IN THE SPECIAL TRIBUNAL

[REPUBLIC OF SOUTH AFRICA]

(Held at the High Court, Gauteng Division, Pretoria)

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

SIGNATURE 28/5/2021 DATE

CASE NO: GP 07/2020

In the matter between:

LEDLA STRUCTURAL DEVELOPMENT (PTY) LTD	First Applicant
RHULANI MBOWENI LEHONG	Second Applicant
KGODISHO NORMAN LEHONG	Third Applicant
MAELA DISTRIBUTORS AND PROJECTS CC	Fourth Applicant
MEDIWASTE PACKAGING (PTY) LTD	Fifth Applicant
IPI PROPERTY GROUP (PTY) LTD	Sixth Applicant

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
SPECIAL TRIBUNAL
CNR AMANDA AVENUE & RIFLE RANGE ROAD, OAKDENE
2021 -05- 25
C/A No: One
REGISTRAR

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email and will be released on SAFLII. The date and time for hand down is deemed to be 10h00, 25 May 2021.

JUDGMENT

MOTHLE J

Introduction

1. These are applications for leave to appeal two judgments and orders, the first judgment delivered on 10 December 2020 and the second on1 February 2021, both arising out of the main application lodged by the Special Investigating Unit ("SIU").

Background

2. On 19 August 2020, the respondent in this application, the SIU, launched an application *ex parte,* wherein it sought relief that was three-fold. The first relief was for the declaration as unlawful, a procurement contract for the supply of Personal Protective Equipment and sanitation products ("medical goods"), issued by the Gauteng Department of Health ("the Department") to the first applicant, Ledla Structural Development (Pty) Ltd ("Ledla"), whose directors were Mrs. Rhulani Mboweni Lehong, the fifth applicant and Mr. Kgodisho Norman Lehong, the sixth applicant.

3. The second relief was in the form of preservation orders on various other respondents' bank accounts. The Department had on 3 August 2020, paid R38,700,000.00 to Ledla, out of that impugned contract. Upon receipt of this amount, Ledla, on the same day distributed the amount to three entities' and several individuals' bank accounts. Each of the three entities in turn and mostly on the same day and in some instances, a day later, further distributed parts of the payment received from Ledla, to numerous other beneficiaries. The SIU sought relief to have these various amounts recovered by way of forfeiture orders, as proceeds of unlawful activities.

4. The third order sought was for an interim interdict, prohibiting the Government Employees Pension Fund and the Government Pension Administration Agency, from paying out the pension and other benefits due to Ms Mantsu Kabelo Lehloenya, the former Chief Financial Officer (CFO) of the Department, pending the conclusion of a civil trial launched by the SIU against the CFO in the Tribunal.

5. The Tribunal granted the various orders sought by SIU, in the form of *a rule nisi,* calling upon the respondents to show cause, on a return date, why these orders should not be made final. Most of the respondents entered the fray and opposed the orders sought by SIU.

6. Due to the delay on the part of some respondents in filing their opposing affidavits, the *rule nisi* was extended until 20 November 2020, on which date the matter was heard. The first judgment was delivered on 10 December 2020. In that judgment, the Tribunal referred some of the issues concerning forfeiture orders to independent

auditors. The Auditors' assistance was sought in calculating the value of the medical supplies allegedly delivered to the Department, as at the time of the transaction, based solely on the evidence as it appeared on the record. The report of the Auditors assisted the Tribunal to determine whether the money received from Ledla was for value. The determination resulted in the second part of the judgment and orders on forfeiture, dated 1 February 2021.

7. The Tribunal confirmed the rule nisi against some of the respondents, including the applicants in these applications. The applications for leave to appeal are against the two judgments and orders.

Leave to appeal before the Tribunal

8. K Manufacturing and Supply (Pty) Ltd and some of its payees had filed an application for leave to appeal in the Tribunal but failed to appear at the hearing. The Tribunal was informed that K Manufacturing had subsequently concluded that an application for leave to appeal the judgments and orders was not necessary.

9. Section 17(1)(a) and (b) of the ***Superior Courts Act, 10 of 2013*** provides that leave to appeal may only be given where the Judge or Judges concerned are of the opinion that:

> "(a) *(I) The appeal* ***would*** *have a reasonable prospect of success; or*

(ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a): and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

10. It is trite that prior to the enactment of the Superior Courts Act, the common law test applicable in applications for leave to appeal was that the applicant must establish, on a balance of probabilities, that the envisaged appeal *might* have a reasonable prospect of success.[1] As a matter of fact some counsel still make their submissions, couched in these terms.

11. Section 17 of Act 10 of 2013 amended the common law test The new test as provided for in section 17 quoted above, replaces the word *"might" in* the common law test with the word *"would"*. It is thus clear that the test as outlined by statute raised the bar and it is thus more stringent.

12. In ***Mont Chevaut Trust (IT 28/2012) v Tina Goosen & 18 others Case No. LLC 14 R / 2014, delivered 3 November 2014, at para 6***, Bertelsmann J wrote:

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[1] Van Heerden v Conwright and others 1985 (2) 242 TPD; Roman Catholic Church Klerksdorp Diocese v Southern Life Association Limited 1992 (2) SA 807 AD.

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Conwright & others 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

13. In general, and concerning all the applicants except the CFO, the grounds for leave to appeal arise from the Tribunal's findings and orders on forfeiture of the proceeds of unlawful activities. I will therefore first deal with the attack on the findings and order declaring the award of the contract of supply of goods by the Department to Ledla as unlawful; the challenge on the order for the interim interdict by the CFO including the costs order related thereto and then the issues of forfeiture, in that order.

The declaration of invalidity of the contract

14. The Tribunal declared the contract of supply of medical goods awarded to Ledla unlawful and invalid, and ordered it cancelled. In so concluding, the Tribunal essentially considered and accepted the evidence relating to broadly two issues raised by SIU. Firstly, the SIU allegations supported by evidence, that there was non-compliance with

legal prescripts, in particular the Public Finance Management Act, 1999 *(the PFMA)*; the procurement laws and procedures as well as the Treasury Instructions, Notes and guidelines. Secondly, the factual allegations and evidence relating to how Ledla came to be awarded the contract of supply of medical goods.

15. Ledla, in relation to the first set of issues, contends that the appeal would have reasonable prospects of success in that the Covid-19 pandemic created an emergency situation for procurement of the much sought Personal Protective Equipment and sanitizers. Consequently, the Department had to acquire the medical goods under exigent circumstances.

16. In effect, the award of these contracts did not comply with the provisions of, amongst others, the PFMA, section 217 of the Constitution and the Treasury Instructions, Notes and guidelines. When authorising the contracts, the Treasury Instructions and Notes emphasised three conditions, namely; *the need for compliance with the quality assurance of the goods as prescribed by the National Department of Health*; *the need for suppliers to be on the Central Supplier Data Base; the procurement of goods at equal or lower prices as per the attachment to the Treasury Notes and compliance with the PFMA provisions*, in particular, the system of delegated authority in procurement.

17. The SIU evidence demonstrates that the procurement was executed outside these conditions and in an unlawful manner, where names of individuals and entities, not appearing on the Central Supplier Data Base, were obtained and forwarded to the CFO. She, in turn, and with the assistance of other personnel in the Department, contacted the said individuals and entities by telephone, inviting them to provide quotations for the supply of the medical goods. Some of these suppliers were not qualified and were non-compliant with VAT.

18. The quotes were accepted through issue of a letter of commitment as opposed to Purchase Orders, *on the suppliers' stated terms, with no evidence of an attempt to negotiate lower prices.* In this manner, contracts were awarded by the CFO or by others acting on her authority. This happened routinely on the receipt of the quotation, for amounts such as R45,000,000.00 and R78,000,000.00. An amount of R139,000,000.00 was committed to Ledla, which by far exceeded the lawfully prescribed delegated authority of the CFO or any of her subordinates, as per the system of delegation prescribed by the PFMA. The award of these amounts were not counter-signed by the Head of the Department.

19. In regard to the second set of issues, the evidence from the e-mails demonstrate that Ledla obtained its contract as successor-in-title to another respondent in the main application, Royal Bhaca Projects (Pty) Ltd (Royal Bhaca), whose sole director was Mr Diko. In terms of the evidence, the directors of Ledla, Mrs Lehong and Mr. Lehong had also

acted on behalf of Royal Bhaca. The CFO had on 13 April 2020, received a quotation on behalf of Ledla. According to the SIU, *'the analysis of the data imaged from Ms. Lehloenya's (the CFO's) device indicated that the same quotation was created by Mr. Diko and modified by Ms. Lehloenya.'*

20. The Ledla quotation was for the supply of Masks: FFP2; Masks: N95; Hand Sanitizers Bottle spray; Boxes of Bio-Hazard Health Care 1421 and Bio-Hazard Health Care Disposable Bags Plain Red, all for a total of R139m. The CFO accepted the quotation on behalf of the Department, by sending a letter of commitment, attached to an email dated 20 April 2020 and significantly addressed to *Mr. Diko of Royal Bhaca* and not to Ledla. She referred to the letter as *"amended commitment letter*". The quotation submitted by Ledla was partly identical in content to the Royal Bhaca quotes. Neither Royal Bhaca, Ledla nor the CFO disputed these emails.

21. There are thus, in my view, no reasonable prospects that an appeal on this ground would be successful. The evidence of the award of these contracts proves that the execution thereof was in the form of unlawful and corrupt activities.

The Interim Interdict

22. The CFO is the only party affected by the order of the interim interdict. She delivered an affidavit, opposing the confirmation of the *ex parte* order granting of the interim interdict. In her affidavit she had

raised disputes of fact on the allegations made by the SIU against her. The SIU, correctly so in my view, and in anticipation of these disputes of fact, had, prior to launching the ex parte application, instituted action proceedings in the Tribunal. In the application, the SIU sought an order for an interim interdict, to prohibit payment of the CFO's pension and other benefits, pending the prosecution of the claim against her in the action.

23. The Tribunal, on the extended return date of the rule nisi, ordered that '*the order for interim interdict dated 20 August 2020, prohibiting the Government Employees' Pension Fund and Government Pensions Administration Agency from payment of pension and retirement benefits due to the forty-second respondent, is extended, pending the finalisation of the action proceedings under case number GP/11/2020 in the Special Tribunal; the forty-second respondent is ordered to pay the costs only of the applicant, including the costs of two counsel;*'

24. The evidence against the CFO arose from the content of emails she wrote and exchanged with Royal Bhaca concerning the award of the unlawful contract to Ledla. She awarded a contract of R139m to Ledla for which she could not have had any lawfully delegated authority in terms of the provisions of the PFMA. The procurement officer who had been recently appointed, Ms. Pino, questioned the award of that contract without the counter-signature of the Head of the Department.

25. The significance of the evidence of the award of this contract, is that firstly, it established a link between the CFO, Ledla and Mr. Diko as being involved in the unlawful activities. Secondly, it served as the

basis from which Ledla obtained the unlawful contract, out of which a payment of R38,7m was effected to it on 3 August 2020. That amount became the subject of the main application.

26. Apart from stating in vague terms that she received the names and telephone contacts of the suppliers from the staff in the Office of the Premier, the Office of the MEC and the Head of the Department, the CFO failed to identify the persons who provided her with the names and telephone numbers of the suppliers. By declining to identify such persons, the CFO failed to take the Tribunal into her confidence and she thus remained complicit in the corruption. She had thus not provided the Tribunal with reasonable explanation of her role in the unlawful award of the contracts, for the Tribunal to discharge the interim interdict at this stage. The CFO has a case to answer before the Tribunal in the civil trial.

27. The CFO contends that leave be granted to her to appeal the cost order, on the ground that it is practice to refer the costs of an interim order for determination by the final court. Ordinarily, that is the practice followed by the courts. This practice does not detract from the overriding principle that costs are primarily a matter of discretion by the courts, in this instance, the Tribunal.

28. On the eve of the hearing of the main application on 20 November 2020, when all the papers had been paginated and the parties had filed their heads of argument, the CFO delivered an answering affidavit of 1034 pages. The Tribunal then issued a directive to her and copied to all respondents as follows:

"05 November 2020

Dear Madam/Sir

RE: SPECIAL INVESTIGATION UNIT VS LEDLA STRUCTURAL DEVELOPMENT + 43 OTHERS
CASE NUMBER: GP/07/2020

1. The interim order in this application was granted in August 2020[2]. The final date for delivery of the answering affidavits was 25 September 2020. The respondents who failed to comply with that date, were granted leave during the hearing of the return date of this application on 6 October 2020, to deliver their answering affidavits not later than 12 October 2020.

2. It has come to my attention on Thursday 05 November 2020 that the 42nd respondent, Mantsu Kabelo Lehloenya, has delivered an answering affidavit via email on 25 October 2020 consisting of 1034 pages including the annexures, way outside the return date in the interim order.

3. I therefore direct the 42nd respondent Mantsu Kabelo Lehloenya to appear before the Special Tribunal hearing of this matter on 20 November 2020, either personally or through a legal representation, if she still intends to be heard, to show course why her answering affidavit should be accepted by the Tribunal at the hearing.

4. Should the 42nd respondent Mantsu Kabelo Lehloenya persuade the court that her affidavit be accepted, she should then show course why she should not be mulcted with punitive costs, on an attorney and client scale. "

29. After this directive, the attorneys for the CFO delivered an affidavit explaining the reasons for the delay starting from the time they obtained instructions, which reasons came down to an alleged late or non-delivery of the requested documents from SIU. Neither the attorney's affidavit nor the CFO answering affidavit provided an

[2] The actual date of the interim order was 20 August 2020.

explanation for the delay from the date the CFO was served with the *rule nisi* in August 2020 and the final date scheduled for delivery of the answering affidavit on 25 September 2020, more than a calendar month.

30. At the hearing of the main application in November 2020, the SIU complained of prejudice, in that they had to file a truncated replying affidavit so as not to delay the hearing for other respondents whose bank accounts were under preservation order. The Tribunal refrained from dealing with the tardy conduct of the CFO, as the SIU had not responded to the veracity of the allegations raised in the affidavit of the CFO's attorney. This matter was not dealt with in the judgment.

31. Consequently, the Tribunal did not mulct her with a punitive cost order as per the directive, but costs on a party-party scale as with all unsuccessful respondents. The CFO was not successful in opposing the interim interdict. Thus, the cost order against the CFO, as with other respondents, followed the result, as stated in para 110 of the main judgment.

32. I am thus not persuaded that leave to appeal against the cost order would have any prospect of success.

Forfeiture orders.

1. All the applicants, except the CFO, challenged the Tribunal's order declaring moneys in their bank accounts forfeit to the State. Much has been written about the law relating to forfeiture of property to the State.

In the main judgment relating to this matter, the Tribunal referred to three Constitutional Court decisions[3] on the approach to forfeiture orders. While writing this judgment, on 3 May 2021, the Supreme Court of Appeal delivered a judgment in the matter of ***Bobroff and another v The National Director of Public Prosecutions (case no. 194/20) [2021] ZASCA 56 (3 May 2021)***, declaring moneys held by a former attorney in exile, forfeit to the State.

2. The declaration of forfeiture of moneys to the State has always being applied in instances where such forfeiture had been sought against parties that have been found to have been involved in unlawful activities. In this instance it would be Ledla and its directors. The rest of the parties were found to have received payment of these moneys either directly or indirectly from Ledla.

3. In approaching this matter, the Tribunal applied the test stated by the Constitutional Court in ***NDPP and another v Mohamed N.O. and others 2003 (5) BCLR 476 (CC) at para 18 and National Director of Public Prosecutions v Botha N.O. and another 2020 (1) SACR 599*** *(CC)*. In Mahomed, the test is formulated thus:

> 'At the forfeiture stage of the proceedings, an owner (bank-holder or recipient of the money) can claim that he or she acquired an interest in the property in question legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in the offence.'

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[3] NDPP and another v Mohamed N.O. and others 2003 (5) BCLR 476 (CC); Muhunram v National Director of Public Prosecutions (Law Review Project as amicus curiae) (2007) ZACC 4 (CC) and National Director of Public Prosecutions v Bothe N.O and another 2020 (1) SACR 599 (CC).

And in Botha as follows:

'. . .A proportionality analysis ensures that the ordering of forfeiture does not amount to an arbitrary deprivation of property. Clearly, arbitrariness is broader than just proportionality. This Court stated in FNB, and affirmed in Shoprite Checkers, that a deprivation of property is arbitrary when the law does not provide sufficient reason for the deprivation or when it is procedurally unfair. A forfeiture order that is disproportionate will, in short, be arbitrary. The point was well put, in this context by the Supreme Court of Appeal in the following terms: "it is indeed the purpose of the proportionality enquiry to avoid arbitrary deprivation of property and to ameliorate the potentially unjust consequences that could follow if the forfeiture is grossly disproportional to the offence."'

4. The Tribunal applied the test to all the respondents (except respondent 42, the CFO). The applicants in this application are amongst the respondents who failed to persuade the Tribunal that that respondent, (a) had money deposited or transferred into his/her bank account, acquired the right, title and interest to the money in the bank account legally; (b) that the acquisition was for value; and (c) the respondent neither knew nor had reasonable grounds to suspect that the money was proceeds of unlawful activity.

5. In the instance of some respondents, the court enlisted the assistance of independent Auditors to assist with the calculation from the evidence on record, the question as to whether the value of the goods alleged to have been delivered for payment could be determined. That necessitated the postponement of part of the main judgment, which was eventually delivered in February 2021 after receipt of the Auditors' report.

6. The Tribunal found, on the evidence, that Ledla received and dissipated the amount of R38.7m, paid by an unidentified official of the Department, from the unlawful contract. The applicants, except the CFO, had the onus to provide a reasonable explanation for their bank accounts having been credited with various portions of the R38,7m the proceeds of the unlawful activity, as received directly or indirectly from Ledla. For the reasons stated in the judgment, they had failed to discharge this onus.

7. Applying the test formulated in the two Constitutional Court cases as quoted above, and also for the reasons stated in the main judgment and the February 2021 judgment, the remaining applicants, except the CFO, had also failed to discharge the onus in one or other of the 3 defences in the test. It is not necessary to repeat the reasons as they appear in the judgments.

8. The Ledla, its directors and Maela raised a further ground in attack of the forfeiture order. They argued that the Tribunal did not compensate for, or made a set off on the medical goods they had supplied to the Department, for which the latter was unduly enriched. None of the respondents launched a claim in the papers, against the Department. In order to sustain such claim, they would have been expected, amongst others, to present evidence that the alleged medical goods delivered, were in compliance with the quality assurance as prescribed by the National Department of Health. The medical goods were not delivered to SIU, so as to give rise to an undue enrichment claim.

9. An appeal against the judgments and orders in each case, would have had no prospect of success. The applications must thus fail. In the premises, I make the following order:

1. The application for leave to appeal by Ledla Structural Development (Pty) Ltd, Rhulani Mboweni Lehong and Kgodisho Norman Lehong, is refused;
2. The application for leave to appeal by Mediwaste Packaging (Pty) Ltd, API Property Group (Pty) Ltd and Mapiti Aaron Molopa is refused;
3. The application for leave to appeal by Maela Distributors and Projects CC, is refused; and
4. The application for leave to appeal by Mantsu Kabelo Lehloenya is refused.
5. Each of the applicants are ordered to pay to the SIU costs of the application, including costs of two counsel.

JUDGE SP MOTHLE

Member of the Tribunal

Judge of the High Court.

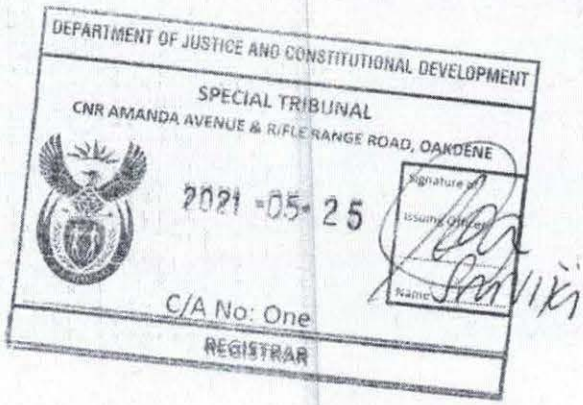
9. An appeal against the judgments and orders in each case, would have had no prospect of success. The applications must thus fail. In the premises, I make the following order:

1. The application for leave to appeal by Ledla Structural Development (Pty) Ltd, Rhulani Mboweni Lehong and Kgodisho Norman Lehong, is refused;
2. The application for leave to appeal by Mediwaste Packaging (Pty) Ltd, API Property Group (Pty) Ltd and Mapiti Aaron Molopa is refused;
3. The application for leave to appeal by Maela Distributors and Projects CC, is refused; and
4. The application for leave to appeal by Mantsu Kabelo Lehloenya is refused.
5. Each of the applicants are ordered to pay to the SIU costs of the application, including costs of two counsel.

JUDGE SP MOTHLE

Member of the Tribunal

Judge of the High Court.



Appearances

For Ledla Structural Development (Pty) Ltd, Mrs Rhulani Mboweni Lehong and Mr. Kgodishi Norman Lehong:

Adv. Manala and

Adv. Sekwakweng

For Mediwaste Packaging (Pty) Ltd; API Property Group (Pty) Ltd and Mr. Mapiti Aaron Molopa:

Mr. I Motloung

For Maela Distributors and Projects CC

Adv. Fitzroy

For Ms. Mantsu Kabelo Lehloenya:

Adv. Ramogale

For the Special Investigating Unit:

Adv. Kennedy SC

Adv. Ngcangisa.