



CONSTITUTIONAL COURT OF SOUTH AFRICA

Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit

CCT 319/21

Hearing date: 24 May 2022

Date of judgment: 10 March 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 10 March 2023 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order of the Special Tribunal. The Special Tribunal reviewed and set aside an unlawful contract and issued a final interdict and a forfeiture order in respect of monies held in terms of a preservation order against Ledla Structural Development (Pty) Ltd, Ms Rhulani Lehong, Mr Kgodisho Norman Lehong (applicants), other individuals and entities.

In December 2019, the world was introduced to COVID-19. The first confirmed case of COVID -19 in South Africa was reported on 5 March 2020. The South African government decided to take active measures to prevent the further spread of the coronavirus and, as far as possible, mitigate its effects. One such measure was the procurement of personal protective equipment (PPE) by the various provincial departments of health. On 27 March 2020, the Chief Operations Officer of the Gauteng Department of Health (Department) presented a report that revealed a PPE shortage to the value of R1.7 billion for the entire Department. A decision was taken to procure PPE stock. The Chief Financial Officer in the Department, Ms Lehloenya, was appointed as the chairperson of the Bid Adjudication Committee, which was tasked with the procurement of PPE. Owing to reasons of exigency, the Department authorised a deviation from compliance with the normal tender processes in that there was no competitive bidding.

The Department received a bid to supply masks, disposable bags and sanitisers from Royal Bhaca (Pty) Ltd (Royal Bhaca), whose sole director was Mr Thandisizwe Diko – a close family friend to Dr Bandile Masuku, the then Member of the Executive Council for Health in Gauteng. Mr Diko secured two contracts (PPE contracts) with the Department

to the value of R125 million. When the relationship between Mr Diko and Dr Masuku became public knowledge, Royal Bhaca was substituted with Ledla.

On 13 April 2020, Ledla submitted a quotation for PPE items amounting to R139 million, which was alleged to have been created by Mr Diko and modified by Ms Lehloenya. The quotation was accepted by Ms Lehloenya on 20 April 2020, and an amended letter of commitment was sent to Mr Diko. On 30 April 2020, Ms Lehloenya sent an email to Mr Diko, terminating the contract with Royal Bhaca and an email to Ledla containing the amended letter of commitment. Ms Lehloenya resigned on 1 May 2020.

On 3 August 2020, the Department made a deposit of R38.7 million into the bank account of Ledla. Between 3 and 5 August 2020, the funds were disposed of through various transactions and paid to various entities and individuals.

Due to several complaints regarding allegations of corruption in the procurement of PPE in the country, the President of the Republic of South Africa issued a proclamation in terms of the Special Investigating Units and Special Tribunals Act (SIU Act). The proclamation authorised the Special Investigating Unit (SIU), to investigate maladministration, corruption and breaches of procurement procedure relating to COVID-19, and to take remedial action. The SIU conducted investigations and found that, in so far as the Royal Bhaca/Ledla contract was concerned, Ms Lehloenya was central to the conclusion of the unlawful contract with Ledla and the authorisation of the payment of R38.7 million to Ledla.

In August 2020, the SIU filed an ex parte urgent application in the Special Tribunal for the setting aside of the contract awarded to Ledla. It also sought a preservation order against the various bank accounts to which the R38.7 million had been deposited and an interdict against the pension funds which held Ms Lehloenya's pension and retirement benefits. The Special Tribunal granted the interim order and issued a rule nisi. On the return day, Ledla opposed the granting of the final relief sought on the basis that: (a) the Special Tribunal is not a court and does not have review powers to grant the orders sought; (b) the SIU lacked the necessary legal standing to prosecute the claim; (c) the funds had mixed with other monies in the bank and thus became the property of the bank (*commixtio*); and (d) it sought the proper interpretation of rule 26 of the Rules for the Conduct of Proceedings in the Special Tribunals. Ledla also denied the allegations against it.

The Special Tribunal held that it is a court of its own kind and that the evidence before it demonstrated that Ms Pino (who had signed the letter of commitment for the two PPE contracts awarded to Ledla by the Department) did not have requisite authority to sign the letters of commitment. It further held that Royal Bhaca and Ledla were connected through the substitution, and that their directors worked with the Department's officials to inflate the quotations and conclude the contracts. The Special Tribunal elucidated that the evidence before it implicated Mr Diko and Ms Lehloenya. It held that the contracts awarded to Royal Bhaca and Ledla were unlawful and set them aside. The amount of R38.7 million, which was subject to a preservation order, was declared forfeit to the state. An interdict against Ms Lehloenya's pension funds and benefits was granted.

The applicants applied for leave to appeal the Special Tribunal's decision. That application was dismissed. The applicants unsuccessfully petitioned the Supreme Court of Appeal. The applicants thereafter approached the Constitutional Court for leave to appeal.

In the Constitutional Court, the applicants submitted that the Constitutional Court's jurisdiction was engaged as the matter concerned the interpretation and application of section 217 of the Constitution, the right to a fair trial and the scope of the Special Tribunal's powers to adjudicate judicial reviews and make forfeiture orders. The applicants also submitted that it was in the interests of justice for the Court to hear the matter as there were reasonable prospects of success. The applicants argued that the Special Tribunal is not a court of law and, consequently, the review proceedings and the forfeiture orders were a nullity. The applicants further submitted that, since the Special Tribunal is not a court, it does not have the authority to preside over judicial reviews, neither under the principle of legality nor the Promotion of Administrative Justice Act (PAJA). The applicants contended that the Special Tribunal erred in ruling that it had the competence to grant a forfeiture order as it was not empowered to do so by the SIU Regulations or the Special Tribunal Rules. The applicants also submitted that the Special Tribunal erred in its factual findings. Ultimately, the applicants sought that the appeal be upheld, and the orders of the Special Tribunal be set aside with costs.

The SIU submitted that leave to appeal should be refused because the applicants do not have a material defence. The SIU also submitted that the applicants had raised novel issues and arguments in their written submissions before the Constitutional Court, including their challenge to the status and jurisdiction of the Special Tribunal, as these had not been raised in the Special Tribunal proceedings or in the application filed in the Supreme Court of Appeal. Regarding the status of the Special Tribunal, the SIU submitted that the Special Tribunal's power to adjudicate judicial reviews and to grant forfeiture orders is not dependent on its status as a court, but rather on an accurate interpretation of the powers vested in the Special Tribunal by the SIU Act and the SIU Regulations. The SIU further submitted that the Special Tribunal is a court by virtue of its functions and composition; and the fact that it does not bear the name "court" has no bearing on its characterisation. The SIU submitted that the Special Tribunal is empowered to adjudicate civil proceedings, which includes judicial review proceedings, in terms of section 8(2) of the Act. The SIU also argued that the Special Tribunal is empowered by rule 24 of the 2019 Special Tribunal Rules to make preservation and forfeiture orders. Lastly, the SIU supported the Special Tribunal's factual findings and, sought that the application for leave to appeal be dismissed with costs.

In a unanimous judgment penned by Mhlantla J, the Constitutional Court held that this matter engages both its constitutional and extended jurisdiction. It reasoned that this matter is primarily centred on the determination of the scope and content of the Special Tribunal's status, powers and functions involving, to some extent, the interpretation of section 8 of the SIU Act. It further held that inquiry into the status, powers and functions of the Special Tribunal raises an arguable point of law of general public importance, as envisaged in section 167(3)(b)(ii) of the Constitution. In addition, the Court said that on this ground,

it is also called upon to provide clarity on the competence of the Special Tribunal to adjudicate reviews and make forfeiture orders. The Court held that the questions before it had greater implications that transcend the interests of the litigants before it and therefore the Constitutional Court granted leave.

In addressing the preliminary issue raised by the respondent that the applicants had raised questions regarding the status and powers of the Special Tribunal for the first time in this Court, the Court held that these issues were squarely pleaded by the applicants and considered by the Special Tribunal.

On the question whether the Special Tribunal is a court, the Court held that a plain reading of section 166(e) of the Constitution reveals that it applies to a court established or recognised in terms of an Act of Parliament. It also includes a court of similar status to the High Court or the Magistrates' Courts. It does not apply to a tribunal. The Constitutional Court held that section 2(2) of the SIU Act makes clear it that only the President of the Republic of South Africa is empowered to refer matters to the SIU or to establish a Special Investigating Unit in order to investigate a matter. These features are not those of a court of law. The Special Tribunal's jurisdiction is also restricted to civil proceedings that arise from the investigations and referral by the SIU, in terms of section 2(2) of the SIU Act. This Court agreed that the presiding officer of the Special Tribunal can be a judge or retired judge. However, the other members of the Special Tribunal are not always judges. On this score, the Court concluded that the Special Tribunal is not a court.

The Court also considered the question whether the Special Tribunal has powers to adjudicate reviews under PAJA or legality reviews. This Court held that the definition of a tribunal in terms of section 1 read with section 6(1) of PAJA must be read to mean that the Special Tribunal has no power to adjudicate a review of administrative action under PAJA as it has not been established by national legislation for purposes of judicially reviewing administrative action in terms of PAJA.

With regard to legality review, this Court considered its recent decision in *Competition Commission of South Africa v Group Five* [2022] ZACC 36 (*Group Five*). It held that this matter was distinguishable from *Group Five* in that although both the Special Tribunal and the Competition Tribunal are creatures of statute, the Special Tribunal has broad remedial powers in terms of section 8 of the SIU Act. Furthermore, the preamble of the SIU Act makes it clear in the objectives of the Act that its legislative intention was to cast a wide net over the scope of the proceedings the Special Tribunal is empowered to adjudicate upon. Therefore, a legality review is not excluded from the ambit of the jurisdiction of the Special Tribunal.

The Constitutional Court refused to interpret rule 26 of the Special Rules as it held that what the applicants sought was in substance a constitutionality challenge. This Court also declined to entertain the argument on the factual findings of the Special Tribunal on the basis that the factual disputes were divorced from the primary constitutional issue and that there was no basis for this Court to consider them.

In the result, the Court concluded that the Special Tribunal is not a court. However, it has the power to adjudicate legality reviews. The Constitutional Court granted leave to appeal but dismissed the appeal with costs, including costs of two counsel.