

SOUTH AFRICA / JUDGMENT

Special Investigating Unit and Another v Ndlovu and Others (GP 19/2021) [2023] ZAST 2 (31 January 2023) [2023] ZAST 2

COURT
Special Tribunal

BEFORE
L.T Modiba

CASE / FILE NUMBER
GP 19/2021

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IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE SPECIAL
INVESTIGATING UNITS AND

SPECIAL TRIBUNALS ACT 74 OF 1996

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: GP 19/2021

In the matter between:

SPECIAL INVESTIGATING UNIT First Applicant NATIONAL HEALTH LABORATORY SERVICE
Second Applicant And THABISO HAMILTON NDLOVU First Respondent ZAISAN KAIHATSU
(PTY) LTD Second Respondent REGISTRAR OF DEEDS, PRETORIA Third Respondent BUGATTI
SECURITY SERVICES AND PROJECTS (PTY) LTD Fourth Respondent VICTOR NKHWASHU
ATTORNEYS INC Fifth Respondent ZAHEER CASSIM NO Sixth Respondent COMMISSIONER OF
THE SOUTH AFRICAN REVENUE SERVICES Seventh Respondent AKANNII TRADING AND
PROJECTS (PTY) LTD Eighth Respondent HAMILTONN HOLDINGS (PTY) LTD Ninth Respondent
HAMILTONN PROJECTS CC Tenth Respondent MOK PLUS ONE (PTY) LTD Eleventh Respondent
ABOMPETHA (PTY) LTD Twelfth Respondent FELIHAM (PTY) LTD Thirteenth Respondent
JORITANS LOGISTICS (PTY) LTD Fourteenth Respondent PERSTO (PTY) LTD Fifteenth
Respondent KGODUMO MOKONE TRADING ENTERPRISE (PTY) LTD Sixteenth Respondent

REASONS

FOR THE ORDER

INTRODUCTION

[1] On 23 August 2022, I granted the order below with reasons to follow:

“HAVING read and considered the papers filed of record, it is hereby ordered that:

1. The forms, service and ordinary time periods provided for in the Special Tribunal Rules are dispensed with and the matter is dealt with as one of urgency in terms of Rule 12.
2. The applicants are authorised to take steps contemplated in paragraphs 6.1, 6.2, 6.3, 6.3.2 and 6.3.3 of the Special Tribunal’s order of 7 June 2022 under case number GP 19/2021 (“the Special Tribunal’s order”) to the extent necessary to obtain possession, control and access the forfeited assets listed in paragraph 5 of the Special Tribunal’s order and to preserve the assets pending finalisation of the application dated 28 June 2022 by the first, ninth, tenth and thirteenth respondents for leave to appeal and pending finalisation of any further application for leave to appeal or appeal to any other court.
3. This order is only granted for the purpose specified in paragraph 2 above and does not authorise the curator bonis to take ownership of the forfeited assets on behalf of the State and to sell them as provided for in paragraph 6 of the Special Tribunal’s order pending finalisation of the application dated 28 June 2022 by the first, ninth, tenth and thirteenth respondents for leave to appeal and pending finalisation of any further application for leave to appeal or appeal to any other court.
4. The curator bonis shall invest and preserve the proceeds of the rentals collected in terms of paragraph 6.3.3 of the Special Tribunal’s order in an interest bearing Trust Account pending finalisation of the application dated 28 June 2022 by the first, ninth, tenth and thirteenth respondents for leave to appeal and pending finalisation of any further application for leave to appeal or appeal to any other court when such funds shall, unless otherwise directed by the court be dealt with in terms of paragraph 5 of the Special Tribunal’s order.
5. The Special Tribunal’s order is declared to be immediately operative and executable to the extent necessary to give effect to paragraph 2 to 4 above.
6. The applicants’ costs must be paid by the first and ninth respondents, including the costs of two counsel.
7. Reasons for the order shall be furnished in due course.”

[2] I set out reasons for the orders below. For convenience, I refer to the above order as the s18(3) order. Unless otherwise specified, in these reasons, I reference all other orders by their dates e.g., “the 7 June order”.

- [3] The Special Investigation Unit (“SUI”) and the National Health Laboratory Service (“NHLS”) (“the applicants”) jointly applied for an order in terms of s18(3) of the Superior Court’s Act[1] to execute part of the order I granted in their favour on 7 June 2022 pending the final determination of the application for leave to appeal the 7 June order brought by Hamilton Ndlovu (“Mr Ndlovu”) and other respondents (“the Ndlovu respondents”) on 28 June 2022. The Ndlovu respondents oppose the application.
- [4] With the parties’ agreement, I determined this application on the basis of the papers filed. It is important to mention that when I granted the s18(3) order, I was yet to determine the application for leave to appeal. I dismissed it on 7 September 2022 on the basis that the Tribunal lacks jurisdiction over it since, in terms of s8(7) of the Special Investigating Unit and Special Tribunal’s Act[2] (“the SIU Act”), the Ndlovu respondents enjoy the automatic right to appeal to the High Court with jurisdiction.
- [5] The applicants contended that the 7 June order was suspended as a consequence of the application for leave to appeal. They sought the s18(3) order on the basis that it would preserve the status quo that prevailed prior to 7 June 2022; they would suffer irreparable harm if the Ndlovu respondents retained possession and control of the preserved assets; the Ndlovu respondents have no prospect of success on appeal and the application is simply a delaying tactic.
- [6] The Ndlovu respondents resisted the application on the basis that the first preservation order was granted on 18 August 2021. It is not the applicants’ case that the preservation orders did not serve their intended purpose and that the applicants have suffered harm as a result thereof. The section 18(3) order sought by the applicants will give effect to the forfeiture of the preserved assets while the dispute between the parties is pending. The SIU Act does not provide for the forfeiture of assets in pending cases. On the authority in *Ledla Structural Development (Pty) Ltd v SIU*[3] (“Ledla”), the Superior Courts Act does not apply in Tribunal matters.
- [7] Having regard to the applicants’ basis for the application and the Ndlovu respondents’ grounds of opposition, the following issues arose for determination:
- 7.1 the status quo prior to 7 June 2022;
 - 7.2 whether the applicants would suffer irreparable harm if the s18(3) order was not granted and the prospects of success on appeal;
 - 7.3 prospects of success on appeal;
 - 7.4 the application of the Superior Courts Act in Tribunal matters.
- [8] I set out reasons for the s18(3) order below with reference to the above issues.

THE STATUS QUO PRIOR TO 7 JUNE 2022

- [9] On 18 August 2021, the SIU sought and was granted an order preserving four properties registered in favour of the second respondent Zaisan Kaihatsu (Pty) Ltd (“Zaisan”) and funds the Fifth Respondent Victor Nkhwashu Attorneys Inc held in trust on behalf of several Ndlovu respondents.
- [10] On 4 October 2021, the applicants sought and were granted a second preservation order to preserve Scania trucks owned by the eighth respondent Akanni Trading and Projects (Pty) Ltd (“Akanni”) on the basis that they were allegedly acquired with proceeds of unlawful activities derived from the impugned tenders.
- [11] On 03 February 2022, the applicants sought and were granted a third preservation order joining the ninth to thirteenth respondents to the application that led to the granting of the 18 August order and supplementing the latter order by interdicting the Ndlovu respondents from dealing in any manner with funds and the property the seventh respondent, the South African Revenue Service (“SARS”) preserved under the order granted by the Gauteng Division of the High Court under case number 2020/35696 (“the SARS order”). The 3 February order also ordered SARS to pay to the applicants or a curator bonis appointed by them any funds and hand over any property remaining under the SARS order after the Ndlovu respondents’ tax liability has been satisfied to satisfy the judgment debt that arise from any order for forfeiture granted in terms of the 7 June order.
- [12] The preservation orders also authorise the SIU to appoint a curator bonis to take steps to preserve assets that are subject to the respective preservation orders. The preservation orders expressly apply pending the final determination of the main application.
- [13] The preservation orders addressed above were granted ex parte. The cited respondents could have the preservation orders reconsidered in terms of Tribunal Rule 12(9). None of them did.
- [14] In October 2021, the applicants brought the main application. Several Ndlovu respondents opposed it. The application resulted in the 7 June order being granted. The applicants contend that in terms of section 18(1) of the Superior Court’s Act, the application for leave to appeal automatically suspends the execution of the 7 June order. It is for this reason that the applicants brought the application in terms of s18(3) for leave to execute the specified parts of the 7 June order notwithstanding the application for leave to appeal. The Ndlovu respondents agree that the application for leave to appeal suspended the 7 June order. However, they rely on a different legal basis. They contend that on the authority in *Ledla*, the Superior Courts Act does not apply in Tribunal matters.
- [15] The preservation orders were prevailing when the 7 June order was granted. They are not amended by the 7 June order. The 7 June order disposed of the preserved assets by way of a forfeiture order. Since the 7 June order was subsequently appealed against, it was automatically suspended when the application for leave to appeal was filed. The preservation orders remained operative and are not in any way disturbed by the application for leave to appeal. Therefore, the assets preserved in terms of the preservation orders

remained preserved. The s18(3) order seeks to entrench the status quo that prevailed since the preservation orders were granted.

WHETHER THE APPLICANTS WOULD SUFFER IRREPARABLE HARM IF THE S18(3) ORDER WAS NOT GRANTED AND PROSPECTS OF SUCCESS ON APPEAL

- [16] The applicants contended that they would suffer irreparable harm if the s18(3) order was not granted and the appeal has no prospects of success. The respondents contended that the preserved immovable assets remained in their possession since the preservation orders were granted, there had not been any change in circumstances, the applicants' contention that they would suffer irreparable harm if the s18(3) order was not granted lacked a factual basis. The Ndlovu respondents further contended that if granted, to their prejudice, the s18(3) order would authorise forfeiture of the preserved assets notwithstanding the pending appeal in respect of which they have good prospects of success.
- [17] The Ndlovu respondents miss the point. The s18(3) order does not authorise forfeiture of the preserved assets. Neither does it authorise the execution of the forfeiture injunction which forms part of the 7 June order. The forfeiture of the preserved assets as provided for in the 7 June order is suspended in terms of s18(1) pending appeal. Therefore, the applicants may not execute the forfeiture order pending appeal.
- [18] The Ndlovu respondents had not surrendered some of the assets subject to the preservation orders to the curator bonis. Assets yet to be entrusted to the curator bonis are four immovable properties owned by Zaisan and Scania trucks owned by Akanni. The SIU had not been able to trace these assets. As a result, the Ndlovu respondents were frustrating the very purpose of the preservation orders. They were in contempt of the relevant preservation orders and did not stand before this Tribunal with clean hands.
- [19] The purpose of the preservation orders is to preserve specific assets belonging to several Ndlovu respondents to protect them against damage or loss of value pending their final forfeiture and to appoint a curator bonis to give effect to the preservation orders. The preservation orders will endure pending final determination of the review application. The Ndlovu respondents have no legal basis to resist the preserved assets being placed in the custody and control of the curator bonis.
- [20] The preservation orders were granted because the applicants established prima facie that the preserved assets were acquired from fraudulent tenders and were therefore proceeds of unlawful activities. Very serious allegations of procurement fraud are made against Mr Ndlovu and several Ndlovu respondents in the review application. They did not dispute the allegations. They mainly disputed the applicants' entitlement to a forfeiture order. They contended for the right to a statement and debatement of account to establish the profits the Ndlovu respondents derived from the impugned tenders. They contended that they could not prove their expenses because the relevant documents have been seized as part of the investigation conducted by the South African Police Services' Directorate for Priority Crime Investigation.

- [21] The dispute regarding the delivery or non-delivery of the procured items was determined in favour of the Ndlovu respondents. Hence, the costs associated with the acquisition of these items were deducted from the amount the relevant Ndlovu respondents were ordered to forfeit to the applicants in terms of the 7 June order.
- [22] Since Mr Ndlovu has not disputed the allegation that 90% of the proceeds of the tender were for his personal benefit and not spent to acquire the procured items, the pending appeal may lack a practical effect. Even if the court of appeal finds that the Ndlovu respondents are entitled to a statement and debatement of account, there are no prospects that the appeal court will allow him to retain the benefits he derived from the fraudulent tenders as such benefits allegedly constitute proceeds of unlawful activities.
- [23] If Mr Ndlovu is allowed to file a statement and debatement of account and succeeds in proving that he incurred additional expenses which the applicants did not take into account when determining the amount to be forfeited, Mr Ndlovu will be entitled to retain such amounts. To that extent, some of the preserved funds will be paid back to him. However, on the facts before the Tribunal, this is highly improbable. The preserved assets represent R40 million of the benefits derived from the fraudulent tenders. Mr Ndlovu has not accounted for approximately R54 million he and some of the Ndlovu respondents received from the impugned tenders. It is highly improbable that he would prove input expenses in this amount. It is rather more probable that he would need to pay back to the applicants substantially more than the preserved assets.
- [24] Further, Mr Ndlovu's failure to provide a version regarding the R54 million the applicants were not able to trace demonstrates his propensity to conceal or dissipate large sums of money in a short space of time. So is the fact that the four preserved immovable properties and the Scania trucks have been registered in the name of third parties and he had failed to comply with the preservation orders. These circumstances display bad faith on his part. If he retained control of the preserved assets, it is highly probable that Mr Ndlovu would continue to dissipate and conceal the assets, thus frustrating the applicants' efforts to recover the maximum of the monies lost as a result of the alleged fraudulent tenders. These circumstances justify viewing Mr Ndlovu's conduct with suspicion and caution.
- [25] The fact that the Tribunal's judicial review powers in terms of section 172 of the Constitution are currently impugned before the Constitutional Court is of no moment. This does not entitle the Ndlovu respondents to remain in contempt of the preservation orders.
- [26] Therefore, the Ndlovu respondents would not suffer harm if the application is granted. They remain restricted from dealing with, accessing, controlling and/ or disposing of the preserved assets including cash held in bank accounts just as they were before the 7 June order was granted. They are not prevented from using the preserved immovable properties.

[27] Since the Ndlovu respondents have not disputed the applicants' version that the preserved assets are proceeds of unlawful activities, it is not in the interest of justice that they are allowed to retain possession of the preserved assets.

WHETHER THE SUPERIOR COURTS ACT APPLIES IN THE TRIBUNAL

[28] The Ndlovu respondents contend, on the authority in *Ledla*, that it does not. The applicants contend that it does.

[29] In *Ledla*, s8(2) of the SIU Act was held to be authority for the Tribunal's power to grant the immediate execution an order. There, the applicants did not rely on s2(3) of the Superior Courts Act. Here, the applicants expressly opted to rely on s2(3) of

the Superior Courts Act to contend for an order in terms of s18(3).

[30] As argued by the applicants:

30.1 on the authority in *Special Investigating Unit v Nadasen and Another*[4] ("Nadasen") properly interpreted, the Tribunal is a court of a status similar to the High Court;

30.2 s1 of the Superior Courts Act defines a Superior Court to include any court of a status similar to the High Court;

30.3 s2(3) of the Superior Courts Act provides that its provisions are complimentary to any specific legislation pertaining to courts to which that Act applies but in the event of a conflict between this Act and such legislation, such legislation much prevails;

30.4 the present facts do not give rise to any conflict between the Superior Courts Act and the SIU Act.

[31] I find that the applicants are entitled to seek relief in terms of s18(3) of the Superior Courts Act.

URGENCY

[32] The Ndlovu respondents' contention that the application is not urgent lacks merit. They have not tendered in the present application to comply with the preservation orders by surrendering to the curator bonis control of the assets that they are yet to entrust to him. The intended appeal might take more than two years to dispose of, particularly if the Ndlovu respondents opt to exhaust the appellate processes at their disposal. In that time, the preserved assets will be vulnerable to disposal through loss or damage.

[33] These circumstances are exceptional, justifying the granting of the application.

CONCLUSION

[34] The applicants made out a proper case for the granting of the order in terms of s18(3) of the Superior Courts Act.

JUDGE L.T MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the applicants: Adv. B Roux SC, assisted by Adv. I Currie and Adv. J Singh.

Attorney for the Applicants: Mr R Moodley, Cliffe Dekker Hofmeyr Inc.

Counsel for the Respondents: Adv. Mphaga assisted by, SC Adv. ME Manala

Attorney for the Respondents: Mr T Manala, Manala & CO Incorporated

Date of hearing: Not applicable. Application determined on written submissions.

Mode of delivery: these reasons were circulated to the parties' legal representatives by email, released to SAFLII and uploaded to Caselines at 2pm on 31 January 2023.

[1] Act no. 10 of 2013.

[2] Act 74 of 1996.

[3] [Case no. GP 07/2020] 17/23 February 2022

[4] 2002 (4) SA 605 (SCA).

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Prepared on 12 October 2026 · Esheria