

SOUTH AFRICA / JUDGMENT

Caledon River Properties (Pty) Ltd t/a Magwa Construction and Another v Special Investigating Unit and Another (GP/17/2020) [2022] ZAST 20 (8 September 2022)

[2022] ZAST 20

COURT

Special Tribunal

BEFORE

L T Modiba

CASE / FILE NUMBER

GP/17/2020

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IN

THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION
2(1) OF THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL

TRIBUNALS ACT 74 OF 1996

CASE

NO: GP/17/2020

In

the application for leave
to appeal between:

CALEDON
RIVER PROPERTIES (PTY) LTD
First Applicant/ First Defendant
t/a
MAGWA CONSTRUCTION
PROFTEAM
CC
Second Applicant/ Second Defendant
and
THE
SPECIAL INVESTIGATING UNIT
First Plaintiff/ First Respondent
NATIONAL
DEPARTMENT OF PUBLIC WORKS
Second Plaintiff/ Second Defendant
AND
INFRASTRUCTURE

JUDGMENT

Summary – application for leave to appeal to the Full Court of the High Court Division with jurisdiction against this Tribunal's

judgment - Whether s 8(7) of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("the Act") and the Regulations and Rules proclaimed in terms of the Act provides for the right to appeal against the Tribunals' decisions on leave being granted by the Tribunal - Whether s 16 and 17 of the Superior Courts Act[1] are applicable to determine applications for leave to appeal in the Tribunal.

Held: In terms of s 8(7), parties enjoy an automatic right to appeal to the Full Court of the High Court Division with jurisdiction against this Tribunal's judgment. s 16 and 17 of the Superior Courts Act[2] are inapplicable to determine applications for leave to appeal in the Tribunal.

MODIBA J:

- [1] The Defendants have applied for leave to appeal to the Full Court of the Gauteng Division against this Tribunal's judgment delivered on 9 March 2022. The judgment is the second in a sequel of two judgments delivered in this matter. It is therefore convenient to reference it Caledon River 2. The Plaintiffs are opposing the application for leave to appeal.
- [2] Both parties filed heads of argument addressing the merits of the application for leave to appeal. At the Tribunal's request, the parties filed additional heads of argument addressing the following

issues:

2.1 Whether s 8(7) of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("the Act") and the Regulations and Rules proclaimed in terms of the Act provides for the right to appeal against the Tribunals' decisions on leave being granted by the Tribunal;

2.2 Whether s 16 and 17 of the Superior Courts Act[3] are applicable to determine applications for leave to appeal in the Tribunal;

- [3] The Tribunal raised these question mero motu as they had been hanging for a while. In an earlier judgment in *Special Investigating Unit and Another v Caledon River Properties (Pty) Ltd t/a Magwa Construction and Another* ("Caledon River 1")[4], where the Tribunal (per Modiba J) was called upon to determine the Tribunal's status as a court as well as its constitutional

jurisdiction, the Tribunal held that it is a court with similar status to the High Court as envisaged in s 65 and 166(e) of the

Constitution, 1996 (“the Constitution”) and consequently, it has the jurisdiction to grant orders in terms of s 172 of the Constitution. While analysing the Tribunal’s powers to determine its status as a court, the Tribunal made an obiter

statement in respect of appeals against Tribunal’s decisions. It is appropriate to quote the relevant statement:

“[43] The only difference between High Court appeals and Special Tribunal appeals is that s8(7) does not specifically provide for the Special Tribunal to grant leave to appeal. Further, the section does not provide for direct appeal against a Special Tribunal judgment to the Supreme Court of Appeal in the event that leave to appeal is denied by the Special Tribunal. The latter omission is catered for in s16 (1) (c) of the Superior Courts Act. It provides that any appeal against a decision of a court of similar status to the High Court lies to the Supreme Court of Appeal upon such leave being granted by such other court (read Special Tribunal) or the Supreme Court of Appeal.”

- [4] This Tribunal in other earlier judgments in Msagala[5] and Ledla[6] (Mothle J as he then was presided in both matters) heard and refused applications for leave to appeal. When an application for leave to appeal was filed against a judgment I handed down in Lehloenya,[7] out of concern that Tribunal Rule 32 provides for leave against Tribunal decision only where leave to appeal is granted whereas the plain reading of s 8(7) suggests an automatic right of appeal to the Full Court of the High Court with jurisdiction, there will be possible conflicting approaches to applications for leave to appeal, not only by this Tribunal but also by litigants. I requested the then Tribunal President, Judge Makhanya to constitute a three-member Tribunal to consider the above questions. Judge Makhanya acquiesced the request and issued directives that the application for leave to appeal in Lehloenya would be considered by a three-member Tribunal.
- [5] Regrettably, due to the lack of availability of Tribunal members, Judge Makhanya could not constitute a three-member Tribunal. Ms Lehloenya subsequently abandoned her application for leave to appeal and approached the Full Court on the basis of her automatic right to appeal to that court.
- [6] As fate would have it, in Mpofana[8] the parties against whom judgment was granted automatically approached the High Court to appeal against the Tribunal’s

judgement

without seeking leave. They too asserted what they contend is their automatic right to appeal in terms of s 8(7) of the Act. However, in Digital Vibes[9], Hamilton Ndlovu[10] and LNG Scientific[11] the parties are seeking the Tribunal’s leave to appeal to the Full Court.

- [7] Given that there were no prospects that I will be able to constitute a three-member Tribunal to consider the above issues in the short-term due to the lack of availability of Tribunal members, I resolved to hear the present application. I however, requested counsel for the parties to submit supplementary heads of argument addressing the above issues. I am indebted to them for their prized assistance.
- [8] The plaintiffs contend that leave to appeal in civil proceedings is a jurisdictional requirement in respect of any judgment or order. Therefore, section 8(7) read with ss 16 and 17 of the Superior Courts Act should be interpreted to impose such a jurisdictional requirement. Profteam contends that Tribunal Rule 33(3) is ultra vires s 9(1) of the Act in that it attempts to limit the unqualified right to appeal in s 8(7) of the Act. Caledon River Properties merely made submissions as directed by the Tribunal. It takes no issue with the point the Tribunal raised and demands that its application for leave to appeal, filed in terms of Tribunal Rule 32 be considered as the rule has not been set aside.
- [9] The wording in s 8(7) is devoid of ambiguity. It provides as follows:
- “Any party may appeal against a ruling, decision or order of a Special Tribunal to the Provincial Division of the Supreme Court which has jurisdiction and such an appeal shall be deemed to be an appeal against a decision by a single judge of the Supreme Court: Provided that no appeal shall lie against any ruling, decision or order which, if made by the Supreme Court, would not be subject to appeal.”*
- [10] S 8(7) expressly provides for the right of a party to appeal against a Tribunal’s ruling, decision or order to a Division of the High Court with jurisdiction. It has not qualified this right. It only excludes the right in any ruling, decision or order which, if made by the High Court, would not be subject to appeal.
- [11] The Tribunal is a creature of statute. Its rights must be strictly construed as set out in its enabling legislation.[12] In terms of s 9(1), the Tribunal President may make rules to regulate the conduct of proceedings before the Tribunal including the manner in which proceedings are brought before the Tribunal, and the form and content of that process. S 9(1) does not authorise the Tribunal President to divest parties the right they enjoy in terms of the Act.
- [12] A limitation to a litigant’s unqualified automatic right of appeal to the Full Court may not be imposed through a purposive interpretation to s 8(7) as argued on behalf of the plaintiffs as the provision is unambiguous. Further, limiting a litigant’s right to appeal in this manner would create an unintended anomaly. In the event that the Tribunal refuses leave to appeal, the Act does not give a party the right to directly appeal to the Supreme Court of Appeal. It appears that such a party would still be bound in terms of s 8(7) to appeal to a Division of the High Court with jurisdiction.

[13] As argued on behalf of Profteam, when the SIU Act was enacted, the Supreme Court Act[13] was in operation. Appeals were regulated by Section 20 of that Act. Section 20(4) read as follows:

“(4) No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except-

- (a) in the case of a judgment or order given in any civil proceedings by the full court of such division on appeal to it in terms of subsection (3), with the special leave of the Appellate Division;
- (b) in any other case, with leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the Appellate Division.

[14] The Supreme Court Act contained no provision for appeals from courts of a similar status to the High Court. An Act establishing such a court made provision for appeals and generally required the leave of such court to appeal to a superior court. The Labour Court established in terms of the Labour Relations Act[14] and the Land Claims Court established in terms of the Restitution of Land Rights Act[15] are examples of such courts. The Act was enacted during the same era as the Labour Relations Act and the Restitution of Land Rights Act. The Labour Relations Act and the Restitution of Land Rights Act grant a right to appeal but only with leave of the court established in terms of the respective statute. As already observed, the Act does not provide for such a right. If the legislature intended to similarly qualify the right to appeal against Tribunal’s decisions, orders and rulings, it would have expressly provided so. The Tribunal derives its powers from the Act and not from the Superior Courts Act. Therefore, s16 of the Superior Courts Act may not be used to qualify a litigant’s right to appeal against the Tribunal’s decisions, orders and rulings.

[15] Parties enjoy the automatic right to appeal against Tribunal’s decisions to the Full Court of a Division of the High Court with jurisdiction as provided for in s 8(7). They do not require the Tribunal’s leave to appeal against its decisions.

[16] Therefore, the present applications are redundant. Caledon River Properties’ is not entitled to demand that the Tribunal considers its application for leave to appeal. The fact that Tribunal Rule 32 has not been repealed does not assist Caledon River Properties. It followed the procedure in Tribunal Rule 32 to place its application for leave to appeal before the Tribunal but the Tribunal derives no power from this rule to grant such an order.

[17] Leave to appeal in civil proceedings is not, as contended by the plaintiffs a general jurisdictional requirement. It is regulated by statute as set out above.

[18] In the premises, I find that the defendants’ applications for leave to appeal are not proper before the Tribunal. They stand to be dismissed.

MERITS OF THE APPLICATION FOR LEAVE TO APPEAL

- [19] Having found that the defendants' applications for leave to appeal are not proper before the Tribunal, I do not determine the merits of the defendants' applications for leave to appeal.
- [20] It is however important that I clarify the basis on which I approached the determination of just and equitable relief in Caledon River 2. During oral argument in the application for leave to appeal I put to the parties that, based on the submission by counsel for Caledon River Properties when he advanced argument in opposition to the plaintiffs' application for a postponement, that the matter will not be disposed of in that hearing in any event because the parties had to file expert reports for the determination of just and equitable relief, I approached the issue of just and equitable relief as a purely legal question. For that reason, I did not consider the defendants witness statements and expert reports. Counsel for the parties could not agree on whether the defendants witness statements and expert reports had been properly placed before the Tribunal. Counsel for the defendants contended that the defendants' evidence was properly before the Tribunal. Counsel for the plaintiffs contended that the defendants had to lead oral evidence and the plaintiffs had the right to cross examine the defendants' witnesses.

- [21] I requested the parties to file a transcribed record in order for me to determine precisely how the parties had formulated the issue before me. The parties agreed with me that it will be necessary for me to have regard to the record in order to determine the issues in the application for leave to appeal in a manner that would assist the court of appeal. Regrettably, it took the parties more than three months to file the record. I resorted to listening to the recording in order to dispose of the application for leave to appeal without further delay.
- [22] Having listened to the record, I am of the view that I misconstrued the question before me, that it was not an entirely legal question and that I ought to have had regard to the defendants' witness statements and expert reports when determining whether it is just and equitable for the defendants not to be divested of the profits accrued from the impugned contract, as well as the defendants' counterclaims. At the pre-trial conference held between the parties on 20 September 2021, the plaintiffs resolved to argue their case on the basis of the defendants' evidence. During the trial, the plaintiffs did not assert their right to cross examine the defendants' witnesses, notwithstanding that they had been lined up to testify. The additional expert reports to be filed as argued by counsel for Caledon River Properties are the defendants' financial statements for the purpose of determining their profits in the event that I found that the defendants ought to be divested of their accrued profits.

COSTS

[23] Given that the defendants' applications for leave to appeal were disposed of on the basis of issues raised mero motu by the Tribunal, it is appropriate that the costs of the application are costs in the appeal.

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

ORDER

1. The first and second defendants' applications for leave to appeal are dismissed.
2. Costs are costs in the appeal.

JUDGE L. T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the applicant: Adv. Ishmael Semanya SC assisted by Adv. Nicole Mayet, instructed by the Office of the State Attorney, Pretoria

Counsel for the 1st respondent: GJ Scheepers SC, instructed by Louw Le Roux Inc

Counsel for the 2nd respondent: E L Theron SC, instructed by Alant, Gell and Martin Inc

Date of hearing:

19 May 2022

Date of judgment:

7 September 2022

Revised:

8 September 2022

Mode of delivery: this judgment was handed down electronically by transmission to the parties' legal representatives by email, uploading on Caselines and releasing to SAFLII. The time for handing down the judgment is deemed to be 10am.

[1] Act 10 of 2013.

[2] Act 10 of 2013.

[3] Act 10 of 2013.

[4] Special Investigating Unit and Another v Caledon River Properties (Pty) Ltd t/a Magwa Construction and Another (GP/17/2020)

[2021] ZAST 4 (26 February 2021).

- [5] Special Investigating Unit and Another v Msagala and Others (GP03 of 2020) handed down on 25 May 2021.
- [6] Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit (GP07 2019)
- [2021] ZAST 32 (25 May 2021).
- [6] Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit (GP07 2019)
- [2021] ZAST 32 (25 May 2021).
- [7] Special Investigating Unit v Lehloenya In Re: Lehloenya v Makhura and Others (GP 11 of 2020)
- [2021] ZAST 28 (25 October 2021).
- [8] Special Investigating Unit v Fikile Mpofana (Pty) Ltd and Others (GP13/2021)
- [2022] ZAST 4 (10 February 2022)
- [9] Special Investigating Unit v Digital Vibes (Pty) Ltd and Others (KN03/2022)
- [2022] ZAST 7 (13 April 2022)
- [10] SIU and Another v Ndlovu and Others (GP 19/2021) [2022] ZAST 12 (7 June 2022)
- [11] SIU and Another v LNG Scientific (Pty) Ltd In re: LNG Scientific (Pty) Ltd v SIU and Another (GP03/2022) [2022] ZAST 15 (29 June 2022)
- [12] Special Investigating Unit v Nadasen 2002 (1) SA 605 (SCA) at paragraph 5.
- [13] Act 59 of 1959.
- [14] Act 66 of 1995.
- [15] Act 22 of 1994.

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