

SOUTH AFRICA / JUDGMENT

Special Investigation Unit and Another v Msagala and Others (GP05/2020) [2021] ZAST 7 (30 April 2021)

[2021] ZAST 7

COURT

Special Tribunal

BEFORE

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CASE / FILE NUMBER

GP05/2020

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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)

BOOYSENS MAGISTRATE COURT

CASE NO: GP05/2020

In the matter between:

THE SPECIAL INVESTIGATING UNIT

First Plaintiff

TRANSNET (SOC) LTD

Second Plaintiff

and

LINYENGA MAKAINENE HERBERT MSAGALA

First Defendant

LINYENGA MAKAINENE HERBERT MSAGALA N.O.

Second Defendant

(in his representative capacity as a Trustee (and a Beneficiary) of

The Msagala Investment Trust, The Msagala Family Trust and
The Msagala Residents Trust)

ROBERTO JORGE MEDONCA VELOSA N.O.

Third Defendant

(in his representative capacity as a Trustee of

LORETTA KGAKGAMATSO MSAGALA Fourth Defendant

BONOLO MATHULO MSAGALA Fifth Defendant

IGS CONSULTING ENGINEERS (PTY) LTD

Sixth Defendant

SIPHO VICTOR SITHOLE

Seventh Defendant

JUDGMENT IN RESPECT OF THE SPECIAL DEFENSES OF

RES JUDICATA AND LIS PENDENS

SUMMARY

Background:

The plaintiffs - the Special Investigation Unit (the SIU) and Transnet SOC LTD (Transnet) cause of action arises from Transnet's employment relationship with Herbert Msagala ("Msagala"). Until June 2020, Msagala was employed by Transnet as a senior executive. The SIU and Transnet allege that while employed by Transnet, Msagala received substantial amounts of monies from the sixth defendant, IGS Consulting and/ or seventh defendant, Sipho Sithole ("Sithole"). At the time, IGS Consulting was a contract supplier to Transnet under the New Multi-Products Pipeline (NMPP) Project. The plaintiffs further allege that the payments were made illicitly as secret profits and in breach of Msagala's common law, contractual and statutory duties to Transnet. Msagala denies these allegations. He alleges that the monies constitute income derived from his various business activities over and above his income from Transnet.

In July 2020, the plaintiffs sought and were granted a provisional order by Motlhe J under Special Tribunal case number: GP03/2020, declaring 7 properties and 37 motor vehicles listed in a schedule to the notice of motion ("the listed assets") - to the extent of R18,4m

- as proceeds of unlawful activities in terms of section 17 of the Prevention and Combating of Corrupt Activities Act ("PRECCA") read with Rule 3 of the Special Tribunal Rules and declaring them forfeit to the state in terms of Rule 26. He found that Msagala

acquired the assets using funds received from IGS Consulting and/ or Sithole. Motlhe J also granted an interim order interdicting Msagala from accessing his pension benefits held with Transnet Retirement Fund pending an action the plaintiffs would institute against the cited defendant within 5 days of the order.

In August 2020, the plaintiffs instituted the action. They seek an order holding the cited defendants (with the exception of the third and fourth defendants, due to the interest they hold in the assets of the cited Trusts as co-Trustee and beneficiary respectively) liable to Transnet for R18,4m and other further amounts. They also seek a statement and debatement of account in respect of Msagala's

nefarious financial relationship with IGS Consulting and/ or Sithole. The first, second, fourth and fifth defendant (the defendants) are defending the action on the same basis they defended the forfeiture order and interim interdict. The trial is scheduled to start on 3 May 2021 until 21 May 2021 as determined with the parties' agreement at the judicial case management meeting held on 6 November 2020.

Meanwhile defendants are appealing the final forfeiture order.

On 30 March 2021, the defendants filed a special plea raising the special defences of *res judicata* and *lis pendens*. The plaintiffs

filed a replication on 13 April 2021. If the special defences are upheld, the defendants seek a stay of the trial. The special defences were separated from the rest of the issues in the trial. Argument was heard on 19 April 2021 and judgement reserved.

Questions for determination:

- Whether the judgment delivered by Motlhe J on 17 November 2020 conclusively determined the dispute between the parties (whether the dispute between the parties is *res judicata*).
- Whether, when the pending appeal proceedings against the judgment by Motlhe J is determined, the dispute between the parties will be conclusively determined (whether the dispute is *lis pendens*).
- Whether the action should be disallowed on the basis of the once and for all rule.

The defendants contend that the dispute in the action is the same as the dispute in the pending appeal proceedings. The plaintiffs dispute this.

The applicable legal principles are cognate and trite. They are:

- whether the same dispute between the same parties, based on the same cause of action and for the same relief is pending in another court or forum;
- the above requirements ought to be relaxed to avoid a negative result based on the facts of each case and considerations of equity and fairness;

- the 'once and for all rule' which requires a party to seek relief based on the same cause of action in one action is determined based on the facts of each case and considerations of equity and fairness.

Findings:

Res judicata

- the res judicata special defense is unsustainable because the appeal proceedings are still pending.

Lis pendens

- the parties are the same;
- the cause of action is not the same. In the application, the plaintiffs sought and were granted an order in terms of which the listed assets are proceeds of unlawful activities and forfeited to the state. In the action they seek to hold the defendants personally liable by the loss to Transnet emanating from Msagala's alleged conduct.
- relaxing the same cause of action requirement to allow the issue estoppel defense in respect of the Msagala's alleged receipt of the R18,4m from IGS Consulting or Sithole would not serve the requirements of equity and fairness. On the defendant's version in the pending appeal proceedings, the trial action is the appropriate action for determining the dispute between the parties. The appeal court has not been called upon to determine the merits of the forfeiture application. Therefore, the appeal will only have a dilatory effect.
- the relief sought in the trial is not the same as that granted in the application. The forfeiture order is limited in scope - to these assets - and in purpose - to avert the acquisition of illicit wealth. The assets seized under the forfeiture order have been to approximately R8m. The order sought by the plaintiff in the action will compensate the fiscus for the difference between the amount Msagala is found to have illicitly received from IGS Consulting/ Sithole and the value of the forfeited assets. The other relief sought bears no relation to the forfeiture order.
- the defendants have failed to establish a basis for the once and for all rule to be upheld in their favour. Under the present circumstances, this rule must yield to the demands of equity and fairness. The order sought in the action does not duplicate the forfeiture order. It complements it. The defendants conduct in the forfeiture application and the action is vacillatory and evasive. In the forfeiture application, they sought a dismissal of the application on their version. Their version was rejected. In the appeal, they allege that the application ought to have been referred for trial as there is a material dispute of fact, irresolvable on the papers, yet this is not what they sought in the application. In the action, they allege that the same dispute is pending in appeal proceedings.

ORDER

1. The special defenses of lis pendens and res judicata raised by the first, second, fourth and fifth defendant are dismissed with costs.

MODIBA J:

INTRODUCTION

- [1] Two questions arise in this matter. The first is whether the judgment delivered by my brother Motlhe J on 17 November 2020 under Special Tribunal case number GP 03/2020 conclusively determined the dispute between the parties (in legal parlance, whether the dispute between the parties is res judicata). The second is whether, when the pending appeal proceedings against the judgment by Motlhe J is determined, the dispute between the parties will be conclusively determined (in legal parlance, whether the dispute is lis pendens) or differently put, whether the dispute that arises in the present action is the same dispute in the pending appeal.[i]
- [2] These two questions are important because they hold implications for the trial that is due to commence in this Special Tribunal on 3 May 2021. The defendants are seeking a stay of the trial on the basis that the dispute between the parties was conclusively determined by Motlhe J in the 17 November 2020 judgment or it will be conclusively determined when the defendants' pending appeal proceedings against that judgment are finalized.
- [3] The first, second, fourth and fifth defendant raised these questions by way of the special defenses (pleas) of res judicata and lis pendens in this trial action. The plaintiffs, the Special Investigating Unit ('the SIU') and Transnet SOC Ltd ('Transnet')

filed a replication in opposition of the special defenses. The rest of the defendants did not enter the fray. It is for convenience that the defendants who raised the special defenses are simply referred to as 'the defendants' in this judgment.

- [4] The special defenses of res judicata and lis pendens are ordinarily available to a party who desires to resist legal proceedings on the basis that - in the case of the res judicata defense - the dispute has been finally determined by another court or tribunal and in the case of the lis pendens defense, the same dispute is pending in another court or tribunal. The dispute ought to be between the same parties, based on the same cause of action and for the same relief for the special defenses to be upheld.
- [5] Upholding the res judicata special defense is dispositive of the legal proceedings in which the special defense is raised while upholding the lis pendens defense only serves as the basis to stay those legal proceedings, on the presupposition that the legal proceedings will be rendered res judicata when the pending legal proceedings are concluded. Therefore, upholding any of the special defenses may constitute an absolute bar

to the proceedings in which the special defenses are raised, in this case, the trial that is due to commence on 3 May 2021.

[6] The principle behind these special defenses is that there should be finality in litigation and that generally, courts should avoid

determining an issue that is pending before another court to prevent conflicting judgments on the same issue.

[7] There have been various dispute resolution proceedings between the parties arising from the first respondent's, Herbert Msagala's

(‘Msagala’) employment with Transnet. The crux of the dispute between the parties is an allegation that during his employment with Transnet, Msagala improperly received a substantial amount of monies as secret profits from IGS Consulting, a contract supplier to Transnet and/ or from IGS Consulting's

controlling officer, the seventh respondent, Sipho Sithole (‘Sithole’).

[8] In the Special Tribunal, the plaintiffs seek to have this dispute resolved by way of a parallel application and trial action. The

dispute resolution proceedings between the parties are detailed in the next section of this judgment.

[9] For the reasons that follow, this Special Tribunal finds that the 17 November 2020 judgment did not conclude the dispute between the parties. It also finds that when it is determined, in the event that it is upheld, the pending appeal will not conclusively determine the dispute between the parties. Ultimately, the defendants' special defenses hinge on whether allowing the trial to continue will violate the once and for all principle. This Special Tribunal finds that the once and for all principle ought to yield to the dictates of equity and fairness under the prevailing circumstances.

[10] This judgment follows the following pattern: the legal requirements for the special defenses of res judicata and lis pendens are outlined, followed by an outline of the various dispute resolution proceedings between the parties. By way of analysis, whether the requirements for the special defenses of res judicata and lis pendens are met is determined against the prevailing facts and circumstances of this case. Put differently, the two questions raised in the first paragraph of this judgment are determined. Lastly, the question whether allowing the trial to proceed violates the once and for all principle is determined.

THE APPLICABLE LEGAL REQUIREMENTS

[11] The legal requirements for the res judicata and lis pendens special defences are cognate and trite. The applicable principles are neatly summarized with reference to the different cases where they have been applied in *Prinsloo NO v Goldex (Pty) Ltd*[ii] as stated in paragraph 4 and 6 above.

[12] Recognizing that a strict application of the three requirements of the same parties, same cause of action and same relief may yield a negative response, over the years, there has been a relaxation of the application of the requirements to avoid an unjust outcome. For example, where the parties are not the same but there is similarity of identities[iii]; where the cause of action, although not the same, hinges on the same issue of law or fact, attracting the issue estoppel defense[iv] and/ or where the relief sought is not the same[v].

[13] Determining whether the requirements should be relaxed requires careful scrutiny, largely because upholding any of the special defence(s) could cause great hardship and positive injustice to parties; hence courts have refused to uphold the special defence(s) in such circumstances.[vi] Each case will depend on its facts and any extension will be determined on a case by case basis. Relevant considerations will include:

13.1 Equity and fairness, not only to the parties themselves but to others;

13.2 Convenience.

[14] In terms of the once and for all rule, it is generally impermissible for the applicants to seek different relief on the same issue in different proceedings.[vii]

[15] Once the requirements of lis pendens are met, the court should be inclined to uphold it as it is undesirable to have litigation pursued in two different courts on

the same issue. However, the court still retains the discretion to refuse to stay proceedings.

THE DISPUTE RESOLUTION PROCEEDINGS BETWEEN THE PARTIES

[16] An examination of the various dispute resolution proceedings between the parties is important to determine whether the defendants make out a case for the trial action to be stayed.

[17] In 2017, Transnet instituted disciplinary proceedings against Msagala by way of arbitration. Transnet charged Msagala with various acts of misconduct including misconduct in relation to IGS Consulting. The arbitrator acquitted Msagala of the charges.

[18] In May 2020, Transnet instituted fresh disciplinary proceedings against Msagala on the basis of new evidence unearthed from an investigation

conducted by the SIU. This time Transnet charged Msagala with various acts of misconduct in relation to IGS Consulting, including receipts of secret profits. Msagala raised the defense of res judicata, contending that he has already been acquitted of the charges during the arbitration. When this defense was not upheld, he resigned and instituted constructive dismissal proceedings against Transnet in the Bargaining Council.

[19] The Transnet disciplinary proceedings were continued in his absence. He was convicted of the charges and dismissed. Msagala disputes the legitimacy of the outcome of the second disciplinary proceedings on the basis that the continuation of the disciplinary proceedings after he resigned was irregular.

[20] In July 2020, the SIU and Transnet as applicants, launched an application against the defendants in the Special Tribunal in two

parts - A and B. In part A, the applicants sought an order on an urgent basis attaching and preserving assets listed in Schedule A attached to the notice of motion ("the listed assets") and an interdict preventing Msagala from accessing his retirement

benefits held with the Transnet Retirement Fund pending an action to be instituted against Msagala within 5 days of the granting of the order in Part A.

[21] In part B, the applicants sought an order for the final forfeiture of the listed assets to the State in terms of section 17 of the

Prevention and Combating of Corrupt Activities Act[viii] (PRECCA) read with Rule 3 and 26 of the Rules of the Special Tribunal.

[22] The application came before my brother Motlhe J. He granted an order as sought under Part A of the notice of motion in July 2020. On 17 November 2020, Motlhe J delivered a judgment and order in terms of Part B of the notice of motion declaring the listed assets finally forfeited to the State.

[23] In December 2020, the defendants filed an application for leave to appeal the 17 November 2020 judgment and order. This is the application referred to above as pending under case number GP03/2020. The application for leave to appeal was still pending when this judgment was handed down.

[24] After the order in Part A was granted, the applicants issued and served a summons against the defendants, dated 5 August 2020, initiating the trial action. This is the trial action subject to which the applicants successfully interdicted Msagala from accessing his

pension fund in Part A of the application and in which the defendants have raised the special defences under consideration.

[25] The defendants filed a notice of intention to oppose and a plea on 20 August 2020. The defendants did not raise a special defense at that stage. They only did so in an amendment to their plea dated 30 March 2021, served on the applicants on 13 April 2021 and only filed by the applicants with the Special Tribunal on 16 April 2020 when the applicants filed their replication to the special defenses.

[26] The 3 May 2021 trial date was agreed at the Judicial Case Management Meeting held on 6 November 2020. Given that the special defences have implication for the commencement of the trial, legal argument in respect of the special defences was heard on 19 April 2021,

separately from the rest of the issues in the trial. The agreement to separate the special defences from the issues in the trial was reached at the second Judicial Case Management meeting held on 12 April 2021.

[27] The defendants contend that the present legal proceedings are based on the same cause of action and facts as well as the relief sought in the application proceedings brought under case number GP03/2020 and as a result, the cause of action and facts are *res judicata*. The defendants are also aggrieved by the manner in which the applicants are litigating the dispute between the parties in the Special

Tribunal. They contend that the plaintiffs have duplicated proceedings and that this renders the proceedings vexatious and an abuse of process. For that reason, if any of the special defenses is upheld, they seek an order holding the plaintiffs liable for the wasted legal costs.

[28] The applicants dispute this. They contend that the present legal proceedings are premised on a different cause of action and relief.

Therefore, the trial action should not be stayed.

ANALYSIS

The *res judicata* special defence

[29] During oral argument, counsel for the defendant did not persist with the *res judicata* special defense because with the application for leave to appeal still pending, it goes without saying that the requirement that the same dispute is conclusively finalized in another forum is not met. Therefore, as matters stand, the *res judicata* special defense cannot be sustained.

[30] For this reason, the oral argument advanced on behalf of the parties largely focused on the *lis pendens* special defense. This Special Tribunal considers the latter defense in the next section of this judgment.

[31] It is however important for this Special Tribunal to consider the *res judicata* special defense as raised in the application because, in light of the pending appeal proceedings, the *res judicata* special defense has implications for the *lis pendens* special defense raised in these proceedings in that a conclusive finding on the issue is yet to be made.

[32] In the application, the defendants unsuccessfully raised the *res judicata* special defense in relation to the arbitration disciplinary proceedings Transnet instituted against Msagala in terms of section

188A of the Labour Relations Act (“LRA”).[ix] The dismissal of the *res judicata* special defense, pleaded on this basis, constitutes one of the defendants’ grounds of appeal in the pending appeal proceedings.

[33] In the present action, res judicata is pleaded on a different basis. It is only pleaded in relation to the final forfeiture order. Res judicata based on the arbitration proceedings was only dealt with in the defendants' heads of argument. Therefore, ordinarily, this

Special Tribunal would be confined to the res judicata special defense as pleaded before it. However, as already stated, it would be imprudent for the Special Tribunal to ignore this ground of defense for the purposes of the lis pendens special defense under consideration as it is an issue in the pending appeal proceedings.

[34] The section 188A arbitration as a basis for the res judicata special defense in the pending appeal does not sustain a lis pendens special defense in the action for the following reasons:

34.1 there is a statutory limit to the arbitrator's jurisdiction in terms of section 188A (1), to enquire into the conduct or capacity of an employee during the arbitration proceedings;

34.2 in terms of section 188A(9), the arbitrator may only make a ruling based on the evidence presented during the arbitration and the criteria of fairness in the LRA rule as to what action an employer should take against an employee.

[35] The relief sought in the arbitration and in the action is clearly distinguishable but more importantly, the relief sought in the

arbitration is circumscribed. Transnet could not obtain in the arbitration proceedings brought in terms of the LRA, the relief that it seeks in the present action because of the jurisdictional limits referred to above.

[36] Therefore, the fact that the res judicata special defense as raised in the appeal proceedings remains pending does not sustain the lis pendens special defense as raised in this action.

The same parties

[37] This requirement was hardly disputed. Therefore, delving on the requirement would unduly burden this Special Tribunal.

The same cause of action

[38] When rigidly applied in this matter, the same cause of action requirement does not yield a positive outcome for the defendants.

[39] Although the relief sought in the application and in the action hinged on Msagala receiving R18,4m from IGS Consulting and/ or Sithole as secret profits, as this Special Tribunal finds below, the cause of action in the two legal proceedings is not the same.

[40] In the application, the applicants sought and were granted a final forfeiture order in respect of the listed assets. The applicants

sought the final forfeiture order in terms of section 17 of PRECCA[x] read with the definition of unlawful activities in Rule 3[xi] and 26[xii] of the Rules of the Special Tribunal. Therefore, to succeed in the application, the applicants had to allege and prove that:

40.1 during his tenure as a senior executive at Transnet, Msagala received R18,4m from IGS Consulting and/ or Sithole as secret profits;

40.2 when Msagala received the said amount, IGS Consulting was a contract supplier to Transnet;

40.3 Msagala received the said amount in contravention of section 17 of PRECCA in that he held a private interest in the IGS Consulting contract(s) in which his employer Transnet was a party;

40.4 by receiving the said amount, Msagala engaged in a(n) unlawful activit(ies) as envisaged in the definition of unlawful activities in Rule 3 of the Rules of the Special Tribunal;

40.5 Msagala utilized the said amount to acquire the listed assets, rendering the listed assets susceptible for forfeiture in terms of Rule 26.

[41] In the action, the plaintiffs seek to hold the cited defendants, with the exception of the third and fourth defendants - liable to Transnet for secret profits found to have been unlawfully paid by IGS or Sithole to Msagala, the Msagala Trusts, trust beneficiaries and Msagala's relatives ("the Msagalas") as secret profits and/or unlawful benefits and to provide a statement and debatement of account for such payments.[xiii] They have merely cited the third and fourth defendants due to the interest they hold in the Msagala trust assets and co-Trustee with Msagala and beneficiary respectively.

[42] The plaintiffs seek this relief on the basis of the alleged breach of the common law, contractual and statutory obligations applicable to Msagala as a Transnet employee. To succeed in the action, the plaintiffs must allege and prove these breaches.

[43] The pleaded breaches are clearly not the cause of action for a forfeiture order in terms of section 17 of PRECCA read with Rules 3 and 26. The final forfeiture order would have still been granted if no findings in respect of the breaches were made.

[44] An allegation that the breaches were committed are, rather, the cause of action for the interdict against the payment of Msagala's

pension benefits, which has been preserved pending this trial where Msagala's liability to Transnet (and that of all the other cited defendants) stands to be determined. These allegations had to be pleaded in the application to make out a case for the interim interdict.

[45] Therefore, this Special Tribunal finds that the causes of action in the two legal proceedings are not the same.

[46] The question then arises whether a relaxation of this requirement would obviate the resultant negative outcome for the defendants.

[47] The same cause of action requirement is capable of being relaxed in the form of the issue estoppel defense because receipt of the R18,4m as secret profits and/ or unlawful benefits was an issue in the application without which a final forfeiture order could not be made. Similarly, receipt of the R18,4m as secret profits and/ or unlawful benefits is also the basis on which Transnet seeks to hold the cited defendants liable to it for the alleged breach of the various employment duties outlined above.

[48] Further, as contended by counsel for the defendants, the fact that the same persons who deposed to affidavits in the application have filed witness statements in the action and are lined up to testify in the trial supports the relaxation of the requirement.

[49] However, for the reasons that follow, considerations of equity and fairness weigh against relaxing this requirement.

49.1 a careful scrutiny of the papers in the application, the pending appeal and the action reveals that as to what the appropriate forum to adjudicate the dispute between the parties is, the defendants reprobate and approbate;

49.2 on the defendants' own case in the pending appeal proceedings, the trial is the appropriate procedure to adjudicate the dispute between the parties.

[50] In the application, Msagala denied receiving secret profits from IGS Consulting and/ or Sithole as alleged. He contended that he derived substantial income from his various businesses over and above his remuneration from Transnet. However, the defendants never pleaded that the application should be dismissed because a foreseeable material dispute of fact irresolvable on the papers had arisen. They sought a dismissal of the application on the basis of their version.

[51] The plaintiffs then pleaded in paragraph 14 of their replying affidavit that in the event that the Special Tribunal finds that there exists a material dispute of facts irresolvable on the papers, the matter should be referred to oral evidence or for determination in this trial. It was still open to the defendants to concede to this request but they did not. The request was not granted because the defendants' version was found to be far-fetched and untenable and rejected and the plaintiffs' version accepted.

[52] In the appeal, the defendants' position has changed. They are no longer persisting with a dismissal of the application on their version as they have cited no grounds to this effect – apart from the ground of appeal in respect of the res judicata defense in relation to the arbitration disciplinary proceedings, which was dealt with above and found not to have any bearing on the trial action

- [53] Rather, they contend that Motlhe J ought to have found that there is a material dispute of fact irresolvable on the papers. Therefore, they further contended, Motlhe J should not have granted a final forfeiture order but referred the matter for determination in this trial. The defendants also contested the plaintiffs' authority to seek a final forfeiture order in the application proceedings.
- [54] The plaintiffs are entitled to the final determination of the forfeiture relief. The appeal court has not been called upon to pronounce on the merits of the dispute between the parties. Therefore, in the event that the appeal is upheld on any or both grounds dealt with above, the dispute between the parties will not be *res judicata*.
- [55] Under these circumstances, staying the trial on the basis of the pending appeal proceedings will only have a dilatory effect.

The same relief

- [56] The defendants contended that the plaintiffs are seeking in the action, a monetary judgment in the amount already sought and granted in the forfeiture order. The plaintiffs addressed this concern in their replication. They pleaded that they are not pursuing the same amount in the action. The curator has valued the assets seized in terms of the forfeiture order to R8m. The plaintiffs will offset this amount against the R18,4m that Msagala was found to have received from IGS Consulting and/ or Sithole and only take judgment in respect of the difference in terms of prayer 21(a) of the particulars of claim.
- [57] For the reasons that follows, this Special Tribunal finds that the relief sought and granted in the application and the relief sought in the action is distinguishable in purpose and scope.
- [58] In the application, the plaintiffs sought and were granted a forfeiture of the listed assets to the value of R18,4m as proceeds of unlawful activities in terms of Rule 26. The listed assets, held by Msagala, his daughter Bonolo and the Msagala Trusts were found to have been illicitly acquired. The forfeiture order advances the objectives of PRECCA as set out in the preamble, to amongst others prevent the illicit acquisition of personal wealth because it erodes the country's economy, ethical values and the rule of law.
- [59] The listed assets are the only assets that fall within the scope of this order. The order cannot be executed against any other assets. If the plaintiffs are barred from seeking relief in the action to hold the cited defendants liable for the difference between the value of the seized assets and the amount in the final forfeiture order, and any further amount the Msagalas are proven to have received from IGS Consulting and/ or Sithole, a positive injustice would arise, not only to Transnet but to the fiscus and the public, for whose ultimate benefit public funds are disbursed.
- [60] Similarly, the purpose of the Special Investigating Units and Special Tribunals Act[xiv] to recover unlawfully appropriated public funds through civil proceedings would be frustrated.
- [xv]

[61] In the action, the plaintiffs seek to hold the defendants personally liable to Transnet for the losses that result from the defendants'

alleged nefarious financial activities. In the event that the defendants do not satisfy the monetary judgment, it can be executed against any of the assets of the cited defendants, including Msagala's pension benefits preserved in Part A of the

application. This relief is clearly not limited to the listed assets.

[62] Therefore, it cannot be that the plaintiffs are pursuing the same thing. The relief in the action complements the final forfeiture order to avert a looming injustice occasioned by the inadequacy in the value of listed the assets to fully compensate Transnet for its loss. It does not duplicate it.

[63] Further, the prayers in paragraphs 21 (b), (c) (d) and (e) do not overlap with the forfeiture order. It is clear from the notice of motion that the plaintiffs always intended to pursue this relief in the action and to execute monetary orders granted in the action, including the R10m deficit derived from the execution of the final forfeiture order under prayer 21(a), against Msagala's pension benefits.

[64] Therefore, this Special Tribunal finds that the relief sought in the two proceedings is not the same.

The once and for all rule

[65] Considerable reliance was placed on the recent Constitutional Court's judgment in *Ascendis Animal Health*[xvi] by counsel for the defendants. In *Ascendis Animal Health*, Cameron J, reinforcing the once and for all rule, would have upheld a special defense of *res judicata* to bar a party who was unsuccessful in patent revocation proceedings brought in terms of section 61 the Patents Act[xvii] from relying on other grounds of revocation as grounds of defense in patent infringement proceedings. It was largely on the basis of this authority that it was contended on behalf of the defendants that the piecemeal litigation embarked on by the plaintiffs in the two legal proceedings before this Special Tribunal should not be tolerated.

[66] *Ascendis Animal Health* is not authority for the proposition that the applicable legal requirements ought to be relaxed to thwart piecemeal litigation for several reasons.

[67] Firstly, the Constitutional Court did not have a majority judgment as it was split in half with the result that the judgment of the High Court prevailed.

[68] Secondly, in the second judgment penned by Cameron J, the requirements applicable to the defense of *res judicata* were not developed further. This clearly appears from paragraphs 111 to 114 where Cameron J summarized the applicable principles as stated in various prior cases. He prefaced this section of the judgment by stating '...I borrow with appreciation from its thorough overview of the principles'[xviii], then went on to summarize the principles.

[69] Most importantly, Cameron J observed at paragraph 113 of his judgment that ‘the breath of what is required when repeat litigation is barred is still being developed’. He proceeded to reason why he would have relaxed the res judicata requirements to prevent the reliance on additional grounds of revocation in subsequent patent infringement proceedings. He would do so for reasons of equity and fairness having regard to the pertinent facts in that case[xix] as well as the importance of preventing the destabilization of the patent litigation system. [xx]

[70] Therefore, the defendants’ reliance on Ascendis Animal Health is misplaced.

[71] The presence of the three requirements does not necessarily constitute a bar to repeat litigation. The approach to this rule that is crystalizing from similar cases is that courts are disinclined to disbar second legal proceedings where disallowing it would yield an inequity. A finding that an inequity would result in the present action has already been made.[xxi]

[72] Courts have allowed more than one remedy against the same parties based on different causes of actions. In *National Sorghum Breweries*[xxii] the SCA disallowed a special defense of res judicata raised in the context of two separate actions arising from the breach of one contract, one based on damages and the other based on restitution. In *Porrit*[xxiii], the SCA upheld the decision of the High Court, allowing a liquidator or trustee to assess a claim of a creditor who obtained the

liquidation and sequestration order on the basis of equity and fairness. It held that relaxing the res judicata requirements would not be appropriate under those circumstances as it would invariably result in unfair distributions and prejudice to other creditors.[xxiv] In *Prinsloo*[xxv], the SCA allowed a party who was found to have committed fraud on the basis of the less vigorous *Plascon Evans Rule* to defend himself in a subsequent damages action on the ground that he has not committed fraud because an injustice would have occurred if a full examination of the facts relating to the alleged fraud - which would occur at the trial - was disallowed.

[73] In several authorities listed in the defendants bundles of authorities, the special defences at issue in this matter were upheld. Most of the listed authorities were not addressed in the defendants’ written or oral argument on why they support the defendants’

case. Notably, in the relevant cases, the special defences were upheld based on the facts of each case which is the trite approach

when determining special defenses of this nature.

[74] The defendants were always aware that the plaintiffs have structured the relief that they seek in the Special Tribunal in parallel proceedings as this clearly appears from the notice of motion. The reason for this approach appears in the plaintiffs’ founding affidavit filed in the application. The plaintiffs moved swiftly to preserve and seek a final forfeiture of the listed assets in urgent proceedings while the SIU investigations in this matter were continuing, with a clear intention to seek further relief in the action.

[75] The defendants did not complain about vexatious proceedings and the abuse of process in their answering affidavit filed in the application

proceedings. They sought the dismissal of the application on their version. They fully participated in the trial action by filing

pleadings and participating in a Judicial Case Management meeting where the trial date was agreed while Part B of the application was pending. Having failed in their plea to have the application dismissed on their version, in the application for leave to appeal,

as already mentioned, they have changed position, implying that the trial action is the appropriate procedure for the resolution of the dispute between the parties. Yet in the trial action they now allege that the same dispute is pending in the appeal proceedings.

[76] The defendant's approach to litigation in the Special Tribunal has turned out to be vacillatory and evasive and should not be tolerated.

[77] This Special Tribunal finds that the parallel proceedings instituted against the cited defendants in the Special Tribunal serve the dictates of equity and fairness that prevailed in the authorities cited in paragraph 72 above. It also finds that the defendants have failed to establish a basis for the once and for all rule to be upheld in their favour.

CONCLUSION

[78] Having found that:

78.1 the parties are the same;

78.2 the cause of action is not the same, and, relaxing this requirement to allow the issue estoppel defense in respect of the Msagalas's alleged receipt of the R18,4m from IGS Consulting and/ or Sithole would not serve the requirements of equity and fairness;

78.3 the relief sought in the trial is not the same as that granted in the application;

78.4 the defendants have failed to establish a basis for the once and for all rule to be upheld in their favour;

- it follows that the defendants have not made out a case for the relief sought.

[79] In the premises, the special defenses of res judicata and lis pendens stand to be dismissed with costs.

1. The special defenses of lis pendens and res judicata raised by the first, second, fourth and fifth defendant are dismissed with costs.

JUDGE L. T. MODIBA (MS.)

MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the plaintiffs: Adv. P. Kennedy SC assisted by Adv. G. Ngcangisa, instructed by Bowman Gilfillan INC

Counsel the first, second, fourth and fifth defendant: Adv. H. Louw, instructed by Boqwana Burns INC

Date of hearing:

19 April 2021

Date of judgment:

30 April 2021

Date revised:

11 May 2021

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[i] This articulation of the *lis pendens* special defense was coined by De Villiers CJ in *Wolf NO v Solomon*

(1898) 15 SC 297 at 306-307 derived from Voet J 44.2.7, The Selective Voet being the Commentary on the Pandects (Gane's translation, 1957) Vol 6 at 560 in the chapter headed 'The Exception of Res Judicata and applied in *Caesarstone SDOT-YAM Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA).

[ii] 2014 (5) SA 297 (SCA) (28 March 2012) at paragraph 10

[iii] *Caesarstone n1* at paragraph 31, 41-43

[iv] *Caesarstone n1* at par 20-21 citing *Boshof v Union Government* 1932 TPD 29 at 37 and *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653)

[v] See the authorities cited in paragraph 72 of this judgment.

[vi] See *Smith v Porrit* 2008 (6) SA 303 (SCA) (23 March 2007) and other cases cited in paragraph 72 of this judgment.

[vii] *Caesarstone n1* at paragraph 28

[viii] Act No. 12 of 2004

[ix] Act 66 of 1995

[x] Section 17 of PRECCA provides: “17.

- (1) Any public officer who, subject to subsection (2), acquires or holds a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body, is guilty of an offence.”

[x] Section 17 of PRECCA provides:

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- (1) Any public officer who, subject to subsection (2), acquires or holds a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body, is guilty of an offence.”

[xi] “Unlawful activities” is defined in Rule 3 as follows: ““Unlawful activities” shall mean acts of serious maladministration in connection with the affairs of the state or any of its organs; improper and unlawful conduct by employees of any state institution, unlawful appropriation or expenditure of public money or property; Unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property; intentional or negligent loss of public money or damage to public property; unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public and includes offences referred to in Part 1 to 4 or sections 17, 20 or 21 of Prevention and Combating of Corrupt Activities Act No. 12 of 2004 (PRECCA); and which offences were committed in connection with the affairs of any state institution”

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[xii] Rule 26 provides as follows: “26. Forfeiture Orders At the conclusion of the proceedings and on final determination of the dispute, depending on the outcome on the unlawful activities of the respondent or the defendant, as the case may be, the Tribunal may make a final order for forfeiture to the State, of the property held under a preservation order or the interdict order where the respondent has been found to have participated in unlawful

activities.”

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“26. Forfeiture Orders

At the conclusion of the proceedings and on final determination of the dispute, depending on the outcome on the unlawful activities of the respondent or the defendant, as the case may be, the Tribunal may make a final order for forfeiture to the State, of the property held under a preservation order or the interdict order where the respondent has been found to have participated in unlawful

activities.”

[xiii] The relief is pleaded as followed in the plaintiffs’ particulars of claim: “ORDER PRAYED FOR: 21. The SIU and Transnet pray for an order in the following terms as against the First, Second, Third, Fifth, Sixth and Seventh

Defendants, jointly and severally: (the one paying, the other to be absolved): a) Payments to Transnet of the sum of R18 056 000; b) Payment to Transnet of the sum R250 000; c) provide a statement and debatement of account of all amounts paid to first and Second Defendants and/or the Msagala Investment Trust, The Msagala Family Trust and/or Msagala Residence Trust by the Sixth

and/or Seventh Defendants as secret profits or other unlawful benefits earned or received by Mr Msagala arising from his business

dealings (as Transnet’s Group Executive: Capital Projects) with the Sixth and Seventh Defendants; d) Payment to Transnet of whatever sum may be determined as owing after statement and debatement of account under prayer (c) in addition to the amounts in (a) and (b); e) Payment to Transnet of interest at the applicable prescribed rate of interest on each of the sum referred to in prayers (a), (b) and (d) from date of judgement to date of payment; f) Payment of the Plaintiffs’ costs; g) Other or alternative relief.”

[xiii] The relief is pleaded as followed in the plaintiffs’ particulars of claim:

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- d) Payment to Transnet of whatever sum may be determined as owing after statement and debatement of account under prayer (c) in addition to the amounts in (a) and (b);
- e) Payment to Transnet of interest at the applicable prescribed rate of interest on each of the sum referred to in prayers (a), (b) and (d) from date of judgement to date of payment;
- f) Payment of the Plaintiffs' costs;
- g) Other or alternative relief."

[xiv] Act 74 of 1996

[xv] See the preamble and section 2, the Special Investigating Units and Special Tribunals Act.

[xvi] Ascendis Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others 2020 (1) SA 327 (CC)

[xvii] Act 57 of 1978

[xviii] Justice Cameroon was referring here to the first judgment penned by Justice Khampepe.

[xix] See Ascendis Animal Health n16 at paragraph 113 to 138

[xx] Ascendis Animal Health n16 at paragraph 139.

[xxi] See Wolff NO n1 at paragraph 25, S v Molaudzi 2015 (2) SACR 341 (CC)

[xxii] National Sorghum Breweries (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd

[2001] 1 All SA 417 (SCA)

[xxiii] Porrit at fn 6 above.

[xxiv] See also Wolff NO n1 at paragraph 25

[xxv] Prinsloo n2 at paragraph 21 to 25

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