THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 405/2022

In the matter between:

MPHAPHULI CONSULTING (PTY) LTD	**APPELLANT**

and

SPECIAL INVESTIGATING UNIT	**FIRST RESPONDENT**
ADVOCATE JAN LEKHOA MOTHIBI	**SECOND RESPONDENT**
FETAKGOMO – GREATER TUBATSE MUNICIPALITY	**THIRD RESPONDENT**
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FOURTH RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICE	**FIFTH RESPONDENT**
MINISTER OF FINANCE	**SIXTH RESPONDENT**
MINISTER OF MINERAL RESOURCES AND ENERGY	**SEVENTH RESPONDENT**
ESKOM HOLDINGS SOC LIMITED	**EIGHTH RESPONDENT**
MEC: DEPARTMENT OF COOPERATIVE GOVERNANCE, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS, LIMPOPO PROVINCIAL GOVERNMENT	**NINTH RESPONDENT**

Neutral citation: *MPHAPHULI CONSULTING (PTY) LTD v SPECIAL INVESTIGATING UNIT and OTHERS* (Case no 405/2022) [2023] ZASCA 118 (29 August 2023)

Coram: PONNAN, MABINDLA-BOQWANA and WEINER JJA and KATHREE-SETILOANE and MALI AJJA

Heard: 29 August 2023

Delivered: 29 August 2023

Summary: Application for leave to appeal – dismissal of – no practical effect or result can be achieved in the case.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Muller J, sitting as court of first instance):
The application is dismissed with costs, including those of two counsel.

JUDGMENT

Ponnan JA (Mabindla-Boqwana and Weiner JJA and Kathree-Setiloane and Mali AJJA concurring):

[1] This is an application for leave to appeal and, if granted, the determination of the appeal itself. The two judges who considered the application referred it to oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013 (the Act). At the outset of the hearing of the matter, counsel was requested to present argument as to whether or not the matter fell to be dealt with in terms of s 16(2)*(a)*(i) of the Act, according to which this Court may dismiss an appeal where 'the issues are of such a nature that the decision sought will have no practical effect or result'.

[2] It is trite that courts should and ought not to decide issues purely for academic interest (*Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA)). Of its predecessor, s 21A of the Supreme Court Act 59 of 1959, this Court stated in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 7: The purpose and effect of s 21A has been explained in the judgment of Olivier JA in the case of *Premier, Provinsie Mpumalanga en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA). As is there stated the section is a reformulation of principles previously adopted in our courts in relation to appeals involving what were called abstract, academic or hypothetical questions.

[3] Whether we are confronted by such a question in this matter arises for decision against the following backdrop: On 29 August 2013, the applicant and the Greater Tubatse Municipality (the Municipality) concluded a contract for the delivery of electricity to households within the Municipality. On 1 August 2014, by way of Proclamation No R52, the President referred alleged maladministration within the Municipality to the Special Investigating Unit (SIU) for investigation and the possible institution of civil proceedings. Among the matters investigated by the SIU was the contract concluded between the Municipality and the applicant and the addenda thereto. The SIU delivered its report in September 2019. Prior thereto, on 24 August 2017, the SIU instituted an action in the Limpopo High Court (the high court) claiming payment of the sum of approximately R76 million from the applicant. That action is yet to be finalised.

[4] Some two years after delivery by the SIU of its report, the applicant applied to the high court for an order in the following terms:

'1. Reviewing and setting aside the report of the first respondent [the SIU] issued in September 2019 following its investigation that was authorised by the President of the Republic of South Africa in terms of Proclamation NO: R52 OF 2014, Gazette number 37884 dated 1 August 2014.

2. Declaring that the Investigation of the First Respondent conducted against the Applicant was unlawful as it fell outside the terms of reference and scope of the investigation under Proclamation NO: R52 OF 2014, Gazette number 37884 dated 1 August 2014.

3. Declaring all steps taken by all the Respondents following the report of the First Respondent issued under Proclamation NO: R52 OF 2014, Gazette number 37884 dated 1 August 2014 against the Applicant unlawful and set aside.

4 Ordering all the Respondents to stop all steps taken against the Applicant from the First Respondent's report issued under Proclamation NO: R52 OF 2014, Gazette number 37884 dated 1 August 2014.'

[5] At the hearing of the matter before Muller J in the high court, the applicant abandoned prayers 3 and 4. It also came to be accepted that the applicant was not entitled to seek to challenge the report in its entirety. Accordingly, in the event of the

appeal succeeding an order was sought that the 'report of the SIU, as it refers to the applicant, is found to be unlawful and set aside'. Leaving aside the fact that such an order was not the relief sought below and on account of its vagueness conduces to all kinds of confusion, as the high court recorded 'the opinions and views held by the SIU are not final or determinative'.

[6] The high court added:

'But, as previously stated civil proceedings were instituted by the applicant as well as the SIU, long before the report came into being. The decision to institute legal proceedings was only an initial step in a multi-staged process that followed the decision. Setting aside a section of the report which is applicable to the applicant will, in my view, not have any effect on the pending litigation.'

What the applicant's case boiled down to emerges from the following excerpt from the judgment:

'When counsel was confronted with the proposition that the order will have no practical effect counsel pointed out that the deponent to the founding affidavit is a businessman and that he as well as the business of the applicant inclusive of other business activities suffer as a result of the recommendation and contents of the report which is defamatory.'

[7] However, reputational harm was not the foundation for the relief sought before the high court. On that score, the closest that the application came to advancing such a ground was:

'I submit therefore that the findings . . . are not only unauthorised and biased but are for an ulterior purpose to destroy the business of the applicant . . .'.

Counsel was constrained to accept at the bar in this Court that this constituted the high-water mark of the applicant's case on the papers. In any event, the report has been in the public domain for some four years and to the extent that it was the cause of any reputational harm, setting it aside now can hardly right that wrong.

[8] In the result, no practical effect or result as contemplated by s 16(2)*(a)*(1) of the Act, can be achieved in this case. Consequently, the application falls to be dismissed with costs, including those of two counsel.

V M PONNAN
JUDGE OF APPEAL

Appearances

For the appellant:	FW Botes SC and I Kentridge
Instructed by:	Israel Maenetja Attorneys, Polokwane
	Fixane Attorneys, Bloemfontein.
For the first & second respondents:	V Soni SC and M Makoti
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Polokwane
	The State Attorney, Bloemfontein.