of the notice of motion. Consequently, and notwithstanding the averments in the founding affidavit, it could not be argued with any conviction that the order of 28 September 2022 should be set aside for lack of compliance. In any event, even if Part B was to be adjudicated upon, the 60 days would only start to run from date of the order still to be issued. This attack is without substance.

- [27] Mr Hodes furthermore argued that the SIU failed to disclose how monies flowed to the various entities. I find it difficult to understand his submission, bearing in mind the detailed explanation by Mr Neave together with the summary contained in annexure "FA15". It was not submitted that the evidence relied upon by the SIU was inadmissible, either because it was hearsay, or for any other reason. The SIU could not find any proof of a contractual relationship between Tamukelo and Tshimologo CC or Tamukelo and the Onalerona Trust. Such information and evidence to that effect would be available to Ms Moyo who could have asked her friend and cousin, Nzama and her brother, Dlamini to explain such contractual relationships under oath. It is noted finally, that as explained by Mr Neave with reference to the glaring examples given bearing the hallmarks of money laundering, that immediately after Tamukelo received payment from Eskom, it would pay huge amounts to Phuwanda who would then pay similar amounts to Tshimologo CC or the Onalerona Trust. It was not good enough for Ms Moyo to merely deny the various payments and/or transfers in the circumstances of this case.
- [28] In reply and in conclusion, Mr Hodes submitted that the report of the forensic investigator should have been placed before the Tribunal and the failure to do so was fatal for the SIU's case. According to him, this report would have shown how funds were channelled from one entity to the other. I disagree. I am satisfied that the evidence provided by Mr Neave, the SIU's Principal Forensic Investigator, was more than sufficient, bearing in mind that he personally deposed to the founding and replying affidavits on behalf of the SIU.

CONCLUSION

- [29] Having considered all the affidavits and annexures presented to me as well as the parties' submissions, I am satisfied that no reasons were advanced to reconsider and set aside the order of 28 September 2022. As explained, Ms Moyo failed to meaningfully grapple with the factual averments in the founding affidavit.

ORDER

[30] The following order is issued:

1. The application for reconsideration of the order of 28 September 2022 is dismissed with costs and that order is confirmed.

JUDGE JP DAFFUE

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No appearance for the 2nd respondent

Date of hearing: 17 January 2023

Date of judgment: 02 February 2023

Mode of delivery: this judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time of delivery is deemed to be 16h00 on 02 February 2023.