IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE SPECIAL INVESTIGATIONS UNIT AND SPECIAL TRIBUNALS ACT 74 OF 1996 (REPUBLIC OF SOUTH AFRICA)

CASE NO: LP01/2024

In the matter between:

THE SPECIAL INVESTIGATING UNIT	**APPLICANT**
And	
AHUIWI NETSHIDAULU	**FIRST RESPONDENT**
ALEXANDRA FORBES RETIREMENT FUND (PENSION SECTION)	**SECOND RESPONDENT**
LEPELLE NORTHERN WATER	**THIRD RESPONDENT**
DEPARTMENT OF WATER AND SANITATION	**FOURTH RESPONDENT**

JUDGMENT

Summary: Civil procedure – application for an interim interdict to restrain the first respondent from accessing and the second respondent from releasing the first respondent's pension benefits – joinder of the fifth respondent - urgency - double jeopardy - failure to have the decision to appoint Blackhead Consulting reviewed and set aside – whether the requirements for an interim interdict have been met – whether costs on an attorney and client scale are justified.

Held – application for the joinder of the fifth respondent dismissed as no proper case made out – requirements for urgency not met because applicant delayed to bring application and has not established that it will be denied substantive redress in due course – no merit to double jeopardy ground of opposition as it can only be raised in terms of s 35(3)(m) of the Constitution by a person charged with a criminal offence – decision to appoint Blackhead Consulting valid until set aside, therefore any cause of action based on irregularities that led to the decision is premature - requirements for an interim interdict not met – costs on an attorney and client scale justified.

Modiba J:

Introduction

[1] The Special Investigating Unit (SIU) applies for an order interdicting Ahuiwi Netshidaulu (Netshidaulu) and Alexandra Forbes Retirement Fund (Pension Section) (AFRF) from respectively accessing and paying Netshidaulu's pension benefits, pending the outcome of an action the SIU intends instituting against him in the Tribunal within 90 days of the granting of the interim interdict. It has brought the application on notice to the respondents. It seeks the interdict on an urgent basis.

[2] Initially, the SIU had cited AFRF as the second respondent, Lepelle Northern Water (LNW) as the third respondent and the Department of Water and Sanitation (DWS) as the fourth respondent. It applies to join Alexandra Forbes Pension Fund (Alexander Forbes) as the fifth respondent. It alleges that it seeks to join Alexander Forbes to ensure that the order it seeks is effective. The legal basis for joining this party to ensure that the SIU meets the test for joinder is not properly set out in the affidavit filed in support of the joinder application. It has also not changed its notice of motion where it seeks the interim interdict only against AFRF and LNW.

[3] AFRF has filed a notice to abide.

[4] A request for joinder is not there for the asking. The SIU has not made out a proper case for joining Alexander Forbes as the fifth respondent. A proper case for this relief must be properly made. In any event, since the application falls to be dismissed for reasons set out in this judgment, nothing much turns on the dismissal of the joinder application.

[5] Accordingly, the SIU's application to join Alexandra Forbes is joined as the fifth respondent is dismissed.

[6] The cause of the action the SIU intent pursuing against Netshidaulu is for damages LNW and DWS allegedly suffered as a result of Netshidaulu's participation in a procurement process that led to a tender being unlawfully awarded to Blackhead Consulting (BC). Netshidaulu is the only party opposing the application. He does so on the basis that the SIU fails to meet the requirements for (a) urgency and (b) an interim interdict. He has also raised the following preliminary points: (c) double jeopardy and (d) failure to review the decision appointing BC. In respect of the merits, he contends that there is nothing irregular about the role he played in the procurement process that led to the appointment of BC.

[7] I first set out the background facts. Then, I determine the preliminary grounds, followed by the interim interdict. Lastly, I determine the costs of the application. An order concludes the judgment.

Background

[8] The background facts are largely uncontested.

[9] For many years, water resources in the Letaba River in the Limpopo Province have been heavily utilised, resulting in regular water supply shortages in the areas that derive water supply from this river. On 5 July 2012, the DWS through its former Director General (DG), made a request to the then Minister of Water and Environmental Affairs, Minister Edna Molewa (Minister Molewa), for approval to proceed with the implementation of the Water Development Project comprising of amongst others, the rising of the Tzaneen Dam. I conveniently refer to this projects as the Letaba River Project.

[10] The gross storage capacity for the Tzaneen Dam was 157.3 million m3. The project was aimed at augmenting water supply in the Greater Letaba River catchment of the Limpopo Province to address water shortages in the area. The dam wall would be raised by adding 43 million m3 to increase the yield of the dam to 200 million m3.

[11] An environmental authorisation for the rising of the Tzaneen Dam was initially granted on 27 September 2011. Further amendments to the authorisation were

submitted on 25 May 2012. The project scope included the following major components:

(a) A new major dam in the Groot Letaba River at the site known as Nwamitwa.
(b) The raising of the existing Tzaneen Dam.
(c) The provision of bulk water services infrastructure for domestic use.
(d) The exploration and development of groundwater on a regional basis, as a Government Water Works in terms of section 109 of the National Water Act.[1]

[12] The estimated costs for rising the Tzaneen dam wall was R106 million including VAT, escalated at 10% per annum from 2010 to 2012. The targeted beneficiaries of this project were rural communities who would receive a basic level of water supply service, new entrant irrigation farmers and riverine ecosystems. Consequently, no income stream would be derived from water tariffs to cover the capital costs of the project. Government would finance the project.

[13] The other project components were separately costed. National Treasury allocated funds for all project components over the 2012/13 to 2014/15 MTEF period.

[14] Subsequently, Ms Nomvula Mokonyane (Minister Mokonyane) succeeded Minister Molewa as the Minister of Water Affairs and Sanitation. On 25 August 2014, Minister Mokonyane issued a directive to Mr PK Legodi, the Acting Chief Executive of LNW (Mr Legodi) in terms of Section 41(1)(ii) of the Water Services Act[2] to address water challenges in Mopani District Municipality through the

[1] Act No. 36 of 1998.
[2] Act 108 of 1997. Section 41 (1) (ii) provides as follows:
"41 Directives to water boards
(1) The Minister may, to the extent that it is reasonable, from time to time issue directives to a water board-
(a) to undertake a specific activity-
…
(ii) against full or partial payment, as directed by the Minister; or
(b) …
(2) The water board must comply with any directive given under subsection (1).

Giyani Water and Wastewater Treatment Works and associated infrastructure to restore water supply to the residents of Giyani. I conveniently refer to this project as the Mopani Project. She directed that LNW should intervene immediately with effect from 18 August 2014.

[15] The Tzaneen Dam Project was initially not included in the scope of the Mopani Project. On 1 July 2015, Minister Mokonyane issued another directive to LNW instructing it to include the Tzaneen Dam Project in the scope of the Mopani Project. Minister Mokonyane's directive specified that the scope for the Tzaneen Dam Project should include project planning and multi-disciplinary engineering services required to finalize the engineering design, contract administration and site supervision. DWS would conclude a detailed project scope with LNW.

[16] DWS Chief Directorates for Infrastructure Development and Engineering Services would monitor and evaluate LNW performance in respect of the Tzaneen Dam Project. The Deputy Director General for National Water Resources Infrastructure Ms Mathe was the project sponsor.

[17] On 24 August 2015, Ms Mathe provided Mr Legodi with the following scope of works for the Tzaneen Dam Project:

(a) Detailed engineering design on all aspects of the proposed works up to the production of working drawings and tender documents. This includes the procurement of all supporting services for the engineering design, including but not limited to geotechnical engineering investigations, surveys etc.
(b) Detailed feasibility study and report showing the economic viability of the Project.
(c) Obtaining all the relevant statutory permits and authorizations from the relevant Departments and other statutory bodies to ensure that the project is successfully implemented. The relevant sections within the DWS would assist in this regard.

[18] LNW was requested to submit the implementation plan within four weeks after the Project kick-off meeting. The particulars of this meeting and whether this target was met is not disclosed.

[19] Subsequently, LNW requested the DWS Bid Adjudication Committee (BAC) to grant approval for the participation of LNW to the DWS's panel of Professional Service Providers ("PSPs") to render professional multi-disciplinary services covering civil, structural, mechanical, electrical engineering, architectural services, and project management services. This process was initiated when the Programme Manager for LNW, Mr Mulibana compiled a memorandum on 9 November 2015, asking Mr Legodi for approval to deviate from normal tender processes for the appointment of engineering services consultants for the Tzaneen Dam Project. Netshidaulu as the General Manager, Operations and Mr JC Killian as CFO supported the request.

[20] The SIU's alleged cause of action against Netshidaulu arises from his support for the request made by Mr Mulibana.

Preliminary grounds of opposition

Urgency

[21] The trite requirements for urgency are set out in Tribunal Rule 12(3). It mirrors Uniform Rule 6(2). This rule requires that in every affidavit filed in support of any application brought under this rule, the applicant must set forth explicitly the circumstances which it avers renders the application urgent and the reasons why the applicant claims that it would not be afforded substantial redress at a hearing in due course.[3]

The circumstances that render the application urgent

[22] The SIU alleges that Netshidaulu's employment was terminated in December 2023. As a result, he became entitled to withdraw his pension and retirement benefits held with AFRF. During February 2024, the LNW Human Resources department informed SIU that on 12 February 2024, Netshidaulu completed his

[3] See *In Re: Several Matters on the Urgent Court Roll* 2013 (1) SA 549 (GSJ) at 551 paragraph 7 to 8. See also, *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite* (Pty) Ltd 2011 JDR 1832 (GSJ).

pension benefits withdrawal form. NLW further informed SIU that it will only stay Netshidaulu's pension benefits withdrawal request when ordered to do so by this Tribunal. This made it necessary for the SIU to bring the application.

[23] Netshidaulu disputes that the circumstances described by the SIU render the .application urgent. He contends that the SIU's explanation for urgency is insufficient. He further contends that if the application is found to be urgent, the urgency is self-created.

[24] Netshidaulu complains that on 21 May 2021, the SIU set a target for itself that it will institute an action for damages against Netshidaulu by November 2021. More than two years later, it has still not done so simply because there is no basis for the SIU's allegations against Netshidaulu.

[25] On 15 February 2024, an LNW employee informed Netshidaulu that the SIU is in the process of instituting this application. It only did so on 26 March 20024, almost six weeks later.

[26] I find the SIU's explanation for the circumstances that render this application urgent inadequate. It concerns me that in its founding affidavit, it fails to disclose to this Tribunal that it had informed Netshidaulu that it would institute the action against him by November 2021. In response to this allegation, in its replying affidavit, the SIU accuse Netshidaulu of misrepresenting its undertaking. The SIU further states that it had made it clear that the timeframe would change because its investigations are ongoing. In my view, this is a material non-disclosure, particularly because the SIU undertakes to bring the action within 90 days of an order. It probably failed to disclose this information to avoid the Tribunal questioning whether it would meet the 90-day undertaking when it failed to institute the intended action for a period of two years.

[27] It is clear from the version of both parties that when the SIU realized that it would not meet the November 2021 timeframe for instituting a damages action against Netshidaulu, it never communicated the new time frame to him.

Netshidaulu is correct in questioning whether the SIU would honour the new time frame it is asking the Tribunal to impose.

[28] The SIU only offered a substantial explanation in its replying affidavit, that it is awaiting the final report of its quantity surveyor. It is due to be submitted on 17 March 2024. It will only consider its investigation completed when it receives this report.

[29] In my view, the quantity surveyor's report is not an acceptable excuse for the dilatory conduct on the part of the SIU. The SIU does not need to quantify the alleged damages for its cause of action against Netshidaulu to be completed. If it does, at the very least it should have explained why it contends that this is so. Instituting a damages claim is never delayed pending the quantification of the damages. Quantifying damages is often expensive. It is for that reason that in most cases, the plaintiff would separate the action in respect of merits from the quantum to avoid incurring wasted legal costs if the merits segment of the action is dismissed.

[30] The SIU further contends that the proverbial clock started ticking on 15 February 2024 when it became aware that Netshidaulu has started withdrawing its pension benefits. I don't accept this. Netshidualu's employment was terminated in December 2023. The SIU knew as far back as 2021 that it intends instituting a damages claim against him. It ought to have acted with haste after Netshidaulu's employment was terminated in December 2023 to bring this application that's when Netshidaulu became entitled to withdraw his pension benefits. It did not wait to be informed by LNW that he has submission forms to do so.

[31] Even if I were to accept that the proverbial clock started ticking in February 2024 as contended by the SIU, its explanation for the actions it took since then is inadequate.

[32] The SIU explains that the State Attorney only appointed counsel on 22 February 2024. The first consultation with counsel took place on 26 February 2024. He submitted the first draft of the application to the SIU on 12 March 2024. Further

information was required from the investigating team. The application was finalised on 20 March 2024. The SIU issued it on 26 March 2024.

[33] The SIU continued to be dilatory after the urgency it relies on occurred. It has not explained two-week lapses between the briefing of its counsel, preparation, and finalization of the application.

[34] I therefore find that the SIU has failed to provide a full and sufficient explanation for the circumstances that render the application urgent. The urgency it relies on is self-created. Its contention that the application is inherently urgent does not absolve it from fully explaining the circumstances that render the application urgent.

Whether the SIU will not be afforded substantial redress in due course

[35] Even when urgency is self-created as contended by Netshidaulu, it ordinarily would not justify denying an applicant urgent audience if doing so would effectively deny it substantive redress in due course. However, for reasons I set out in this judgment, the SIU has failed to establish that if Netshidaulu accesses his pension benefits at this stage, the SIU will not be denied substantive redress in the planned damages action because it has not established the legal basis for its intended action against Netshidaulu. It has also not established that it has prospects of success.

[36] I am therefore constrained to find that the SIU also fails to meet this leg of the test.

[37] I nonetheless proceed to determine the other issues that arise between the parties because the application is fully pleaded, ripe for hearing and all the issues were ventilated during oral argument.

Doubly jeopardy

[38] Netshidaulu contends that if it pursues the alleged cause of action against him, the SIU will subject him to double jeopardy because he was subjected to a disciplinary enquiry based on the same allegations and was acquitted of the relevant charges. The charge was formulated as follows:

> **"CHARGE 13**
>
> **GROSS DISHONESTY**
>
> On or about the 09th of November 2015, in your capacity as the General Manager: Operations and Maintenance, you supported a memorandum requesting deviation from normal tender processes for the approval of the appointment of an Engineer Services Consultant for the raising of the Tzaneen Dam wall. At the time of supporting the memorandum, you were aware that the reasons which your department provided to justify the deviation in terms of Regulation 16A6.4 of the National Treasury Regulations issued in terms of the Public Finance Management Act (PFMA), 1999 were not valid. By supporting the request for deviation, you created an impression that it was impractical to invite competitive bidding which was not the case. Your conduct shows that Page 19 of 103 you cannot be trusted, amounts to gross dishonesty, and constitutes misconduct.
>
> **Alternatively**
>
> **GROSS NEGLIGENCE**
>
> On or about the 09th of November 2015, in your capacity as the General Manager: Operations and Maintenance, you supported a memorandum requesting deviation from normal tender processes for the approval of the appointment of an Engineer Services Consultant for the raising of the Tzaneen Dam wall. At the time of supporting the memorandum, you were aware or ought reasonably to have been aware that the reasons which your Department provided to justify the deviation in terms of Regulation 16A6.4 of the National Treasury Regulations issued in terms of the Public Finance Management Act (PFMA), 1999 were not valid thereby creating an impression that it was impractical to invite competitive bidding which was not the case. You ought not to have supported the request for deviation under the circumstances but you proceeded to do so. Your conduct amounts to gross negligence and constitutes misconduct. I annex a relevant page in which the charge is contained as annexure **"AN 2""** (Sic)

[39] The Chairperson's findings on the specific charge were as follows:

"Charge 13

"The employee was charged for supporting a memorandum requesting deviation from normal tender process for the approval of the appointment of engineer services consultant for the raising of the Tzaneen Dam.

Ms Mkhari, testified that the employee, invoking regulation 16A6.4 of National Treasury Regulations, requested the approval to utilise the Department of Water Affairs' appointed panel of consultants for project planning for the Tzaneen Dam and other disciplinary engineering services required to assist in the finalisation of the engineering design; contract administration and site supervision for the raising of the Tzaneen Dam. The Department acceded to the request.

The employer contended that the reasons for deviation were misleading and not true. The company could have procured using its own procurement policies and procedures which could have taken it about 3 months to finalise the tender process.

The employee argued that it requested to invoke regulation 16A.6.6 of the Treasury Regulations to participate in a contract DWS procured through a competitive bidding process rather than having to start the process from scratch and risk not initiating the project in time. This is a normal process in terms of regulation 16A.6.6 of the Treasury Regulations.

I accept the employee's explanation. Ms Mkhari conceded that the procurement process in this matter was not in terms of regulation 16A.6.4 but in terms of Regulation 16A.6.6 of the Treasury Regulations. This does not amount to deviation in the strictest sense.

The environmental authorisation was issued on 27 September 2011. The activity was supposed to commence within a period of five years from the date of issue. There was no certainty that the tender process would have been completed in three months. It was therefore prudent of the employee to support the recommendation. There was no dishonesty. Neither was there negligence or dereliction of duties. I do not find employee guilty of this charge." Copy of the relevant page of the verdict is attached hereto marked annexure **"AN 3".** (sic)

[40] For reasons advanced on behalf of the SIU, the double jeopardy ground of opposition is unsustainable. In terms of section 35(3)(m) of the Constitution, having regard to the context in which Netshidaulu seeks to raise it, the defence is only available to persons who are charged with a criminal offence. This legal principle was confirmed in *Motloung and Another v South African Revenue*

Services.[4] To succeed on this defence, Netshidaulu should have raised a *res judicata* special plea.

[41] Therefore, this ground of opposition falls to be dismissed.

[42] As I find below, Netshidaulu's version regarding the disciplinary enquiry bears relevance for the SIU's case in respect of its *prima facie* right to an interim interdict.

Failure to review the decision appointing Blackhead Consulting

[43] It is common cause that LNW's decision to appoint BC has not been reviewed and set aside. It is an administrative decision. According to the Oudekraal principle[5], it remains valid until it is reviewed and set aside. As contended on behalf of Netshidaulu, until the decision to appoint BC is reviewed and set aside, any cause of action founded on the irregularities in the procurement process that led to BC's appointment would be premature. Nothing prevents the SIU from seeking such an order in the same action it intends instituting against Netshidaulu.

[44] Therefore, this ground of defence falls to be dismissed.

Interim Interdict

[45] The requirements for an interdict are trite. They are set out in the prevalently relied upon judgment in *Setlogelo v Setlogelo*.[6] To succeed in this application, the SIU ought to meet them. They are as follows:

(a) A prima facie right

(b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is ultimately granted;

(c) A balance of convenience in favour of granting the interim interdict, and;

(d) The absence of an alternative remedy.

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[4] [2023] JOL 59916 (FB).

[5] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at [26].

[6] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012) ("OUTA") paras [41] – [45].

[46] The approach to determining whether an applicant for an interim interdict has made out a proper case for the relief it seeks is set out in *Webster v Mitchel.*[7] The approach is summarised in the headnote as follows:

"In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.

In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted, subject, if possible, to conditions which will protect the respondent."

[47] I adopt the same approach to determine whether the SIU has made out a proper case for the interdictory relief it seeks. For reasons set out below, I find that the SIU does not meet the requirements for the interim interdict.

A prima-facie right

[48] A *prima facie* right in the context of the relief the SIU will seek in the intended action entails prospects of success.[8]

[49] The SIU's alleged cause of action against Netshidaulu is a damages action. The SIU alleges that Netshidaulu participated in the irregular procurement processes that led to the appointment of Blackhead Consulting (BC) as a

[7] *Webster v Mitchell* 1948 (1) SA 1186 (W).
[8] *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* 2014 (4) SA 371 (CC) at paragraph 25.

service provider and that as a result, DWS and/or LNW suffered losses in that despite various payments made to BC, the DWS derived no benefit therefrom.

[50] There are serious shortcomings in the SIU's alleged cause of action against Netshidaulu.

(a) The SIU has not set out a proper cause of action for the alleged damages it seeks to recover from Netshidaulu.

(b) According to Netshidaulu, there is nothing irregular about the procurement process proposed by Mulibana, which he supported because it is consistent with the NLW SCM Policy.

[51] Unless the SIU alleges a nexus between Netshidaulu's alleged role in the tender process and the damages allegedly suffered, there is no basis on which he may be found liable for any damages suffered because of the irregular tender process.

[52] Netshidaulu admits that he supported the request by Mr Mulibana to deviate from the normal process and to procure professional services for the Tzaneen Dam Project from the DWS panel of service providers. The SIU alleges that the procurement method used was an emergency deviation. Netshidaulu denies that the procurement process is an emergency deviation as authorised by Treasury Regulation 16A6.4.

[53] According to Netshidaulu, term "deviation" is loosely used in their environment. In this context, it connotes deviating from a normal tender process to participate in contracts procured by another institution. This process is regulated by Treasury Regulation 16A6.6. It does not connote deviating from a normal tender process to embark on an emergency procurement. When procuring services in terms of Treasury Regulation 16A6.6., the LNW SCM Manual requires that a written request is made to the CEO to participate in the contract of another institution, clearly stating the benefits and discounts of such participation. This

is the request set out in the memorandum complied by Mr Mulibana which Netshidaulu supported. Mr Legodi approved the request and directed a request to DWS to participate in the DWS panel of professional service providers. DWS approved the request in writing.

[54] Following the approval by DWS, the end user through NLW BAC would propose the procurement method to be utilized. The memorandum attached to the Founding Affidavit as annexure ZM 10 outlines the proposed procurement methodology. The proposed method is in line with Treasury Regulation 16A6.6. read with LNW SCM Manual.

[55] In its replying affidavit, the SIU fails to deal with Netshidaulu's version. Consequently, it stands undisputed. Pertinently, the SIU does not dispute Netshidaulu's contention that supporting a memorandum prepared by Mr Mulibana seeking approval to utilise the DWS panel of service providers is not irregular in terms of Treasury Regulation 16.A6.6. Yet, the SIU continues to insist that the procurement process followed is still irregular because it was an emergency deviation. In its replying affidavit, shifts stance and allege that the procurement process was not fair and competitive because service providers were only provided with 24 hours to respond to the RFQ.

[56] This is an entirely different case made out in reply. Netshidaulu's culpability in requiring a 24-hour response period is not alleged in the founding affidavit. According to Netshidaulu, the procurement process was proposed by the end user and approved by BAC.

[57] Therefore, at the intended trial there are no prospects that the SIU will succeed in establishing that it was irregular for Netshidaulu to support a request to utilise the DWS panel of service providers for the procurement of service providers for the Tzaneen Dam Project in terms of Treasury Regulation 16A6.6.

[58] If DWS derived no value for money from the Tzaneen Dam Project, the SIU has not established the nexus between the Netshidaulu's support for Mulibana's request to participate on the DWS professional service providers' panel and the alleged loss. On its own version DWS was responsible for monitoring LNW's

performance on this project. From the SIU's any damages suffered were caused by inadequate performance because it contends that no value was received for the services paid for. It has also not shown in what respect, by supporting the memorandum proposed by Mulibanda did Netshidaulu contribute to such inadequate performance.

[59] I therefore find that the SIU has not set out a proper cause of action for its intended damages action against Netshidaulu. It has also not established that it has prospects of success in establishing that it was irregular for Netshidaulu to support the memorandum prepared by Mulibana.

[60] What weakens the SIU's case further is that Netshidaulu was charged for his role in the impugned procurement based on the same allegations the SIU has made against him in this application. The deponent to the SIU affidavit testified at Netshidaulu's disciplinary enquiry. She conceded the version Netshidaulu put up in this application. Netshidaulu was acquitted of the relevant charge. In other words, her evidence could not sustain the relevant charge. Similarly, in the intended action, the evidence of the deponent to the SIU affidavits would not establish its cause of action. The SIU withheld this information from the Tribunal. In that regard, it has failed to act in the interests of justice in its investigation of the allegations against Netshidaulu and when instituting this application.

[61] The SIU's reliance on the judgment in *Pietersen v the State*[9] is misplaced. The charges against Pieterson were based on an emergency deviation in terms of Treasury Regulation 16.A.6.4. This is not the deviation Netshidaulu supported, which the SIU does not dispute. The court in *Pietersen* also found that deviation in terms of which IBR's was appointed –

"was a stratagem contrived to justify the appointment of IBR, the politically pre-selected consultant, for an open-ended range of purposes over an extended period without a competitive tender process. It did not meet the requirements

[9] *Pietersen v S* (A309/2017) [2019] ZAWCHC 93 (6 February 2019).

of Regulation 36 and was therefore invalid. As a result, all the expenditure incurred on IBR was incurred in contravention of the SCM Policy." The facts in the present case are clearly distinguishable."

[62] The facts and findings in Pietersen are clearly distinguishable from the present facts.

The remaining three requirements for an interdict

[63] Having failed to meet the low threshold of a *prima facie* right to the interim interdict even open to doubt, it follows that the SIU has not established a reasonable apprehension of harm if the interdict is not granted. For the same reason, balance of convenience in granting the interdict does not favour the SIU. It will be extremely inconvenient for Netshidaulu's pension benefits to be withheld until the intended action is concluded if the SIU has not established the legal basis for such an action, let alone the prospects of success. A question of an alternative remedy also does not arise because the SIU has not established that it has any basis for Netshidaulu to be held liable for any loss DWS and/ LNW may have suffered because of Netshidaulu's role in the procurement process that led to BC's appointment.

[64] The application for an interim interdict must therefore fail.

Costs

[65] Netshidaulu seeks a dismissal of the application on an attorney and client scale because it is frivolous and lack any prospect of success having brought on allegations in respect of which he was acquitted at a disciplinary hearing. Further, the application was brought to unnecessarily punish and frustrate him and to cause hardship and delay in the processing of his pension benefits. These contentions are consistent with my findings.

[66] Even more seriously, the SIU has not established any basis on which Netshidaulu could be held liable for any loss allegedly suffered by DWS and/ or LNW and failed to disclose pertinent information to the Tribunal in respect of the disciplinary process in which Netshidaulu was acquitted on a charge based

on the same allegation the SIU relies on in this application, thus failing to act in the interests of justice.

[67] This conduct on the part of the SIU justify costs on the scale Netshidaulu contends for.

[68] In the premises, the following order is made:

Order

The application is dismissed with costs on the attorney and client scale.

JUDGE L.T. MODIBA
PRESIDENT OF THE SPECIAL TRIBUNAL

Appearances
For the first respondent
Counsel: Adv. M.E Ngoetjana SC , assisted by N. Munangwa

Attorney: Mr L. Baloyi, BL Attorneys INC

For The Special Investigating Unit
Counsel: Adv. MD. Sekwakweng
Attorney: Ms S. Zondi, Office of the State Attorney, Pretoria

Date of hearing: 15 April 2024

Date of judgment: 16 May 2024

Mode of delivery
This judgment is handed down by email transmission to the parties' legal representatives, uploading on Caselines and release to SAFLII and AFRICANLII. The date and time for delivery is deemed to be 10 am.