

SOUTH AFRICA / JUDGMENT

Special Investigating Unit and Another v LNG Scientific (Pty) Ltd (GP03/2022) [2023] ZAST 4 (3 February 2023)

[2023] ZAST 4

COURT
Special TribunalBEFORE
L.T. ModibaCASE / 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)

JUDGMENT

Summary – Civil procedure - whether the present circumstances are proper for the exercise of the Tribunal’s discretion in terms of Tribunal Rule 28(1) to invoke Uniform Rule 49(2) to address a lacuna in the Tribunal Rules to regulate an appeal against the Tribunal’s decision to the Full Court.

MODIBA J:

INTRODUCTION

[1] The issues set out below arose between the parties at a case management meeting held on 10 November 2022:

1.1 the period by which the respondent, LNG Scientific (Pty) Ltd (“LNG Scientific”) ought to have filed its notice to appeal with the High Court having jurisdiction;

1.2 whether the Tribunal’s 7 September 2022 order is suspended in terms of s18(1) of the Superior Court’s Act[1] under the present circumstances.

[2] Since the parties held opposing views on the above issues and given their novelty and importance in other matters likely to arise before the Tribunal, I considered it necessary to render a reasoned ruling on the above issues. I then invited the parties to file written submissions. They did. I found the parties written submissions extremely useful to determine the above issues. I am grateful to the parties’ respective legal teams for their assistance.

[3] I firstly set out the background facts. Then, I proceed to determine the above issues.

BACKGROUND

FACTS

[4] On 11 April 2022, the first applicant, the Special Investigating Unit (“SIU”) and the second applicant, the Member of the Executive Council for Health: Gauteng Province (“the MEC”) filed an application in the Special Tribunal to review and set aside a decision taken by the Gauteng Department of Health’s former Chief Financial Officer, Ms Lehloenya to procure various personal protective equipment (“PPE”) items from LNG Scientific. LNG Scientific filed a notice of intention to oppose. It is yet to file an answering affidavit.

[5] LNG Scientific filed a notice in terms of Uniform Rule 53(1) calling on the applicants to file a record of the impugned decision. When the applicants refused to comply with its request, LNG Scientific brought an application to compel. The applicants opposed it. In a judgment handed down on 29 June 2022, I refused to invoke Uniform Rule 53(1) and ordered the applicants to discover the record of the impugned decision in terms of Tribunal Rules 28(1)

read with Tribunal Rule 17(4) and Uniform Rule 35 (13) (1) and (2). LNG subsequently filed an application for leave to appeal the 29 June judgment and order. On 7

September 2022, I dismissed the application on the basis that in terms of s8(7) of the Special Investigating Units and Special

Tribunals Act[2], LNG Scientific has an automatic right of appeal to the High Court having jurisdiction. [6] On 02 November 2022, LNG Scientific filed its notice of appeal in the High Court. The applicants responded by filing an application in terms of Uniform Rule 30 and 30A to set aside LNG Scientific's notice of appeal for the reason that it was filed out of time and no condonation application had been filed.

- [7] At the case management meeting held on 10 November 2022, counsel for the applicants requested me to issue directives for the further conduct of the main application because, until the Full Court grants LNG Scientific condonation for delivering its notice to appeal late, there is no proper appeal pending before the High Court.
- [8] LNG Scientific has since filed an application for condonation before the Full Court. It contends that in that application, it has shown good cause why the time bar should be extended. Therefore, the main application ought not to proceed until its condonation application and appeal has been disposed of. [9] In its written submissions, LNG Scientific did not deal with the second issue.

THE PERIOD BY WHICH AN APPEAL AGAINST THE TRIBUNAL'S DECISION OUGHT TO BE FILED WITH THE FULL COURT

- [10] The Tribunal Rules are silent on the period within which a party ought to exercise its automatic right to appeal by filing a notice to appeal with the Full Court having jurisdiction. Tribunal Rule 28(1) gives the Tribunal a discretion to invoke the Uniform Rules to address this lacuna.
- [11] Uniform Rule 49(2) regulates the procedure for filing a notice of appeal to the Full Court where leave to appeal is granted. It requires that such notice is filed within 20 days after the date on which leave was granted. It further provides that the 20-day period may be extended on good cause shown.
- [12] In its written submissions, LNG Scientific contends that the 20-day period applies in instances where leave to appeal to the Full Court was granted. In this case, it does not apply because LNG Scientific's application for leave to appeal was dismissed. Further, even if the 20-day period is applicable, in terms of Uniform Rule 49(2), it may be extended on good cause shown. [13] The commonality between the procedure Uniform Rule 49(2) regulates and the present matter is that they both relate to an appeal against the decision of a single Judge.

- [14] There is a dissimilarity between the procedure Rule 49(2) regulates and the present facts which LNG Scientific seeks to take advantage of. In terms of s17(6)(a) of the Superior Courts Act, the right of a party intending to appeal against the decision of a single judge to the Full Court only arises when leave to appeal is granted. Hence, in terms of Uniform Rule 49(2), the dies for filing the notice of appeal to the Full Court starts running on the date leave to appeal is granted. Here, as ordered on 7 September 2022, LNG Scientific enjoys an automatic right to appeal the Tribunal's decision to the Full Court.
- [15] LNG Scientific's contention is untenable. It has advanced no solution to the present lacuna. It has also not advanced reasons why the Tribunal's discretion should not be exercised in the applicants favour by invoking Tribunal Rule 28(1) to render Uniform Rule 49(2) applicable in the present circumstances. Upholding its contention is not in the interest of justice as it would result in a party having an open ended period in which to note an appeal. It would also frustrate the SIU Act's objective to have Tribunal matters resolved expeditiously.
- [16] Since in terms of s8(7) of the SIU Act parties enjoy the automatic right of appeal to the Full Court, and given the lack of a Tribunal Rule regulating the procedure for lodging an appeal with the Full Court, purposively interpreted, Uniform Rule 49(2) is the rule that best addresses this lacuna. The date for filing the notice of appeal in the Full Court ought to be reckoned from the date the Tribunal's judgment or order being appealed against is delivered or if only an order was granted and reasons only handed down at a later date, the reckoning date ought to be the date on which the reasons were handed down.[17] Having considered the present facts and the parties written submissions, I find that the present circumstances are proper to invoke Tribunal Rule 28(1) to render Uniform Rule 49(2) applicable in the present circumstances. Since LNG Scientific had sought leave to appeal from the Tribunal on the basis of the practice that prevailed then, a purposive interpretation of Uniform Rule 49(2) requires that the dies for filing the notice of appeal in the Full Court be to be reckoned from the date the Tribunal's order dismissing its application for leave to appeal was granted.
- [18] Therefore, LNG Scientific ought to have filed its notice to appeal to the Full Court within 20 days of 7 September 2022 as required in terms of Uniform Rule 49(2). Since it failed to do so, as argued on behalf of the applicants on the authority in *Myeni v Organisation Outdoing Tax Abuse NPC*[3], until the period in Uniform Rule 49(2) is extended on good cause shown, there is no proper appeal pending before the Full Court.
- [19] For the purpose of the above issue, the applicants' Uniform Rule 30 and 30A application is inconsequential. [20] To succeed in its condonation application, LNG Scientific will have to provide a full explanation for the delay and show that it has prospects of success on appeal. In its written submissions, LNG Scientific simply states that its notice of appeal was only late by 19 days.
- [21] LNG Scientific seeks to appeal a judgment dealing with an issue in respect of which the Tribunal exercised a discretion in the wide sense. There is no reasonable prospect of an appeal court holding that in dismissing LNG's application to compel, and by ordering that

the Applicants provide the record of the impugned decision in terms of Tribunal Rule 17(4) read with Uniform Rules 35(13), (1) and (2), the Tribunal did not exercise the discretion conferred on it by Tribunal Rule 28(1) judicially or committed any of the other irregularities which permit an appeal court to interfere.

[22] Even if the Full Court upholds the appeal in the interests of justice as argued on behalf of LNG Scientific, for the purpose of the pending review application, the appeal will not have a practical effect. LNG Scientific is in possession of the record it seeks the Full Court to order the applicants to file in terms of Uniform Rule 53(1) as the applicants have discovered it in compliance with the Tribunal's June 2022 judgment. It is not its case that the record is inadequate.

The appeal relates to an interlocutory issue. It is unclear how the dictum in *Mamadi and Another v Premier of Limpopo Province and Others*[4] on which LNG Scientific relies on will yield a different practical outcome on appeal. Worse so, as matters stand, there is no proper appeal pending before the Full Court.

[23] In the premises, the applicants' request for directives for the further conduct of the review application to be issued is granted.

[24] The following directives are issued:

1. The respondent shall deliver its answering affidavit, if any, by 6 March 2023.
2. The applicants shall deliver their replying affidavit by 24 March 2023.
3. The applicants shall deliver their heads of argument by 7 April 2023.
4. The respondent shall deliver its heads of argument by 21 April 2023.
5. The registrar is directed to arrange a with the parties a date of hearing in the second term 2022.

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: Not applicable. Application determined on written submissions. Last date for filing submissions: 18 November 2022

Date of judgment: 3 February 2023

Mode of delivery: this Judgement was circulated to the parties' legal representatives by email, released to SAFLII and uploaded to Caselines at 4pm on 03 February 2023.

[1] Act 10 of 2013.

[2] Act 74 of 1996.

[3]

[2021] ZAGPHPHC 56 (15 February 2021) paragraphs 19 and 25 to 26.

[4] [2022] ZACC 26.

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Prepared on 8 October 2026 · Esheria