IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 21441/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

2 Feb 2023 [redacted]

DATE SIGNATURE

In the matter between:

SIBONGISENI JEROME MTHEMBU **APPLICANT**

and

SPECIAL INVESTIGATING UNIT **FIRST RESPONDENT**

ESKOM HOLDINGS SOC LTD **SECOND RESPONDENT**

JUDGMENT

LUKHAIMANE AJ:

Introduction

[1] This is an application to review a report of the first respondent, the Special Investigating Unit (SIU). The SIU handed over a report to the second

respondent, Eskom Holdings SOC Ltd (Eskom), through its Acting CEO, Mr Jabu Mabuza, now deceased, in the form of a letter dated 12 November 2019. The report was in relation to investigations by the SIU into the affairs of Eskom, including possible misconduct by officials or employees of Eskom. These affairs related to irregularities with procurement contracts of coal and diesel to Medupi and Kusile power stations. The scope of the investigation included looking into any undisclosed or unauthorized interests which employees, officials or agents of Eskom may have had in contractors, suppliers or service providers bidding for work or doing business with Eskom or to whom contracts were awarded by Eskom and the extent of any actual or potential benefits derived directly or indirectly by such employees, officials, agents from such undisclosed or unauthorised interests.[1] The report stated that the SIU investigation had revealed evidence that points towards three (3) acts of misconduct by the applicant, which acts were listed and explained as Counts 1 to 3. The report further indicated that a copy has been forwarded to the President and Eskom should inform the SIU of the outcome of any disciplinary proceedings that Eskom chooses to institute, so that the SIU may convey same to the President. (SIU letter dated 12 November 2019)

[2] The SIU is a statutory entity established in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996 (The SIU Act). The President,

[1] Paragraph 8 of schedule of Proclamation

through a proclamation, mandates the SIU, to investigate specified issues in state institutions[2] it is required to report to the President. As stated above, the SIU report to Mr Mabuza recommended disciplinary action against the applicant, on the grounds that he committed acts of misconduct.

The facts

[3] On 29 November 2019, Mr Mabuza called the applicant into a meeting in his office and indicated that there were issues regarding the applicant's conflict of interest and private work that he has done whilst employed at Eskom. Mr Mabuza briefly explained the nature of the allegations and requested the applicant to spend some time thinking about it, undertook to telephone applicant on 1 December 2019 to further discuss the matter. However, on 2 December 2019, applicant received a letter from Mr Mabuza through Mr Anton Minaar, Eskom's General Manager: Executive Support with a copy of the SIU report, informing him of the view that his contract of employment be terminated with immediate effect and asking him for reasons why this should not be the case.[3]

[2] The SIU was established by Proclamation R118 on 31 July 2001. The President issued a proclamation to address the affairs of the second respondent and Transnet on 6 April 2018

[3] Mabuza letter dated 29 November 2019

[4] The applicant responded by the way of memorandum making representations why his contract of employment should not be terminated, in essence denying the validity of the SIU report and a letter containing a settlement proposal of early termination and payment of the remainder of his contract period. On 7 December 2019, the applicant met with Mr Mabuza who indicated that the applicant should consider resigning to minimize legal disputes with Eskom and him. Mr Mabuza also rejected the settlement proposal and countered with a proposal for applicant to resign in return for three (3) months' pay. The applicant resigned on 8 December 2019, which resignation was accepted on 10 December 2019, by Mr Mabuza.

[5] On 28 December 2019, the applicant caused a letter to be sent to the SIU requesting the latter to withdraw its report by no later than 10 January 2020. The letter had detailed reasons as to why the applicant was insisting on a withdrawal of the SIU report. The SIU replied with a letter dated 17 January 2020, refusing to unconditionally withdraw any report forwarded to Eskom and further refusing to discuss any aspect or issue related thereto. In a response to the SIU dated 24 January 2020, the applicant indicated that he intends to take legal action as the SIU failed to comply with his withdrawal request. It is this application that is now before this court.

[6] The review application was dealt with on the principle of legality and not under the auspices of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This was also made clear during the hearing and all parties were alive to this fact. Therefore, the test for the review is whether the impugned report is rational, a factual enquiry[4]

[7] It is now settled in our law that reports of the SIU are reviewable for rationality. In ***Minister of Defence v Motau*** **2014 (5) SA 69 (CC) at 69**, with regards to the rationality test, it is stated that:

> *"For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given. It is also well established that the test for rationality is objective and is distinct from that of reasonableness."*

[8] The issue is further dealt with in detail in ***Masuku v SIU and Others***[5] where the court concluded that the SIU report was an exercise of public power and had an impact on persons implicated in the investigation which could be deleterious to their interests and of importance to the general public inasmuch as they had

[4] Wellness Medical Scheme v Registrar of Medical Schemes 2021(1) SA 15 (SCA) at [13]); Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the RSA 2000 (2) SA 674 (CC) at esp [85] – [86] and [90]

[5] (P55372/2020) [2021] ZAGPPHC 273 (12 April 2021) at paragraphs 19 - 30

an interest in the conduct of public officials and therefore, reviewable under the principles of legality.

Is the report rational

[9] As stated above the exercise of public power must be rationally related to the purpose for which it was granted. The Proclamation establishing the SIU for purposes of investigating the affairs of Eskom was meant to deal with matters that occurred between 1 January 2010 and 6 April 2018, relating to the contracting for or procurement of coal, coal transportation services or diesel; maladministration and any losses or prejudice suffered by Eskom in relation to Medupi and Kusile Power Stations, Ingula Pumped Storage Scheme, Paragraph 5 of the schedule states as follows:

> *"5. Any undisclosed or unauthorised interests which employees, officials or agents of Eskom may have had in contractors, suppliers or service providers bidding for work or doing business with Eskom or to whom contracts were awarded by Eskom; and the extent of any actual or potential benefits derived directly or indirectly by such employees, officials or agents from such undisclosed or unauthorised interests."*

[10] Therefore, the Proclamation limits the investigation into undisclosed and unauthorised interests to the contractors, suppliers or service providers bidding or doing work for Eskom.

[11] The SIU concedes that the Proclamation does not deal with the situation of the applicant, hence its reliance on section 5(7) of the SIU Act. It was confirmed by the investigator with Eskom's General Manager that the three entities that the applicant was involved in never bid for Eskom's business nor are they involved with any contractors, suppliers or service providers of Eskom. In fact, the entities never traded and some were in the process of being deregistered.

[12] The SIU submitted that it acted within its powers as contemplated in section 5(7) of the SIU Act which revealed that the applicant failed to declare his directorships in the three (3) companies thereby contravening the provisions of clause 2.2.7 of Eskom's conflict of interest policy (Unique Identifier 32-173; and

- The applicant contravened the provisions of clause 2.2.1.1 read with 2.2.1.3(a) of Eskom's Private Work Policy (Unique Identifier number 32-1186), as he failed to obtain written approval from Eskom to perform work in the three (3) companies.

[13] Section 5(7) of the SIU Act provides as follows:

"Without limiting the provisions of section (5), if, during the course of an investigation, any matter comes to the attention of the Head of the Special Investigating Unit, which, in his or her opinion, justifies the institution of civil proceedings by a State Institution against any person, he or she may bring such matter to the attention of the State Attorney or the State Institution concerned, as the case may be."

[14] It is not clear why the SIU seeks to rely on the provisions of section 5(7) of the SIU Act in this matter. The section specifically deals with the institution of civil proceedings, ostensibly in the SIU activities, these would be aimed at recovering any losses that a State Institution might have incurred as opposed to criminal charges. As aptly stated in *Masuku*[6] *"If it believes it has discovered evidence which supports a civil claim it may institute a claim in the special Tribunal or in a Court of Law. In short, the SIU's opinion about any issue is not determinative nor final in any way."* The SIU report does not indicate what these proceedings are, if any and what they are aimed at. What it does is point to disciplinary proceedings, which do not rise to the level of civil proceedings. The report at paragraph 1 states as follows:

"Kindly be advised that as part of its investigation in terms of the mandate set out in Annexure 1, and in line with its duty to ensure lawful and proper governance at Eskom Holdings SOC Limited ("Eskom"), the Special Investigating Unit ("SIU") acting in terms of the provisions of section 5(7) of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("the SIU Act"), is constrained to bring to your attention that in its view the investigation reveals that certain officials or employees may be guilty of misconduct which may justify the institution of disciplinary proceedings against them, including disciplinary action."

[6] Supra at para 17

[15] The SIU completed an investigation by going through the Companies and Intellectual Property Commission's ("CIPC") online website which confirmed applicant's directorships in the three companies. At the time that the report was issued Eskom had already confirmed that the three (3) companies referred to never bid for work at Eskom nor were they involved with any Eskom service providers, contractors, etc.[7] Yet Count 1 of the report states that the applicant "unlawfully and intentionally made a material misrepresentation to Eskom knowing it to be false ……….. resulting in actual and/or potential prejudice to Eskom during the relevant period."

[16] The SIU report is based on the evidence gathered which is backed up by documentation being the CIPC reports and the applicant's declaration forms. The SIU saw no crime having been committed by the applicant, nor did it find any basis for civil action against him. However, what it did was act outside of the empowering Proclamation and its own general enabling legislation. The SIU has no inherent powers, its powers are dictated by legislation and therefore its actions must be capable of being located within its empowering legislation and the specific Proclamations issued from time to time.

[17] Therefore, in relation to the applicant, this court finds that the SIU acted *ultra vires*.

Failure to grant applicant an opportunity to reply to the report

[18] The applicant is aggrieved that he was not afforded an opportunity to respond to the report or comment on the evidence gathered before the report was finalised. The SIU does state that it did not make any "findings" and it was for

[7] Statement under oath by Muvenda Khomola, Eskom's General Manager Shared Services

Eskom to take a decision on what action is appropriate. Thus, Eskom was not bound by the report.

[19] It certainly would have assisted the SIU in its investigation if it had granted the applicant an opportunity to engage with the process – however given the *ultra vires* finding above, it is not clear what value that would have added. Besides, it is accepted in our law that as an investigative entity; which does not itself make determinations, the SIU does not have to provide those implicated with an opportunity to reply to its reports before finalising same.

[20] The SIU in this instance had the substantive information to come to a different conclusion regarding any wrongdoing on the part of the applicant.

[21] The obligation in terms of the Eskom policy is to declare all conflict of interest, directorships, memberships, details of any related or interrelated persons or other associate that does business with Eskom and all "material personal interests" whether a conflict exists or not.

[22] Given the framing of the policy, a diligent investigator would have engaged the applicant to establish those aspects of the interests that might have required/necessitated disclosure.

The application is moot

[23] The first respondent contends that the application is moot as there is no dispute or issue between the applicant and Eskom.

[24] The test for mootness in ***Normandien Farms (Pty) Ltd v South African Agency for Promotion of Exportation and Exploitation SOC Ltd and Another*** **(2020 (4) SA 409 (CC))** is when a matter no longer presents an existing or live controversy.

[25] It is submitted on behalf of the applicant that the legal fraternity at the level at which he operates and the stigma associated with state capture malfeasance are such that the applicant continues to suffer prejudice as he is unable to apply for employment without the dark cloud that comes with the SIU report. Although none of the organisations that the applicant has unsuccessfully approached for work have explicitly raised the SIU report as an issue – the matter is known in the legal market and publicised in the Sunday Times Newspaper; applicant considers this a factor in his unsuccessful attempt of being gainfully employed.

[26] Therefore, this is not limited to his relationship with Eskom, but his professional career, his good name and livelihood. Therefore, this matter is not a hypothetical issue for the applicant. This court finds that even if the issue were to be considered moot for the purposes of Eskom, an order reviewing and setting aside the SIU report would have a practical effect on the applicant in that for those who concern themselves with facts and not innuendos or rumours, the blight on the applicant's name would be lessened, if not removed, especially as full arguments were advanced by both parties.

[27] In the premise, the applicant has made out a case for the relief he seeks.
As to the issue of costs, the applicant insists on a punitive costs order against the first respondent. It is not clear why considering the very detailed correspondence that the applicant directed at the SIU requesting that it withdraws its report, the SIU failed to reconsider its report. The SIU's heavy

handedness and reluctance to revisit its actions, in light of substantive submissions from the applicant, is conduct that is unexpected of an organisation in its position and leaves a lot to be desired. Societ and those being investigated expect the SIU to act in a manner above reproach in its investigations and where soothing has gone, array, own up to such. Such conduct will only serve to bolster the SIU in the discharge of its onerous mandate. Considering the likely impact that the report has had on the applicant, a punitive costs order is indeed warranted.

Condonation

[28] The SIU delivered its answering affidavit on 22 April 2021, eight months out of the prescribed time limit of the rules of this court. The first respondent's explanation for the delay was that the attorney seized with the matter who has resigned from the State Attorney's office had failed to deliver the answering affidavit which had been signed in time. Therefore, the delay was caused by the actions of its representative.

[29] After considering the condonation application, the court is of the view that condonation be granted as the explanation is reasonable and the issue at hand will best be adjudicated upon by considering full arguments from both parties. The interests of justice will best be served by granting the condonation.

[30] In the result, I make the following order:

[30.1] The report titled "Investigation in terms of Proclamation No 11 of 2018 issued in terms of section 2(1) of the Special Investigating Units and Special Tribunals Act (Act 74 of 1996) and published in Government Gazette No 41561 Dated 6 April 2018 into the Affairs of Eskom Holdings

SOC Limited: Possible Misconduct by Officials or Employees, dated 12 November 2019 is hereby reviewed and set aside.

[30.2] The SIU is ordered to pay the costs, on an attorney client scale, including the costs of two counsel where engaged.

[redacted]

MA LUKHAIMANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the applicant	:	Adv M Majozi
Instructed by	:	Shandu Attorneys Incorporated
On behalf of the respondent	:	Adv L Nkosi Thomas, SC
		Adv M Kgatala
Instructed by	:	The State Attorney
Date of hearing	:	16 November 2022
Date of judgment	:	2 February 2023