

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA**

Case No: 28999/21

In the matter between:

LIESL JOY MOSES

Applicant

and

SPECIAL INVESTIGATING UNIT

Respondent

In re:

LIESL JOY MOSES

Applicant

and

SPECIAL INVESTIGATING UNIT

1st Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

2nd Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

3rd Respondent

RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

MASHUDU NETSHIKWETA

do hereby make oath and state as follows:

1. I am an adult male. I am the Lead Investigator of the Special Investigating Unit ("the SIU"). The SIU, whose operations are governed by the Special Investigation Units and Special Tribunals Act, No 74 of 1996 ("the SIU Act"), has been cited as the Respondent herein. I



oppose this application and make this affidavit on behalf of the SIU, being duly authorised to do so.

2. The averments made herein are true and correct and are, save where I say so or the context indicates otherwise, within my own personal knowledge and belief. I must however point out that the person with personal knowledge of the SIU's interactions with Applicant is Mr Nelson Mathaba. He is the source of the information relating to those interactions. A confirmatory affidavit from him will be filed evenly herewith.
3. I have read the founding papers lodged in this matter and intend to respond thereto, to the extent that is required in the circumstances. However, before I set out such response, I wish to raise three points *in limine*. I deal with each of them in turn.

Matter is not urgent

4. The first point *in limine* is that the application has been brought as one of alleged urgency, with the Respondents being given a limited time in which to lodge their answering papers. In response to the prayer that the time periods set out in the Rules of this Court be dispensed with, I aver and submit that the application is not urgent. Applicant would be able to secure effective and appropriate relief even if the matter is heard in the ordinary course. This is because the alleged harm that she alleges she is seeking to guard against will not be visited upon her until she is charged, which is an eventuality that may not happen at all, or if it does, it will happen only at some stage far in the future.



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5. In addition, I submit that the urgency has been self created. In this regard, I point out the following. On her own version, Applicant was formally notified on 17 May 2021 that she was required to appear before the SIU on 31 May 2021 to be questioned on oath about the matters set out in the notice. Indeed, she did appear on 31 May 2021, with her counsel I hasten to add. However, she and her counsel claimed that they needed more time to prepare for the questioning. By agreement, her appearance was postponed to 14 June 2021. Applicant then waited 10 further days to note an objection to being made to appear, allegedly because this would affect her rights. The SIU responded that she was required to appear on 14 June [as arranged], but she was entitled to approach Court. On 14 June 2021, she arrived at the SIU offices but handed the applicant papers to Mr Mathaba, the SIU's Chief Forensic Lawyer, who was to conduct the questioning. As appears from the notice of motion, Applicant had already decided that this application would be heard on 29 June 2021. It was then agreed that, depending on the outcome of Part A of the application, she would appear again at the SIU offices on 12 July 2021.
6. Based on the foregoing, I submit with respect that the urgency, such as might exist, has been self created.
7. In light of the foregoing I submit that this application falls to be struck from the roll and Applicant be directed to pay the costs.

No entitlement to order interdicting the investigation



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8. In paragraphs 3 and 4 of the Notice of Motion, Applicant seeks to interdict the SIU "from conducting *any investigation or questioning* against" her, pending the finalisation of Part B, in which she alleges she is challenging the constitutionality of s 2 of the SIU Act, alternatively the validity of the manner of investigating and questioning.
9. I submit that the grant of such an order would have grave and far-reaching consequences for not only this investigation but other investigations being conducted by the SIU: it would encourage other persons who are being investigated by the SIU to seek such relief. However, I must also hasten to point out that the law on the grant of an order that has the effect of disallowing an organ of state from fulfilling its statutory duties is clear: such an order will not be granted except in the "clearest of cases". I submit that not only has Applicant not made out such a case, she has not made out even a *prima facie* case.

No case made out for declaring s 2 of the SIU Act unconstitutional

10. As regards the allegation that s 2 of the SIU Act be declared unconstitutional, I respectfully point out that no case at all has been made out for the grant of that relief on account of the following. Applicant's complaint is that s 2 of the SIU Act does not afford persons the right to remain silent. But s 2 of the SIU Act deals with an entirely different issue: the circumstances in which a proclamation may be issued. It has nothing to do with obligations of persons to answer questions. There is accordingly no link between the complaint (that is,

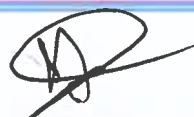


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not affording persons the right to remain silent) and the alleged unconstitutionality of s 2.

11. I further point out that it is also not clear on what basis it is alleged that the investigation or questioning of the Applicant goes beyond the “authorised mandate” of the proclamation. In this connection, I point out that among the matters that the schedule to the proclamation expressly authorises the SIU to investigate are the following: *maladministration* in the affairs of the National Lotteries Commission (“the NLC”) *in relation to allocation of money* in the National Lottery Distribution Trust Fund *to beneficiaries who were not entitled thereto* in terms of the Lotteries Act, No 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*. This latter category, I submit, would include persons such as Applicant.

12. In the Founding Papers, the Applicant has studiously avoided setting out the facts relating to her connection with an entity that has been a beneficiary of allocations made by the NLC. That entity is Denzhe Primary Care, a non-profit organisation (NPO). As the SIU is still investigating the propriety of those allocations and whether they may have been tainted by improper or unlawful conduct, it would not be appropriate for me to deal with the nature of the allegations and what the investigations have revealed at this stage. However, it is on account of concerns about the allocations that the NLC made to Denzhe Primary Care that the SIU wishes to question Applicant and requires her to produce documents. With respect, that is what the applicable



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statutory and regulatory measures require the SIU to do. In the premises, this reinforces my earlier contention that no case has been made out to interdict the SIU from carrying out its statutory mandate.

13. I turn now to deal with the allegations in the Founding Affidavit. I must however point out the following. A number of issues raised in the Founding Affidavit constitute contentions of law. It is not my intention to deal with those contentions in any detail in this affidavit. I reserve the SIU's right to address them more fully during argument.

Ad para 1

14. Save for the address of the Applicant, neither the SIU nor I have knowledge of the matters set out in this paragraph. In the circumstances, I am not in a position to admit them, nor do I.

Ad para 2

15. I accept that this Court has jurisdiction, but dispute that there is any "cause" that justifies an application being made to it for any relief against the Respondents.

Ad para 3

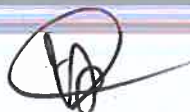
16. The relevant chronology, insofar as the involvement of the SIU in respect of the matters it is investigating concerning maladministration in the NLC may be summarised as follows.

- 16.1 Soon after the Proclamation was issued, the SIU began its investigations into the matters identified in the Schedule.



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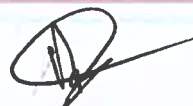
- 16.2 I may point out that the SIU is investigating numerous allocations made by the NLC from the Fund to different NPOs.
- 16.3 Among the matters that it is investigating are the allocations that the NLC made to Denzhe Primary Care.
- 16.4 What prompted that aspect of the investigation is the following. Denzhe Primary Care had applied to the NLC for an allocation from the Fund at a time when the Applicant does not appear to have been involved with Denzhe Primary Care. It appears that no allocation was made to Denzhe Primary Care pursuant to that application. However, after the Applicant and Mr Lesley Ramulifho, who is Applicant's attorney of record in this matter, became involved in Denzhe Primary Care, it [Denzhe Primary Care] made another application to the Fund for an allocation. Seemingly pursuant to that application, allocations were made from the Fund by the NLC to Denzhe Primary Care. The SIU's investigations at this stage reveal that a total of **R27 285 625,29** has been paid by the NLC to Denzhe Primary Care.
- 16.5 In light of the foregoing, the SIU has questioned and is still to question a number of persons connected with Denzhe Primary Care and the NLC. As Applicant is one of the persons connected with Denzhe Primary Care, the SIU wished to question her and secure documents from her. To that end, it sent to her a notice requiring her to appear before the SIU on



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31 May 2021. The notice was accompanied by a copy of the Proclamation. (The notice is annexure "LJM01" and the Proclamation "LJM02" to the Founding Affidavit.)

- 16.6 As was required by the notice, Applicant appeared at the SIU offices on 31 May 2021. She was accompanied by her counsel, Advocate Mark Coetzee. However, they indicated that they were not "ready" and asked for more time. It was agreed by the SIU and the Applicant and her counsel that the hearing would then take place on 14 June 2021.
- 16.7 On 10 June 2021, the SIU received a letter from Mr Ramulifho questioning the "legality" of Applicant's being required to attend at the SIU offices, objecting to her participating in the meeting of 14 June 2021, offering specified "assistance" to the SIU and indicating that Applicant would challenge the "legality of the process" in Court. The letter is Annexure "LJM04" to the Founding Affidavit
- 16.8 The SIU responded by email on the following day, stating that the notice to appear on 14 June 2021 stood, and remained valid, until set aside by Court. (The SIU's email is annexure "LJM05" to the Founding Affidavit.)
- 16.9 Applicant appeared at the SIU offices on 14 June 2021. She was accompanied by Advocate Moyahabo Sebjeni. They indicated that they had prepared Court papers and handed over the Founding Papers in this matter. As is clear from the



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stamp of the Office of the Registrar of this Court, they had been issued earlier that day.

16.10 An application was then made on Applicant's behalf for the hearing to be postponed. The chairperson then postponed the hearing and directed Applicant to appear again on 12 July 2021.

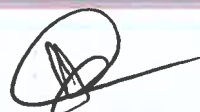
16.11 The person who had been appointed to chair the meeting was Mr Andrew Ntjie Kgasago, who is on the staff of the SIU but is not involved in the investigations into matters concerning the NLC or the proclamation in issue.

17. There is one further point I must make. Applicant has not made any appearance before the Special Tribunal: she appeared only before SIU officials.

18. Save as is consistent with the foregoing, I deny every allegation in the paragraph under reply save to the extent that it is consistent with what I have set out in the paragraph immediately above.

Ad para 4

19. I have earlier in this affidavit addressed the question of urgency. As regards the alleged urgency of this matter, the undeniable facts are as follows: Applicant was formally notified on 17 May 2021 that she was



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required to appear at the SIU offices to answer questions and to bring with her certain documents; in compliance with the notice, she did appear in on 31 May 2021; moreover, she was accompanied by an advocate; despite this, she instituted the application only on 14 June 2021 – nearly a month later.

20. In this respect I point out that if the matter is now urgent, it was also urgent on 17 May 2021, when Applicant was served with the Notice. Having given herself nearly a month to prepare for the application, Applicant now asks that this matter be heard within two weeks of the papers being served on the SIU. In effect, the SIU has been given just a few Court days to prepare its Answering papers. I submit that the Applicant should not be permitted to cause such prejudice to the SIU.
21. In the premises, I deny that a case has been made out for urgency, alternatively I submit that any urgency that exists is self created. Moreover, I reiterate: the matter falls to be struck from the roll and Applicant be directed to pay the costs.
22. Save as is consistent with the foregoing, I deny every allegation in the paragraph under reply save to the extent that it is consistent with what I have set out in the paragraphs immediately above and earlier in this affidavit.

Ad para 5

23. I am not aware of the existence of the practice that Appellant alleges is “standard”.



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24. I am advised however that, in certain circumstances, where an entity or person who intends taking a decision or action in terms of statutory powers is informed that a challenge to the decision or action is about to be launched, the entity or person is expected to await the challenge. But the position is different where the decision that is to be challenged has already been taken and is being implemented. In that case, again save in exceptional circumstances, in order to arrest the implementation or further implementation of the decision, the organ of state may be under a duty to require that the person concerned seeks to interdict the further implementation of the decision. This is especially the case where the cogency of the challenge to the validity of the decision is highly questionable, as it is in this case, and where the prejudice of not further implementing the decision will cause grave prejudice to the entity, as it will cause in this case, if the SIU stops its investigation into the propriety of the allocation that the NLC made to Denzhe Primary Care. In this case, if the allocation was improper or unlawful, the recovery of what was paid would be delayed and accordingly would be gravely prejudiced. Indeed, a delay may mean that the monies paid would never be recovered. This, I submit, is against the public interest.
25. Save as is consistent with the foregoing, I deny every allegation in the paragraph under reply save to the extent that it is consistent with what I have set out in the paragraphs immediately above.

Ad para 6



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26. In paragraph 6 of the Founding Affidavit, the Applicant makes a number of allegations about the proclamation, which provides as follows. On account of allegations contemplated in s 2(2) of the SIU Act in respect of the NLC and that the losses it and the State suffered may be recovered, the President deemed that the allegations should be investigated and civil proceedings be adjudicated upon. He was accordingly, in terms of s 2(1) of the SIU Act, referring the matters mentioned in the Schedule for investigation to the SIU.
27. In light of the foregoing, I submit that it will be helpful to set out herein the relevant provisions of s 2 of the SIU Act.
28. The relevant provisions of s 2 of the SIU Act read as follows:
- (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) establish a Special Investigating Unit to investigate the matter concerned; or
refer the matter to an existing Special Investigating Unit for investigation;
 - (b) [not relevant for the purposes of this application as it deals with the establishment of Special Tribunals]
- 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 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;



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- (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice;
- (e) intentional or negligent loss or public money or damage to public property;
- (f) offences referred to [in certain identified provisions] of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences were connected 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.

(3) The proclamation referred to in subsection (1) must set out the terms of reference of the Special Investigating Unit, and such particulars . . .

(4) The President may at any time amend a proclamation issued by him or her in terms of subsection (1).

29. As I have noted earlier in this affidavit, among the matters that the schedule to the proclamation expressly authorises the SIU to investigate are the following: *maladministration* in the affairs of the NLC *in relation to allocation of money in the Fund to beneficiaries who were not entitled thereto* in terms of the Lotteries Act; and *improper or unlawful conduct by officials or employees of the NLC, or any person or entity, in relation to such allocation.*

30. I submit that a proper consideration of the SIU Act and the proclamation, read with the schedule thereto, authorises the SIU to investigate both NLC employees and others who may have been in some way connected with an allocation that is alleged to be improper or unlawful. I stress: the SIU's investigations are not confined to NLC employees or officials. Read properly, the proclamation and schedule expressly authorise investigations also into persons or entities who are suspected of being linked with improper or unlawful allocations.

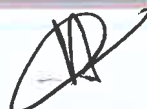


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31. In addition, it is clear that even if the conduct of an NLC employee or any other person is found to be *unlawful*, the SIU is authorised to investigate it. The fact that such conduct may also be investigated by the police or other law enforcement agencies, such as the Hawks, is not a bar to the SIU's authorisation to continue its investigations.
32. In the premises I deny that the limitations that it is alleged are placed on the SIU's investigative powers in this case are borne out by a proper interpretation of the relevant statutory provisions. I further deny that the questioning of Applicant amounts to an abuse of authority.
33. Quite significantly, Applicant does not point to any provision of the SIU Act or the proclamation or any principle of law in support of the allegations of such limitations. This, I submit, is not surprising: there are no such provisions or principles.
34. Save as is consistent with the foregoing, I deny every allegation in the paragraph under reply save to the extent that it is consistent with what I have set out in the paragraphs immediately above.

Ad para 7

35. I have already pointed out that the SIU is still in the process of investigating the allocations to Denzhe Primary Care. It requires information from Applicant to determine whether there was impropriety or unlawfulness in the allocations. Applicant has information that the SIU is entitled, in terms of its powers under the SIU Act, to obtain from



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- Applicant. In requiring Applicant to furnish the information sought, the SIU is legitimately exercising the powers granted to it by the SIU Act.
36. I must also emphasise that the purpose of the calling in of Applicant is not for her "to meet her case": it is to collect all relevant information from persons who may possess such information. I also reiterate that, as regards the allocations in question, Applicant is not the only person who has been and will be questioned. She is one of a number who may provide such information. The SIU is under a duty to secure all relevant information.
37. The Notice informs the Applicant of her right to claim privilege and the possible consequences of not exercising that right. However, those consequences may only eventuate in the following circumstances. First, if Applicant is later charged, which is not a decision that the SIU makes. Second, if the prosecuting authority chooses to use the information. Third, the Applicant's right, at a possible trial, to challenge the fairness of admitting such evidence.
38. In light of the foregoing, I submit that the allegation that the notice violates Applicant's rights or that the conduct of the SIU officials is irrational, unconstitutional or invalid is without merit.
39. Save as is consistent with the foregoing, I deny every allegation in the paragraph under reply save to the extent that it is consistent with what I have set out in the paragraphs immediately above.

Ad para 8



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40. The information that the SIU seeks from Applicant is relevant in determining whether the allocations made to Denzhe Primary Care were used for its purposes or instead for the benefit of Applicant or any close member of her family. There is no overreach or exceeding the SIU's investigative powers. It is our experience that where there are improper allocation of public funds, persons involved in such improprieties or unlawful conduct, seek to channel those funds to family members. I submit that there can be no legitimate complaint about such enquiries.
41. One of the purposes of the inquiries is to follow the flow of money so that it can be recovered from persons or entities to whom or to which the money may have been channelled. In this regard, I point out that part of the express mandates of the SIU, in terms of the proclamation, is to recover losses that the State or the NLC may have suffered as a result of an improper or unlawful allocation to among others Denzhe Primary Care.
42. Insofar as it is alleged that the "style of investigation preferred by the SIU" is to create a "parallel criminal justice system", I submit with respect, there is no merit in that allegation. The SIU Act requires the SIU to investigate serious maladministration. It would be a total waste of public resources for the SIU to stop its investigations into a matter as soon as it is found that there was criminal conduct involved. It must finalise its investigations and refer such evidence to the relevant prosecuting authority. Unless it finalises its investigations, it would not



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be in a position to submit a final report to the President, as it is required to do in terms of s 4(1)(g) of the SIU Act.

43. Save as is consistent with the foregoing, I deny every allegation in the paragraph under reply save to the extent that it is consistent with what I have set out in the paragraphs immediately above.

Para 9

44. I dispute that the Applicant has established the requirements for an interdict.
45. As regards the right to silence, I submit that the SIU Act makes it clear that Applicant, like all persons who are included in an investigation by the SIU, are required to answer all questions put to them. Insofar as the claim to a right to silence is concerned, I point out that the Applicant has not been charged: it is not a matter that the SIU determines. In addition, the SIU Act provides appropriate protection of that right, if the Applicant is eventually charged.
46. I submit that the refusal of the interdict will not result in irreparable harm to Applicant. The alleged harm of which she complains, at a possible criminal trial, will not eventuate. She may not be charged. Or, if she is charged, such evidence may not be used at the criminal trial.
47. The balance of convenience favours the refusal of the interim interdict. In this connection, I point out that our highest Court has stressed the following. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a



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claimant's case may be granted *only in the clearest of cases* and after a careful consideration of separation of powers harm.

48. The Applicant has an alternative remedy. She can claim the immunity from use of the information at the criminal trial, if indeed she is charged at some future date.

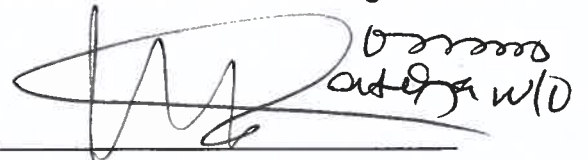
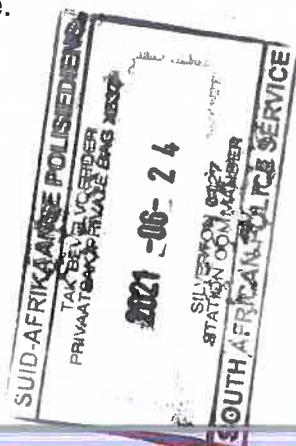
49. Save as is consistent with the foregoing, I deny every allegation in the paragraph under reply save to the extent that it is consistent with what I have set out in the paragraphs immediately above.

WHEREFORE I humbly pray that the application is struck from the roll on account of its not being urgent or the urgency being self created, or if it not struck from the roll it be dismissed with costs.



Deponent

SIGNED and SWORN to before me at Silverton on this the 24 day of June 2021 by the deponent who has acknowledged that she knows and understands the contents of this affidavit, that she has no objection to taking the prescribed oath and that she considers the prescribed oath to be binding on her conscience.



COMMISSIONER OF OATHS

Full names: Mahlodi huts

Capacity: warrant officer

Address: 497 Pretoria Road Silverton

