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

**(REPUBLIC OF SOUTH AFRICA)**

CASE NO: GP 07/2020

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| **LEDLA STRUCTURE DEVELOPMENT (PTY) LTD** | **FIRST APPLICANT** |
| **RHULANI LEHONG** | **SECOND APPLICANT** |
| **KGODISHO NORMAN LEHONG** | **THIRD APPLICANT** |
| **AND** | |
| **SPECIAL INVESTIGATING UNIT** | **FIRST RESPONDENT** |
| **FIRST NATIONAL BANK LIMITED** | **SECOND RESPONDENT** |

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## REASONS

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## HEADNOTE:

*Whether funds that have been declared forfeit to the State in terms of Tribunal Rule 26 maybe released for the purpose of financing the applicants' legal costs under circumstances where the applicants have applied for leave to appeal.*
*Held:* The SIU Act and the Tribunal Rules do not make provision for reasonable legal expenses post-forfeiture. The applicants' contention on the basis of section 18 (1) of the Superior Courts Act 10 of 2013, that an application for leave to appeal suspends a final forfeiture order is misplaced. The Tribunal does not derive its powers from the Superior

Courts Act. It derives its powers from its enabling statute, the Special Investigating Unit and the Special Tribunals Act 74 of 1996 (the SIU Act).
*Held:* It is nonetheless important to clarify the Tribunal's powers in this regard to provide guidance to parties in future litigation of a similar nature.
*Held:* The identified statutory lacuna places litigants before the Tribunal on an unequal footing with litigants before the High Court. Litigants before the High Court are always protected by section 18 (1) of the Superior Courts which automatically suspends an order of the High Court when appeal proceedings are instituted.
*Held:* There is no rational justification for the asymmetrical treatment of Tribunal and High Court litigants in this regard.
*Held:* The statutory lacuna also renders ineffective the right applicants enjoy in terms of section 8(7) of the SIU Act, to appeal the Tribunal's order.
*Held:* Section 8(2)(b) of the SIU gives the Tribunal inherent jurisdiction in matters falling within its jurisdiction.

*Whether the present circumstances are appropriate for the invocation of the Tribunal's inherent jurisdiction to close the identified statutory lacuna?*
*Held:* the present circumstances justify the invocation of the Tribunal's inherent jurisdiction in terms of section 8(2)(b) to address the identified statutory lacuna, to place High Court and Tribunal litigants on an equal footing and to render the applicants' right to appeal the Tribunal's order effective.
*Held:* The dictates of equity and fairness require that an appealable Tribunal order is automatically suspended when the party against whom the order is made institutes appeal proceedings. Therefore, funds that have been declared forfeit to the State in terms of Tribunal Rule 26 maybe released for the purpose of financing the applicants' legal costs under circumstances where the applicants have applied for leave to appeal.

Paragraphs 15, 17, 18, 20, 21, 27, 28

*Whether the applicants have established a proper case for the preserved funds to be released.*
*Held:* There is an apparent typographical error in Tribunal Rule 23(10(b). When an applicant seeks an order for reasonable legal expenses, it is nonsensical that the Rule would require the applicant to satisfy the Tribunal that it cannot meet the expense out of his or her preserved property. The applicant has no access to the preserved property. Hence, it seeks permission to access it. What the rule maker probably meant is that the applicant must satisfy the Tribunal that it cannot meet the expense out of its unpreserved property.
*Held:* Reading Tribunal Rule 23(10) in a logical manner, to succeed in this application, the applicants must:
(a) disclose under oath all their interest in the preserved funds;
(b) satisfy the Tribunal that:
    (i) the costs of obtaining an appeal record is a reasonable legal expense;
    (ii) the applicants cannot pay for the appeal record out of their unpreserved funds.
*Held:* The applicants fall far short of meeting the above requirements, having not made out a proper case in their founding affidavit.
*Held:* The granting of leave to appeal to the Constitutional Court is insufficient to establish good course for the purpose of this application as it does not trump the applicants' duty to meet the requirements in Tribunal Rule 23(10)(b).
*Held:* The application is dismissed with costs.

Paragraphs 34 - 41

**MODIBA J:**

[1] On 17 February 2022, I granted an order dismissing the above application with costs, with reasons to follow. I set out the reasons below.

[2] The issue that arises for determination in this application is whether the funds that have been declared forfeit to the State in terms of Tribunal Rule 26 maybe released for the purpose of financing the applicants' legal costs under circumstances where the applicants have applied for leave to appeal. If I find that the funds may be released, the second question to be determined is whether the applicants have established a proper case for the funds to be released.

[3] The applicants seek on an urgent basis, an order in terms of Tribunal Rule 23(10)(b) for the release of an amount of R 98 704.50 to Digital Audio Recording Transcriptions as payment for the applicants' appeal record. The Special Investigating Unit (SIU) is opposing the application.

[4] The background facts are largely common cause.

[5] On 19 August 2020, the SIU approached the Tribunal for an order in terms of Tribunal Rule 24(1), preserving the funds Ledla held in specified bank accounts pending the final determination of an application to review the decision by the Gauteng Department of Health (the Department) to appoint Ledla Structure Development (Pty) Ltd (Ledla) to supply the Department with PPE items required

in the fight against the Covid 19 pandemic. On 20 August 2020, the Tribunal granted an order preserving the funds (the preservation order).

[6] On 10 December 2020, the Tribunal granted an order declaring the preserved funds forfeit to the State in terms of Tribunal Rule 26. The applicants subsequently applied for leave to appeal the Tribunal's decision. In a judgment handed down on 22 June 2021, the Tribunal dismissed the application for leave to appeal. The applicants unsuccessfully petitioned the Supreme Court of Appeal. On 14 October 2021, the applicants applied to the Constitutional Court for leave to appeal the Tribunal's forfeiture order.

[7] The Constitutional Court notified the applicants on 17 January 2022 that it has afforded them an audience to ventilate their application for leave to appeal. It directed the applicants to file an appeal record by 22 February 2021. On 25 January 2022, the applicants obtained a quotation from Digital Audio Recording Transcriptions for the compilation of the appeal record. They instituted the present application on 8 February 2022. The Tribunal heard the application on 15 February 2022.

[8] The SIU has since executed the forfeiture order by remitting the funds to the Department.

[9] It is against this background that I first determine whether the SIU meets the requirements for urgency. I then determine the questions articulated in paragraph 1 above with reference to the applicable legal framework. An order concludes the judgment.

**WHETHER THE APPLICANTS MEET THE REQUIREMENTS FOR URGENCY**

[10] Tribunal Rule 12(3) replicates the requirements for an urgent application as set out in Uniform Rule 6(12). In terms of these rules and on the authority in *Luna Meubels*[1], an applicant will satisfy the mandatory requirements for urgency if, in its founding affidavit, it:

10.1 sketches out the circumstances that render the application urgent;

10.2 sets out reasons why it claims that it cannot be afforded substantial redress at a hearing in due course.

[11] The applicants allowed the SIU extremely truncated periods to file its opposing papers. This was unfair given the relatively generous time the applicants had to prepare and launch this application. However, the SIU withstood the pressure and is effectively opposing the application. It has not detailed in its answering affidavit, in what manner the response period imposed by the applicants has been prejudicial to it.

[12] The one-week unexplained delay between the issuing of the Constitutional Court's directives and the date for the quotation for the costs of compiling the appeal record was issued, and a further two weeks lapse prior to launching this application is not fatal to the applicants' case on urgency. On the authority in *East*

[1] *Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 136 H

*Rock Trading*[2], it is trite that the ultimate test for urgency is whether the applicant will be denied substantive redress in due course.

[13] The applicants meet the latter requirement. The Constitutional Court will hear the application for leave to appeal approximately 7 months after the applicants launched it. This will be just under two years after the preservation order was granted and approximately 18 months after the final forfeiture order was granted. If the applicants do not file the record on 22 February 2022 as directed by the Constitutional Court, they will, in terms of the Constitutional Court Rules, forfeit the 24 May 2022 date of hearing, resulting in a further delay in the determination of their application for leave to appeal. That they can always re-enrol the application for hearing does not amount to substantial redress due to the substantial period they will have to wait to have their application for leave to appeal heard.

[14] For the above reasons, I find that the applicants meet the requirements for urgency.

[2] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 in paragraph 6.

**WHETHER FUNDS FORFEITED TO THE STATE MAY BE RELEASED TO THE APPLICANTS IN TERMS OF TRIBUNAL RULE 23(10)(b)**

[15] The SIU contends that since the preserved funds were forfeited to the State in terms of the 10 December 2020 order, the funds are no longer preserved funds as envisaged in Rule 23(10)(b).

[16] It further contends that the Tribunal Rules do not make provision for reasonable legal expenses post-forfeiture. Therefore, the applicants ought to have invoked Tribunal Rule 28(1).[3] This omission, further contends the SIU, is fatal to the application.

[17] The SIU's invitation to the applicants to invoke Tribunal Rule 28(1), and the interpretation it seeks to ascribe to this Rule is misplaced because, there is no Uniform Rule sought to be invoked by the applicants.

[18] The applicants rather contended, on the basis of section 18(1) of the Superior Courts Act[4] that an application for leave to appeal suspends a final forfeiture order. Their reliance on this provision is misplaced as the Tribunal does not derive its powers from the Superior Courts Act. The Tribunal derives its powers

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[3] Tribunal Rule 28(1) provides as follows:
***"28. Procedures Not Provided for in the Rules***
*(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."*

[4] Act 10 of 2013.

from its enabling statute, the Special Investigating Unit and the Special Tribunals Act[5] (the SIU Act).

[19] It is nonetheless important to clarify the Tribunal's powers in this regard to provide guidance to parties in future litigation of a similar nature.

[20] The SIU Act and the Tribunal Rules are silent on the status of appealable orders, including a final forfeiture order, when an appeal against the order is pending. Rather, section 8(2)(a) of the SIU Act bestows upon the Tribunal the power to issue suspension orders, interlocutory orders or interdicts on application by the SIU or a party. In this instance, the applicants have not applied for the suspension of the forfeiture order.

[21] Considering that the SIU has a choice of forum between the Tribunal and the High Court as envisaged in section 4(1)(c) of the SIU Act,[6] the identified statutory lacuna places litigants before the Tribunal on an unequal footing with litigants before the High Court. Litigants in proceedings instituted in the High Court are always protected by section 18(1) of the Superior Courts act which automatically suspends an order of the High Court when appeal proceedings are instituted. There is no rational justification for the asymmetrical treatment of Tribunal and High Court litigants in this regard.

[22] The statutory *lacuna* also renders ineffective the right the applicants enjoy in terms of section 8(7) of the SIU Act, to appeal the Tribunal's order.

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[5] Act 74 of 1996.

[6] Section 4(1)(c) provides that *'The functions of the Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in section 2(1) – (c) - to institute and conduct civil proceedings before a Special Tribunal or a court of law…"*

[23] Although 'court of law' in section 4(1)(c) could mean the Magistrates Court or the High Court, I focus here on the High Court because the legal proceedings instituted in terms of the SIU Act rarely fall within the jurisdiction of the Magistrates' Court.

[24] Section 8(2)(b) gives the Tribunal inherent jurisdiction in matters falling within its jurisdiction.[7] For the mere fact the disputed funds were preserved and subsequently forfeited in terms of an order of this Tribunal, it goes without question that the disputed funds fall within the Tribunal's jurisdiction. Hence, the Tribunal is seized with this application. Pertinently, the SIU does not dispute the Tribunal's jurisdiction over the application.

[25] The question arises whether the present circumstances are appropriate for the invocation of the Tribunal's inherent jurisdiction to close the identified statutory lacuna.

[26] In *Ex Parte Millsite Investments Co (Pty) Ltd,*[8] the court per Vieyra J said the following about inherent jurisdiction.

> *"It is to that reservoir of power that reference is made where in various judgements courts have spoken of the inherent power of the Supreme Court. The inherent power is not merely one derived from the need to make the court order effective, and to control its own procedure, but to hold the scales of justice where no law provides directly for such a given situation." (My emphasis)*

[7] See section 8(1)(b)
[8] 1965 (2) SA 582 (T) at 585 G-H

[27] In *Oosthuizen,*[9] after discussing the inherent jurisdiction of the High Court elaborately with reference to various judicial authorities and commentaries, the Supreme Court stated as follows:

> *"[20] It follows that a high court can only exercise its inherent jurisdiction in relation to the regulation of its own process when confronted with a case over which it already has jurisdiction and when faced with procedures and rules of the court which do not provide a mechanism to deal with an instant problem. A court will, in that case, be entitled to fashion the means to deal with the problem to enable it to do justice between the parties."*

[28] The present circumstances justify the invocation of the Tribunal's inherent jurisdiction in terms of section 8(2)(b) for the following reasons:

28.1 to address the identified statutory lacuna;

28.2 to place High Court and Tribunal litigants on an equal footing; and

28.3 to render the litigants right to appeal the Tribunal's orders effective.

[29] The dictates of equity and fairness require that an appealable Tribunal order is automatically suspended when the party against whom the order is made institutes appeal proceedings. Therefore, funds that have been declared forfeit to the State in terms of Tribunal Rule 26 maybe released for the purpose of financing the applicants' legal costs under circumstances where the applicants have applied for leave to appeal. This ruling merely maintains the status of the preserved funds by keeping the SIU's right to execute against an order of the Tribunal in abeyance until the leave to appeal is disposed of, which right will fall away if the appeal is upheld.

[30] Regrettably for the applicants, for the reasons set out below, they do not stand to benefit from this ruling.

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9 *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA)

**WHETHER THE APPLICANTS MEET THE TRIBUNAL RULE 23(10)(b) REQUIREMENTS**

[31] It is trite that an applicant makes out its case in the founding affidavit to afford its opponents an opportunity to answer thereto.[10] The applicants have plainly failed to meet this basic rule that regulates application proceedings. They have also not replied to the disputes the SIU has raised in its answering affidavit. Attempts by counsel for the applicant to address the disputes from the bar with reference to prior judgments in this matter is at odds with the principles in *Swissborough Diamond Mines.*

[32] Furthermore, reference in paragraph 1 of the applicants' heads of argument to "an application for interim relief pending the finalisation of litigation for the provision of reasonable legal expenses" constitutes a different case from that the SIU has been called to answer as borne out of the notice of motion and founding affidavit.

[33] I therefore determine the applicants case based on the prayers set out notice of motion as supported by the founding affidavit. I consider the applicants' written and oral legal submissions to the extent that they are consistent with the applicants' case as set out in their founding papers.

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[10] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T)

[34] Tribunal Rule 23(10) provides as follows:

> *Without derogating from the generality of the powers conferred by sub-rule (1), a preservation order may make such provision as the Tribunal may think appropriate -*
> *(a) for the reasonable living expenses of a person against whom the preservation order is being made and his or her family or household; and/or*
> *(b) for the reasonable legal expenses of such person if the Tribunal is satisfied that the person whose expenses must be provided for has disclosed under oath all his interests in property subject to a preservation order and that the person cannot meet the expenses concerned out of his preserved property.* (Emphasis added)

[35] There is an apparent typographical error in Tribunal Rule 23(10(b). When an applicant seeks an order for reasonable legal expenses, it is nonsensical that the rule would require the applicant to satisfy the Tribunal that it cannot meet the expense out of its preserved property. The applicant has no access to the preserved property. Hence, it seeks permission to access it. What the rule maker probably meant is that the applicant must satisfy the Tribunal that it cannot meet the expense out of its unpreserved property.

[36] Therefore, reading Tribunal Rule 23(10) in a logical manner, to succeed in this application, the applicants must:

36.1 disclose under oath all their interests in the preserved funds;

36.2 satisfy the Tribunal that:

36.2.1 the costs of obtaining the appeal record is a reasonable legal expense;

36.2.2 the applicants cannot pay for the appeal record out of their unpreserved funds.

[37] The applicants fall far short of meeting the above requirements. They have only premised the application on bare averments that as a result of the present

litigation, Ledla has been shunned as a result of which it no longer trades and that its directors cited as second and third applicants have been similarly treated.

[38] All three applicants have not disclosed their unpreserved funds or any documents to establish that they have none. Ledla's management accounts and bank statements have not been disclosed to support these allegations.

[39] The applicants have not disclosed their interests in the preserved funds.

[40] They have not explained why they consider the costs of compiling the appeal record a reasonable legal expense and why they cannot cover this expense from their unpreserved funds. An explanation by their counsel from the bar as to why their attorney of record does not compile the appeal record also does not cure this defect as the SIU has not been afforded an opportunity to properly answer thereto.

[41] Further, the applicants have been conducting litigation in this matter for over 18 months. They have been legally represented throughout. Yet, they have not taken the Tribunal into their confidence regarding how they have financed the litigation to date and why only now they seek to resort to the preserved funds.

[42] Although the granting of leave to appeal to the Constitutional Court in and of itself establishes the prospects of success as argued by counsel for the applicants, it is insufficient to establish good course for the purpose of this application as it does not trump the applicants' duty to meet the requirements in Tribunal Rule 23(10)(b).

[43] In light of these short comings, the applicants have not established good course to urge me to exercise my discretion in their favour to allow them access to the preserved funds.

[44] For these reasons, the application stands to be dismissed with costs.

**ORDER**

1. The application is dismissed with costs.

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**JUDGE L. T. MODIBA**
**MEMBER OF THE SPECIAL TRIBUNAL**

**APPEARENCES**

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| Counsel for the 1st to 3rd applicants: | Adv. M Manala assisted by Adv. D Sekwakweng |
| Attorney for the applicants: | Mr. K Tshabalala, MNM & Associates Inc. |
| Counsel the 1st respondent: | Adv. R Athmara |
| Attorney for the 1st respondents: | Ms. S Zondi, Office of the State Attorney, Pretoria |
| Date of hearing: | 15 February 2022 |
| Date of order: | 17 February 2022 |
| Date reasons were furnished: | 23 February 2022 |