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

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

5/9/2023
DATE SIGNATURE

**Case Number: 21369/2023**
**B1092/2023**

In the matter between:

| | |
|---|---|
| **DR JOHN MARITE** | Applicant |
| and | |
| **MINISTER OF JUSTICE AND CORRECTIONAL SERVICES** | First Respondent |
| **MALWANDLA SOLLY SIWEYA** | Second Respondent |
| **HEAD OF SPECIAL INVESTIGATING UNIT** | Third Respondent |
| **THE SPECIAL INVESTIGATING UNIT** | Fourth Respondent |

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**JUDGMENT**

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**H G A SNYMAN AJ**

## INTRODUCTION

[1] The applicant ("*Dr Marite*") launched this application on 7 March 2023 as an urgent application for a final interdict against the first respondent ("*the Minister*"), the second respondent ("*Mr Siweya*"), the third respondent ("*the head of the SIU*"), and the fourth respondent ("*the SIU*"). The head of the SIU and the SIU will where applicable, collectively be referred to herein as *"the SIU respondents"*.

[2] In addition to the prayer for urgency, Dr Marite sought wide-ranging relief against each of the respondents as part of the notice of motion.

[3] In paragraph 2 of the notice of motion, Dr Marite asks that Mr Siweya be interdicted and restrained from:

[3.1] Harassing and intimidating Dr Marite in any manner whatsoever;

[3.2] Contacting Dr Marite in any form or manner whatsoever, save through his attorneys of record, and then only during usual business hours;

[3.3] Contacting, intimidating, or harassing Dr Marite's family, employers, businesses, or any party related to him in any form or manner whatsoever; and

[3.4] Attending at Dr Marite's home at 33 Wildwood Way, Silverwoods Country Estate, Silver Lakes Drive, Silver Lakes, Pretoria ("*the estate*").

[4] In paragraph 3 of the notice of motion, Dr Marite asked that the Minister and the SIU respondents be ordered to enlist the services of and/or appoint a new investigative committee to investigate the matters referred to herein, and to provide Dr Marite confirmation thereof within 10 (ten) days of date of the order, through Dr Marite's attorney of record.

[5] In paragraph 4 of the notice of motion, Dr Marite asked that the Minister and the SIU respondents be ordered to retain any and all documentation pertaining to Dr Marite under "*lock and key*" and/or in a secure location to which no third party, other than the aforesaid (new) committee members and/or the SIU may have access.

[6] In paragraph 5 of the notice of motion, Dr Marite asks that the SIU respondents be interdicted from revealing or discussing any disclosures Dr Marite made to them with any third party, including with Mr Siweya, until such time as a final decision may be taken by them regarding Dr Marite. In such an event, Dr Marite must be given notice of such decision within 5 (five) days *prior* to the release or discussion of such information, which notice is to be provided to Dr Marite's attorneys of record.

[7] In paragraph 6 of the notice of motion, Dr Marite asked that the prior testimony of Dr Marite be set aside, alternatively be deemed to have been provided without prejudice, and that "*a copy of the meeting*" held with the SIU respondents be provided to Dr Marite's attorneys of record within 5 (five) days of date of an order. This is obviously a reference to the recording of the interview.

[8] In paragraph 7 of the notice of motion, Dr Marite asked that the SIU respondents be interdicted and restrained from continuing with the questioning of Dr Marite without the aforesaid having been complied with, and without the SIU respondents advising Dr Marite of his rights, in writing, regarding such questioning, and to confirm, in writing, whether Dr Marite is being investigated;

[9] In paragraph 8 of the notice of motion Dr Marite asks costs against "*the respondents*", jointly and severally, the one paying the other to be absolved, if unopposed, and punitive costs against any opposing party.

[10] Mr Siweya and the SIU respondents oppose the application. The Minister filed a notice to abide. The matter first came before the Honourable Ms Justice Mngqibisa-Thusi in urgent court on 22 March 2023.

[11] Per agreement between the parties, as pertaining to time frames, the judge granted an order removing the application from the urgent roll and the matter

was referred to this court's opposed motion roll. Subject to the Registrar's directives, the judge ordered that the matter was to be allocated to a preferential date, alternatively it was ordered that the parties may approach the office of the Deputy Judge President for assistance in the allocation of a preferential opposed motion date. Mr Siweya was ordered to pay the wasted costs of Dr Marite (including counsel) and the SIU respondents, including the costs of employing by the latter of two counsel.

[12] From the heads of argument filed on behalf of the SIU respondents it appears that the background to this costs order granted against Mr Siweya was that on the date of hearing in the urgent court, the Mr Siweya appeared through his newly appointed legal representatives and sought a postponement of the matter to file his answering affidavit. It is stated that consequent to Mr Siweya's last minute show and request for an indulgence, an order was prepared between the parties, on the face of it including Mr Siweya, for presentation to the court. This then included the costs order against Mr Siweya.

[13] The judge further ordered Mr Siweya to serve his answering affidavit, if any, on or before Monday, 27 March 2023; Dr Marite and the SIU respondents was entitled to reply thereto, if deemed necessary, on or before Monday, 3 April 2023. The parties were ordered to file heads of argument and/or supplementary heads of argument by 11 April 2023. The parties were entitled to enrol the matter on the opposed roll, even if the aforesaid is not complied

with by any party.

[14] The matter was then set down before me in the ordinary opposed motion court for hearing on 5 June 2023.

[15] Counsel for Dr Marite submitted before me that the order of Mngqibisa-Thusi J referred to above, rendered the matter no longer to be urgent. This is of course not correct as the judge's order merely related to the time periods for filing of the parties' papers. No interim relief was granted. Be that as it may, it appears that none of the parties took further action in this matter pending the further hearing of the application, which in itself rendered the matter no longer to be urgent. It was accordingly common cause between the parties before me that the urgency was no longer an issue to be decided upon.

[16] During argument before me it became apparent, for the first time, that Dr Marite was no longer persisting with some of the relief he sought in the notice of motion. I therefore requested counsel for Dr Marite, who I point out was not the same counsel who prepared the heads of argument, to submit a draft order embodying exactly what relief Dr Marite persisted with.

[17] From the draft order submitted, it appeared that Dr Marite was now no longer asking for the relief in paragraphs 3, 4 and 6 of the notice of motion. These were the paragraphs referred to above in terms of which Dr Marite in summary sought an order that the Minister and the SIU respondents appoint

a new investigative committee, that the information obtained should be kept under lock and key, and that Dr Marite's prior testimony be set aside, alternatively be regarded to be without prejudice.

## BACKGROUND

[18] Since there were allegations made as contemplated in section 2(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("*the SIU Act*"), in respect of the affairs of the National Lotteries Commission ("*NLC*"), the President in terms of Proclamation No. R.32, of 2020, promulgated on 6 November 2020 in Government Gazette No. 11193, referred an investigation into the affairs of the NLC in terms of section 2(2) of the SIU Act to the SIU.

[19] The SIU was, *inter alia*, mandated to investigate serious maladministration that was uncovered in the improper and unlawful conduct by the NLC employees and officials in respect of allocation of funds from the National Lotteries institution trust fund. This was following widely published reports on the maladministration and losses suffered by the NLC. The matters to be investigated related to the allocation of money in the NLC Fund to beneficiaries who were not entitled to funding in terms of the prescripts of the Lotteries Act 57 of 1997, together with improper conduct by officials of the NLC, or any person in relation to these incidents.

[20] Section 4 of the SIU Act describes the functions of the SIU. In terms of section

4(1) the functions of the SIU are within the framework of its terms and reference as set out in the proclamation referred to in section 2(1). This includes to investigate all allegations regarding the matter concerned and to collect evidence regarding acts or omissions which are relevant to its investigation.

[21] In terms of section 5(1)(a) of the SIU Act, the head of the SIU may determine the procedure to be followed in conducting an investigation. For the performance of its functions in terms of section 4, the SIU may in terms of section 5(2)(a) through a member require from any person such particulars and information as may be reasonably necessary.

[22] In terms of section 5(2)(b), the SIU may order any person by notice in writing under the hand of the head of the SIU, or a member delegated thereto by him, or her, addressed and delivered by a member, a police officer or the Sheriff, to appear before it at a time and place specified in the notice and to produce to it specified books, documents or objects in the possession or custody under the control of such person. The notice has to contain the reason why such person's presence is needed.

[23] Section 5(2)(c) provides that a member of the SIU may administer an oath to or accept an affirmation from any person referred to in subparagraph (b), or any person present at the place where such interview is held, irrespective of whether or not such person has been required under subparagraph (b) to

appear before it, and question him or her under oath or affirmation.

[24] Section 5(3)(a) provides that the law regarding privilege as applicable to a witness subpoenaed to give evidence in a criminal trial, shall apply to the questioning of a person in terms of subsection 5(2). Also that if a person who refuses to answer any question on the grounds that the answer would tend to incriminate him or her to a criminal charge, may nevertheless be compelled to answer such question.

[25] Section 5(3)(b) provides, however, that no evidence regarding any questions and answers contemplated in the proviso to section 5(3)(a), shall be admissible in any criminal proceedings, except in criminal proceedings where such person stands trial on a charge of perjury or on a charge contemplated in section 319(3) of the Criminal Procedure Act 56 of 1955 ("*the Criminal Procedure Act*"). Section 5(4) provides that any person appearing before a special investigating unit by virtue of subsection 5(2)(b) and (c), may be assisted at such examination by a legal representative.

[26] As part of its investigations, the SIU is investigating a transaction that relates to a funding request and subsequent agreement between the NLC and Zibsimonde NPC ("*Zibsimonde*"). In terms of this the NLC paid a grant of approximately R20 million to Zibsimonde. Following the payment of the funds to Zibsimonde, an amount of approximately R7 million was transferred to a bank account under the control of Dr Marite. This was the account of one of

Dr Marite's businesses, namely Right Play Health Services (Pty) Ltd ("*Right Play*"). According to the SIU it is this transaction that links Dr Marite to the investigation.

[27] It is Dr Marite's case that during or about April 2017 he was approached by Mr Siweya who asked him to refer Mr Siweya to someone that provides circumcision medical services. Dr Marite says that he as a medical practitioner through Right Play, confirmed that he would assist with such services, including assistance therewith at a traditional event "*as is a matter of rights in African Customs*". Dr Marite was then introduced to Zibsimonde and its director, Ms Lulalo, who invited Dr Marite to make a proposal to Zibsimonde regarding circumcision services. This was since Zibsimonde apparently required a medical service provider to assist with the said circumcision services. According to Dr Marite he submitted such a proposal, which proposal was accepted. He says that he then through Right Play duly caused circumcision medical services to be rendered to young men through Zibsimonde after the NLC granted funding to Zibsimonde.

[28] Dr Marite was not part of Zibsimonde's funding proposal but became aware thereof when Zibsimonde contacted him "*out of the blue*" in May 2017, requesting an invoice so that he could "*proceed with the said services*". Dr Marite then rendered an invoice to Zibsimonde. Dr Marite says that he was advised by Zibsimonde that it acquired funding from the NLC. Dr Marite attached the *"relevant grant documentation"* to the founding affidavit which

*"subsequently came into [his] possession"*. Based on his invoice, read with the funding documentation he says that it appears that he provided all the services for which funding was sought, with Zibsimonde "*making, it seems, a hefty profit of approximately R13 000 000,00.*"

[29] As proof that he actually rendered the relevant services, Dr Marite attaches a one-page letter by a certain Mr J Skosana, a traditional leader of Gemsbokspruit, Mpumalanga, dated 25 June 2017, to his founding affidavit. This letter simply says: *"I want to thank you and your company, [Right Play], for the medical services you provided during our Ingoma Traditional Circumcision rituals. The assistance provided by your Doctors is appreciated"*. Neither the letter, nor Right Play's R7,292,700 invoice says where and when the alleged services were rendered, or the number of patients involved. The one-page invoice breakdown for instance only lists the globular figures like *"Medical Screening of prospective initiates – R1,050,000"* and *"Medical Monitoring Incl procedures (wound debridement, etc) – R2,100,000"*.

[30] Zibsimonde apparently specifically instructed Dr Marite to make use of two other companies as subcontractors, namely Iron Bridge and Ndzhuku Trading. The latter is Mr Siweya's company. It appears that neither of the subcontractors rendered any services, notwithstanding allegedly being paid by Right Play after it received payment from Zibsimonde. Dr Marite says that having been *"compelled to make use of the above fruitless providers, [he]*

*was effectively advised by Zibsimonde not to pursue recourse against same for non-performance / non-provision of services to Zibsimonde – Zibsimonde simply advised that it would remain accountable for the funds, and would account therefore".*

[31] Dr Marite contends that the SIU respondents harassed and intimidated him, and that he was "*tricked*" into attending a "*meeting*" with the SIU, which was instead an interrogation, without him being advised of his rights. He was on that occasion otherwise treated "*very*" unfairly and without due process. It is said in addition that one of the members of the SIU investigating team evidently leaked information to Mr Siweya, who is one of the relevant service providers. According to Dr Marite he is accordingly constrained to approach this Court for the necessary relief to prevent "*further harm*" to himself, as set out in the notice of motion and founding affidavit.

## THE LEGAL POSITION

[32] In this matter the respondents raise several disputes of fact. The approach a court must follow in considering factual disputes on paper was formulated as follows in **Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA)** at paragraph 13:

> *"A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the facts said to be disputed. There will of course be*

*instances where a bare denial meets the requirements…. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied…There is a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.*" (my emphasis)

[33] The general rule for evaluating affidavits in motion proceedings was described as follows by Corbet JA in **Plascon-Evans Paints v Van Riebeeck Paints**[1]:

"*It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain circumstances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or* ***bona fide*** *dispute of fact (see in this regard* ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*** *1949 (3) SA 1155 (T) at 1163-5;* ***Da Mata v Otto NO*** *1972 (3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court … and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks …*

1 **1984 (3) SA 623 (AD) at 634F – 635C.**

*Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers…*" (my emphasis)

[34] In the matter of **National Treasury and others v Opposition to Urban Tolling Alliance and others 2012 (6) SA 223 (CC)**, the Constitutional Court was called upon to reconsider the test for interim interdicts as was held in the **Setlogelo** case. The court held that it was unnecessary to fashion a new test for the grant of an interim interdict and that the test laid down **Setlogelo**, as adapted by case law, continues to be applied. The court further held that when the balance of convenience is considered, in the absence of *mala fides*, an application for an interdict restraining the exercise of statutory powers is not readily granted and the applicant for such interdict must therefore establish the clearest of cases. The court held in this regard as follows:[2]

"*[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.*

*[46] Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the*

2 **Setlogelo v Setlogelo 1914 AD 221.**

*constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.*

*[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case."*

[35] In this case what Dr Marite seeks is a final interdict. There are three requisites for the grant of a final interdict, all of which must be present, namely a clear right on the part of the applicant; an injury actually committed or reasonably apprehended; and the lack of an adequate alternative remedy.[3]

[36] In the unreported matter of **Liesl Joy Moses v Special Investigating Unit**, case number 28999/2021, judgment delivered on 22 July 2021, this court per the judgment of Baqwa J, which counsel on behalf of the SIU respondents submitted was squarely on all fours with the present matter, this court heard and dismissed an application by Liesl Joy Moses ("*Ms Moses*") to interdict the SIU from investigating or questioning her about R27 million she received from the NLC. The court was firstly not satisfied that Ms Moses made out a

3 **Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd 2017 (1) SA 613 (CC)** at paragraph 8.

case for urgency. The court further held that the applicant had failed to establish any of the requirements for an interim interdict. The court, relying *inter alia* on the principles set out in **National Treasury v Opposition to Urban Tolling Alliance** held that Ms Moses had alternative remedies in that in the event of her being prosecuted she could always claim immunity against the use of the information presented to the SIU at a future criminal trial. Moreover, that none of the rights protected in terms of the Bill of rights is infringed by the provisions of the SIU Act.

[37] Although both the **Liesl Joy Moses** and the **Urban Tolling Alliance** matters deal with the situation where an interim interdict was sought, in my view the considerations apply equally where a final interdict is sought, even more so since what is at stake is final relief.

[38] In so far as the granting of interdicts are concerned, the Constitutional Court formulated the approach to be followed as follows in **Commercial Stevedoring Agricultural and Allied Workers Union and Others v Oak Valley Estates (Pty) Ltd 2022 (5) SA 18 (CC)** at paragraphs 19 and 20:

> *"[19] In a constitutional order, interdicts occupy a place of importance. In granting an interdict a court enforces 'the principle of legality that obliges courts to give effect to legally recognised rights'. The purpose of injunctive relief is to 'put an end to conduct in breach of the applicant's rights'. An interdict is intended to protect an applicant from the actual or threatened unlawful conduct of the person sought to be interdicted. Thus, for an interdict to be granted, it must be shown, on a balance of probabilities (taking into account the Plascon-Evans rule, where final relief is sought on motion), that unless restrained by an interdict, the respondent*

*will continue committing an injury against the applicant or that it is reasonably apprehended that the respondent will cause such an injury. The requirement of a 'reasonable apprehension of injury' was explained by the then Appellate Division in Nordien:*

> *'A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts . . . . The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result . . . . However, the test for apprehension is an objective one. .....This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.'*

*[20] Plainly, if the evidence is insufficient to establish any link between the respondent and the actual or threatened injury, the apprehension of injury cannot be reasonable. Put differently, it follows that there must be some link between the respondent and the alleged actual or threatened injury. But this does not provide a complete answer to the present appeal. What must also be determined is whether mere participation in a strike, protest or assembly, in which there is unlawful conduct, suffices to establish the required link."*

## DR MARITE'S CASE AGAINST THE MINISTER

[39] Since Dr Marite has abandoned the relief contained in paragraphs 3, 4 and 6 of the notice of motion, he no longer asks any relief against the Minister.

## DR MARITE'S CASE AGAINST THE SIU

[40] According to Dr Marite, on or about 28 February 2023, at or around 15:09, he received a call from *"a certain Mr Mashudu"* of the SIU.

[41] Mr Mashudu asked Dr Marite to "*kindly provide*" information about the

transaction referred to earlier herein. Dr Marite accepted and asked that a meeting be held as soon as possible (09:00 the next day). Mr Mashudu agreed, and a confirmatory email was sent less than 40 minutes later. As appears from the confirmatory email, Dr Marite was informed that the SIU was conducting an investigation in respect of certain alleged irregularities at the NLC. It was stated that the SIU is entitled, in terms of section 5(2) of the SIU Act, through a member, to require from any person such particulars and information as may be reasonably necessary for it to perform its functions, e.g. conduct investigations such as the aforementioned. It was stated that the SIU's investigations revealed that Right Play received money from Zibsimonde. It was stated with reference to the earlier telephone conversation, that a request was made for a meeting to discuss the above matter at the offices of the SIU.

[42] According to Dr Marite when he attended the meeting at the SIU, "*the meeting*" followed the form of an interrogation, with six attendees of the SIU present. Dr Marite states that he was advised, after specifically asking, that the meeting was recorded. During the meeting, he was advised that the service provider Iron Bridge is owned by Mr Letwaba and his relatives. Mr Letwaba is believed to be the former CEO of the NLC. According to Dr Marite this was news to him. For the "*sake of full disclosure*" Dr Marite says that, as a medical practitioner, he has provided medical assistance or advice to Mr Letwaba and his immediate family. He alleges that he felt uncomfortable

being confronted as such, more so with the alleged information, which he says is unknown to him.

[43] Dr Marite says that during the meeting he was requested to file an affidavit with effectively unspecified contents with the SIU by Monday, 6 March 2023, which he agreed to do as he says he was not given an opportunity but to comply.

[44] Dr Marite says further that he entered the meeting under the impression that same was a discussion, but was instead "*unjustifiably targeted and interrogated*". He says he was never advised of his rights. He was never advised that he is an accused, or a suspect "*despite obviously being considered as such*". He says he was during the meeting threatened that his registration with the Health Professionals Council of South Africa ("*HPCSA*") would be retracted at the behest of the SIU, and he was accused of numerous unfounded allegations.

[45] According to Dr Marite the SIU alleged that his company, Right Play, was solely established for the aforesaid services to be provided, and that it had never provided services before. He says that this is unfounded, and he outright rejected it. With respect to the SIU wishing to summons him, he says that the SIU is welcome to do so. He will defend same strenuously, he says. He noted at the meeting that the SIU had his bank statements. He says he is unsure if he is under investigation and that none of his rights were

explained to him. It is also, he says, not his job nor mandate to investigate the SIU. He further says that if the SIU wishes to "*without justification*", charge him criminally (for which it has no "*mandate*"), he invites them to do so, but he says that he will certainly seek damages for defamation if it does so.

[46] Dr Marite says that he has nothing to hide and will not do so, but does not deem it lawful or fair to be called as a "*witness*", only to be "*dehumanised*" and treated as a convict, with none of his rights explained to him. He says that post the meeting he sought legal advice. He says that this application was launched effectively three court days post the meeting at the SIU and one day post the deadline for his affidavit to which he now objects in the circumstances.

[47] The SIU respondents deny that Dr Marite was harassed. It is stated that the interview with Dr Marite was conducted without problems and that at no point during the interview did Dr Marite register his dissatisfaction with the interview, nor did he suggest that he felt he was being intimidated in any way. In his replying affidavit Dr Marite admits that at no point during the interview did he register his dissatisfaction, but he denies the remainder.

[48] The SIU respondents' deponent also say that during the meeting, which he attended, the process *"took the nature that took cognisance of all important audi alteram partem principle (sic). [Dr Marite] was cordially invited to state what he knew and to give his input"*. As I see it, all indications are that the

SIU at all relevant stages in this matter did exactly what the SIU Act empowered and in fact compel it to do.

[49] According to the SIU respondents there is simply no basis in law for any of the relief Dr Marite seeks. It is stated that the SIU is mandated in terms of its empowering legislation to conduct its investigations. Granting the relief sought will not only destabilise the investigation, which has reached an advanced stage, it would further set an undesirable precedent that would scupper and damage any work of the SIU. It was in this regard submitted on behalf of the SIU respondents that the investigation is at such an advanced stage that the SIU is on the verge of seeking preservation and or forfeiture orders before the Special Tribunal.

[50] The SIU states that Dr Marite has failed to satisfy the requirements for the granting of an interdict. It is stated that none of the requirements of a final interdict have been satisfactorily substantiated.

[51] It is stated that the SIU Act is clear on the mandate of the SIU. The SIU says this court should be very reluctant to encroach into the legislator's space without a proper basis for such approach. It is stated nothing has been proven by Dr Marite that his questioning will lead to criminal charges, and if those charges do eventually come, it is said that the powers of the SIU are sufficiently described in that the information gathering cannot be utilised in a trial against the applicant. For these reasons, the SIU contends that no

imminent or irreparable harm has been set out by Dr Marite.

[52] It appears to me that what was at stake in so far as the meeting is concerned, is section 5(2)(a) of the SIU Act. That provides that the SIU may through a member require from any person such particulars and information as may be reasonably necessary. It was not a meeting as envisaged in section 5(2)(b) of the SIU Act in terms of which Dr Marite was ordered to appear, administered an oath, directed to produce specified books, documents or objects and was compelled to answer questions.

[53] It seems that Dr Marite, at the outset at least, voluntarily attended the meeting. It also does not appear that he was compelled to answer any questions. It seems to be common cause that save for Dr Marite's impression that the meeting took the form of an interrogation, he seemingly voluntarily tendered the information and even agreed to provide an affidavit. It is in this regard stated in the answering affidavit on behalf of the SIU respondents, that Dr Marite, on the face of it during the telephone conversation, indicated his willingness "*to be a witness for the SIU and assist in the investigation*". It is said that it was on this basis that the meeting was scheduled for Wednesday, 1 March 2023, at the offices of the SIU.

[54] In response to this in his replying affidavit Dr Marite makes a bold denial. He states that he was "*probed*" on more than the listed aspects and that he was confronted with random accusations pertaining to the NLC members. He

says that the SIU sought to obtain information from him, which was *inter alia* obtained through duress.

[55] In their answering affidavit the SIU respondents, gives a detailed account of what Dr Marite told them during the meeting. As I see it, the version that the SIU records in the answering affidavit in so far as what Dr Marite told them, is not materially different from the version that Dr Marite, obviously voluntarily, sets out in the founding affidavit.

[56] The SIU says that instead of allowing the process to unfold naturally and co-operating with the SIU in fulfilling its mandate, Dr Marite has opted for the shorter route to scupper the investigation from proceeding by bringing the application on an urgent basis. The SIU implores this court to view the alleged incident between Dr Marite and Mr Siweya as one between two acquaintances who have fallen out, have become highly suspicious of each other and are now attempting to perform damage control *"to cover their tracks in relation to the NLC scandal that is now highly publicised*".

[57] The SIU says that Dr Marite is simply relying on conjecture that is unsubstantiated and seeks to drag the SIU into his erstwhile relationship with Mr Siweya.

[58] The alleged *"clear right"* that Dr Marite relies upon for the final interdict that he seeks is that he has a clear right to his privacy, good name, and reputation

not being infringed, and to not being intimidated and harassed, *"as does his family"*. He also says that he has a clear right to be treated fairly and with due process, which he says are being infringed by the SIU. Dr Marite's clear right is therefore based on his fundamental rights in terms of the Constitution 1996

[59] As the court held in the **Urban Tolling Alliance** matter at paragraph 46, to the extent that Dr Marite's right to an interdict is sourced from the Constitution 1996 it would be redundant to enquire whether that right exists.

[60] To the extent that Dr Marite seeks to protect his right to silence, it is trite that the right to silence is only accorded to arrested, detained and accused persons in terms of section 35 of the Constitution 1996. Dr Marite is not yet either of these.

[61] The issue in this matter is therefore whether Dr Marite has made out a case against the SIU for an injury actually committed or reasonably apprehended. In addition, whether he has no adequate alternative remedy.

[62] As basis for the alleged injury actually committed or reasonably apprehended, Dr Marite relies thereon that the SIU has allegedly already leaked information regarding him forming part of its investigation. Moreover, that the SIU will continue to do so. This is why he initially asked that the entire *"committee"* be replaced and that the *"information"* gathered so far be sealed.

He no longer persist with this relief.

[63] He also relies thereon that him and his family has already *"been intimidated and harassed unlawfully by the SIU"* and that this will continue. The basis for this is that the alleged SIU leak caused Mr Siweya to attend his home. He also asks that the SIU be interdicted and restrained from questioning him and demanding affidavits from him until such time that he has been advised duly of his rights. The SIU and Mr Siweya deny the factual basis for this. Dr Marite does not further address the lack of an adequate alternative remedy as part of his affidavit.

[64] As I see it the relief that Dr Marite initially asked for and has now abandoned, which formed a central theme of his alleged injury as appear from what is set out above, was clearly not competent and was therefore wisely not persisted with before this court. That relief was in essence aimed at directing the SIU to how it should conduct its affairs. This is, however, something which is expressly entrusted to the SIU in terms of the SIU Act. The relief was therefore clearly not competent and would have amounted to this court intruding into the exclusive terrain of another branch of government.

[65] As I see it, paragraph 5 of the notice of motion ought to suffer the same fate. As part of that, Dr Marite seeks an interdict that the SIU be interdicted from revealing or discussing any disclosures made by Dr Marite to them with any third party, including Mr Siweya. This is until such time as a final decision

may be taken by them regarding Dr Marite. It is of course not inconceivable that the SIU may want to confront third parties with Dr Marite's version. To grant the interdict sought against the SIU will obviously hamstring the SIU in its investigation. Moreover, to order that the SIU must give advance notice to Dr Marite before they may act, my also infringe against the other remedies that the SIU may have in terms of its empowering legislation.

[66] In addition to the above, as I see it, Dr Marite has, in view of the disputes of fact the SIU respondents raised, failed to make out a case on a balance of probabilities (taking into account the Plascon-Evans rule) that unless restrained by an interdict, the SIU respondents will continue committing an injury against Dr Marite, or that it is reasonably apprehended that the SIU respondents will cause such injury.

[67] As I see it, taking into account those facts which Dr Marite avers, which have been admitted by the SIU respondents, together with the facts as alleged by the SIU respondents, these simply do not justify that an interdict be granted against the SIU. This is simply not one of those *"clearest of cases"* referred to in the **Urban Tolling Alliance** matter.

[68] Moreover, taking into account the *dicta* in **Nordien** referred to above, it cannot be said that Dr Marite has a reasonable apprehension of injury which a reasonable man might entertain on being faced with the facts in the present matter. He has failed to show that it is reasonable to apprehend that injury

will result. This court can therefore not find that on the facts presented there is a basis for the entertainment of a reasonable apprehension by Dr Marite. Plainly, in the words of the above authority, the evidence is insufficient to establish any link between the SIU respondents and the actual or threatened injury apprehension or injury.

[69] I so far as the requirement of the lack of an adequate alternative remedy is concerned, I am of the view that Dr Marite has also failed to make out a case for that. As the court held in the **Liesl Joy Moses** matter, Dr Marite clearly has alternative remedies at his disposal. For instance, in the event of him being prosecuted, he could always claim immunity against the use of the information presented to the SIU at a future criminal trial.

[70] As I see it, Dr Marite's application against the SIU respondents ought therefore to fail.

## DR MARITE'S CASE AGAINST MR SIWEYA

[71] Dr Marite says that after receiving the phone call from the SIU on 28 February 2023, he left the estate in which both he and Mr Siweya reside in the afternoon. He says that outside the gate he was "*accosted*" by Mr Siweya who asked Dr Marite to meet him at his home "*as he needed to see*" Dr Marite urgently. During a meeting "*later*" with Mr Siweya, Mr Siweya advised Dr Marite that he was informed that Dr Marite was meeting the SIU the following

day and that Dr Marite would be required to answer questions. Mr Siweya said that he would guide Dr Marite to answer the questions.

[72] According to Dr Marite, Mr Siweya said that he would "*prepare*" Dr Marite for the meeting. Dr Marite said that he reluctantly attended at Mr Siweya's home. He says that upon arrival he was advised that Mr Siweya was not present. He says he waited for approximately 30 minutes, out of fear of missing his meeting with Mr Siweya, but then left.

[73] He says that Mr Siweya clearly acted as aforesaid (seemingly a reference to the fact of summonsing him for a meeting and then not attending), in an attempt to intimidate and harass him. He says this is unacceptable, as Mr Siweya advised that he was "*guiding him*". Dr Marite says that at approximately 23:55 that evening, 28 February 2023, Mr Siweya then attended at his home, without notice. He says that this is his family home. In support of this he attached a photograph from his home security cameras to his founding affidavit. Mr Siweya denies this. He says that he was at another meeting at the time. In any event, the photo is illegible and does not assist this court either way.

[74] Dr Marite says that although Mr Siweya did not directly threaten him, or his family, he proceeded to dictate "*how [he] should answer questions at the SIU (which [he] did indeed so answer) but out of fear*", he says. Dr Marite says that he was harassed and intimidated by the Mr Siweya, even if indirectly,

"*put at the lowest*".

[75] Dr Marite says that due to the fact that he was contacted by Mr Siweya, on the same day that the SIU contacted him, he must accept that one of the parties to the meeting on behalf of the SIU, notified Mr Siweya. Alternatively someone in the SIU's office did, which is why he says in the founding affidavit that he asks for the file being kept sealed or private for fear that persons speaking out and "*injuring me unjustifiably in my name and reputation, at the least*". He says that surely, as a party that is not an accused and who is requested to provide information willingly, he should be provided with effective protection. He says that it appears that he has no protections and must accordingly approach this court for necessary relief. He says that the SIU meeting seemed to be an interrogation and fishing expedition.

[76] Mr Siweya's in his answering affidavit sets out a version of events that is diametrically opposed to Dr Marite's. For one, he says that the SIU has not yet made contact with him. He says upon analysis of the SIU respondents' answering affidavit that it is clear that according to the SIU he might be contacted in future for interviewing. He says that since the SIU respondents aver that "*it is clear that [Dr Marite] was recruited by [Mr Siweya]*", it is apparent that the SIU has already made factual conclusions about his involvement in its pending investigation before interviewing him and/or pending investigation which has not yet reached its conclusion or recommendation. He therefore says that this poses a great danger for him to

answer to certain averments made by Dr Marite and the SIU when he is still to be interviewed. He says that he therefore invokes his constitutional right in terms of section 35(3)(j) being a right against self-incrimination pending an investigation by the SIU, should SIU decide to subpoena him for interview pertaining to this matter. This claim is, of course, unfounded as Mr Siweya is clearly not yet an accused person. The SIU support Mr Siweya's version that the SIU has not yet made contact with Mr Siweya. Dr Marite's allegation that Ms Siweya learned of his meeting with the SIU from a leak at the SIU can therefore not be correct.

[77] Mr Siweya says that it was Dr Marite who introduced him to Mr Letwaba. Mr Siweya therefore denies that he approached Dr Marite in April 1917. He says that it was actually Mr Letwaba that informed him that Dr Marite required his assistance to develop a business case for initiation schools across the country. Mr Siweya says that it was Dr Marite who undertook to sub-contract his company, should Dr Marite and Zibsimonde succeed with obtaining funding from the NLC. In return, Zibsimonde would pay him an admin fee. He says that he at the instance of Dr Marite prepared the business case that Dr Marite attaches to the founding affidavit. He therefore says that this document was prepared by him and not as alleged by Dr Marite. He says it makes no sense that a qualified medical practitioner would sub-contract a company and go on to pay significant funds when that company rendered no service.

[78] Mr Siweya also denies that he "*accosted*" Dr Marite. He says that it is Dr Marite that came to his house on 28 February 2023, and informed his wife "*Tintswalo*" that Mr Siweya should not sleep that night without seeing him. Mr Siweya says that at that time he was still in Bloemfontein. He attaches an affidavit by Ms Siweya confirming this.

[79] Mr Siweya further says that he left for Bloemfontein on 27 February 2023 for a meeting which was scheduled for 28 February 2023. He says that the meeting lasted for the better part of 28 February 2023. He says that he received a phone call on 28 February 2023 from Mr Letwaba who informed him that Dr Marite wants to see him urgently. He says that he told Mr Letwaba that he was in Bloemfontein in a meeting and would only return to Gauteng later that evening. Mr Letwaba then told him that he should see Dr Marite as he needed his help. In support of this Mr Siweya attaches his phone call log to his answering affidavit showing calls between him and Mr Letwaba on 27 and 28 February 2023.

[80] Mr Siweya only came back to Gauteng at about 19:00 on 28 February 2023 and left for another meeting. On his version he could therefore not have accosted Dr Marite at the gate of the estate during the day on 28 February 2023. Mr Siweya says that he only came back (seemingly to the estate) at about 00:57 on 1 March 2023. He therefore denies Dr Marite's version. In support of contention that he was in Bloemfontein on 28 February 2023, Mr Siweya attaches two confirmatory affidavits by persons who confirm that they

were with Mr Siweya in Bloemfontein on 28 February 2023. In support of the fact that he only returned to the estate by 00:57, he attached an entry log of the security of the estate to his affidavit.

[81] Mr Siweya further argues that this court should approach the founding affidavit with caution due to the fact that the *"entire purpose of this application is to avoid investigation and play a victim of circumstances by [Dr Marite]*".

[82] As I see it, Mr Siweya raises genuine *bona fide* disputes of fact against the case Dr Marite attempts to make out against him. Again, applying the Plascon-Evans rule, Dr Marite has made out no case against Mr Siweya. As I see it, his case against the SIU, as well as against Mr Siweya is almost entirely based on unfounded inferences and on conjecture that is unsubstantiated. He provides no evidence of the alleged interference with his clear right.

[83] In any event, even if it is found that Mr Siweya did threaten him, which this court does not accept, the highwater mark of Dr Marite's case is that Mr Siweya indirectly threatened him. Furthermore, Dr Marite clearly had alternative remedies available like to approach the South African Police Service or any like agency to register an appropriate complaint against Mr Siweya. As I see it, this is no basis for granting the wide-ranging interdictory relief against Mr Siweya.

[84] In the result, I find that Dr Marite's application ought also to fail against Mr Siweya.

## COSTS

[85] Both Mr Siweya and the SIU respondents ask that Dr Marite's application be dismissed with a punitive cost order.

[86] In the case of Mr Siweya, I am of the view that there is no reason for costs not merely to follow the event.

[87] In so far as the SIU respondents are concerned, it is clear that Dr Marite brought them before this court for *inter alia* relief that the entire investigation team who has now been busy with the investigation for well over four years had to be replaced. He sought relief that the SIU be directed how it should conduct its investigation. Relief that he eventually abandoned. For the remainder, he fails to set out a case and upon analysis it appears that his entire case was from the outset based on suspicions and innuendo without having any real prospect of success. It was therefore submitted on behalf of the SIU respondents that the application amounted to an abuse of process. I agree.

[88] In the result, I am of the view that a punitive cost order in so far as the SIU respondents are concerned, is warranted.

[89] In the result, the following order is made:

**ORDER**

1. The applicant's application against the second respondent is dismissed, with costs.

2. The applicant's application against the third and the fourth respondents is dismissed with costs on the scale as between attorney and client, including the costs occasioned by the employment of two counsel.

**H G A SNYMAN**
Acting Judge of the High Court of
South Africa, Gauteng Division,
Pretoria

Heard in open court: 8 June 2023

Delivered and uploaded to CaseLines: 5 September 2023

Appearances:

| | |
|---|---|
| For the applicant: | Adv Marius Snyman SC<br>Instructed by Elliott Attorneys |
| For the first respondent: | No appearance |
| For the second respondent: | Adv L Molete |

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|---|---|
| | Instructed by Nemasisi (N) Attorneys |
| For third and fourth respondents: | Adv S Poswa-Lerotholi SC<br>Adv N Ncube<br>Instructed by Modise Mabule Attorneys |