




IN THE SPECIAL TRIBUNAL
REPUBLIC OF SOUTH AFRICA
(HELD AT BOOYSENS MAGISTRATES' COURT, JOHANNESBURG)
CASE NO: GP/03/2020

(1)	REPORTABLE: <input checked="" type="checkbox"/> / NO
(2)	OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/> / NO
(3)	REVISED.
25/5/2021	
DATE	SIGNATURE

In the matter between

LINYENGA HERBERT MSAGALA

First Applicant

BONOLO MATHULO MSAGALA

Second Applicant

LINYENGA HERBERT MSAGALA N.O.
(in his capacity as Trustee of the
Msagala Investment Trust)

Third Applicant

ROBERTO JORGE MENDOCA VELOSA N.O.
(in his capacity as Trustee of the
Msagala Investment Trust)

Fourth Applicant

LINYENGA HERBERT MSAGALA N.O.
(in his capacity as Trustee of the Msagala
Residence Trust)

Fifth Applicant

ROBERTO JORGE MENDOCA VELOSA N.O.

Sixth Applicant

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	
SPECIAL TRIBUNAL	
CNR AMANDA AVENUE & RIFLE RANGE ROAD, OAKDEN	
	7021-05-25
C/A No: One	
REGISTRAR	

[Signature]

(in his capacity as Trustee of the Msagala Residence Trust)

LINYENGA HERBERT MSAGALA N.O.
(in his capacity as Trustee of the Msagala Family Trust)

Seventh Applicant

ROBERTO JORGE MENDOCA VELOSA N.O.
(in his capacity as Trustee of the Msagala Family Trust)

Eighth Applicant

LINYENGA HERBERT MSAGALA N.O.
(in his capacity as Trustee of the Msagala Share Trust)

Ninth Applicant

ROBERTO JORGE MENDOCA VELOSA N.O.
(in his capacity as Trustee of the Msagala Share Trust)

Tenth Applicant

And

SPECIAL INVESTIGATION UNIT

Respondent

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email and the date and time for hand down is deemed to be 10h00, 25 May 2021.

JUDGMENT

MOTHLE J

Introduction

[1] This is an application for leave to appeal, launched by Mr. Linyenga Hebert Msagala and his Trusts against the judgment and orders of the Special Tribunal ("Tribunal") dated 17 November 2020. The Special Investigating Unit ("SIU") opposed the application. In this judgment, the parties will be referred to as in the main application. Mr. Msagala and his Trusts will be referred to jointly as the respondents and the SIU as the applicant.

Background

[2] In this case, the SIU investigated a project conducted by Transnet known as the New-Multi Product Pipeline Project, established for the construction of a pipeline for the high pressure transportation of liquid petroleum products from Durban to Heidelberg. This project was managed by Mr. Linyenga Herbert Msagala ("Mr. Msagala"), the first respondent, who at that time was employed by Transnet as the Group Chief Executive: Transnet Capital Projects. It was during his incumbency as Group Chief Executive, that in 2015, IGS Consulting Engineering CC (IGS), whose sole member was Mr. Sipho Sithole ("Mr. Sithole"), was awarded a service contract in the project, and additional contracts at a later stage.

[3] On 30 July 2020, after conducting the investigation, the SIU and Transnet lodged an urgent *ex parte* application before the Tribunal. The

applicants sought as relief, an order by the Tribunal to preserve or freeze certain assets belonging to Mr. Msagala and five Trusts in which he served as a trustee, and were directly under his control. The Trusts were cited and represented by the trustees, as the third to tenth respondents. Further assets sought to be preserved included those registered in the name of Mr. Msagala's daughter, Ms. Bonolo Mathulo Msagala, the second respondent.

[4] The applicants further sought an order directing that should the Tribunal find any assets belonging to the respondents to be proceeds of unlawful activity, such assets should be forfeit to the State in terms of Rule 26 of the Tribunal Rules. To that end, the Tribunal should appoint a *curator bonis* to report on the valuation of the assets. The applicants further requested an interdict, prohibiting the Transnet Pension Fund from paying any pension due to Mr. Msagala, pending the action proceedings to be instituted against him. At the time of the urgent application, Mr. Msagala was no longer in the employment of Transnet.

[5] In support of the application, the applicants in the founding affidavit alleged that between January 2015 and December 2016 (the two-year period), and during his employment with Transnet, Mr Msagala, directly and through his Msagala Investment Trust, received various cash payments of amounts in excess of R18,000,000.00 from IGS and Mr. Sithole.

[6] The applicants allege further that the cash payments received by Mr. Msagala and his Trust occurred after IGS had contracted with Transnet as a service provider in 2015. Thus the cash payments amounting in excess of R18,000,000.00 constituted "*secret profits made at the expense of Transnet, and paid as a corrupt bribe, gratification, kickbacks and/or improper benefits*". Consequently, by receiving these payments from an entity conducting business with Transnet, whilst being employed by the latter, Mr Msagala was involved in unlawful activities. The applicants further alleged that from the unlawful and

secret profits, the respondents acquired assets which included vehicles and residential properties, which were all proceeds of Unlawful activity as defined in Rule 3 of the Rules of the Tribunal.

[7] The Tribunal granted the application as an interim order, in the form of a *rule nisi*, calling upon the respondents on the return date, to show cause why the interim order should not be made a final order. Mr. Msagala, also acting on behalf of the second to the tenth respondents, opposed the application. In essence, Mr. Msagala denied that he or his Trusts received any payment from IGS and/or Mr. Sithole. He further alleged that neither he nor the Trusts were involved in any unlawful activity, and that the assets he and the respondents had acquired were not proceeds of unlawful activity and as such, should not be declared forfeit to the State.

[8] Mr. Msagala alleged that in addition to his salary and bonuses he received from Transnet, the additional income he received during the two-year period, came from profits in the following businesses: the transport business; letting and hiring of tents and chairs for events; farming; purchasing vehicles at an auction, repairing and re-selling them; purchasing and renovating residential properties for lease; consulting; and other businesses that were not identified. Mr. Msagala also alleged that an arbitration had found him not guilty on various charges arising from these allegations.

[9] The Tribunal found, on the conspectus of the evidence and on a balance of probabilities, that there was merit in the SIU case and granted the orders sought, including the interim interdict.

[10] Section 17(1)(a) and (b) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the Judge or Judges concerned are of the opinion that:

- ‘(a) (i) The appeal **would** have a reasonable prospect of success; or
- (ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’ [emphasis added]

[11] It is trite that prior to the enactment of the Superior Courts Act, the common law test applicable in applications for leave to appeal was that the applicant must establish, on a balance of probabilities, that the envisaged appeal “*might*” have a reasonable prospect of success.¹ As a matter of fact some counsel still premise their submissions, couched in these terms.

[12] Section 17 of the Superior Courts Act amended the common law test. The new test as provided for in section 17 quoted above, replaces the word “*might*” in the common law test with the word “*would*”. It is thus clear that the test as outlined by statute raised the bar and it is thus more stringent.

[13] In *Mont Chevaut Trust (IT 28/2012) v Tina Goosen & 18 others LLC 14 R / 2014*, Bertelsmann J at paragraph 6 wrote:

‘It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Conwright & others* 1985 (2) SA 342 (T) at 343H. The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.’

¹ *Van Heerden v Conwright and others* 1985 (2) 242 TPD; *Roman Catholic Church Klerksdorp Diocese v Southern Life Association Limited* 1992 (2) SA 807 AD.

[14] The Tribunal found overwhelming evidence that the first applicant, during his employment with Transnet was involved in unlawful activity, by accepting money directly and indirectly from Mr. Sithole and his company IGS, a Transnet service provider, in a corrupt manner. He accepted as gratification or bribe, direct cash payments and indirect payments made on his behalf, and thus found himself in breach of the provisions of section 2(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996, read with the Regulations published under Proclamation R1263 in the Government Gazette² and the Rules of the Tribunal; section 17 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 as well as sections 75 and 76 of the Companies Act 71 of 2008. The gratifications and bribes were paid into his bank account and the bank accounts of the Trust applicants.

[15] The Tribunal ordered that the money profited by the applicants from the corrupt activities, be forfeit to the State as proceeds of unlawful activity. In attempting to explain the payments he received, Mr. Msagala claimed to have conducted numerous businesses that he attributed as the source of his income. This kind of defence was firmly rejected by Makgoba JP in *National Director of Public Prosecutions v Maila*³, where a person alleged to be dealing in drugs, was found in possession of large amounts of cash. He claimed that the cash was from a taxi business he was operating.⁴

² Special Investigating Units and Special Tribunals Act 74 of 1996, GN R1263, 26 September 2019.

³ *National Director of Public Prosecutions v Maila* [2018] ZALMPPHC 70 at paras 24 and 25.

⁴ See also *National Director of Public Prosecutions v Matika* [2020] ZAECGHC; NDPP and another v Mohamed N.O. and others 2003 (5) BCLR 476 (CC); *Muhunram v National Director of Public Prosecutions* (Law Review Project as amicus curiae) (2007) ZACC 4 (CC); *National Director of Public Prosecutions v Bothe N.O and another* 2020 (1) SACR 599 (CC) and recently *Bobroff and another v The National Director of Public Prosecutions* [2021] ZASCA 56.

[16] The SIU alleged and claimed that Mr. Msagala received an amount in excess of R18,460,020.02. The curator appointed by the Tribunal, provided a report which concluded that the amount received was just in excess of R15m. The tribunal granted an order for the amount as evaluated by the curator, but not exceeding R18,460,020.02.

[17] In their grounds of appeal, the applicants basically repeated the same grounds of defence and rehashed the same argument which the Tribunal had rejected in the judgment. The essence of the applicants' submission is that the Tribunal has erred in its findings and conclusions. To do no more than just contend that the Judge or Judges erred in their findings and conclusion on the evidence, as the applicants did in this application, does not come close to attaining the threshold of the test prescribed by section 17 of the Superior Courts Act.

[18] Thus for reasons stated in the judgment, I am not persuaded that leave to appeal in this case would have any prospects of success. The application for leave to appeal must therefore fail.

[19] In the premises I make the following order:

- (a) The application for leave to appeal the judgment and orders in this case is dismissed;
- (b) Mr. Msagala and his Trusts are ordered to pay the costs of the application, including the costs of the Special Investigation Unit's two counsel.

Judge SP Mothle

Judge of the High Court

Member of the Special Tribunal

Appearances

For the SIU:

Adv. PM Kennedy SC

Assisted by:

Adv. G Ngcangisa

Instructed by:

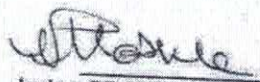
Bowman Gilfillan Attorneys

For Mr. Msagala and Trusts:

Adv. H Louw

Instructed by:

Snyman Attorneys



Judge SP Mothle

Judge of the High Court

Member of the Special Tribunal

Appearances

For the applicants:

Assisted by:

Instructed by:

Adv. PM Kennedy SC

Adv. G Ngcangisa

Bowman Gilfillan Attorneys

For the respondents:

Instructed by:

Adv. H Louw

Snyman Attorneys

