



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

**Case Number: GP05/2020**

In the matter between:

**SPECIAL INVESTIGATING UNIT**

First Plaintiff

**TRANSNET SOC LTD**

Second Plaintiff

and

**LINYENGA MAIKANE HERBERT MSAGALA**

First Defendant

**LINYENGA HERBERT MSAGALA N.O**

In his representative capacity as a Trustee and a Beneficiary of the Msagala Investment Trust, the Msagala Family Trust, and the Msagala Residence Trust

Second Defendant

**ROBERTO JORGE MEDONCA VELOSA N.O**

In his representative capacity as a Trustee of the Msagala Investment Trust, the Msagala Family Trust, and the Msagala Residence Trust

Third Defendant

**LORETTA KGAKGAMATSO MSAGALA**

Fourth Defendant

**BONOLO MATHULO MSAGALA**

Fifth Defendant

**IGS CONSULTING ENGINEERS (PTY) LTD**

Sixth Defendant

**SIPHO VICTOR SITHOLE**

Seventh Defendant

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## JUDGMENT

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**MODIBA J:**

### **INTRODUCTION**

[1] This action is jointly brought by the plaintiffs, the Special Investigation Unit (SIU) and Transnet SOC Limited (Transnet). They seek to disgorge secret profits from five of the six cited defendants. The secret profits are alleged to have been improperly earned by Herbert Msagala (Msagala) from IGS Consulting Engineers (Pty) Ltd (IGS), at the time, a supplier contracted to Transnet, and/or its sole shareholder and director Siphso Sithole (Sithole), while Msagala was in fulltime employment with Transnet. The plaintiffs rely on breach of contractual, common law and constitutional duties against receiving such secret profits.

[2] Msagala, in his personal capacity and in his official capacity as the co-Trustee of the cited Trusts (the Msagala Trusts), his wife Loretto Msagala (Loretto) and daughter Bonolo Msagala (Bonolo), jointly defended these proceedings, even though the plaintiffs seek no relief against Loretto. The plaintiffs merely cited Loretto due to the interest she may have in these proceedings as a beneficiary of the Msagala Trusts. For convenience, I refer to these defendants as the Msagala defendants.

[3] Msagala's co-Trustee, Roberto Velosa (Velosa) did not enter the fray. Neither did IGS and Sithole.

[4] The Msagala defendants defended the proceedings until the commencement of the trial. On the first day of the trial, Msagala applied for a postponement. For the reasons set out in this judgment, Msagala's postponement application was refused. He then decided not to participate in the trial and left the court. Loretto and Bonolo followed him. Consequently, although the Msagala defendants had filed a plea and witness statements, they did not subject the plaintiffs' witnesses to cross examination. Their witnesses were also not called, and as a result, not cross examined. Therefore, the trial proceeded on a default basis against all the cited defendants.

[5] The action was proceeded by several legal proceedings detailed in the judgment in respect of the special defences of *lis pendens* and *res judicata*, handed down on 30 April 2020. They are summarised in this judgment as they have an important bearing on some of the issues in the trial.

[6] This judgment follows the following scheme: the background, reasons for the refusal of the Msagala defendants' application for a postponement, the plaintiffs' cases as pleaded, the evidence of the plaintiffs' witnesses and analysis, findings, costs of the action, and the order

## THE BACKGROUND

[7] Msagala started working for Transnet in 1997. He occupied various positions.

From 1 September 2014 to 17 May 2016, he served as Transnet's Chief Group Executive: Capital Projects (now Transnet Group Capital). Thereafter, he served as Transnet's Group Executive: Business Development. It is common cause that between 1 January 2015 and 31 December 2016, while Msagala was employed by Transnet in the capacities described above, IGS was awarded a series of contracts by Transnet: Capital Projects. The contracts were awarded to IGS, either on its own or together with a joint venture partner, Turnmill ProQuip Engineering (Pty) Ltd under Transnet's New Multi Product Project ("the NMPP"). This period is conveniently referred to as the period under review.

[8] The NMPP involved the construction of a 715 kilometre multi-product pipeline for the high pressure transportation of liquid petroleum products from Durban, Kwa Zulu Natal to Heidelberg, Gauteng. The pipeline has two hubs: TM1 located in Durban, and TM2 located in Heidelberg. The Project was managed jointly by Transnet Capital Projects and Transnet Pipelines, both specialist divisions within Transnet. The plaintiffs allege that, IGS was paid in excess of R160 million, for the services it rendered under the contract. The plaintiffs further allege that during the same period, IGS and Sithole made various substantial payments to Msagala, which he received either directly or into the bank account of the Msagala Investment Trust. They also allege that Sithole made several payments on behalf of Msagala.

[9] The NMPP was first investigated by Nexus, at Transnet's instance. The Nexus investigation focused on the appointment of companies that provided engineering services on the NMPP, including IGS and Turnmill ProQuip. Nexus was appointed by Transnet before the Presidential Proclamation authorising the SIU investigation into Transnet was issued.<sup>1</sup> The Nexus report is dated 13 October 2017. The Nexus report found that Msagala was living a flamboyant lifestyle and owned many properties. However, the Nexus report fell short of investigating how Msagala acquired his wealth, as Nexus lacks the necessary statutory powers to subpoena bank records. This became the focus of the SIU investigation. The SIU conducted a lifestyle audit on Msagala.

[10] Following the conclusion of the Nexus investigation in 2017, Transnet instituted disciplinary proceedings against Msagala by way of arbitration proceedings. Transnet charged Msagala with various acts of misconduct including misconduct in relation to IGS. The arbitrator acquitted Msagala of the charges.

[11] In May 2020, after the SIU investigation was concluded, Transnet instituted fresh disciplinary proceedings against Msagala on the basis of the new evidence unearthed from the SIU investigation. The lifestyle audit revealed that Msagala was living excessively beyond his remuneration at Transnet. It also revealed the source of his additional income as IGS and Sithole. Transnet charged Msagala with various acts of misconduct arising from his relationship with IGS and Sithole, including receiving secret profits. Transnet dismissed Msagala following this disciplinary hearing.

[12] In July 2020, the SIU and Transnet as applicants, launched an application against the defendants in the 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. In part B, the plaintiffs 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<sup>2</sup> (PRECCA), read with Tribunal Rule 3 and 26 (the forfeiture application).

[13] The forfeiture application came before my brother Motlhe J. He granted the order sought in Part A. On 17 November 2020, Motlhe J delivered a judgment and order in terms of Part B, declaring the listed assets finally forfeited to the State. Msagala's application for leave to appeal that judgment was dismissed in a judgment handed down on 25 May 2021. The plaintiffs instituted this action on 5 August 2020. They seek to hold the relevant defendants personally liable for the loss Transnet suffered as a result of Msagala's alleged nefarious relationship with IGS and Sithole.

## REASONS FOR THE POSTPONEMENT

[14] Reasons for the dismissal of the postponement application were reserved. They are set out below.

[15] Msagala advanced the several reasons in support of the request for a postponement. He argued that he has been part of several litigation in the Tribunal, arising from his employment with Transnet. He was initially represented by Snyman Attorneys. He terminated Snyman Attorneys' mandate due to lack of funds. He has no financial means to conduct the litigation because his employment with Transnet has been terminated. His substantial pension benefits, have been preserved. A substantial number of his personal and Msagala Trust assets have been forfeited to the state. He received a pro-forma invoice from the Msagala defendants' erstwhile attorneys of record on 2 May 2021, and has not been able to place them in funds. As a lay person, he has no knowledge of the law and is in no position to conduct his own defence. Even if he were to attempt to conduct his own defence, his erstwhile attorneys of record have retained his court papers. He seeks a postponement in order to seek the services of a *Pro Bono* legal team or to apply for Legal Aid.

[16] Msagala vigorously defended the proceedings before Transnet, represented by Snyman Attorneys. Snyman Attorneys continued to represent the Msagala defendants during the forfeiture application. Snyman Attorneys withdrew before the forfeiture application was heard. Boqwana Burns Inc. immediately came on record as the attorneys for the Msagala defendants, purportedly to bring economy into the matter. Two case management meetings were subsequently

held. At the first case management meeting, a timetable to get the trial ready for hearing as well as trial dates were agreed. At the 12 April 2021 case management meeting, the parties reiterated their commitment and readiness to proceed with the trial.

[17] The notice of withdrawal, filed on a Sunday, less than 24 hours before the trial was due to commence, was a completely unexpected twist to the matter, particularly after counsel for the Msagala defendants confirmed their readiness to proceed with the trial at the April 2021 case management meeting.

[18] The conduct of the Msagala defendants and their attorneys towards the plaintiffs' legal team in the days leading to the trial was not only discourteous, it was an utter display of lack of *bona fides* on the part of the Msagala defendants for the reasons that follow.

[19] At no point was the Msagala defendants' inability to afford legal fees brought to the attention of the plaintiffs and/ or the presiding member of the Tribunal. Attempts by the plaintiffs' attorneys, to meet with the Msagala defendants' attorneys in the weeks leading up to the trial, with a view to curtailing issues at the trial, were ignored, only for the attorneys to withdraw less than 24 hours before the trial commenced. The reason stated by the Msagala defendants' attorney for their withdrawal, is that the Msagala defendants terminated their mandate. Otherwise the Tribunal would have refused them leave to withdraw at that late stage, not to imperil the trial.

- [20] On Friday 30 April 2021, an expert financial report was filed on behalf of the Msagala defendants, compiled by an Accountant. It begs the question how they afforded these services under these circumstances. It is highly improbable that the attorneys of record for the Msagala defendants only presented them with a *pro forma* invoice, the day before the trial.
- [21] It is also highly improbable that Msagala is as impecunious as he would like this Tribunal to believe. He made no mention of the other assets and businesses he owns which are not part of the forfeiture order. He failed to take the Tribunal into his confidence regarding what his monthly income is from his businesses and assets, most of which are student rented accommodation; what are his living expenses; how much the Msagala defendants' legal fees are; what the financial shortfall is, and how he intends to meet it. Yet, Msagala would have Mothe J accept that he generated approximately R18 million from his businesses between 2009 and 2017, over above his remuneration from Transnet.
- [22] Msagala offered no explanation why he waited until the trial commenced before applying for Legal Aid and seeking *Pro Bono* legal services. Given that Msagala owns multiple properties, some of which generate rental income, he is unlikely to qualify for Legal Aid or *Pro Bono* services. Given that Msagala's attempts to raise funding for this litigation from family and other associations have failed, he failed to take the Tribunal into his confidence regarding how he intends funding this litigation, in the likely event that he does not obtain Legal Aid or *Pro Bono* legal services.

[23] The Msagala defendants have always been jointly defending the proceedings in the Tribunal, represented by the same firms of attorneys. Bonolo and Loretto were always content with this arrangement. There is no reason to treat them as separately defending the proceedings at this stage, more so that they have filed opposing papers jointly. Bonolo also offered no explanation why she waited until the trial commenced, to express an intention to apply for Legal Aid.

[24] For these reasons, if granted, the postponement would probably only have a dilatory effect. Therefore, this matter falls within the rubric of those matters where, terminating an attorney's mandate on the eve of a trial is a strategy for delaying the commencement of the trial.<sup>3</sup>

## **THE PLAINTIFFS' CASE AS PLEADED**

[25] In paragraph 17 of the particulars of claim, the plaintiffs claim several amounts comprised as follows:

“17.1 payment to Transnet of R18,056,000.

17.2 payment to Transnet of the sum of R250,000.

17.3 further amounts which Transnet reasonably believes were paid by IGS Consulting and/ or Sithole to Msagala, the Msagala Trusts, Msagala's relatives for which Transnet seeks an order for a statement and debatement of account.”

[26] The total amount that the plaintiffs will prove in these proceedings is R26, 423,028.77. They seek to amend paragraph 17 of their particulars of claim as set out below, to plead further amounts that they are able to prove during the trial:

“(a) various amounts totalling R15,656,000.00 which were proceeds of cash cheques drawn against the IGS bank account, which amounts were deposited into the bank account of the Msagala Investment Trust;

“(b) four cheques of R500,000 each (cheque numbers 102766, 102779, 102780 and 102781), amounting in total to R2 million, issued by IGS, and reflecting Mr Msagala’s details on the reverse side of the cheques and cashed;

“(c) three cheques issued by IGS for the amounts of R350,000 (IGS cheque no 102798), R100,000 (cheque no 102802) and R1 million (cheque no 102813), amounting in total to R1,450,000.00, which cheques reflect the details of Mr Aiden Smith (a protection officer who was acting on the instructions of Msagala) on the reverse side, drawn as cash with the proceeds made over to Mr Msagala;

“(d) seven cheques issued by IGS for the amounts of R1 million (cheque no 102819), R1 million (cheque 102820), R150,000 (cheque102840), R1million (cheque 102845), R200,000 (cheque 102846), R200,000 (cheque 102853) and R800,000 (cheque 102904), amounting in total toR4,350,000.00, reflecting the details of Mr Chauke (a protection officer acting on the instructions of Mr Msagala) on the reverse, drawn as cash with the proceeds made over to Mr Msagala;

“(e) R400,000.00 arising from IGS cheque number 102839 drawn for R950,000, cashed at Standard Bank Sandton City branch, of which R550,000 cash was deposited into the Msagala Investment Trust Account (included in item (a) above), with the balance of cash of R400,000 retained by or made over as cash to Mr Msagala;

“(f) IGS cheque number 102789 for R300,000, paid towards acquiring property for Ms B Msagala – paid to conveyancers, deposit slip bearing Mr Msagala’s signature etc., R300,000 deposited using IGS cheque (together with cash of R540,000);

“(g) IGS cheque number 102868 for R1 million cashed at Std Bank Sandton City 12 May 2016;

“(h) R50,000 EFT payment by Akani Residence Trust (controlled by Mr Sithole) on 15 September 2015 to conveyancers Strauss Scher as part deposit for Mr Msagala’s acquisition of Dainfern/Steyn City property;

“(i) R140,000 EFT payment made on 05 December 2015 from Siphon Sithole Trust’s bank account reference to beneficiary referred to on bank statement as “Loan Tiling – Herbert Msagala”;

“(j) Payment of R77,028.77 on 26 February 2015 from Siphon Sithole Family Trust shown on its bank statement as EFT to beneficiary “Msagala”;

“(k) IGS Cash Cheque 102835 for R1 million, cashed on 2 November 2015, with Msagala’s details reflected on reverse side of cheque;

“(l) Further amounts which the SIU and Transnet reasonably believe were paid by IGS and/or Mr Sithole to Mr Msagala, his family Trusts and/or relatives, for which the SIU and Transnet seek a statement and debatement of account.”

[27] The proposed amendment is consistent with the plaintiffs’ cause of action as pleaded. The defendants stand to suffer no prejudice if the amendment is granted. Therefore, the amendment stands to be granted.

[28] The plaintiffs allege that as an employee of Transnet, Msagala was subject to various common law, contractual and constitutional duties.

[29] The pleaded duties in terms of the common law include the duties an employee owes his employer, not to derive secret profits from the employment relationship. Where he does, he is liable to his employer for such profits. This duty includes the duty to act faithfully, the requirement to devote their time, energy and skills to furthering the interests of their employer's business;<sup>4</sup> not to work against the employer's interests;<sup>5</sup> not to allow a conflict of interest to arise by resisting being placed in a position where, an employee's interests conflict with the interests of the employer; and the duty to account for and hand over to the employer every advantage directly or indirectly connected with the employment relationship, derived without the employer's knowledge and/ or consent, save the remuneration agreed upon.<sup>6</sup>

[30] Duties imposed on Msagala by his employment contract and Transnet's policies largely mirror the common law duties described above. They are not repeated here to avoid prolixity. It is however, important to mention that Clause 15 of Msagala's employment contract subjected Msagala to Transnet's Disciplinary Procedure, Codes of Conduct and all other policies that regulate the employment relationship. Clause 20 records his acceptance that he is familiar with and bound by the Code of Ethics. The prevailing version when the plaintiffs' cause of action arose, included the duty to act in a fashion that will earn Transnet the reputation of being transparent in all dealings and disclosures, responsible and accountable; to act with integrity at all times; to be honest and protect Transnet's assets and property; never to use his position of authority to further his own, his friends' or his relatives' interests; never to allow personal interests to influence business decisions and being prepared to disclose any actual or potential conflict of interests; to be honest

in all actions, promoting a corporate image of integrity, honesty and stringent business ethics; to maintain zero tolerance for any form of bribery, corruption and inducements; not to abuse Transnet's property and assets by using them for personal reasons; not to solicit or receive gratuities, bribes or kickbacks including money, loans, equity, special privileges, personal favours, benefits or services; and to ensure that his actions comply with the applicable laws and regulations.

[31] Clause 9 of the Transnet Code of Ethics provides that Msagala made a personal commitment to respect and observe the principles of the Transnet Code of Ethics to ensure practices that are beyond reproach. The Transnet Code of Ethics contains prohibitions and offences that are consistent with the employment duties described above.

[32] Since Transnet is an organ of state, its employees including Msagala, are bound to comply with the values and obligations imposed on state organs and their officials by the Constitution and the applicable legislation and regulations. These include a high standard of professional ethics, efficient, economic and effective use of public resources, accountability and transparency, in terms of section 195 of the Constitution. Public entity officials such as Msagala, must ensure that Transnet as a public entity uses its financial and other resources in an effective, efficient, economical and transparent manner by amongst others, prevent irregular, fruitless and wasteful expenditure and safeguarding Transnet's assets, as required in terms of section 57 of the Public Finance Management Act<sup>7</sup> (PFMA).

[33] The plaintiffs allege that by using his position as a Transnet Executive to derive substantial secret profits from IGS, a service provider contracted to Transnet,

Msagala breached the above duties. Hence, they seek a disgorgement of the secret profits.

[34] The Msagala defendants deny these allegations and put the plaintiffs to the proof. The plaintiffs approached their case with reference to the version Msagala in the forfeiture application. There, the Msagala defendants contended that, Msagala derives additional income over and above his remuneration from Transnet, from his other businesses.

## **THE EVIDENCE OF THE PLAINTIFF'S WITNESSES**

[35] The following witnesses testified on behalf of the plaintiffs:

35.1 *Mr Aiden Gerdian Smith* (Smith). He is employed by Transnet as a security practitioner. When the plaintiffs' cause of action arose, he was assigned to Msagala as his VIP protector. He testified concerning the three occasions when Msagala sent him to Standard Bank Sandton City, to cash IGS cheques on Msagala's behalf;

35.2 *Mr Vervandhan Govender* (Govender) is employed by the SIU as a Chief Forensic Investigator. He led the SIU investigation into Msagala's life style audit and testified regarding the outcome of the investigation. He deposed to affidavits in the Transnet disciplinary proceedings against Msagala, and in the forfeiture application. He also deposed to the discovery affidavit in these proceedings;

35.3 *Ms Leanne Jane Jamieson (Jamieson)* is employed by Steyn City Real Estate in the Sales Department. She markets properties on sale at the Steyn City Development. She testified in relation to the sale of stand 2288, later swapped with 2295, to the Msagala Investment Trust for R7 million, and Sithole's role in the sale;

35.4. *Lamprecht Fick Bezuidenhout (Bezuidenhout)* is also employed by Steyn City Real Estate. He testified concerning his role in following up with Sithole when Msagala defaulted on the payment terms in respect of the sale of stand 2295, the emails he exchanged with Sithole, as well as the proof of payment he received from Sithole;

35.5 *Mr Julian Scher (Scher)* is a director at Strauss Scher Attorneys. Strauss Scher Attorneys did the conveyancing on Stand 2295 Steyn City when the Msagala Investment Trust took ownership of this property. Scher testified in relation to the payment of the purchase price as received into the Strauss Scher Trust Account;

35.6 *Mr Janie Viljoen Bester (Bester)* is a Senior Forensic Document examiner. He examined a sample of specimen and questioned documents on which Msagala's hand writing and/ or signature appears. He prepared and filed a forensic report concerning this assignment. He testified concerning the contents of this report;

35.7 *Mr Ishmael Dagwood Varachia (Varachia)* is employed by the SIU as the Chief Forensic Accountant. He testified in relation to the forensic analysis he

conducted on the bank accounts held in the names of Msagala, the Msagala Investment Trust, IGS, Sithole's Trusts, Melusi Ntumbe (Mtumbe) and Thulambube and compiled a spreadsheet. Varachia's spreadsheet reflects payments Sithole made on behalf of Msagala, payments Msagala and the Msagala Investment Trust received from IGS, cash deposits that correlate with Transnet's payments to IGS and cheques cashed by Msagala or on his behalf by others. Varachia also testified in relation to the transactions between Msagala and Mtumbe, used by the Msagala defendants' in their defence in the forfeiture application.

[36] The evidence of these witnesses is set out in their sworn witness statements which were served on the Msagala defendants and filed with the Tribunal in terms of Tribunal Rule 19(6)(b)(ii)(B). All the above witnesses, testified at the trial under oath, and confirmed the correctness of their sworn witness statements.

[37] The evidence of these witnesses, that Msagala received over R26 million in secret profits from IGS, and Sithole, while Msagala was employed by Transnet, is compelling. Govender found that during the period under review, Msagala earned approximately R3,8m per annum from his employment with Transnet. Varachia's analysis of the bank statements of the bank accounts mentioned in paragraph 35.7 above reveals that Msagala derived over R26 million from IGS and Sithole during the period under review.

***An analysis of the Msagala Investment Trust Account***

[38] Govender testified, with reference to the bank statements, that between November 2015 and September 2016, on each occasion, shortly after IGS cash cheques were presented for payment at Standard Bank Sandton City, cash was deposited into the Msagala Investment Trust Account.

[39] The Msagala Investment Trust Account with Standard Bank was opened in or about October 2015. The account opening documents reflect that Msagala opened the account. He controlled it, as he was its sole signatory. The Msagala Investment Trust Account first bank statement, issued in November 2015, reflects the first deposit into this account, in the amount of R500,000 in cash. By 31 December 2016, R24,292,300.00 had been deposited into this account. R15,792,300 was deposited in cash. The cash deposits attracted deposit fees in the amount of R197,209.50. The deposits correlate with Transnet payments to IGS over the same period and cash cheques IGS issued over the same period, which were presented for payment at Standard Bank Sandton City. Smith's evidence, dealt with below, is enlightening in this regard.

[40] This evidence negates Msagala's version in the forfeiture application, that he earned this income from his other businesses, which he has been running since 2009, over and above his income from Transnet.

[41] It is improbable that Msagala would earn cash from various businesses in such a substantial amount, and wait six years to open a bank account to deposit the business income. Only R85,565.93 was deposited into Msagala's current account

excluding what appears to be employment related deposits during the period under review. These payments were excluded from the forensic analysis.

[42] In the forfeiture application, Msagala's further version was that he received R1,9 million from Mtumbe, with whom he invested money for interest in Mtumbe's Smart Billions account. This is improbable. These investments do not reflect on any of Msagala and the Msagala Investment Trust bank statements. R3,555,000.00 was withdrawn by Mtumbe from Casinos during 2015 as reflected from his bank statement. The difference between this amount and the R1,9 million he supposedly paid Msagala, is not explained. It is unclear why Mtumbe would pay Msagala such a large amount in cash.

[43] Msagala has not discovered books of accounts for his businesses. Govender's investigation reveal that, most likely, Msagala does not have a bank account for his businesses. Msagala opened only one bank account for the Msagala Investment Trust, which mainly received cash deposits from cash correlated to IGS cash cheques issued at approximately the time when Transnet paid IGS. He did not withdraw these funds from any of his other bank accounts and deposit them into the Msagala Investment Trust Account. The evidence presented, that several IGS cheques were either cashed by him or on his behalf at Standard Bank, Sandton City, establish that Msagala received all the cash deposited into the Msagala Investment Trust Account from IGS. An analysis of these cash cheques, established that the cheques were presented for payment by either Msagala himself, Smith or Jabulani Chauke (Chauke).

[44] Another improbability arises from the fact that Msagala did not make one or a few cash deposits, after he opened the Msagala Investment Trust Account. These

deposits were made over the entire period under review, corroborating the plaintiffs' version that during the IGS NMPP contract period with Transnet, whenever Transnet made payments to IGS, IGS made payments to Msagala.

[45] The developments in this trial show that the Msagala defendants crafted a defence in an attempt to meet the plaintiffs' case in the forfeiture application. There, the plaintiffs' sought a forfeiture of the listed assets to the amount of R18 million, being the amount they were able to prove at that stage. This amount was reflected in the notice of motion. Therefore, the Msagala defendants had prior notification of it. In this trial, initially, the plaintiffs sought an order for the same amount. They are able to prove a higher amount as reflected in the amended particulars of claim. The amendment, introduced at the end of the trial, gave the Msagala defendants no opportunity to tailor a defence accordingly. This adds to the improbabilities in the defence of the Msagala defendants, in the forfeiture application.

[46] A forensic analysis by Bester, of the control signature from the documents Msagala signed when he was suspended from Transnet, and the specimen signature from the back of several of the cashed IGS cheques, confirms Msagala as the person who signed at the back of the said cash cheques. The telephone number at the back of these cheques, is Msagala's. Sithole's cell number also appears at the back of some of the cheques. According to Govender, the bank teller would have written Sithole's cell number at the back of the cheque, after calling Sithole to obtain verbal confirmation from him, that the bank may honour payment of the respective cash cheques. These are standard requirements and procedures when a person presents a cash cheque for payment at a branch of a bank.

[47] Although the IGS's mother branch is in Polokwane, more than 20 of its cheques were cashed at the Standard Bank Sandton City branch. This is the same branch where Msagala's cash deposits were made. This branch happens to be the Msagala Investment Trust Account mother branch.

[48] On 22 April 2016, R2 million was deposited in the Msagala Investment Trust Account in 10,000 R200 notes. This also renders his version, that he earned the funds from his businesses, improbable. He has not attested to what he did suddenly, to earn so much money in one day, from his purported businesses.

#### ***An analysis of the IGS bank statements***

[49] An analysis of the IGS bank records over the same period by Varachia, reveals that Sithole is the sole account signatory. Between 1 January 2015 and 31 December 2016, there were 190 cash cheques above R 5 000 that were drawn on this account amounting to R70, 710,786.24. Of the 190 cash cheques drawn, there were over 20 cheques that were cashed that correspond in amounts and timing with the various deposits made into the Msagala Investment Trust Account. These cheques were drawn between 3 November 2015 and 12 May 2016, just after the Msagala Investment Trust Standard Bank account was opened. The cheques amount to a total of R 20,981,000.00.

[50] Govender's evidence, based on the analysis of the IGS and the Msagala Investment Trust Accounts conducted by Varachia, as well as Smith's evidence, dealt with below, establish beyond any reasonable doubt that the deposits made

to the Msagala Investment Trust Account were deposits made from the cheques issued by IGS and Sithole.

***Cashed Cheques not reflecting on the Msagala Investment Trust Account***

[51] Several IGS cashed cheques do not correspond to deposits made into the Msagala Investment Trust Account. These cheques are pleaded at paragraphs 17 (b) to g and (j) of the plaintiffs' amended particulars of claim. They include cheques deposited by Smith and Chauke, pleaded at paragraphs 17 (b) and (c).

[52] Govender identified Smith's role in the relationship between Msagala, IGS and Sithole from 3 cash cheques that were presented to Standard Bank for payment. Smith's name, ID number and cell number, was written behind these cheques. He then interviewed him. Smith subsequently made a sworn statement to Sergeant Dlamini, the investigating officer in the pending criminal investigation against Msagala. The plaintiffs filed the statement in these proceedings as Smith's witness statement.

[53] Smith's evidence was most explosive and illuminates the main *modus operandi* used by IGS to make payments to Msagala. Together with Chauke, Smith was assigned to Msagala, as his personal VIP protector.

[54] Smith testified concerning the three cheques that he cashed on behalf of Msagala, amounting to R1,450,000.00. He received these cheques from Msagala who asked him to cash the cheques on his behalf. On the first occasion, Msagala sent Smith to the bank, Msagala went with him to show him the procedure he should follow. They went to Standard Bank at Sandton City. When they arrived at

the bank tellers, Msagala asked for a lady referred to by a specific name. He would ask for this lady on his subsequent visits to the bank. Smith presented the cheque to this teller, who asked him to verify his identity and sign at the back of the cheque. The teller then handed the cash to Smith. Smith put the cash in the bag Msagala gave him for that purpose. He kept the bag in the car. When he dropped off Msagala at home in the evening, he left the bag in Msagala's study, in Msagala's care, together with Msagala's other bags that he had taken to his Transnet office.

[55] Smith followed this procedure on the two subsequent occasions Msagala sent him to the bank to cash cheques on his behalf. He did not know the source of the cheques at the time. He did not personally receive any cash from Msagala for his own benefit.

[56] Govender also traced some of the cashed cheques to have been presented for payment by Chauke. Chauke confirmed this when Govender interviewed him, but when his statement was reduced to writing, he disavowed the handwriting at the back of the cheques. Subsequently, Govender discovered from Chauke's bank statement, payments from IGS to Chauke, referenced to Msagala. These include an electronic transfer of R300,000. Transnet subjected Chauke to disciplinary proceedings in relation to these events. Chauke was acquitted. Chauke is under ongoing criminal investigation, together with Msagala, relating to Msagala's relationship with IGS and Sithole, and Chauke's role in that relationship.

[57] R300,000.00 paid to Baydon Vogel and Partners Inc Conveyancers for the purchase of the Harrismith property from a cash cheque drawn from the IGS bank account. In addition to this cheque, R540,000.00 cash was deposited. These transactions are reflected in a R840,000.00 deposit slip dated 1 September 2015,

Govender received when he subpoenaed banking records for the relevant accounts. Ms B Msagala, in whose name the property is registered, is referenced on the deposit slip. Msagala's cell number is stated.

***Payments made by IGS or Sithole to or on behalf of Msagala***

[58] Govender also testified concerning these payments as pleaded in paragraph 17 (h) to (j) of the plaintiffs' amended particulars of claim. These payments include a R50 000 deposit by Sithole on 15 September 2015, towards the purchase of Msagala's vacant stand in Steyn City in Dainfern, Johannesburg. Sithole sent proof of payment to the estate agents and the conveyancers. This money was paid by EFT directly from Sithole's Akani Residence Trust Account to the conveyancers', Strauss Scher, Trust Bank Account. Bezuidenhout confirmed receiving the proof of payment from Sithole. Scher confirmed that this money did reflect in the Strauss Scher Attorneys Trust Account in respect of the sale of stand 2295 Steyn City. The Akani Residence Trust Account opening documents show that Sithole opened this account and is its sole signatory. At the time, the Msagala Investment Trust did not have a bank account. This explains why Sithole would directly make this payment on Msagala's behalf.

***Other evidence of impropriety between Msagala, IGS and Sithole***

[59] Msagala made further payments to settle the balance of the purchase price, conveyancing and transfer costs for the Steyn City property, without any loan

financing, in the form of 6 ATM transfers in the amount of R999,999.99. He made these payments from the Msagala Trust Investment Account to the Strauss Scher Attorneys Trust Account on 09 February 2016. According to Govender and Varachia, these amount were made to avoid scrutiny for purposes of banking and Financial Intelligence Centre controls. This is consistent with the pattern of substantial money being channelled from IGS to Msagala for his personal benefit, and that of his Trusts and family, secretly, to avoid detection.

[60] Govender testified that there are several indications of Msagala's interest in the awarding of contracts to IGS. These include the fact that the emergency tender process was used. Further, IGS commenced works long before the contracts were signed. This is highly irregular. Evidence show that IGS and Sithole started making payments to Msagala as early as February 2015, before IGS was awarded contracts. When IGS became active in the Transnet contracts, Msagala's bank accounts became very active in the form of deposits.

[61] During the Transnet proceedings, Msagala attempted to hide his relationship with IGS and Sithole. Initially Msagala said he does not know Sithole. Then he said he knows him through his brother, whom he did not name. This evidence is refuted by Jamieson's evidence that, Msagala and Sithole attended the Steyn City development offices together, twice. On the first occasion, Msagala showed an interest in purchasing stand 2288. He signed the relevant documents to purchase the property. He informed Jamieson that Sithole will handle the transaction going forward, which he did as confirmed by Bezuidenhout's evidence. On the second occasion, when Msagala came to swap stand 2288 to 2295, they were in the company of two women.

[62] Msagala's version in the forfeiture application, that the R300,000 used to purchase the Harrismith property was a repayment to him by Sithole of a loan Sithole owed him is also improbable. He has not provided proof that the loan was advanced. It is unclear why Sithole would take a loan from a Transnet Executive, when he has cashed cheques for over R70 million. In any event, in terms of the Transnet Code of Ethics, this transaction is impermissible. Msagala was required to declare to Transnet his relationship with Sithole. He failed to do so.

[63] The fact that no evidence of Msagala's role in the awarding of contracts to IGS was found during the Nexus and SIU investigations does not imperil the plaintiffs' cause of action. Proof that Msagala received secret profits from IGS and Sithole in breach of his employment duties is sufficient to give rise to liability for disgorgement.

***Assets purchased during the period under review***

[64] Msagala purchased the following properties during the period under review, without financing:

64.1 Bedworth Park, acquired on 16 September 2015 for R1,460 million. Payments for this transaction were made out of Standard Bank Auto Plus for R999,999 and R219,643.60 from the Msagala Investment Trust Account on 23 April 2016;

64.2 Dainfern, Steyn City, acquired on 8 September 2015 for R7 million. The payments for this property were dealt with earlier;

64.3 Farm 336 Meddilil, acquired on 17 February 2016 for R1,197,000;

64.4 The Rondheuwel property, acquired on 23 March 2016 for R4,560 million. R3,605,465.16 was paid on 23 April 2016 and R999,999,99 on 12 May 2016;

64.5 the Harrismith property, dealt with earlier, purchased for R840,000 on 16 November 2015;

64.6 the Phuthaditjaba property, acquired on 8 October 2015 for R200,000. It is unclear how this amount was paid. Given that, the Msagala Investment Trust Account was not yet opened, and that Msagala had started receiving cash from IGS, for example the cheques cashed by Smith valued at R1,450,000, it is probable that Msagala paid for this property from these substantial cash receipts.

[65] The total value of these properties is R15,2 million. They were all purchased between September 2015 and March 2016. Two of the properties were registered in Bonolo's name. The rest were registered in the name of the Msagala Investment Trust. Msagala has never purchased so many immovable properties within such a short period before he started receiving payments from IGS.

[66] Msagala acquired thirty-six cars between February 2016 and January 2017.

These cars were registered to the Msagala Family Trust. Although the cars were paid for using his personal current account into which he made several cash deposits during the period under review, it is highly probable that the substantial payments that Msagala received from IGS, enabled him to purchase these cars. Similarly, Msagala has never purchased so many cars within such a short period before he started receiving payments from IGS.

### ***Bonolo's Liability***

[67] Bonolo had no income during the period under review. She was only 17 years old when she purchased the relevant properties. Her Capitec bank account never received a deposit in excess of R4,000 and never had a balance in excess of that amount since inception. The documents she completed when she purchased the Harrismith property as required in terms of the Financial Intelligence Centre Act, indicate that she receives a R25,000 allowance per month from her parents. The impression created is that because she receives a monthly allowance from her parents she can afford to buy the property. The purchase price was paid directly to MJ Mofokeng, the seller. R300,000 has been shown to be paid through an IGS cash cheque on 25 August 2015. The deposit slip bears Msagala's details. It is highly probable that Msagala paid for this transaction.

[68] Although the documentary evidence reveal Bonolo's direct involvement in the purchase of the Harrismith property, the plaintiffs have established that Msagala purchased or financed the properties registered in Bonolo's name from the money he received from IGS. It is probable that Bonolo knew nothing about her father

Msagala's nefarious activities and the source of the money used to purchase the properties. The properties have been forfeited to the state in terms of the forfeiture order. Under these circumstances, justice would not be served by holding Bonolo personally liable for the losses Transnet has been proved to have incurred in this trial.

[69] Therefore, no order is made against Bonolo.

## **FINDINGS**

[70] The Plaintiffs have, by way of oral and documentary evidence adduced during the trial, established on a balance of probabilities that Msagala did in fact receive secret profits amounting to R26, 423,028.77 from IGS and Sithole whilst he was still employed by Transnet, in breach of his employment duties as pleaded by the plaintiffs.

[71] The timing of many of the payments Msagala received from IGS coincided with the timing of IGS having received payments from Transnet, pursuant to a series of contracts it was awarded by Transnet. Govender's and Varachia's testimony, the subpoenaed bank records and Varachia's spreadsheets illustrate this.

[72] Msagala received the said amount without any requisite disclosures to Transnet. Therefore, the amount constitutes secret profits, giving rise to Transnet's right to disgorge the profits.

[73] The plaintiffs have also made out a proper case against IGS and Sithole. They have elected not to participate in these proceedings. As such, they have not

disputed the documentary evidence in the form of the IGS banking records, including bank statements and cashed cheques issued by IGS and shown to have been presented for payment by Msagala, Smith and Chauke. Accordingly, IGS and Sithole have not disputed any of the evidence that IGS, made multiple payments to Msagala which constituted secret profits, which Msagala received improperly and without disclosing or accounting for those profits to Transnet as his employer.

[74] The plaintiffs have established, as pleaded, that IGS, Sithole and Msagala acted in concert, in an unlawful conspiracy, to benefit Msagala, his family Trusts and his relatives, to the prejudice of Transnet, in relation to benefits that should have been for the advantage of Transnet, and not for the personal enrichment of Msagala as its employee, or for his relatives or Trusts. By so doing, IGS and Sithole intentionally and unlawfully interfered with Transnet's contractual rights. As such, the Plaintiffs have established IGS and Sithole's liability to Transnet.<sup>8</sup> Therefore, IGS and Sithole are jointly and severally liable, with the other relevant Defendants to Transnet, for the amount representing secret profits received by Msagala from IGS and Sithole.

[75] The plaintiffs have also succeeded in making out a case for the statement and debatement of account as prayed for in paragraph 17 (l) of the particulars of claim. The investigations into IGS and Msagala's financial relationship is continuing. Evidence of this relationship has been progressively unearthed. During the forfeiture proceedings, the plaintiffs established that Msagala received over R18 million from IGS and Sithole. In these proceedings, they have been able to establish that Msagala received further amounts of over R8 million from IGS and Sithole. Given the vast extent of the evidence of financial dealings between

Msagala, IGS and Sithole, and the covert nature of their transactions, it is probable that there are further financial transactions only they are aware of.

[76] The claim for the statement and debatement of account is justified under these circumstances. It is consistent with the employment duties Msagala owed Transnet as an employee and as an official of a state entity to disclose secret profits, act honestly, be transparent and accountable, to observe a high standard of professional ethics, and to use public resources efficiently and economically. IGS and Sithole's liability for this claim also arises from their interference with Transnet's contractual rights.

[77] The monies recovered in terms of the forfeiture order as well as Msagala's pension fund preserved in terms of an order granted by Motlhe J, are to be offset against Msagala's liability to Transnet established in these proceedings.

## **COSTS**

[78] The investigations against Msagala have been ongoing since 2017, when the Nexus investigation commenced. Both Transnet and the SIU have employed a lot of time and resources to hold Msagala accountable. The costs associated with this action alone are estimated at approximately 20% of Msagala's liability to Transnet, as established in these proceedings. The costs of other prior proceedings both within Transnet and in the forfeiture application, will dig deeper into the amount Transnet stands to recover in this trial. Msagala has continued to evade responsibility to account to Transnet by not participating in Transnet's second disciplinary hearing and in this trial where overwhelming evidence of his financial

dealings with IGS and Sithole was adduced. He was aware of the evidence as the witness statements filed in this trial were served on his erstwhile attorneys of record.

[79] These factors, as well as Msagala's egregious dishonesty, and the unlawfulness of his conduct warrants a punitive cost order against the relevant defendants, with the exception of Loretto and Bonolo. The SIU and Transnet should not be out-pocketed by their own attorney and client costs, as a result of Msagala, IGS and Sithole's dishonest and unlawful conduct.

[80] In conclusion, it is important to recognize the significant role played by SIU witnesses in matters of this nature. They agree to assist the SIU, often at a huge personal risk. They sacrifice their time and resources to assist in the investigation and testify in court. Without their participation, the recovery of monies lost or owed to the State due to corruption and other forms of illicit conduct by State officials and those contracted to the State, would not be possible.

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

## ORDER

1. The plaintiffs are granted leave to amend their particulars of claim to reflect the amendments set out in the notice of amendment dated 28 May 2021.
2. The first, second, third, sixth and seventh defendants (the defendants), jointly and severally, the one paying, the other to be absolved, shall pay to Transnet the total sum of R26, 423,028.77 comprised of the amounts pleaded in paragraph 17 of the amended particulars of claim.
3. The defendants shall provide, and enter into, a statement and debatement of account of all amounts as may have been paid, in addition to the amounts set out in paragraph 2 above, to the first and second defendants and/or the Msagala Investment Trust, the Msagala Family Trust and/or the Msagala Residence Trust, by the sixth and/or seventh defendants, as secret profits earned or received by Mr Msagala or any other person or entity on his behalf, arising from his dealings, as an employee of Transnet, with the sixth and/or seventh defendants.
4. If, pursuant to the statement and debatement of account referred to in paragraph 3 above, it is determined that any amounts may have been paid to Mr Msagala or any other person or entity on his behalf, by sixth and/or seventh defendants, arising from his business dealings as an employee of Transnet, in excess of the amounts set out in paragraph 2 of this order, the amount

representing such excess shall be paid to Transnet by the defendants, jointly and severally, the one paying the other to be absolved.

5. If the plaintiffs are able to execute against, and recover proceeds from, the assets which are the subject of the forfeiture order granted on 17 November 2020 by Motlhe J in the Tribunal under case number GP/03/2020, such amounts as may be realised through such execution process shall be deducted from the amounts to be paid in terms of paragraphs 2 and 4 of this order.
6. In addition to the payments required to be paid under paragraphs 2 and 4 of this order, the first, second, third, sixth and seventh respondents, jointly and severally, the one paying, the other to be absolved, shall pay interest on each such amount at the applicable prescribed rate of interest from date of judgment to date of payment.
7. The Plaintiffs' costs of these proceedings to date shall be paid by the first, second, third, sixth and seventh defendants, jointly and severally, the one paying, the other to be absolved, on the attorney and client scale.
8. The plaintiffs may only execute against the first defendant's pension which has been preserved under the order granted on 17 November 2020 by Motlhe J in the Tribunal under case number GP/03/2020, to the extent they are not been able to satisfy the judgment debt from the proceeds of the forfeiture order referred to in paragraph 5 of this order



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**JUDGE L. T. MODIBA (Ms.)**  
**MEMBER OF THE TRIBUNAL**

## **APPEARENCES**

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

The first, second, fourth and fifth defendant appeared in person, then withdrew from court when their postponement application was refused.

Date of hearing: 3 to 6 and 13 May 2021

Date of Judgment: 31 August 2021

***Mode of delivery:*** this judgment is handed down on the Micro Soft Teams Platform and livestreamed on the Tribunal's YouTube channel. It is also emailed to the parties' legal representatives and loaded on Caselines. The date and time for hand-down is deemed to be 12:00 pm on 31 August 2021.

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<sup>1</sup> Proclamation No. 11 of 2018

<sup>2</sup> Act No. 12 of 2004

<sup>3</sup> *Take & Save Trading CC and Others v The Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at paragraph 10

<sup>4</sup> PAK le Roux and André van Niekerk: *The South African Law of Unfair Dismissal* (1994) p 129 para 8.5

<sup>5</sup> *Premier Medical & Industrial v Winkler & another* 1971 (3) SA 866 (T) at 867

<sup>6</sup> See also LAWSA: 3rd ed volume 24 part 1 paras 223 – 224. *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4. *Games v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) paras 25 – 29. *Uni-Erection v Continental Engineering Co Ltd* [1981 (1) SA 240 (W) at 252 – 253]. *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 (6) SA 531 (SCA) at paragraph 13-14

<sup>7</sup> Act 1 of 1999

<sup>8</sup> *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd and Another* [2015] ZASCA 164 para 8, *Country Cloud Trading CC v MEC: Department of Infrastructure Development* 2014 (2) SA 214 (SCA) para 26, *Country Cloud Trading CC v MEC, Department of Infrastructural Development, Gauteng* 2015 (1) SA 1 (CC) para 27