



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF
THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1999**

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: NW03/2021

In the matter between:

SPECIAL INVESTIGATING UNIT

Applicant

and

PAKISO JACOB MOTHUPI

First Respondent

GOVERNMENT EMPLOYEES PENSION FUND

Second Respondent

GOVERNMENT PENSIONS ADMINISTRATION AGENCY

Third Respondent

**MEC FOR THE NORTH WEST DEPARTMENT OF
PUBLIC WORKS AND ROADS**

Fourth Respondent

JUDGMENT

SIWENDU J

Introduction

[1] The Special Investigating Unit (SIU)¹ launched this application on an urgent or semi urgent basis on 30 July 2021. It seeks an order restraining and interdicting the Government Employees Pension Fund (GEPF) and the Government Pensions Administration Agency (the Agency) from paying out pension benefits in the sum of R 3 409 943.00 accruing to the first respondent. The order sought is interim, pending the institution of an action (including any appeals) against Mr Mothupi before the Special Tribunal (Tribunal).

[2] The first respondent, Mr Mothupi, whose pension benefits is the subject of the interim interdict was the erstwhile Head of Department of the Department of Public Works and Roads, North West Province (the Department). In his role as the Head of the Department, he was considered, the Accounting Officer as contemplated by the Public Finance Management Act 1 of 1999 (PFMA). The Department, through the office of the MEC and the Executive responsible is cited as the fourth respondent because of the interest the Department has in the matter and as required by s4(1)(c)(i) of the State Liability Act 20 of 1957 as amended read with s 5 (5) of the SIU Act.

[3] The second and third respondents are the GEPF and the Agency are statutory bodies established in terms of the Government Employees Pension Laws of 1996. The Agency serves as the administrator responsible for processing the payment of the pension benefits.

[4] The application follows an investigation into allegations of serious maladministration, improper or unlawful conduct by employees or officials of the Department, and unlawful appropriation or expenditure of public funds and other irregular conduct mandated in terms of Proclamation No 210 of 2021, published in the Government Gazette on 12 March 2021 into the affairs of the Department.

[5] The SIU alleges that its investigations, which are ongoing, revealed that, while working as the Head of the Department, Mr Mothupi committed the Department into unlawful contracts with private entities. He authorised payments to these entities in

¹ The Special Investigating Unit is a statutory body established in terms of Section 2(1) of the Special Investigating Unit and Special Tribunals Act 74 of 1996 to investigate serious malpractices and or maladministration in connection with the administration and affairs of State institutions.

circumstances where there were no services rendered to justify the payment, resulting in financial losses of R 166 290 625, 77 (One Hundred and Sixty-Six Million Two Hundred and Ninety Thousand Six Hundred and Twenty-Five Rand Seventy- Seven Cents). The premise for the intended action against Mr Mothupi is that; as Head of the Department, his conduct violated S 217 of the Constitution, the Treasury Regulations, in particular, Regulation 16A6.6² of the PFMA, the Preferential Procurement Policy Framework Act 5 of 200 (PPPFA) and the regulations under the PPPFA.

[6] Mr Mothupi was suspended from the Department on 26 September 2018 following the allegations of irregularity pertaining to the contract. Disciplinary proceedings were instituted against him in November 2018. He was finally dismissed on 4 June 2021. The dismissal coincided with the end of his fixed term contract of employment. In addition to the dismissal, it appears that there were criminal charges laid with the Klerksdorp Serious Commercial Crime Investigation Unit. The status these criminal proceedings has not be disclosed.

Background

[7] Ayamah Consulting Engineers (Pty) Ltd (Ayamah), an engineering consulting company, provided water and sanitation services to Mbombela Local Municipality (Mbombela) in terms of contract which commenced on 14 July 2014 to 14 July 2017. Utilising the contracting mechanism provided in Treasury Regulation 16A6.6, which permits a state organ to participate in a pre-existing contract with other state organs and or institutions, on 7 November 2016, Mr Mothupi wrote to Mbombela requesting to participate in the contract between the municipality and Ayamah.

[8] The procedure followed as well as the timeline leading to the conclusion of the contract with Ayamah is peculiar. After Mr Mothupi sent the above letter to Mbombela, the Department's Bid Adjudication Committee (BAC) met on 9 November 2016 to consider and recommend the participation. However, the BAC's recommendation was not for participation in a contract for water and sanitation services but for roads. The recommendation was followed by the appointment of Ayamah embodied in a letter signed by Mr Mothupi the dated 11 November 2016. Curiously, on 18 November 2016,

² The Accounting Officer or Accounting Authority may, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractors.

the Chief Directorate Transport Infrastructure, Mr Molefi Chwene prepared a submission seeking approval for the appointment of an external programme managers to assist the Department to achieve its goals. The Department signed a Service Level Agreement (SLA) with Ayamah on the same day as the submission of the approval of the appointment of the external programme manager.

[9] Unlike the contract with Mbombela, the appointment was for roads and management services. The Mbombela contract commenced in July 2014 and terminated in July 2017, while the SLA with the Department commenced in November 2016 and terminated in May 2018. This had the effect of extending a contract that was coming to an end through an effluxion of time. The Department agreed to pay a once off set-up fee (equal to 10% of the annual fee) for the establishment of Ayamah's offices in North West Province, together with relocation and infrastructure costs. Part of the responsibilities assigned to Ayamah included the provision of support to the Department in procurement of professional services and contractors.

[10] The SIU complains that the SLA was riddled with a host of irregularities, and was also in breach of the PFMA and National Treasury Instruction 1 of 2013/14 and Note 32. There was no competitive bidding process followed. The Department failed to consider locally based companies, resulting in set-up costs which are believed to be in excess of the actual costs. The set-up costs were not included in the participation request or letter of appointment.

[11] Apart from this, it seems that the SLA with Ayamah included the fulfilment of functions and duties of the Department without a comparative cost analysis and justification for outsourcing these functions. In addition, the SIU alleges that Ayamah had not objectively shown that it had previous experience in other public institution to justify the claim that it could support the Department achieve its objectives. The budget the Department allocated for the contract was larger than the pre-existing contract with Mbombela. The contract was open-ended in terms of its scope and the terms of renewal. Yet, the Department extended the contract on seven occasions, and included additional services without following a competitive procurement process.

[12] Even though the investigation is on-going, the SIU claims that the Department incurred fruitless and wasteful expenditure because Mr Mothupi deliberately went out of his way to violate the law and unlawfully appointed Ayamah. In March 2017, the

Department made pre-payments of R 103m to Ayamah in two tranches of R 8 540 587 and R 94 495 413. At the time of the application, the Department had paid approximately R 166 290 625,77 to Ayamah. The SIU intends to launch an action to recover this amount as well as the sum of R 3 224 955.09 which remained unclaimed by the Department. It complains that Mr Mothupi appears not to have been concerned about whether or not he was acting in accordance with the law.

Opposition

[13] Mr Mothupi disputes the allegations of irregularity. He contends that Regulation 16A 6.6 does not require an explanation for deviating from competitive bidding. He contends the failure to explain the decision for the deviation and not to procure the services by way of a competitive bid is not an irregularity. He states that he had assumed that the Supply Chain Management (SCM) procedures were followed in the recommendation of the appointment of Ayamah. Further, he claims that the prepayment made to Ayamah is not prohibited.

[14] Even though it is clear from the papers that Ayamah was not providing technical support in respect roads infrastructure to Mbombela, Mr Mothupi disputes that when an organ of state participates in a contract by another organ of state, that contract should be "*like for like*"; meaning that the same services must be contracted for. He contended that Ayamah was an Engineering Consulting Company appointed to provide technical support in advising road builders and road repairers. The nature of the service rendered was not dependant on whether it provided technical services for water or roads, he contends on this account that similar services were contracted for. This is not supported by the correspondence from Mbombela which indicates that the municipality intimated and intention to extend the contract to end in December 2019 and to include roads and water infrastructure technical support. It had not yet done so.

[15] Mr Mothupi claims that the services to be rendered by Ayamah were as defined in the Department's infrastructure plan. Curiously, he agrees that Ayamah was responsible for preparing the infrastructure program implementation plan which would define how Ayamah will manage the implementation of the program. Mr Mothupi also relies National Treasury Regulation 15.10.1.2 (c) and the terms of the impugned contract to justify the pre-payment made to Ayamah and the decision of the Department's BAC for this assertion. He claims that the process leading to the

appointment would have been led by the Supply Chain Directorate and the BAC. He was assured of the process followed by the BAC which recommended the appointment.

[16] He disputed that the Department incurred damages and losses as a result of unlawful and wasteful expenditure. He claims he appointed Nkonki Inc, an audit firm to perform a verification of the work performed by Ayamah. The report, which he claims is in possession of the SIU demonstrates that there was no loss or damage suffered. He did not attach the report on account that it was voluminous, but undertook to make it available at the hearing of the application. It was not made available.

[17] Lastly, on 3 August 2021, Mr Mothupi made a tender, that an interdict is registered over a property he owns situated in lieu of the interdict against his pension benefit. He is currently unemployed, but intends seeking employment actively. He agrees that he needs to access his pension fund to keep up with his household expenses, including paying for the educational costs of his children. The option to withdraw his pension benefit would enable this. With the same breath, he contends there would be no dissipation.

[18] I pause to mention that even though the application was initially brought as an urgent or semi urgent one, the application was served on Mr Mothupi on 19 July 2021. It was scheduled for hearing on 30 July 2021. At the first day of the hearing, Mr Thompson persuaded the Tribunal to grant Mr Mothupi more time to file his answering affidavit. The Tribunal afforded him the opportunity to do so. The indulgence was granted against an undertaking not to take steps to withdraw the pension fund. As a consequence of this extension of time, the urgency diminished, and is no longer a factor in determining this application.

Requirements for an Interim Interdict

[19] It is trite that to qualify for an interim interdict the applicant must show the following:

- A prima facie right;
- Reasonable apprehension of irreparable harm;
- No other remedy; and

- Balance of Convenience

[20] Unlike in an application for a final interdict, where a clear right must be established, in this instance the SIU merely needs to show a *prima facie* right to relief. A preliminary assessment of the merits of the SIU's case is essential. The often cited decision in *Olympic Passenger Service (Pty) Ltd v Ramlagan*³ where Holmes J (as he then was) summed up the position in relation to the granting of interim interdicts is apposite. He stated as follows:

"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression '*prima facie* established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a wellgrounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict — it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience —the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."

[21] The application largely hinges on whether the SIU has established a *prima facie* case warranting the relief sought as well as whether the balance of convenience favours granting the relief. That falls squarely on the Tribunal's *prima facie* view of the statutory breaches complained of. Part of the case against Mr Mothupi centres on the interpretation of the relevant procurement regulations and prescripts, and the facts adduced as evidence of the breaches. On this score, I have had regard of the relevant regulatory framework and statutory provisions, and deal with them herein.

[22] Section 217(1) of the Constitution states that:

³ 1957 (2) SA 382 (D) at 383 C -G

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

[23] Section 38 of the Public Finance Management Act (PFMA) delineates the general responsibilities of an accounting officer. In particular, the accounting officer has the responsibility to ensure that the Department maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. Once more, this responsibility mirrors the constitutional obligation in s217. This responsibility cascades to other officials of the Department under s45(c) who are enjoined to take effective steps to prevent unauthorised, irregular, fruitless and wasteful expenditure. Over and above this, where an accounting officer delegates certain powers to an official or officials within the Department, the accounting officer and those officials are not absolved from the obligation under the PFMA.

[24] When a private party enters into a contract to perform an institutional function on behalf of a state institution, which includes the national and or provincial level of government, as defined in the PFMA, Treasury Regulation 16A applies to the procurement process. In addition, National Treasury has issued various Practice Notices to provide guidance to state institutions. Again, I need not traverse these in detail for the purpose of this judgment⁴. By virtue of Regulation 16, the principles of openness, transparency, fairness, competitiveness and cost-effectiveness (value for money and affordability) which are the embodiment of s 217 of the Constitution are an inherent part of the decision-making process entrenched in the regulation. The above principles also form the back bone of Regulation 16A, dealing with development of a Supply Chain Management, within state institutions. That responsibility is entrusted on the accounting officer, as was the case with Mr Mothupi.

[25] The regulation provides for two modes for procuring goods and services; namely through (1) competitive bidding or (2) through quotations. Under Regulation

⁴ Practice Note Number SCM 1 of 2003 provides general conditions of contract ('GCC') and standardised bidding documents. Practice Note Number SCM 2 of 2003 provides threshold values for the invitation of price quotations and competitive bids. Practice Note Number SCM 3 of 2003 provides detailed guidelines on the appointment of consultants. In addition, policy statements have been published by National Treasury. See, eg, National Treasury 'Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government' (September 2003)

16A.6.4, where it is impractical to procure goods by means of a competitive bid, it is permissible for an accounting officer to do so:

“by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or authority.”

[26] The SIU claims that Treasury Regulation 16A.6.6 applied to the contract with Ayamah and Mbombela and in turn the subsequent contract with the Department. It states that:

“The accounting officer or accounting authority may, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractors”

[27] On the facts placed before me and having regard to Mr Mothupi’s grounds for opposition, I am of the view that the SIU has made out a *prima facie* case of breaches of the procurement regulations by the Department. Mr Mothupi’s opposition demonstrates a misconstruction of the procurement injunctions and his oversight role as the Department’s erstwhile accounting officer. It sufficient for him to pass the buck to the BAC in this instance. He had to ensure that the departure from a competitive bid is fully justified and justifiable.

[28] Other than a bare denial of accountability, which is not consistent with the documents presented pertaining to the appointment of Ayamah, I am unable to discern any serious dispute on the facts relied on by the SIU. There is a case to answer in respect of what seems not merely to have been a lapse in the procurement process, but a disregard of the applicable regulatory injunctions.

[29] The SIU also contended that Mr Mothupi’s denial of irregularities has no merit because it also breached the threshold of the amount of goods and services that can be procured without a competitive tender. There was nothing that made it impractical to follow a competitive bid process. National Treasury Practice Note 8 of sets out the threshold and provides that:

“3.4.1 Accounting officers/authorities should invite competitive bids for all procurement above R500 000.

.....

3.4.1 Should it be impractical to invite competitive bids for specific procurement, eg. In urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority. Accounting officers/ authorities are required to report within ten (10) working days to the relevant treasury and the Auditor General all cases where goods and services above the value of R1m (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4...”

[30] Confronted with the above difficulties, Mr Thompson (for Mr Mothupi) sought to argue without authority that the SIU must at a minimum demonstrate a *prima facie* proof of financial loss. He diminishes the allegations of R166m paid in an irregular award and the irregular pre-payments made to Ayamah. He also overlooks the complaint that Ayamah was paid to fulfil some of the functions fulfilled or which ought to have been fulfilled by the Department.

[31] Significantly, the argument misses the mark on applicable law for two reasons. (1) An award of an unlawful and irregular contract, coupled with a breach of statutory provisions by the Department and Mr Mothupi evokes a public law remedy and relief because of the invalidity and illegality of the contract⁵. (2) The question of the extent and proof of losses suffered is a remedial one for determination at the intended trial. For the purpose of the interdict, it is sufficient for the SIU to show, *prima facie* that there were statutory breaches, irregular, unlawful expenditure and the financial extent thereof. I am satisfied the SIU has made out a *prima facie* case for an interdict.

[32] I now turn to the second, third and fourth considerations; namely that of irreparable harm, a lack of an alternative remedy and whether or not the balance of convenience favours granting the relief.

[33] I pause to mention that Mr Mothupi is currently unemployed and has not revealed how he and his family makes ends meet. Significantly, he confirms in his answering affidavit that, even though he has not initiated the withdrawal process, he requires access to his pension fund for the upkeep of his household, including paying for his children’s educational expenses. This plea however lacks the candour and the

⁵ AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others 2014 (1) SA 604 (CC) (Allpay 1)

full financial disclosure required for proper consideration. On these facts alone, it is not difficult to find that there is a real likelihood that the pension benefit will be dissipated. Accordingly, dissipation will thwart the execution of the mandate entrusted to the SIU and the ability to recover the losses in the event that financial liability is established at the trial.

[34] This takes me to the question of the absence of an alternative remedy, in particular, the tender of the property, made by Mr Mothupi in lieu of the interdict of the pension benefits. Firstly, I have doubts that what was offered constitutes a formal legal tender. Mr Mothupi did not provide the Tribunal with any details worthy of consideration, which would include inter alia, proof of ownership and the current valuation of the property. In any event, subject to a determination in due course, the potential value of the claim is likely to exceed both the value of the pension benefit and the property offered. Furthermore, his proportionate liability, if any, cannot be assessed at this stage of the proceedings.

[35] When I weigh all the above factors, the balance of convenience favours granting the interim relief. The likely prejudice to the SUI in discharging its mandated duty far outweighs the temporary inconvenience Mr Mothupi will endure. I also take account of the lengthy suspension period, as well as the length of time it took to finalise his dismissal. He would have received remuneration by law without rendering any reciprocal services to the Department.

[36] The SIU has undertaken to bring the contemplated action within thirty days of the order.

Accordingly, I make the following order:

- a. The second and third respondents are restrained and interdicted from paying out the pension benefits held by the second and or third respondent standing to the credit of the first respondent.
- b. The order above operates as an interim interdict pending:
 - i. An action to be instituted by the SIU against the first respondent and/ or any other respondents;
 - ii. Any appeal and or petition following the above action;

- c. The SIU is ordered to institute the action in order b (i) within 30 days of this order;
- d. The first respondent is ordered to pay the costs of the application.



JUDGE T. SIWENDU
MEMBER OF THE SPECIAL TRIBUNAL

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading onto Case Lines. The date and time for delivery is deemed to be 10 am on 24 August 2021.

APPEARANCES

Counsel for the Applicant:	Adv Moretlwe
Attorney for the Applicant:	The State Attorney
Counsel for the First Respondent:	Mr Thompsons
Attorney for the First Respondent:	Thompsons Attorneys
Date of hearing:	16 August 2021
Date of Judgment:	24 August 2021