IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED
_____	_____
DATE	SIGNATURE

CASE NO: A14/2023

CASE NO. COURT *A QUO*: GP03/2022

In the matters between:-

LNG SCIENTIFIC (PTY) LTD Appellant

(Reg. No.: 2014/009577/07)

vs

THE SPECIAL INVESTIGATING UNIT First Respondent

MEC: GAUTENG DEPARTMENT OF HEALTH Second Respondent

AND

CASE NO: A68/2023

CASE NO. COURT *A QUO*: GP03/2022

LNG SCIENTIFIC (PTY) LTD Appellant

(Reg. No.: 2104/009577/07)

vs

THE SPECIAL INVESTIGATING UNIT First Respondent

MEC: GAUTENG DEPARTMENT OF HEALTH Second Respondent

Coram: Kooverjie J, Cox AJ et Mogotsi AJ

Heard on: 15 May 2024

Delivered: 10 June 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 10 June 2024.

ORDER

In respect of Case nr. A14/2023 it is ordered:-

1. The application for condonation is granted.
2. The appeal is dismissed with costs.
3. The costs include the costs of two counsel. Such costs to be on the scale of costs in terms of Uniform Rule 69(7). Scale C for senior, and scale B for junior.

In respect of case nr. A68/2023 it is ordered:-

1. The appeal is dismissed with costs.
3. The costs include the costs of two counsel. Such costs to be on the scale of costs in terms of Uniform Rule 69(7). Scale C for senior, and scale B for junior.

JUDGMENT

KOOVERJIE J (Cox AJ and Mogotsi AJ concurring)

[1] The two appeals before the court emanates from the decisions of the Special Tribunal, in terms of Section 8(7) of the Special Investigation Units and Special Tribunals Act 74 of 1996 (“the Act”). For the purposes of this judgment the parties will be referred to as the appellant or “LNG” and the respondents will also be referred as the respondents; the “SIU” and “Department”. The Tribunal Rules will be referred to as “Tribunal Rules” and the Uniform Rules of Court “the Rules”.

[2] The appeal against the judgment and interlocutory order of the Tribunal dated 29 June 2022 appears under case number A14/2023 in this court (the first appeal), and the appeal against the judgment and interlocutory order of 3 February 2023 falls under case number A68/2023 (the second appeal).

[3] Before considering the first appeal, LNG’s condonation application for the late noting of its first appeal should be disposed of. The respondents oppose the granting of the condonation. It is common cause that in the event of condonation being granted, this court is required to make a finding on the first appeal as well as the second appeal.

[4] The well-established principles dictate that this court of appeal to interfere, one or more of the following circumstances is/are present:

4.1 the Tribunal had not exercised its discretion judicially;

4.2 the Tribunal was influenced by wrong principles in law or misdirected itself on the facts; or

4.3 the Tribunal reached a decision which could not reasonably have been made by a Tribunal properly directing itself to all the relevant facts and principles.[1]

THE PROCEEDINGS BEFORE THE SPECIAL TRIBUNAL

[5] The main case before the Tribunal constitutes a judicial review of an alleged impugned decision taken in April 2022 by the Department. In this instance the SIU and the Department jointly sought judicial review of the Department's decision. The decision taken by the CFO (Chief Financial Officer) at the time, Ms Lehloenya, concerned the acquisition of Covid-19 personal protective equipment (PPE) from LNG. The respondents sought consequential relief in terms of Section 172(1)(b) of the Constitution which included an order directing LNG to disgorge its profits from the procurement. The relief claimed in the main case were, *inter alia*:

5.1 a judicial review of the decision of the CFO;

5.2 a declaration of invalidity in relation to the contract entered into between the parties; and

5.3 orders for payment from LNG.

[1] Trencon Construction (Pty) Ltd v Industrial Development Corporation fo South Africa Ltd and Another 2015 (5) SA 245 (CC) at paragraphs 83-89

[6] When LNG received an invitation from the Tribunal to attend a judicial case management meeting, it requested the record of the impugned decision in terms of Rule 53(1)(b) of the Uniform Rules of Court. The respondents opposed such request. The appellant was advised that it would be only entitled to documents in terms of Rule 35 of the Uniform Rules of Court. This caused LNG to institute its interlocutory application persisting with the request of the record. The Tribunal considered the matter and delivered its judgment on 29 June 2022 (the June 2022 order). LNG was not satisfied with the order and judgment and thereafter applied for leave to appeal. The Tribunal was of the view that it was appropriate to discover the record by virtue of Tribunal Rule 17(4) read with Uniform Rule 35.

[7] Thereafter on 15 November 2022, LNG instituted an application for condonation for the late delivery of its notice of appeal in the first appeal and henceforth applied for a hearing date.

[8] Subsequent to the judgment of June 2022 the SIU, on 2 November 2022, and the Department on 10 November 2022, discovered the record. Amidst these two discovery processes, on 3 November 2022[2] LNG delivered the notice of appeal to this full court against the Tribunal's judgment and orders of June 2022.

[9] In LNG's application for leave to appeal, the Tribunal, upon the ventilation of the issues, held that LNG had an automatic right of appeal to the full court (of the

[2] the appellant alleges that thee notice of appeal was filed on 2 November 2022

High Court) and therefore dismissed the application by LNG for leave to appeal. The Tribunal relied on ***Caledon River Properties***[3] which is authority for the proposition that LNG had an automatic right of appeal to the Full Court with jurisdiction. Such judgment order was issued on 7 September 2022.

[10] The appellant opposed the continuation of the main matter before the Tribunal. Its main contention was that the appeal, pending the Tribunal, could not proceed. The Tribunal however found that in the circumstances, the noting of the appeal did not suspend the June 2022 order of the Tribunal. The following processes nevertheless continued:

10.1 During the case management meeting on 10 November 2022, the Tribunal directed that the parties deliver heads of argument pertaining to various issues raised by the respondents, namely whether LNG's right to appeal lapsed, the issue of condonation, and whether the noting of the appeal suspended the operation and execution of the Tribunal's judgment and order of June 2022. The outcome of the said issues would determine whether or not the main matter could be adjudicated.

10.2 On 3 February 2023 the Tribunal found that there was no impediment in proceeding with the main matter and consequently directed that parties file their respective papers as well as the heads of argument. Notably LNG has, to date, not filed its answering papers.

[3] Caledon River Properties (Pty) Ltd t/a Magwa Construction and Another vs Special Investigation Unit and Another (GP/17/2020) [2022] ZAST 20 (8 September 2022) before the Special Tribunal

10.3 LNG has appealed this judgment of 3 February 2023 (February 2023 judgment), the second appeal, under case nr. A68/2023.

10.4 The respondents nevertheless proceeded to enroll the main case for default judgment which was set down for 15 June 2023. LNG again opposed this application and thereafter filed an irregular step notice. The Tribunal, on 7 February 2024, now for the third time delivered its judgment dismissing LNG's irregular step application. It continued with the hearing of the main case and granted the relief sought by the respondents.

[11] There has been no notice of appeal filed against the Special Tribunal's judgment of 7 February 2024. This court is thus only seized with the appeals relating to the June 2022 and the February 2023 orders and judgments.

CONDONATION

[12] The first issue for determination is whether the appellant is entitled to condonation of the late filing of the first appeal. Same was filed on 3 November 2022 followed by its condonation application on 15 November 2022. When the appellant initially filed its application for leave to appeal before the Tribunal, the Tribunal ruled that it did not have jurisdiction since the appellant had an automatic right to appeal to this full court. As referred to above, the order was handed down on 7 September 2022 and the Tribunal dismissed LNG's application for leave to appeal.

[13] On the respondents' version, the notice of appeal was 21 days late. The respondents opposed the condonation application on essentially the following grounds, namely that:

13.1 the delay was unreasonable;

13.2 the reason for the delay was insufficient;

13.3 the appeal has poor prospects of success;

13.4 there is no practical effect or result if the application for leave to appeal is granted;

13.5 the appeal is an abuse of the process of the court and delays the finalisation of the main case in the Special Tribunal.

[14] In summary the respondents contended that the reasons for the delay were inadequate. Furthermore the explanation- that the appellant was unable to pay its debts was insufficient. A full explanation was required as to how, between the period, 7 September to 3 November 2022, the appellant was unable to note its appeal. A proper explanation was also required as to the manner in which its financial situation contributed to the lateness.

[15] It was also argued that there is no merit in the substantive matter pertaining to the request for the record in terms of Rule 53(1)(b) of the Rules of Court. Moreover it would have no practical effect to order that the Rule 53 record be made available as the Tribunal had directed that such record be provided. Eventually the full record was furnished to the applicants as per the Tribunal's order and directive-

namely that the record of the impugned decision must be filed in terms of Tribunal Rule 17(4) read with Uniform Rule 35. The Tribunal specifically expressed that the record, containing the documents relevant to the impugned decision, be furnished to the appellant. It further made provision that the appellant file its answering papers only after receipt of the record.

[16] On this basis, the respondents persisted with their contention that the appeal was an abuse of process. The record was furnished since November 2022 by both the SIU and the Department. It was emphasized that the appellant received the full record.

[17] The respondent held the view that the lateness of appeal be considered in terms of Rule 49(2) of the Uniform Rules of Court, more so as the Uniform Rules of Court finds application in this court.[4] Rule 49(2) reads:

"If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within 20 days after the date on which leave was granted or being such longer period as may upon good cause shown be permitted."

[18] In terms of Rule 49(6)(b) the court, upon good cause shown, may reinstate the appeal which has lapsed. It is not in dispute that the appeal had lapsed. On the

[4] The Tribunal invoked Rule 49 of the Uniform Rules of Court in terms of Tribunal Rule 28

version of the respondent it was pointed out that the appellant was 21 days late and on the version of the appellant, 19 days late, in noting the appeal.

[19] The reasons for the lateness included the fact that it had experienced significant cash flow constraints and was thus unable to pay its legal fees. Furthermore the SIU's investigation into its procurement contract with the Department duly affected its business operations. It explained that as late as November 2022 it was still unable to pay its debts. Under these circumstances, it was argued that 19 days was not excessive and condonation should be granted.

[20] The appellant submitted that it has prospects of success on appeal on the basis that the Tribunal erred in fact and in law by finding that the record need not be furnished in terms of Rule 53(1)(b).

[21] For condonation to be granted, the appellant must satisfy this court that there is sufficient cause for excusing it from non-compliance. Ultimately this court, in exercising its judicial discretion, should have regard to all of the factors presented.[5] The factors would include but are not limited to the following: the degree of non-compliance with the rules; the explanation therefore, the prospects of success on appeal; and the importance of the case.

[5] United Plant Hire (Pty) Ltd vs Hills 1976 1 SA 717 A at 720 E-G

[22] In ***Van Wyk vs Unitas Hospital***[6] the court held that the ultimate test in considering an application for condonation is to have regard to the interests of justice factor. Whether it is in the interests of justice would depend on the facts of the matter. Although the proposition, that a full explanation for the delay must be furnished by a party seeking the indulgence was cited with approval by the said court, it cannot be gainsaid that ultimately a consideration of the full conspectus of the facts must be taken into account.

[23] It is common cause that the prime dispute in the matter turns on an introspection of a crucial procedural aspect pertaining to review procedures and the current procedures adopted at the Tribunal. It is not in dispute that there is a lacuna in the Tribunal Rules since there is no provision made specifically for review processes. This inevitably entails that litigants are not entitled to the record as envisaged in Rule 53(1)(b). It has been argued that this is a significant inroad to a litigant's constitutional right to a fair hearing.

[24] Insofar as the issue of prejudice is concerned, I am required to weigh the circumstances of both parties. It is evident that the appellants would be prejudiced if condonation is not granted. A final word on its right to the record has to be pronounced. The Tribunal landscape illustrates that its prescriptive rules are not aligned to fair process.

[6] Van Wyk vs Unitas Hospital 2008 (2) SA 427 (CC) at 477 A-B

[25] I am further mindful that the issue as to whether or not there are reasonable prospects of success on the merits, is a factor that should be considered. However it cannot be evaluated in isolation. It is not by itself be a determining factor.[7] Having considered the facts, I find that the delay was not inordinate and further on the conspectus of all the facts placed before me, I am inclined to grant condonation for the late filing of the first appeal.

THE FIRST APPEAL

[26] The appellant persisted with the view that it is entitled to the Rule 53 record as envisaged in terms of Rule 53(1)(b) of the Uniform Rules of Court.[8]

[27] The Tribunal, in its judgment, dealt with two issues for determination, namely whether the respondents were obliged to deliver a record of the decision in terms of Rule 53(1)(b); secondly, whether the respondents tender to discover the

[7] Meintjies vs HD Combrink (Edms) Bpk 1961 (a) SA 262 A at 265 A-C

[8] Rule 53(1)(b) provides:

"1. Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and any tribunal, or the officer performing judicial, quasi-judicial administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer, or chairman of the court, tribunal or boardroom officer, as the case may be, and to all other parties affected.

(b) Calling upon the magistrate, the presiding officer, chairman or officer, as the case may be, to dispatch, within 15 days after the receipt of the notice of motion, to the registrar, the record of such proceedings so to be corrected or set aside, together with such reasons as is by law required or desired to give or made and to notify the applicant that he has done so."

relevant documents (record) would allow LNG to properly oppose the review application.

Tribunal's reasoning

[28] The Tribunal unequivocally expressed that its proceedings are regulated in terms of the Tribunal Rules and not the Uniform Rules of Court. It acknowledged that by virtue of Tribunal Rule 28, the Tribunal had a judicial discretion to invoke the Uniform Rules of Court in instances where the Tribunal Rules do not make provision for certain processes.

[29] The review application in this instance was instituted in terms of Tribunal Rule 10 which regulates ordinary applications (Tribunal Rule 10 is similar to Uniform Rule 6). The Tribunal expressed that a reviewing party has the choice to institute its review in the manner that befits it, as in this case. The review proceedings, herein, were instituted in terms of Tribunal Rule 10.

[30] The Tribunal, in its judgment, acknowleged that there is no equivalent review procedure as that envisaged in Rule 53, in the Tribunal Rules. It further reasoned that the remedy in terms of Rule 53(1)(b) could not be available to LNG since Rule 53 envisages circumstances where a party that seeks to review an administrative decision by an organ of state, and in instances where organs of state are cited as the respondents.

[31] It further premised its findings on the following facts namely that: the circumstances herein are different. Here the organ of state is the party reviewing its own decision thereby a self-review application; the Rule 53 mechanism could not find application as the respondents are in possession of the record and are able to make out their case in their founding affidavit; state organs are therefore not obliged to follow the Rule 53 process in these instances (as the expression used: they are not shackled to the Rule 53 process); and finally the Tribunal hence expressed that the identification of the party which institute reviews is a main factor when determining what the appropriate review procedure would be.

Legislative prescripts governing review at the Special Tribunal

[32] It is necessary to make reference to the legislative backdrop against which reviews are administered in the Tribunal setting. This would enable the court to appreciate how reviews have thus far been dealt with at the Tribunal. Review proceedings are instituted within the legal prescripts of the Act and the Tribunal Rules. In this instance, the review was instituted in terms of Section 4(1)(c) together with Section 5(5) of the Act – which stipulates that the SIU may institute and conduct civil proceedings in its own name and on behalf of the state institution before the Special Tribunal or any court of law.

[33] The applicable provisions upon which the review was instituted are:

33.1 in terms of Tribunal Rule 10 which is similar to Uniform Rule 6 (motion proceedings);

33.2 Tribunal Rule 10 can be distinguished from Tribunal Rule 13 which governs action proceedings.

33.3 Coupled with Rule 13 is Tribunal Rule 17 which makes provision for discovery. The request for discovery is not automatic and the leave of the Tribunal is required if particular documents are not discovered.

33.4 Tribunal Rule 17(2) stipulates that where parties cannot reach an agreement on discovery, either party may apply to the Tribunal for an appropriate order, including an order as to costs.

33.5 Tribunal Rule 17(4) specifically states that the provisions of Rule 35 of the High Court Rules, relating to discovery, applies to proceedings instituted before the Tribunal. It stipulates:

"Subject to Rule 19, the provisions of Rule 35 of the High Court Rules, relating to discovery may apply mutatis mutandis to proceedings brought in terms of these rules."

33.6 Tribunal Rule 19(6)(b)(ii) makes provision for judicial case management and stipulates that in the case of an action, discovery follows. Rule 19 further stipulates that the matters be dealt with in an expeditious and cost-effective manner. The rationale for convening case management meetings is to iron out all general issues, including discovery before the hearing of the main application.

33.7 Tribunal Rule 28 affirms the Tribunal's discretionary power in that it makes provision for the Tribunal to adopt any procedure it deems appropriate, including invoking High Court Rules, in instances where the Tribunal Rules do not provide for such a process. Rule 28(1) reads:

"(1) If a situation for which these rules do not provide, arises in proceedings or contemplated proceedings, the Tribunal may adopt any procedure that it deems appropriate in the circumstances, including the invocation of the High Court Rules."

33.8 With reference to the Act, Section 8 stipulates the powers and functions of the Special Tribunal. Of relevance is Section 8(1) which states that:

"A Special Tribunal will be independent, and impartial, and perform its functions without fear, favour or prejudice and subject only to the Constitution and the law."

Section 8(2) gives a Tribunal the power to adjudicate on any civil proceedings brought before it by the SIU in its own name or on behalf of a state institution or any interested parties as defined by the regulations emanating from the investigation by the SIU;

33.9 Rule 28(2) again emphasizes that the Tribunal take steps in order to ensure that there is an expeditious and cost saving manner in which matters are dealt with. Rule 28(2) reads:

"(2) A Tribunal may, in the exercise of its powers and in the performance of its functions, … take any steps in relation to the hearing of

a matter before it which may lead to the expeditious and cost saving disposal of the matter …"

33.10 Notably, Tribunal Rule 28(2), Rule 19 and Section 9(3) emphasizes that the processes must take place in an expeditious and cost effective manner. Section 9 encompasses the procedure and evidence. Section 9(3) stipulates:

"A Special Tribunal may, in consultation of the parties appearing before it, take any steps in relation to the hearing of their matter before it which may lead to the expeditious and cost saving disposal of the matter, including the abandonment of the application of any rule of evidence."

33.11 Of significance is Section 9(1)[9] which specifically gives the Tribunal President the power to make rules and regulate the conduct of proceedings in the Special Tribunal, including the process by which proceedings are brought before the Special Tribunal and the form and content of that process. Hence the Tribunal President may amend or repeal any rule made by him or her.

ANALYSIS

[34] The aforesaid provisions undisputedly demonstrate and, as expressed in the Tribunal's judgment, that there is a lacuna in the Tribunal Rules pertaining to

[9] Section 9(1)(a) stipulates:
"Subject to this Act and the Regulations, the Tribunal President may make rules to regulate the conduct of proceedings of such Special Tribunal, including the process by which proceedings are brought before the Special Tribunal and the form and content of that process."

record accessibility in review proceedings. Tribunal Rule 10 (like Uniform Rule 6), does not specifically address how a record could be accessible in review proceedings. Although the furnishing of a record is not always peremptory, it cannot be gainsaid that the filing of the record is an inherent procedure in review processes.

[35] It became evident that discovery through the Rule 35 process is a misfit. The Tribunal, despite ordering discovery in terms of Tribunal Rule 19 read with Uniform Rule 35 procedure, appreciated the shortcoming in the discovery process. It accepted that by virtue of the discovery process parties are furnished with limited documents. It also accepted that the process only allows for discovery in exceptional circumstances and only after the close of pleadings.

[36] Consequently in acknowledging this shortcoming, it made provision for access to the record in a manner that would not infringe the appellants' right to a fair hearing and in fact ordered that discovery of the record should be made prior to the close of proceedings so that the appellant would have a reasonable opportunity to prepare its answering papers. At paragraph 28 the Tribunal stated:

"The concern LNG raises, with reference to the limitations of the discovery procedure dealt with in paragraph [6] of the Helen Suzman Foundation (HSF) judgment can be addressed by specifying that what the respondents are required to discover is a record of all the information relevant to the impugned decision and nothing more. As explained in HSF, this is all the information that throws light on

the decision-making process and the factors that were likely to be at play in the mind of the decision-maker.[10] *Such an order will circumvent the concerns I raised in paragraph [27] above."*

[37] The order consequently granted in prayer 3 was:

"3. Within 20 days of the date of this order the respondent shall discover the record of the impugned decision in terms of Rule 17(4) read with the Uniform Rules 35(13)(1) and (2).

4. The record to be filed in paragraph 3 of this order shall exclude documents attached to the respondent's founding affidavit in the review application instituted under the above case number. The excluded documents shall only be reflected in the index for the record of the impugned decision, reflecting the reference of each document in the founding affidavit."

[38] On a fair interpretation of the order, it cannot be gainsaid that such order should be understood as per the principles enunciated in the ***HSF*** matter[11]. By making reference in paragraph 28 to ***HSF***, the Tribunal accordingly crafted its order in a manner that ensured that the appellant be furnished with all documents and information relevant to the impugned decision. It emphasized that it should be all the information that throw light on the decision-making process and the factors that were likely to play in the mind of the decision-maker at the time.

[10] my emphasis
[11] Helen Suzman Foundation vs Judicial Service Commission 2018 (4) SA 1 (CC)

[39] Notably at paragraph [23] the Tribunal highlighted that the record forms the basis upon which the court is equipped to perform its constitutionally entrenched review function with the result that the right a litigant enjoys in terms of Section 34 of the Constitution, to have a justiciable dispute decided in a fair public hearing, before a court with all the issues being ventilated. It accepted that the record fosters the equality of arms and allows parties to review proceedings to each have a reasonable opportunity of presenting their case under conditions that do not place them under substantial disadvantage in relation to their opponent.

[40] I reiterate that despite remedying the situation in this matter, there is a void Tribunal processes pertaining to review proceedings persist. The question that begs an answer is: why had the Tribunal not invoked Rule 53(1)(b)? It had the discretion to do so by virtue of Tribunal Rule 28. Surely by invoking Rule 53(1)(b) all the parties would be placed on equal footing.

[41] Ultimately the function of a court, in review proceedings, is to determine if a decision that is reviewed is lawful or not. Judicial review is thus a fundamental mechanism of keeping public authorities within due bounds and upholding the rule of law. The court on review is concerned only with the question of whether the act or order under attack should be allowed to stand or not.[12]

[12] Bo-Kaap Civic and Rate Payers Association vs City of Cape Town 2020 [2] All SA 330 (SCA)

[42] It is therefore imperative that the court be placed in a position where it is able to impartially determine, on the documents and information that was before the decision-maker, prior to the review, if the made decision was lawful or not.

[43] In the seminal judgment of ***HSF***, the Constitutional Court eloquently summarized the rationale and purpose of the record. At paragraph 13-16 the court succinctly stated:

"[13] … the requirements in Rule 53(1)(b) that the decision-maker file a record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps to ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.

[14] Our courts have recognised that Rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:

> *Without the record a court cannot perform its constitutionally entrenched review function with the result that a litigant's right in terms of Section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.*

[15] The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and

there is equality of arms between the person challenging a decision and the decision-maker. Equality of arm requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis the opponents. This requires that:

> *All the parties have identical copies of the relevant documents on which to draft their affidavits and they and the court have identical papers before them when the matter comes to court.*
>
> *In Turnball Jackson the court held undeniably a Rule 53 record is an invaluable tool in the review process. It may help shed light on what happened and why; give the light to unfounded ex pose facto (after the fact) justification of the decision under review; in the substantiation of the as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and the performance of the reviewing court's function."*[13]

[44] Evidently, in this instance, the Tribunal should have appreciated the significance of the Rule 53(1)(b) disclosure and the limitations that the discovery process in terms of Rule 35 presents itself with. At 15B-C in ***HSF*** the court drew the distinction:

"It is helpful to point out that the Rule 53 process differs from normal discovery under Rule 35 of the Uniform Rules of Court. Under Rule 35 documents are

[13] The underlining was to emphasize the salient points in the judgment

discoverable if relevant and relevance is determined with reference to the pleadings.

So under the Rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 35 reviews are different. The rule envisages the grounds of review changing later. So relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit.

The object of review proceedings in terms of Rule 53 is to enable an aggrieved party to quick relief where his rights or interests are prejudiced by wrongful administrative action and the furnishing of the record of the proceedings is an important element in the review proceedings."[14]

[45] The basis for instituting a Rule 35 discovery has different outcomes and discovery is only required to be made, providing that exceptional circumstances exist. Furthermore, under Rule 35 discovery, one is not entitled to all of the documents, but to the documents that are only relevant to the pleaded case. Rule 53 reviews, on the other hand, has a completely different objective. The record is important as it provides the information and the nature of the documents that were before the decision-maker when it considered the matter.

[46] Previously in ***STT Sales***[15], the court highlighted the different features of the two processes:

[14] See also Afrisun Mpumalanga (Pty) Ltd v Kunene N.O. 1999 (2) SA 599 TPD
[15] STT Sales (Pty) Ltd v Fourie 2010 (6) SA 272 (GSJ) at paragraph [16] and [17]

"[16] The essential feature of discovery is that a person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put the party in a position to draw the battle lines and establish the legal issues. Rather it is a tool used to identify factual issues once legal issues are established.

[17] It seems to me that if the provisions of the Rule were to apply to application proceedings, that the Rule would in general permit a demand for discovery only once legal issues have been identified. In application proceedings the legal issues are only identified once all the affidavits have been filed... To allow discovery in application proceedings at that point would in general be to invite chaos. The parties are likely to file further affidavits, embrace new issues and will lead to respond to each other. The formula by which evidence is produced in motion proceedings will surely mutate. This is undesirable."

[47] In light of the said salient principles pronounced by our courts, the matter of ***Chauke***[16], that ruled that the discovery procedure is the only appropriate mechanism to access the record, is unassailable. ***HSF*** has finally cleared these misconceptions. In ***HSF*** at paragraph [26] the court expressed:

"The Rule 53 process differs from the normal discovery under Rule 35 of the Uniform Rules of Court because the relevance of the Rule 53 record is assessed

[16] Special Investigation Unit vs Chauke Quantity Surveyors and Others (Case No. 45529/2016) GNP unreported

as it relates to the decision sought to be reviewed and not the case pleaded in the founding affidavit."

[48] The aforesaid proposition once again recently cited with approval by the Constitutional Court in ***Mamadi.***[17] It reiterated that a Rule 53 record contains all information relevant to the impugned decision that was before the decision-maker at the time of the deliberation.

[49] The primary purpose of Rule 53 is to facilitate and regulate applications for review.[18] In effect, Rule 53 was adapted from Rule 6. The ordinary procedure under Rule 6 was adapted to make provision for reviews and for the party, officially in possession of the record, to make same available.[19]

[50] It is common cause that the decision, that is being reviewed in the main application constitutes an "administrative action". The procedure- that an opposing party is entitled to the documents by way of discovery, in Tribunal proceedings, falls short of recognizing the constitutional ordained right a litigant has for a fair hearing.

[17] Mamadi and Another vs Premier of Limpopo Province 2024 (1) SA 1 (CC)
[18] Jockey Club of South Africa v Forbes 1993 (1) SA 649 A and 660 I to 661 B, the HSF matter and the DA matter
DARD vs Chairperson of the DAC of Stellenbosch University [2021] 2 All SA 141 (WCC) at paragraph 21
[19] Jockey Club matter

[51] It was evident that prior to the first judgment, the respondents were not playing open cards with the appellant. The appellant identified numerous relevant documents that were in the respondents' possession which were not disclosed. Such documents were identified from an affidavit of the then CFO in other court proceedings where she explained the events pertaining to the procuring and sourcing of the various equipment, including the PPE equipment by the Department. The appellant learnt that a Bid Adjudication Committee was set up; a Covid-19 Command Council was part of the decision-making process; there were internal discussions about sourcing, procuring and the replenishing of the stock at the warehouses, instructions were received from the Gauteng Department of Treasury relating to procuring PPE's; there were specific supply and finance delegations; various reports were presented to the Covid-19 Command Council; there were minutes of meetings of the Departmental Procurement sub-committee; there were discussions held regarding the shortages of Covid-19 supplies; and in particular certain deviations were approved. It was emphasized that since there were multi-faceted consultative decision-making processes, it was necessary to have access to the relevant information and documents relating to the decisions, which included the authorization concerning the deviation.

[52] Subsequent to the ruling in ***HSF***, more recently the Supreme Court, in ***Murray and Others vs Ntubela and Others***[20] stated:

[20] [ZASCA] [2024] 2 All SA 342 (SCA) (14 March 2024 and my emphasis

"Rule 53 of the Uniform Rules finds that application of review proceedings is instituted before a competent court. The Rule was designed to serve a dual purpose of informing both the applicant for the review and the court of what actually happened in the process of making the impugned decision … Most often than not, those on whom decisions had an adverse effect had no knowledge of what transpired in the process and were placed at a disadvantage when they sought to challenge the decision in question. Rule 53 becomes a useful term in terms of which access of information could be achieved."

The court went on to say at paragraph [44]:

"To sum up the substantive point made in this judgment is that once the jurisdiction of the court before which review proceedings are pending is beyond question, the reach of Rule 53 of the Uniform Rule, becomes unavoidable."

[53] There can be no doubt that a respondent is entitled to the record in self-review applications. A refusal of the record impinges on the procedural rights of the respondent.[21] The fact that a state organ initiates a legality review of its own decision, cannot limit a respondent's right to a record. It is of no comfort to be advised that the Rule 35 discovery is the applicable procedure for access to documents in self-review applications.

[54] The reasoning of the Supreme Court of Appeal in the ***Minister of Home Affairs*** matter[22] supports the said proposition. The court therein stated:

[21] South African Football Association vs Stanton Woodrush (Pty) Ltd t/a Stan Smidt and Sons 2003 (3) SA 313 (SCA) at paragraph [5]

"It does not matter in this case that the application for the review is based on a principle of legality rather than on the PAJA. No procedural differences arise and the grounds of review that apply in respect of both pathways to review derive ultimately from the same source, the common law – although, in the PAJA, those grounds have been codified."

Mamadi upheld the reasoning set out in the ***Home Affiars***[23] when it expressed that the prevailing approach is that litigants are entitled to access all documents and reasons relevant to the impugned administrative action.

[55] The Supreme Court of Appeal in the ***DA*** matter[24] understood the constitutional implications pertaining to the accessibility of the record and stated at paragraph 36:

"[36] In the constitutional era events are clearly empowered beyond the confines of PAJA to scrutinize the exercise of public power for compliance with constitutional prescripts … It can hardly be argued that, in an 'era of greater transparency', accountability and access to information, a record of decision relates to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to regulate their own process."

[22] Minister of Home Affairs and Another vs Public Protector of the Republic of South Africa 2018 (3) SA 380 (SCA) [2018] 2 All SA 311 at paragraph [38]
[23] Mamadi at paragraph [38]
[24] Democratic Alliance and Others vs Acting National Director of Public Prosecutions and Others 2012 (3) SA 486 (SCA) at paragraph [36]

[56] For the purposes of this judgment, I find it appropriate to summarize the salient principles echoed by our courts regarding the importance of the record in review proceedings, namely:

56.1 a court cannot perform its constitutionally entrenched review function without a full record. The record is there specifically for the court as it is able to independently appreciate how the impugned decision was arrived at;

56.2 a litigant's right in terms of Section 34 of the Constitution would be infringed as such litigant is entitled to a fair public hearing with all the relevant documents and information;

56.3 the parties on both sides must have a reasonable opportunity of presenting their matters as they have a common set of documents before them in order to do so;

56.4 the term "record of proceedings" should be construed to pertain all relevant documents, evidence and information which was before a decision-maker at the time the decision was taken. Hence it should contain all information relevant to the impugned decision or proceedings. The information is relevant if it throws light on the decision-making process and factors that were likely at play in the mind of the decision-maker;

56.5 access to the record is inherent in self-reviews/legality reviews. It makes no difference if an application for the review is based on legality or PAJA. The prevailing position dictates the availability of the record;

56.6 the Rule 35 discovery procedure is an inadequate procedure to gain access to the record in review proceedings;

56.7 those on whom the decisions that adversely affects a party is entitled to the record;

56.8 the function of the court in review proceedings is to determine whether a decision is lawful or not.

[57] At present it is evident that the Tribunal Rules are inadequate insofar as reviews are concerned. A record, if it exists, is an inherent requirement in review proceedings. The Tribunal Rules should make provision for equal access to the record in its proceedings, in order to ensure that litigants are guaranteed fair hearings. Consequently this court invites the Tribunal Chair, by virtue of the powers bestowed on him/her in terms of the Act, to attend to the shortcomings expressed in this judgment. If the Tribunal Rules are aligned to parties having a fair hearing, similar disputes can be curtailed in the future. The view of this Court would affect the manner in which review processes are conducted in the future.

Appeal has no practical effect

[58] It is not in dispute that the appellant was furnished with the record during November 2022 on two occasions. The record was furnished upon directions of the June 2022 order. During argument it was pointed out that the appellant was

placed in possession of all relevant information that was before the Department at the time it made its decision (thus constituting the record).

[59] It is settled law that the appellant is only entitled to information that was before the Department at the time the decision was made and to that part of the record relevant to the decision to be reviewed.[25]

[60] The appellant's counsel further informed this court that the documents it requested, after having sight of the affidavit of the CFO in other proceedings, was subsequently furnished. The appellant had not specified any further documents that have not been furnished.

[61] The proper test to apply is, whether the judgment or order would have a practical effect or result, not whether it might be of importance in a hypothetical future case.[26] Section 16(2)(a)(i) of the Superior Courts Act stipulates:

"When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

As the record had already been furnished to the appellant, a judgment directing same would have no practical effect. The appeal therefore would thus have no practical effect. Accordingly the first appeal is dismissed.

[25] HSF matter at 11B
[26] Premier van die Provinsie van Mpumalanga vs Stadsraad van Groblersdal 1998 (2) SA 1136 (SCA) at 1141 D-F

Costs

[62] Insofar as costs are concerned, there is no reason why the appellant should not be mulcted with costs in respect of this first appeal. As a general rule litigants and their legal representatives have an obligation to appreciate when the outcome of the appeal would have no practical effect. They should appreciate that judicial resources should be used efficiently. There should always be a proper consideration before pursuing a matter. The scarcity of judicial resources requires that such resources should be utilized appropriately and efficiently."[27]

THE SECOND APPEAL

[63] The appellant further noted an appeal against the judgment and order (including the directives issued) of the Tribunal dated 3 February 2023.

[64] It appears that the appellant's main contention is that the Tribunal pre-judged the matter which was not before it for determination. My understanding of the appellant's argument is that the Tribunal could not have proceeded with the matter until this appeal court adjudicates and makes a finding in respect of the June 2022 order of the Tribunal.

[27] John Walker Pools vs Consolidated Aone Trade and Invest 6 (Pty) Ltd (in liquidation) and Another 2018 (4) SA 433 (SCA) at 436 G-H

[65] This brings us directly to the question as to whether the June 2022 order and judgment was suspended or not? The respondents argued that in terms of Section 18(2) of the Superior Courts Act, the interlocutory order did not have a final effect and consequently the order was not suspended.

[66] In analyzing what the true position in law is in making a finding, the first issue for determination is whether the order was interlocutory and if so, whether it was appealable? The court in ***United Democratic Movement***[28] aptly set out the test as to when interim orders are appealable. It stated:

"[41] In deciding whether an order is appealable, not only the form of the order must be considered but also, and predominantly, its effect. Thus, an order which appears in form to be purely interlocutory will be appealable if its effect is such that it is final and definitive of any issue or portion thereof in the main action. By the same token, an order which might appear, according to its form, to be finally definitive in the above sense may, nevertheless, be purely interlocutory in effect. Whether an order is purely interlocutory in effect depends on the relevant circumstances and factors of a particular case. In ***Zweni****, it was held that for an interdictory order or relief to be appealable it must: (a) be final in effect and not susceptible to alteration by the court of first instance; (b) be definitive of the rights of the parties, in other words, it must grant definite and distinct relief; and (c) have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.*

[28] United Democratic Movement and Another vs Lebashe Investment Group (Pty) Ltd and Others [2022] ZACC 34.1

[42] An interim order may be appealable even if it does not possess all three attributes but has final effect or is such as to dispose of any issue or portion of the issue in the main action or suit, or if the order irreparably anticipates or precludes some of the relief which would or might be given at the hearing, or if the appeal would lead to a just and reasonable prompt resolution of the real issues between the parties. In Von Abo, this Court said:

"It is fair to say there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the right of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice."

*[43] Whether an interim order has final effect or disposes of a substantial portion of the relief sought in a pending review is merely one consideration. Under the common law principle as laid down in **Zweni**, if none of the requirements set out therein were met, it was the end of the matter. But now the test of appealability is the interests of justice, and no longer the common law test as set out in **Zweni**.*

…

> *[45] What is to be considered and is decisive in deciding whether a judgment is appealable, even if the **Zweni** requirements are not fully met, is the interests of justice of a particular case and whether or not an order lacking one or more of the factors set out in **Zweni** constitutes a "decision" for the purposes of section 16(1)(a) of the Superior Courts Act. Over and above the common law test, it is well established that an interim order may be appealed against if the interest of justice so dictate. It is thus in the interests of justice that the impugned interim interdict is appealable on the allegation that the interdictory relief in question resulted in the infringement of the right to freedom of expression.*[29]

[67] Thus in applying the ***Zweni*** test, I am of the view that the decision of the Tribunal had a final effect and definitive of the rights of the appellant. The argument that the order and judgment could be revisited by the Tribunal again, in my view, is unassailable. The Tribunal in this instance applied the prescriptive procedures as set out in the Tribunal Rules.

[68] The Tribunal was bound by the Tribunal Rules unless it utilized Tribunal Rule 28(1) and invoked the Rule 53(1)(b) procedure. The Tribunal Rules clearly does not make provision for the filing of the record. The decision therefore could not be susceptible to an alteration by the Tribunal. There can be no doubt that the

[29] the underlining is premised on my emphasis

decision remained definitive of the appellant's rights to gain access to the record in terms of Rule 53(1)(b).

[69] Moreover if I am to apply the overarching test – whether it is in the interest of justice to consider the decision on appeal, the June 2022 order no doubt largely dealt with the appellants' right in terms of Section 34 of the Constitution to have a fair hearing. Undoubtedly it is in the interest of justice to consider the order on appeal.

[70] Further in the analysis, the second issue then for determination is that even if the order had final effect, was such order suspended. In this regard, it is necessary to determine the status of the notice of appeal. The jurisdictional requirement that has to be met for a valid notice of appeal, is that it must be filed timeously. It is the respondents' argument that since the notice of appeal was not filed within the prescribed 20 days, as per Rule 49(2), the appeal had lapsed and consequently the order and judgment of June 2022 could be executed.[30]

[71] Section 18(5) of the Superior Courts Act directs that a decision may only become the subject of an appeal if such application is lodged timeously.

[30] The Tribunal invoke Rule 49 of the Uniform Rules of Court

[72] This principle was extrapolated upon and tested in ***Myeni***[31]. The court therein expressed that the wording in Section 18(1) signifies that in the absence of an application to appeal, the judgment and order are not suspended and are deemed final. The fact that the noting of an appeal suspends the execution of a judgment appealed against logically means that in the absence of such an appeal, the judgment is not suspended and is in fact deemed executable and thus final.

[73] In ***Myeni*** at paragraph [19] the court expressed:

"… in light of the belated application now filed by the appellant, the principal judgment's order continues to remain in operation for the mere fact that the service of an application to condone the late filing of the petition to the SCA does not suspend the operation and execution of any order.

To conclude otherwise would give rise to an untenable situation in law where, after an order has been operational for a number of months, a party could simply bring a condonation application which would result in such an order would suddenly being suspended.

Such a situation would clearly give rise to far reaching consequences that this court cannot condone.

Consequently where an application for leave to appeal is filed out of time, all that is before the Supreme Court of Appeal is a condonation application."

[74] The court in ***Panayiotou***[32] held:

[31] Myeni vs Organisation Undoing Tax Abuse NPC & Another [2021] ZSGPPHC, GPPHC (15 February 2021) paragraphs 19, 25 & 26

[32] Panayiotou vs Shoprite Checkers (Pty) Ltd and Others 2016 (3) SA 110 (GJ) at paragraph 9

> *"[12] It has been argued that S 18(5) is prescriptive and that the test emphasizes that the application for leave to appeal be lodged with the registrar in terms of the rules. Accordingly, it is argued, until, (and only if) condonation is granted can the petition be lodged. All that is before the Supreme Court of Appeal at present is an application for condonation, whose fate is uncertain …"*

[75] Consequently from the aforesaid analysis, I find that the Tribunal did not err in proceeding with the main application. It was entitled to execute the June 2022 order as the notice of appeal was not filed timeously. In the premises, the second appeal is dismissed.

[76] The appellant was at liberty to file an application for the suspension of the June 2022 order to this court (since it had an automatic right to appeal to this court). If such application for the suspension of the order was successful, the appellant would not have found itself in this unenviable position. It is evident that it had not availed this remedy to its benefit.

[77] As things stand, the horse has bolted. The Tribunal had already disposed of the main review application resulting in an adverse order against the appellant. The appellant's version was not before the Tribunal at the time. The September 2023 judgment encapsulates the Tribunal's findings in the main matter. On my understanding, such judgment and order has not been appealed as yet.

[78] In the premises, therefore, the second appeal cannot succeed. The June 2022 order could have been executed as there was no order suspending same.

[79] Similarly, as in the first appeal, there is no reason why the costs should not follow the result. The appellant should be ordered to pay the costs of this second appeal as well.

_____

H KOOVERJIE

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

_____

J MOGOTSI

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

_____

I COX

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant:	*Adv I Hlalethoa*
Instructed by:	*Diale Mogashoa Attorneys*
Counsel for the Respondent:	*Adv AM Breitenbach SC*
	Adv GSS Khoza
Instructed by:	*The State Attorney (Pretoria)*
Date heard:	*15 May 2024*

Date of Judgment: *10 June 2024*