

SOUTH AFRICA / JUDGMENT

Special Investigating Unit and Another v LNG Scientific (Pty) Ltd (GP03/2022) [2022] ZAST 15 (29 June 2022)

[2022] ZAST 15**COURT**
Special Tribunal**BEFORE**
L.T. Modiba**CASE / FILE NUMBER**
GP03/2022

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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
(REPUBLIC
OF SOUTH AFRICA)
CASE
NUMBER: GP03/2022

In

a matter between:

Special
Investigating Unit
First
Applicant

MEC:

Gauteng Department of Health
Second Applicant
and
LNG
Scientific (PTY) Ltd
First Respondent
(Registration
number: 2014/009577/07)
In

re: LNG
Scientific (PTY)
Ltd
Applicant
Special
Investigating Unit
First
Respondent

MEC: Gauteng Department of Health
Second Respondent

JUDGMENT

Summary

Review application – access to record of the impugned decision. Whether the respondent in a self-review application is entitled to a record of the impugned decision in terms of Uniform Rule 53(1)(b) or whether it should seek discovery of the record in terms of Tribunal

Rule 17(4) read with Uniform Rule 35(13), (1) and (2).

MODIBA J

- [1] The controversy that arises in this interlocutory application concerns the procedure a respondent in a self-review application should use to obtain a record of an impugned decision.
- [2] LNG Scientific (Pty) Ltd (LNG) is an applicant in this interlocutory application. The interlocutory application arises in an application in which the Special Investigating Unit (SIU) as the first applicant and the MEC: Gauteng Department of Health (the MEC) as the second applicant seek to review and set aside the decision the then Chief Financial Officer of the Gauteng Department of Health (the Department), Ms Kabelo Lehloenya (Ms Lehloenya) allegedly made on 24 April 2020 to procure personal protective equipment (PPE) supplies from LNG (the impugned decision). They also seek ancillary relief not necessary to detail for the purpose of this application. I conveniently refer to this application as the review application.
- [3] I jointly refer to the SIU and the MEC as the respondents. I individually refer to these parties by their respective names. I refer to LNG by its name.
- [4] LNG opposes the review application. It is for that reason that it seeks the record of the impugned decision. In its notice of motion filed in the interlocutory application, it has prayed for an order compelling the respondents to furnish it with a record of the impugned decision in terms of Uniform Rule 53(1)(b).

[5] The respondents oppose the interlocutory application. They contend that they did not bring the review application in terms of Uniform Rule

53. They take the view on the authority in Jockey Club[1] and Chauke[2], that they are not obliged to produce a record in terms of that rule. In their answering affidavit, the respondents made a tender to consent to an order in terms of Uniform Rule 35(13)[3] and to make discovery in terms of Uniform Rule 35(1) and (2)[4] within 20 days of the Tribunal's order. LNG has not accepted the tender for reasons I deal with later. It contends that it is entitled to a Rule 53 record as a matter of law. Hence it insists on the order as prayed for in its notice of motion. It also seeks a punitive cost order against the respondents. The respondents seek a dismissal of the application with costs in the course.

[6] It follows that the issues that arise for determination are the following:

6.1 whether the respondents are obliged to deliver a record of the impugned decision in terms of Uniform Rule 53(1)(b);

6.2 whether the respondents' tender to discover relevant documents will enable LNG to properly oppose the review application;

6.3 costs of the interlocutory application.

[7] I delve straight into these issues.

WHETHER LNG MAKES OUT A CASE FOR THE RESPONDENTS TO BE COMPELLED TO FURNISH A RECORD OF THE IMPUGNED DECISION IN TERMS OF UNIFORM RULE 53(1)(b)

[8] Tribunal proceedings are regulated in terms of Tribunal Rules and not in terms of the Uniform Rules of Court. Tribunal Rule 28 gives the Tribunal the discretion to resort to the Uniform Rules in the event that a scenario not provided for in the Tribunal Rules arises. The discretion should be exercised judiciously having regard to all the

relevant factors.

[9] The respondents brought the review application in terms of Tribunal Rule 10. Like Uniform Rule 6, Tribunal Rule 10 regulates ordinary applications. Both these rules do not make provision for the applicant to file a record of the impugned decision or call on the decision maker to furnish the record. There is no equivalent of Uniform Rule 53 in the Tribunal Rules. Hence LNG seeks its invocation in terms of Tribunal Rule 28.

[10] Since the decision under review was allegedly made by Ms Lehloenya on behalf of the Department, and that the review application is brought by the SIU and the Department as co-applicants, the respondents have correctly described the review application as what has become known as a self-review application.[5] The SIU brings it in its own name. It is entitled to do so in terms of sections 4(1)(c)(i) read with section 5(5) of the Special

Investigating Units and Special Tribunals Act[6] (SIU Act). The review application emanates from an investigation the SIU conducted, as foreshadowed in section 4(1)(a) to (c) read with section 2(1) of the SIU Act. The SIU seeks the relief to which the Department is entitled. The Department is entitled in terms of section 8(2) of the SIU Act to be the co-applicant in the review application.

[11] For the reasons that follow, a remedy in terms of Uniform Rule 53(1)(b) is not available to LNG. Therefore, LNG has not established the basis for the Tribunal to invoke the application of this Uniform Rule in the present proceedings.

[12] Uniform Rule 53 is at the disposal of an applicant who seeks to review an administrative decision by an organ of State.[7] In such a case, the organ of State is cited as a respondent. The applicant would call on the officer who made the administrative

decision to deliver to the Registrar a record of the decision with reasons for the decision. Such an applicant would have set out its grounds of review in cursory terms because as an external party, it would not be privy to the considerations the decision maker made and documents he or she relied on when making the administrative decision. This is prejudicial to it because without the record of the administrative decision, it is unable to properly make out a case to review the administrative decision. Hence, Uniform Rule 53 makes provision for the applicant to file supplementary grounds of review once the decision maker has filed the record of the administrative decision.

[13] The present application being a self-review, the respondents who are the applicants in the review, hardly require the mechanism in Uniform Rule 53 to properly make out their case in the review. The record of the impugned decision is at the disposal of the Department. It has furnished it to the SIU. The respondents have relied on parts of the record of the impugned decision to craft their case in the review. They have gone to the extent of annexing documents that are part of the record to their founding affidavit to the extent they rely on them in support of the relief they seek in the review application. They have made out their case in the founding affidavit by which they will stand or fall in the review application. They have no automatic

right that an applicant who brings a review application in terms of Uniform Rule 53 to review an administrative decision by an organ of State has to supplement their founding affidavit at a later stage: correctly so, because they crafted their founding affidavit with the record to hand.

[14] Even in trite review applications as described above, courts have recognized the right of a party not to bring a review application in terms of Uniform Rule 53.[8] Where an applicant does not require the mechanism provided for in this Uniform Rule, it is not compelled, to use the parlance used in *Jockey Club and Chauke*, to shackle itself to the mechanism in Uniform Rule 53.

- [15] An applicant in a self-review application has stronger reasons not to bring the review application following the procedure in Rule 53. Since it does not need the benefits deriving from this rule, it is perfectly within its right to avoid being shackled by the ramifications of Uniform Rule 53.
- [16] LNG recognizes this. However, it contends, on the authority in Stanton[9], that it seeks the record of the impugned decision and the respondents may not exercise an election not to bring a review application in terms of Uniform Rule 53 to its prejudice.
- [17] LNG's reliance on Stanton is misplaced as Stanton is distinguishable on the facts. Unlike the present review application, Stanton was a classical review application. The South African Football Association (SAFA) sought to review the decision by the Registrar of Trade Marks, an organ of State, to register the trade mark words Bafana Bafana to Stanton. It elected to use the Uniform Rules 6 procedure as a result of which it did not call on the Registrar of Trade Marks to file a record of the impugned decision. Therefore, SAFA was a typical applicant in a review application for whose benefit Uniform Rule 53 exists. Unlike the SIU and the MEC as applicants in the present review application, SAFA did not have the record of the administrative decision. The procedure in uniform Rule 53 was available to SAFA to obtain the record of the administrative decision. However, it opted not to use this procedure. This election turned out to be prejudicial to Stanton.
- [18] In Stanton, the Appellate Division observed that where an applicant seeking to review an administrative decision elects not to bring the review application in terms of Uniform Rule 53, the respondent organ of State who opposes the application may attach the record of the impugned decision to its answering affidavit.[10] This observation does not apply to an applicant in a self-review application.
- [19] The Appellate Division further observed that the difficulty arises when the respondent organ of State adopts a supine attitude as was the case in Stanton and there is another respondent, in that case Stanton, who opposes the review application. The absence of the record of the impugned decision is prejudicial to such a respondent.
- [20] Here, there is no basis for me to find that LNG is prejudiced by the SIU and the MEC's decision to bring the review application in terms of Tribunal Rule 10. As applicants in a self-review application, Uniform Rule 53 does not apply to the SIU and the MEC. Therefore, theirs is not even a case of making an election which is prejudicial to LNG not to use the Uniform Rule 53 procedure. They are not spoiled for choice. The procedure they have followed is not irregular. Effectively, Tribunal Rule 10 is the only procedure at their disposal.
- [21] Another distinguishing factor is that the organ of State whose decision is impugned here unlike in Stanton, is not supine. It is a co-applicant in the review application. It furnished documents in respect of the impugned decision to the SIU in the course of its investigation. The respondents only attached to their founding affidavit the documents on which they rely.

They stand on the authority in *Jockey Club*,^[11] which recognises their right as applicants to bring the review application on the procedure of their election. This right is not only recognised in *Jockey Club*, which LNG contends is distinguishable, it is also recognised in *Stanton* on which LNG relies.

[22] For these reasons, the application falls to be dismissed.

WHETHER THE RESPONDENTS' TENDER TO DISCOVER RELEVANT DOCUMENTS WILL ENABLE LNG TO PROPERLY OPPOSE THE REVIEW APPLICATION

[23] Superior courts have numerously recognized the importance of a record of the decision in review proceedings. Record of the decision is an invaluable tool in the review process. It is for the benefit of both the parties and the reviewing court. It may give support to the decision maker's decision. It may expose lack of justification for the impugned decision. It also equips the court to perform its constitutionality 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, is respected and fulfilled.

[24] The record of the impugned decision is of crucial importance in that it fosters equality of arms which requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them under substantial disadvantage in relation to their opponents.

[25] However, a record of the decision is not always indispensable in review applications. Although self-reviews applications are a fairly recent phenomenon, courts are becoming inundated with them. Tribunal proceedings are almost wholly self-reviews brought by the SIU, often not with the Department whose decision is under review as a co-applicant as is the case here. Virtually, most review applications are brought before the Tribunal on the procedure adopted in the present review application. The review applications proceed without a demand for a record of the decision. The respondent answers the applicant's case as made out in the founding papers. The Tribunal determines the application on the basis of the papers filed. I am unaware of authority where, if the respondent does not demand a record of the decision, a Court or Tribunal calls for it *mero motu*.

[26] However, this does not insulate self-review applications from the principles set out in paragraph 23 and 24 of this judgment. The respondents probably accept the binding character of these principles. Hence, on the authority in *Chauke*, they have consented to an order making the rules relating to discovery applicable in this application in terms of Tribunal Rule 17(4) read with Uniform Rule 35(13). They have also tendered to make discovery within 20 days in terms of Uniform Rule 35(1) and (2).

[27] Although the respondents have tendered discovery, they have not specified precisely what they intend to discover. As presently crafted, their tender will open the door for wanton discovery, which is not appropriate in application proceedings. In Chauke, Davis J expressed a similar concern but nonetheless proceeded to grant leave for unfettered discovery in terms of Uniform Rules 35(13) and 35(2).[12] I am reluctant to permit unfettered discovery for the reasons below:

27.1 what LNG asserts is the right to a record of the impugned decision. If unfettered discovery is allowed, a wide door for disclosure of all documents that are relevant to the review application is opened. In the present review application, the respondents' case does not only relate to alleged irregularities in the procurement process, it also relates to defective performance. Ordinarily, documents relating to defective performance are not part of the record. Therefore, LNG would not be entitled to them in terms of Uniform Rule 53.

27.2 in application proceedings, discovery is only allowed in exceptional circumstances. Ordinarily, even in trial proceedings, leave to discover prior to close of pleadings is rarely sought and granted.[13] However, in the present case, permitting discovery of the impugned record prior to close of pleadings is appropriate as it serves the principles discussed in paragraphs 23 and 24 above.

[28] The concern LNG raises, with reference to the limitations of a discovery procedure dealt with in paragraph 26 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 at play in the mind of the decision maker. Such an order will circumvent the concerns I raise in paragraph 27 above.

[29] Regrettably for LNG, since it may not access the impugned record in terms of Rule 53(1)(b) under the present circumstances, on the authority in Chauke, the discovery procedure is the only appropriate mechanism to access the record.

[30] The respondents have made partial disclosure of the record in the form of documents they annexed to their founding affidavit. The documents that form part of the record that have been annexed to the founding affidavit are to be excluded from the record to be discovered in terms of the Tribunal's order to avoid prolixity. They are only to be specified in the index for the record and cross referenced to the founding affidavit.

COSTS

[31] LNG has not made out a case for the order it prayed for in the notice of motion. For this reason alone, there is no basis to award costs to it. The respondents referred LNG to the judgment in Chauke when it called on the SIU to provide it with the record of the impugned decision in terms of Rule 53(1)(b). Instead of seeking a discovery of the record in accordance with the authority in Chauke, it opted to bring this application.

[32] The respondents have successfully opposed the relief LNG seeks. They are eager to have the review application determined. Their tender to make discovery is sensible and serves to avoid further interlocutory proceedings on this issue. Their approach to costs, that they be costs in the course is also sensible in these circumstances.

[33] For these reasons, the appropriate cost order is that proposed by the SIU.

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

ORDER

1. The application is dismissed.
2. The costs of the application are costs in the course.
3. Within 20 days of the date of this order, the respondents shall discover the record of the impugned decision in terms of Tribunal Rule 17(4) read with Uniform Rules 35(13), (1) and (2).
4. The record to be filed in terms of paragraph 3 of this order shall exclude documents attached to the respondents' 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.
5. Within 20 days of service of the record of the impugned decision, the applicant shall file its answering affidavit.
6. Within 15 days of filing the answering affidavit, the respondents shall file their replying affidavit if any.
7. Within 5 days of filing their replying affidavit, the respondents shall deliver indexed and paginated papers in the review application to the Registrar of the Tribunal. 8.

Within 5 days of the replying affidavit being filed, the Tribunal Registrar shall convene the second case management meeting to

determine the further conduct of the matter.

JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the 1st and 2nd applicant: Adv. AM Breitenbach SC, assisted by Adv. S Khoza

Attorney for the applicant: Ms S Zondi, State Attorney, Pretoria

Counsel for respondent: JA Motepe SC, assisted by Adv. I Hlalethoa

Attorney for the respondent: Mr M Ngozo, Diale Mogashoa Attorneys

Date of hearing: 22 June 2022

Date of judgment: 29 June 2022

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[1] Jockey Club of South Africa v Forbes [1992] ZASCA 237; 1993

(1) SA 649 (A) at 662F-H.

[2] SIU v Chauke Quantity Surveyors & Project Managers in Association with Listed Entities t/a Chauke Mbenyane Co-Arc Consultants & nine others (45529/2016) [2018] ZAGPPHC 240 (25 January 2018).

[3] This subrule empowers the court to permit discovery in application proceedings.

[4] Rule 35(1) regulates the discovery procedure in trial proceedings, which only takes place after close of pleadings or prior to close of pleadings with the Judge's leave. Rule 35(2) details the discovery procedure.

[5] Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC) paragraph 111 and the authorities cited there.

[6] Act 74 of 1996

[7] See Jockey Club at fn1.

[8] See South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons 2003

(3) SA 313 (SCA) and Chauke at fn2, Nelson Mandela Bay Metro v Erastyle and Others 2019 (3) SA 559 (ECP) paras 16-26

[9] Stanton fn9 at paragraph 5.

[10] Stanton fn8 at paragraph 5

[11] Jockey Club fn1 at 660E-H and 661E-J).

[12] See Chauke at fn2.

[13] STT Sales (Pty) Ltd v Fourie and 5 Others 2010

(6) SA 272 (GSJ) (8 September 2010) at paragraph 13 to 16.

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