



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

22/07/21

*[Signature]*

Case number: 28999/2021

In the matter between:

**LIESL JOY MOSES**

**Applicant**

and

**SPECIAL INVESTIGATING UNIT**

**Respondent**

In re:

**LIESL JOY MOSES**

**Applicant**

And

**SPECIAL INVESTIGATING UNIT**

**1<sup>st</sup> Respondent**

**MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

**2<sup>nd</sup> Respondent**

**THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

**3<sup>rd</sup> Respondent**

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**JUDGMENT**

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**BAQWA J**

## Introduction

[1] In this matter the applicant brings an urgent application in two parts, Part A and Part B.

[2] In Part A she seeks an order that the first respondent be interdicted from conducting any investigation or questioning against the applicant pending finalization of Part B of this application and that costs be reserved for determination on the return date unless Part A is opposed by the respondents.

## Urgency

[3] It would appear that the Special Investigation Unit ("SIU") needed to question the applicant and obtain certain documents from her subsequent a Presidential Proclamation referring certain allegations of maladministration in connection with the affairs of the National Lotteries Commission (The NLC) to the SIU for investigation.

[4] In order to achieve that purpose the SIU sent the applicant a notice together with a copy of the Proclamation requiring her to appear before it on 31 May 2021.

[5] When the applicant appeared on 31 May 2021 she was accompanied by an advocate who requested to be given more time resulting in the hearing being postponed to 14 June 2021.

[6] By letter dated 10 June 2021 the applicant's attorney objected to the applicant participating in the meeting of 14 June 2021 indicating in the same correspondence that "the legality of the process" would be challenged in court.

[7] The SIU insisted that the date of 14 June 2021 would not be altered and that applicant was expected to appear on that date. The applicant did indeed appear as arranged with new counsel who handed over papers pertaining to this application. The hearing was further postponed to 12 July at the request of the applicant.

[8] In these circumstances the first respondent submit that the urgency has been self-created in that having been notified on 17 May 2021 that she was required to answer certain questions and produce documents when she appeared on 31 May 2021, she had waited for nearly a month before she launched the application.

[9] Save for a glib statement that the applicant got sick, scant detail is given regarding the relevance of such sickness to the delay as required by Rule 6(12) (b) of the Uniform Rules of Court.

[10] Notshe AJ said in *East Rock Trading (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and others*<sup>1</sup>

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<sup>1</sup> [2011] ZAGP JAC 196 (23 September 2011) in paras 6 and 7.

*"[6] The import thereof is that the procedure in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.*

*[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."*

In this case I am not satisfied that the applicant has made out a case for urgency as specified in Rule 6(12) and in East Rock.

[11] In the circumstances, I am inclined to agree with the first respondent that the urgency is self-created.

### Background

[12] Proclamation R32 ("The proclamation") was promulgated in 6 November 2020 and in terms thereof the SIU was mandated to, *inter alia*, investigate serious maladministration in the improper or unlawful conduct in the part of the NLC employees or officials or any other persons of entity in respect of allocation of money from the National Lotteries Institution Trust Fund ("The Trust Fund"). The nexus between the investigation and the applicant is alleged to be allocations totalling more than R27 million made to Denzhe Primary Care, an organisation with whom applicant is associated and the SIU has questioned persons from within and from outside the NLC.

### The Law

[13] The proclamation was promulgated in terms of section 2(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("the Act") after the State and the NLC had suffered some losses. The proclamation has a schedule attached to it. The matters included in the schedule are maladministration in the affairs of the NLC in relation to the allocation of money in the Trust Fund to beneficiaries who were not entitled thereto in terms of the Lotteries Act together with improper or unlawful conduct by officials or employees of the NLC, or any person or entity, in relation to such entity.

Section 2 of the SIU Act.

S. 2 of the Act provides as follows:

***“President may establish Special Investigating Units and Special Tribunals***

- (1) *The President may, whenever he or she deems it necessary on account of any of the grounds mentioned in subsection (2), by proclamation in the Gazette –*
- (a) *(i) establish a Special Investigating Unit in order to investigate the matter concerned;*
  - (ii) refer the matter to an existing Special Investigating Unit for investigation; and*
  - (b) *Establish one or more Special Tribunals to adjudicate upon justiciable civil disputes emanating from any investigation of any particular Special Investigating Unit:*

*Provided that if any matter referred to in subsection (2) falls within the exclusive competence of a province, the President shall exercise such powers only after consultation with or at the request of the Premier of the province concerned.*

- (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;*
  - (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 Combating of Corrupt Activities Act, 2004, and which offences was [sic] committed in connection with the affairs of any State institution; or [Para. (f) substituted by s. 36(1) of Act 12 of 2004.]*
  - (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.”*

[14] Further, S.5 of the Act provides:

***“5 Special Investigating Unit***

- (1) *Subject to this Act and the regulations, the Head of a Special Investigating Unit may determine the procedure to be followed in conducting an investigation.*

- (2) For the performance of the functions referred to in Section 4, a Special Investigating Unit may –
- (a) Through a member require from any person such particulars and information as may be reasonably necessary;
  - (b) Order any person by notice in writing under the hand of the Head of the Special Investigating Unit or a member delegated thereto by him or her, addressed and delivered by a member, a police officer or a sheriff, to appear before it at a time and place specified in the notice and to produce to it specified books, documents or objects in the possession or custody or under the control of any such person: Provided that the notice shall contain the reasons why such person's presence is needed;
  - (c) Through a member of the Special Investigating Unit, administer an oath to or accept an affirmation from any person referred to in paragraph (b), or any person present at the place referred to in paragraph (b), irrespective of whether or not such person has been required under the said paragraph to appear before it, and question him or her under oath or affirmation.
- (3) (a) The law regarding privilege as applicable to a witness subpoenaed to give evidence in a criminal case in a court of law shall apply in relation to the questioning of a person in terms of subsection (2): Provided that a person who refuses to answer any question on the ground that the answer would tend to expose him or her to a criminal charge, may be compelled to answer such question.
- (b) No evidence regarding any questions and answers contemplated in the proviso to paragraph (a), shall be admissible in any criminal proceedings, except in criminal proceedings where such person stands trial on a charge of perjury or on a charge contemplated in section 319(3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).
- (4) Any person appearing before a Special Investigating Unit by virtue of subsection (2) (b) and (c), may be assisted at such examination by a legal representative."

### Analysis

[15] Upon reading of S 2 of the Act it is evident that no case is made out for the grant of the relief sought by the applicant. The essence of the applicant's complaint is that the Act does not afford persons subpoenaed the right to remain silent. S. 2 deals with the circumstances in which a proclamation may be issued. It says nothing whatsoever about the right to remain silent. The suggestion of unconstitutionality of S. 2 based on the denial of the right to remain silent does not exist both in fact and in law. On this basis alone, the relief sought not being linked to relevant legislative provision is bad in law and falls to be dismissed.

[16] The proclamation authorises the SIU to investigate maladministration in the affairs NLC in relation to the allocation of money in the National Lottery Institution Trust Fund to beneficiaries who were not entitled thereto in terms of the Lotteries Act 57 of 1997, and improper or unlawful conduct by officials or employees of the NLC, or any person or entity, in relation to such allocation. It cannot be gainsaid that the latter, namely “any person or entity” would include persons such as the applicant.

[17] It is notable that the applicant has not been candid enough in her founding affidavit to fully disclose the facts relating to an entity which had been a beneficiary of allocations made by the NLC, namely Denzhe Primary Care, a non-profit organisation (NPO). The proclamation was issued precisely to deal with such allocations and the subpoena issued against the applicant is to enable the SIU to carry out that mandate in terms of the relevant regulatory and statutory measures.

[18] Given the paucity of information supplied by the applicant in her affidavit, it is necessary to briefly summarise her involvement with Denzhe Primary Care. The applicant together with her attorney, Mr Lesley Ramulifho were involved in Denzhe Primary Care. They made an application to the Fund for an allocation after which a total of R27 285 625, 29 was paid by the NLC to Denzhe Primary Care. It is in this context that the SIU wishes to question her and secure documents from her. This is to enable it to determine if there was any impropriety or unlawfulness in the allocation.

#### Requirements for an interdict.

[19] An application has to establish four requirements in order to be granted an interim interdict, namely a *prima facie* right, even if it is open to some doubt and reasonable apprehension of irreparable and imminent harm. The balance of convenience must favour the granting of an interdict and the application must have no other remedy.

#### Prima facie right

[20] The right applicant seeks to protect is her right to silence. It is trite that the right to silence is accorded to persons who have either been arrested or are facing trial as an accused. The applicant does not fall under either of those categories. In any event the right to silence is not violated by S. 2 of the Act which is the section focussed upon as being unconstitutional. In the circumstances the applicant has failed to establish the first requirement.

#### Irreparable harm.

[21] It does not follow that the intended questioning will of necessary result in a charge and if charged, the powers of the SIU are sufficiently circumscribed in that the information gathered cannot be used in a trial against the applicant. There is, therefore, no imminent or irreparable harm.

### Balance of convenience

[22] The approach of the courts regarding the balance of convenience is summarised succinctly in National Treasury v Opposition to Urban Tolling Alliance<sup>2</sup> where the court said:

*“[46] Two ready examples come to mind. If the right asserted in a claim for an interdict is sourced from the Constitution it would be redundant to enquire whether that right exists, similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.*

*[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant’s case may be granted only in the clearest of cases after a careful consideration of the separation of powers harm. It is neither prudent nor necessary to define “clearest of case”. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of rights. This is not such a case.”*

[23] As stated above none of the rights protected in terms of the Bill of Rights is infringed by the Statutory provisions contained in the SIU Act. It can therefore, not be argued that the present application constitutes one of the “clearest cases” justifying the grant of an interim interdict.

[24] Moreover, the applicant has an alternative remedy in that in the event of her being prosecuted, she can claim immunity against the use of information presented to the SIU at a future criminal trial.

### Conclusion.

[25] The application falls to be dismissed for want of urgency. The relief sought is not competent in that the applicant bases it on a section of the SIU Act that is not applicable. Further the applicant has failed to establish any of the requirements for the granting of an interim interdict.

[26] In, light of all the above I make the following order.

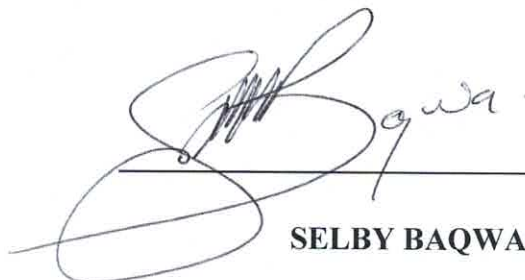
ORDER

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<sup>2</sup> 2012 (6) SA 223 (CC) para 46-47

27.1 The application is dismissed for lack of urgency.

27.2 Part A of the application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'Selby Baqwa', is written over a horizontal line. The signature is stylized and cursive.

**SELBY BAQWA**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**