

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

CASE NO. 2807/2020

In the application of:

SPECIAL INVESTIGATING UNIT

Intervening Party

In the matter between:

HT PELATONA PROJECTS (PTY) LTD

Applicant

and

NELSON MANDELA BAY LOCAL MUNICIPALITY

Respondent

JUDGMENT

RUGUNANAN, J

- [1] On 16 November 2020, the applicant, HT Pelatona Projects (Pty) Ltd ('Pelatona') instituted proceedings against the Nelson Mandela Bay Municipality ('the municipality') as respondent for payment of the amount of R4 315 000 on the basis of a series of payment certificates issued in its favour by the municipality. The Special Investigating Unit ('the SIU') was not a party to those proceedings but now seeks orders for leave to intervene as second respondent and permitting it to file opposing papers, purportedly for ensuring that Pelatona does not derive benefit from what the SIU alleges is an irregularly and unlawfully procured construction

contract. Simultaneously therewith, the SIU intends instituting a counter-application in which it seeks to review the contract awarded by the municipality to Pelatona. In argument counsel for the SIU indicated that the review proceedings have been instituted. Save for an unsigned founding affidavit attached to the intervention application, there is nothing before me such as a notice of motion pointing to the relief sought on review to indicate that such proceedings have in fact been instituted. The main/payment application is pending adjudication on a date to be determined. Except for Pelatona, the municipality does not oppose the intervention application by the SIU.

BACKGROUND

- [2] Pelatona was awarded a tender by the municipality on 28 April 2020 for the construction of 2000 toilets, standpipes and aerators for various informal settlements within the Nelson Mandela Bay district. It received seven payment certificates issued in its favour by the principal agent of the municipality. Of the certificates, five amounting to the aforementioned amount remains unpaid. Seeking payment for what is contractually due to itself, Pelatona launched the payment application on 11 November 2020. The Municipality does not dispute that it has no defence thereto and that it is legally obliged to make payment.¹
- [3] On the version of the SIU, the municipality had given it an undertaking to withhold payments. The undertaking was the upshot of 'instructions' by the SIU directing the municipality to halt the implementation of the contract and not make further payments to Pelatona pending finalisation of the contemplated review application, or until investigations, which include value for money, by the SIU have been completed.² In argument it was

¹ Answering affidavit, main application

² Founding affidavit, intervention application, paragraphs [10, [11] and [44], also heads of argument, SIU

submitted for the SIU that it was precluded from interdicting the municipality from making payment because of the undertaking.

- [4] Omitting irrelevant text, the undertaking given by the municipality reads:³

“We hereby confirm and give an undertaking that the ... Municipality will not implement the contract ... pending the finalization of the investigation ... and review of the matter before the Special Tribunal.”

- [5] Evidently, no reference is made to withholding of payments.

A DIRECT AND SUBSTANTIAL LEGAL INTEREST

- [6] In *SA Riding for Disabled Association v Regional Land Claims Commissioner*,⁴ Jafta J said this:

“It is settled law that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought.”

- [7] The SIU asserts that it seeks intervention as of right or out of necessity.⁵ In the enquiry into whether a direct and substantial interest exists, the essential issue to be determined is whether the SIU has demonstrated a right in the subject matter of the litigation between Pelatona and the municipality that may be prejudicially affected by the judgment of the court.

- [8] What is required is that the party seeking to intervene must give *prima facie* proof of the right to intervene. It would be sufficient to make allegations as

³ Annexure BP4, founding affidavit, intervention application

⁴ 2017 (5) SA 1 (CC) at paragraph [9], see also *Polokwane Local and Long Distance Taxi Association v Limpopo Permissions Board and Others* [2017] ZASCA 44 at paragraph [18]

⁵ Founding affidavit, intervention application, paragraph [27]

would show a *prima facie case* (i.e. allegations which if capable of proof, would attract success), and that the application is made seriously and is not frivolous.⁶

THE ARGUMENTS

- [9] The SIU places store on section 5(5)⁷ of the Act which empowers a Special Investigating Unit to institute civil proceedings if it has obtained evidence substantiating any allegation in section 2(2)⁸. Laying emphasis on the principle of statutory interpretation that powers expressly granted must be interpreted to include those powers reasonably necessary or incidental to those powers⁹, the SIU contends for a wider and purposeful interpretation of the section. It submits that the right to enter the fray and defend any civil litigation instituted against a State institution is corollary to the right to institute civil proceedings before any court.¹⁰ Thus, a broad-based purposeful interpretation of section 5(5) is what underpins the SIU's asserted right to intervene in any litigation as is necessary and incidental to the proper discharge of its statutory functions.

⁶ Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, Volume 1 at pages 227-228

⁷ Section 5(5) provides as follows: "A Special Investigating Unit may institute civil proceedings in a Special Tribunal if, arising from its investigation, it has obtained evidence substantiating any allegation contemplated in section 2(2).

⁸ Section 2(2) reads: " 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 (insofar 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
- (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."

⁹ *Engen Petroleum Limited v The Business Zone 1010 CC t/a Emmarentia Convenience Centre* [2015] ZASCA 176 at paragraph [21]

¹⁰ *Masetlha v President of the Republic of South Africa* 1008 (1) SA 566 (CC), and Heads of argument paragraphs [17]-[20]

[10] Pelatona contends that the intervention application is unsustainable for two overarching reasons:

- (i) The SIU's reservoir of statutory powers does not include the right to seek intervention for the purpose of opposing the payment application; and
- (ii) The intervention application does not show *prima facie* proof of a right to intervene and is frivolous.

STATUTORY FRAMEWORK

[11] The SIU is an entity established by the Special Investigating Units and Tribunals Act 74 of 1996¹¹ ('the Act'). The President, by proclamation, mandates the SIU, *ad hoc*, to investigate specific issues in State institutions.

[12] The purpose of the Act, as conveyed by its long title, is:

"To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public and of instituting and conducting civil proceedings in any court of law or a Special Tribunal in its own name or on behalf of State institutions; to provide for the revenue and expenditure of Special Investigating Units; to provide for the establishment of Special Tribunals so as to adjudicate upon several matters emanating from investigations by Special Investigating Units; and to provide for matters incidental thereto."

[13] Under section 2(1) of the Act, the President is empowered to establish, by proclamation in the Gazette, a Special Investigating Unit whenever it is deemed necessary to address any of the range of issues mentioned in subsection (2).¹² Upon being satisfied that the establishment of a Special Investigating Unit is appropriate, the President issues a proclamation which

¹¹ The SIU was established by Proclamation R118 on 31 July 2001

¹² See footnote 8 *supra*

*“... must set out the terms of reference of the Special Investigating Unit, and such particulars regarding the establishment of the Special Investigating Unit ... as the President may deem necessary.”*¹³ A Special Investigating Unit is therefore given a clear mandate in the terms of reference which informs its activities.¹⁴

- [14] The critical functions of a Special Investigating Unit are the subject matter of section 4 of the Act.¹⁵ In *Masuku v Special Investigating Unit and Others*¹⁶ the court determined that the provisions of the section are indicative that the purpose of the SIU is to investigate matters and not to make a determination about them. The court reasoned:

“... because the SIU is a statutory entity, it operates strictly within the provisions of the ... Act. It exercises statutory powers in order to investigate and report. When the SIU believes it has discovered a crime it must refer the evidence ‘which points to the commission of the offence to the relevant prosecuting authority’. If it believes that it has discovered evidence which supports a civil

¹³ *vide* section 2(3) of Act 74 of 1996, as amended.

¹⁴ *Masuku v Special Investigating Unit and Others* (P55372/2020) [2021] ZAGPPHC 273 (12 April 2021) at paragraph [12], and *Konyn and Others v Special Investigating Unit* 1999 (1) SA 1001 (TkHC) at 1010H-1011 I

¹⁵ The full text of section 4 reads as follows:

"4 Functions of Special Investigating Unit

(1) The functions of a Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in section 2 (1) –

- (a) to investigate all allegations regarding the matter concerned;
- (b) to collect evidence regarding acts or omissions which are relevant to its investigation;
- (c) to Institute and conduct civil proceedings in a Special Tribunal or any court of law for –
 - (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution;
 - (ii) any relief are relevant to any investigation; or
 - (iii) any relief relevant to the interests of a Special Investigating Unit;
- (d) to refer evidence regarding or which points to the commission of an offence to the relevant prosecuting authority;
- (e) to perform such functions which are not in conflict with the provisions of this Act, as the President may from time to time request;
- (f) from time to time as directed by the President to report on the progress made in the investigation and matters brought before the Special Tribunal concerned or any court of law;
- (g) upon the conclusion of the investigation, to submit a final report to the President; and
- (h) to at least twice a year submit a report to Parliament on the investigations by and the activities, composition and expenditure of such Unit.

(2) A Special Investigating Unit must, as soon as practicable after it has obtained evidence referred to in subsection (1) (d), inform the relevant prosecuting authority thereof, whereupon such evidence must be dealt with in the manner which best serves the interests of the public."

¹⁶ *Masuku supra* at paragraph [16]

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 or final in any way."

- [15] I am in agreement with the essential reasoning in the above *dictum* since the wording used in the long title and in the key provisions of the Act admits of the conclusion expressed therein. This is the product of a literal approach which supports the notion that the words used must be adhered to. There is no room to sanction the issuance of 'instructions' to another institution of State. My sense is that a departure from the literal approach on the basis contended for by the SIU is tantamount to statutory-interpretation-by-amendment¹⁷ by adding words to section 5(5) to make it compatible with the purpose ostensibly sought to be achieved by the SIU in these proceedings.
- [16] The terms of reference by the President to the SIU in this matter are encapsulated in Proclamation No. R. 23 of 2020¹⁸ ('the Proclamation'). The President mandated the SIU to investigate and recover any losses by State institutions due to COVID-19 related procurement in relation to the matters set out in the Schedule thereto. The power to recover losses must, in my view, be exercised within the ambit of section 5(5) which requires the SIU to institute civil proceedings. The same holds good for the prevention of losses not incurred but likely to be suffered for which the offending conduct "which has caused or may cause serious harm"¹⁹ or loss, may be appropriately interdicted.
- [17] In summary, the legislative context tells that the SIU is a creature of statute with no jurisdictional powers or functions beyond those granted by the Act with its terms of reference defined by proclamation (*Konyn and Others v Special Investigating Unit*²⁰). In that context, the payment application does not prejudice the SIU's right to investigate the matter or to institute civil

¹⁷ E. A Kellaway, *Principles of Legal Interpretation*, page 138

¹⁸ Published in Government Gazette No. 43546 on 23 July 2020

¹⁹ See sub-regulation (g) in Proclamation No. R. 23 of 2020

²⁰ 1999 (1) SA 1001 (TkHC) at 1015 I

proceedings for the recovery of any perceived losses which it believes has been uncovered by its investigation. This view of the jurisdictional competence of the SIU is necessary for ensuring that its powers are exercised strictly in accordance with the statutory authority in terms of which it was established.

PRIMA FACIE PROOF OF A RIGHT TO INTERVENE

- [18] An applicant in an intervention application must also show that the allegations made by it constitute a *prima facie* case and that the application is made seriously and is not frivolous.²¹
- [19] The deponent to the founding affidavit for the SIU asserts that during August 2020 he conducted an investigation into allegations regarding irregularities in the appointment by the municipality of service providers relating to the implementation of infrastructure projects and procurement of goods and services. In documentation provided by the municipality he uncovered evidence indicating that Pelatona was improperly and unlawfully appointed with no approval that sanctioned a deviation from a competitive bidding process having been obtained. In the course of his investigation, he states that he interviewed various employees of the municipality and questioned them about the procurement of Pelatona.²²
- [20] The deponent goes on to state that the mandate of the SIU will be hampered by the outcome of the payment application. He asserts that the SIU must,

“... be given an opportunity to intervene as respondent and to oppose the payment of the monies claimed, until such time as ... investigations would

²¹ Herbstein & Van Winsen, *op cit* at page 228

²² Intervening application, paragraphs [17]-[23]

*have determined if work was indeed done, and the question of value for money being established.*²³

[21] There is an obvious and fundamental difficulty with the SIU seeking to intervene on that basis. It has not made a single factual averment that supports the conclusion that the work done by Pelatona was not proficiently or suitably performed, much less that the work was not done, or that the municipality did not receive value for money.

[22] The SIU's case is pegged on its investigation, the documents and information obtained from various employees of the respondent, and the view formed by the deponent. No confirmatory affidavits by any of the persons interviewed are annexed to the founding affidavit. The evidence in these respects constitutes inadmissible hearsay; and where a legal conclusion as to unlawfulness is drawn, it constitutes inadmissible opinion evidence.²⁴

[23] Elsewhere in the replying affidavit, the deponent makes the claim that,

*“... if the court was to issue an order for payment to be made as claimed by Pelatona, the instructions that were issued by the SIU to the municipality will be severely affected. In turn, that will affect the course that the investigations will take and, importantly, the quest by the SIU to prevent irregular expenditure will be defeated.”*²⁵

[24] Two points need to be made here. First, the contention that instructions issued to the municipality would be severely affected is misdirected and bad in law. The SIU has no legal right to issue instructions to the municipality.²⁶ In short, it cannot cloak itself with a power or function not assigned to it by law. Second, the contention that an order favouring

²³ Intervening application, paragraphs [31]-[32]

²⁴ see *Asla Construction (Pty) Ltd v Buffalo City Metro Municipality* 2017 (6) SA 360 (SCA) at paragraph [25], and *Special Investigating Unit v Chauke Quantity Surveyors & Project Management in Association with Listed Entities & Others* [2020] ZAGPJHC 257 at paragraph [13]

²⁵ Intervening application, paragraph [11]

²⁶ *Masuku supra* at paragraph [17]

payment to Pelatona will affect the course of the SIU's investigations is nothing more than a conclusion. The SIU was required to advance primary facts (that can be proved) to support that conclusion.²⁷

- [25] A feature of the main application overlooked by the SIU is that the relief claimed by Pelatona is founded on payment certificates. In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*²⁸, the status of a payment certificate appears from the following selectively quoted *dictum*, (footnotes omitted):

"... a final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence that the employer is in the same position it would have been in if it had itself signed an acknowledgment of debt in favour of the contractor. ... [S]imilar reasoning applie[s] to interim certificates. The certificate thus embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action... . It is regarded as the equivalent of cash. The certificates in question all fall within this ambit."

- [26] The outstanding payment certificates provides Pelatona with a self-standing and distinct cause of action that is enforceable without any need to go beyond the certificates or to rely on the underlying construction contract.²⁹ It is significant that nowhere in its papers does the SIU contend

²⁷ Harms, Civil Procedure in the Supreme Court – Commentary on the Uniform Rules at B47; also *Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* [2003] 1 All SA 164 (C) at paragraph [28], where the following is stated: "It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the court (See: *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others* 1999(2) SA 279 (W) at 323G) for the benefit of not only the court, but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may either be primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts (See: *Willcox & Others v Commissioner of Inland Revenue* 1960 (4) SA 599 (A) at 602A; *Reynolds N.O. v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78I). Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (See: *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C-E) and accordingly do not constitute evidential material capable of supporting a cause of action."

²⁸ 2009 (5) SA 1 (SCA) at paragraph [27]

²⁹ see *Nurcha Finance Company (Pty) Limited v Oudtshoorn Municipality* [2016] ZASCA 28 at paragraph [19] and the authorities cited therein

that the issuing of the payment certificates was underscored by collusion, much less does it allege that whoever issued them fraudulently exceeded their mandate. The status, therefore, of the outstanding payment certificates issued to Pelatona, is unassailed. Its right to payment is undisturbed; and even if the SIU held a clear mandate, whether under the Act or the Proclamation, to prevent payment (which it clearly does not) during the currency of its investigation, it ought to have approached the court for appropriate interdictory relief.

[27] In *Special Investigating Unit v MEC for Health, Province of the Eastern Cape and Another*³⁰, Tokota J expressed the sentiment that the courageous work by the SIU and other entities empowered to do so should be encouraged rather than discouraged given the indubitable scourge of corruption in this country and the public outcry to have it stamped out. I endorse this sentiment, despite being of the view that the present application is ill-conceived. The papers put forward by the SIU merely gives rise to a suspicion but do not in fact or in law sustain a case for seeking intervention.

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

The application is dismissed with costs.



S. RUGUNANAN
JUDGE OF THE HIGH COURT

³⁰ 2021 (1) SACR 645 (ECM) at paragraph [21]

Date heard (virtually): 19 August 2021

Date delivered: 18 January 2022

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This judgment was handed down electronically by circulation to the abovementioned legal representatives by email. The date and time for hand-down is deemed to be 09h30 on 18 January 2022.