

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



CASE NO: 21441/20

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
30 July 2024	
DATE	SIGNATURE

In the matter between:

SIBONGISENI JEROME MTHEMBU

Applicant

And

SPECIAL INVESTIGATING UNIT

First Respondent

ESKOM HOLDINGS SOC LTD

Second Respondent

JUDGMENT: LEAVE TO APPEAL

LUKHAIMANE AJ

1. I granted the applicant's ("Mr Mthembu") application to review and set aside the first respondent's ("SIU") report as expressed by the SIU in its letter of 12

November 2019 to the second respondent ("Eskom"), with costs on a punitive scale. The report is titled "Investigation in terms of Proclamation No 11 of 2018 issued in terms of section 2(1) of the Special Investigating Units and Special Tribunals Act (Act 74 of 1996) and published in Government Gazette No 41561 dated 6 April 2018 into the affairs of Eskom Holdings SOC Limited: Possible Misconduct by Officials or Employees". The SIU seeks leave to appeal against the whole of my judgment and order.

2. In the notice of application for leave to appeal, the SIU sought leave to appeal to the Supreme Court of Appeal. From the application for leave to appeal, which was served and filed on 20 February 2023, the SIU relies on the following grounds for leave to appeal against my judgment:

- 2.1 The finding that the view expressed by the SIU in its letter dated 12 November 2019 to Eskom is reviewable. The view expressed by the SIU on the outcome of its investigation is not administrative in nature and thus not reviewable under PAJA or the principle of legality. In expressing its view on the outcome of its investigation, the SIU did not arrive at any decision. The views expressed are not final or determinative. Furthermore, the view on the investigations has no direct external legal effect on the rights of the applicant.

2.2 In misinterpreting section 5(7) of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("SIU Act"). Section 5(7) of the SIU Act provides that:

"Without limiting the provisions of section (5), if during the course of the investigation, any matter comes to the attention of the Head of the Special Investigating Unit, which in his or her opinion, justifies the institution of civil proceedings by a state institution against any person, he or she may bring such matter to the attention of the State Attorney or the state institution concerned, as the case may be."

2.3 In finding on paragraph 14 of the judgment that:

"It is not clear why the SIU seeks to rely on the provisions of section 5(7) of the SIU act in this matter. The section specifically deals with the institution of civil proceedings, ostensibly in the SIU activities, these would be aimed at recovering any losses that a state institution might have incurred as opposed to criminal charges. As aptly stated in Masuku "if it believes that it has discovered evidence which supports a civil claim it may institute a claim in the Special Tribunal or a court of law. In short, the SIU's opinion about any issue is not determinative nor final in any way." The SIU report does not indicate what these proceedings are if any and what they are aimed at. What it does is point to disciplinary proceedings, which do not rise to the level of civil proceedings ...

2.4 In misinterpreting the provisions of section 5(7) of the SIU Act in finding that the section specifically deals with the institution of civil proceedings and that in the SIU activities, that would be aimed at any losses that a state institution might

have incurred. The civil proceedings in the section includes disciplinary hearings.

- 2.5 Should have found that section 5(7) of the SIU Act empowers the SIU to investigate the issues uncovered in relation to the applicant and to express the views as contained in the letter dated 12 November 2019.
- 2.6 In finding that the SIU acted *ultra vires*. Wrongly found that the SIU acted outside of the empowering Proclamation and its own enabling legislation. According to the Acting Judge, the Proclamation limits the investigation into undisclosed and unauthorized interests to the contractors, suppliers or service providers bidding or doing work for Eskom and that the SIU conceded that the Proclamation does not deal with the situation of the applicant, hence its reliance on section 5(7) of the SIU Act.
- 2.7 Wrong in making the above findings in that the SIU made submissions that it acted in terms of Proclamation No 1 of 2018 as well as the provisions of the SIU Act. The SIU never conceded that the Proclamation was not applicable.
- 2.8 Should have found that the SIU acted in terms of Proclamation No 11 of 2018 as well as the provisions of section 5 of the SIU Act and therefore the views expressed in the letter are not subject to review and accordingly dismiss the

applicant's application with costs.

- 2.9 In ordering the SIU to pay punitive costs. The court punishes the SIU for its performance of its statutory duty without any basis. In addition, the court ordered the SIU to pay the costs of two counsel in circumstances wherein the applicant employed only one counsel.

BACKGROUND

3. The background of this matter is set out in detail in my judgment dated 2 February 2023.
4. In brief, Mr Mthembu sought that the SIU report dated 12 November 2019, which concluded that he breached certain Eskom policies relating to disclosure of business interests be reviewed and set aside.
5. I granted the application for the reasons set out in my judgment.

Preliminary Matter

6. Even though the applicant had requested costs for one counsel, the court erroneously awarded costs for two counsel.

7. This matter was brought to the attention of the court in the leave to appeal application by the SIU. Ideally, this matter could have been brought to the court's attention earlier by either party in terms of rule 42(1)(b) of the Uniform Rules of court¹, pointing to the error in the order and contending that this was a clerical and/or patent error.

8. Rule 42 is specifically meant to cater for such instances. Both parties are aware that this was an error. Rule 42(1)(b) provides that the court may rescind or vary any order or judgment which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. The present order as it stands may be interfered with as far as costs are concerned.

THE TEST FOR APPLICATION FOR LEAVE TO APPEAL

9. Section 17(1) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act") provides that to the extent relevant, the following test be applied in considering whether leave to appeal ought to be granted:

¹ Rule 42 of the Uniform Rules of Court Superior Court Practice Volume 2

1. The court may, in addition to other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
 - (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
 - (b) An order or judgment in which there is ambiguity, or a patent error or omission;
 - (c) An order or judgment granted as a result of a mistake common to both parties.
 - (d)

"(1) 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) ...

(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."

10. The SIU relies on the grounds above in applying for leave to appeal, i.e. that the appeal would have a reasonable prospect of success or that there is a compelling reason for the appeal to be heard.

11. In its interpretation of the test for leave to appeal in terms of section 17(1)(a)(i), the Supreme Court of Appeal states as follows²:

"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect

² MEC for Health Eastern Cape v Mkhitha 2016 JDR 2214 (SCA)

of success; or there is some other compelling reason why it should be heard.

- [17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, it is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

12. In the heads of argument filed on behalf of the SIU for the leave to appeal application, reliance was made on the judgment in *Fusion Properties 233 CC v Stellenbosch Municipality*³:

"Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of section 17(1)(a)(i) and 17(1)(a)(ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted 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 ..."

It is manifest from the text of section 17(1)(a) that an applicant seeking leave to appeal would either have a reasonable prospect of success, or alternatively, that there is some compelling

³ (932/2019) (2021) ZASCA 10 (29 January 2021 para 18)

It is manifest from the text of section 17(1)(a) that an applicant seeking leave to appeal would either have a reasonable prospect of success, or alternatively, that there is some compelling reason why an appeal should be heard. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave---”

13. In his heads of argument opposing the leave to appeal application, Mr Mthembu also relies on *MEC Health Eastern Cape v Mkhitha supra*. Further to this, Mr Mthembu submits that what the SIU presents is what *Ramakatsa and Others v African National Congress and Another*⁴ and *Mkhitha supra* is described as remote prospects of success and an arguable case.

14. In the matter of *Ramakatsa supra* the Supreme Court of Appeal said the following:

“[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that ‘but here too the merits

⁴ (724/2019) [2021] ZASCA 31

remain vitally important and are often decisive'. I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist." [our emphasis]

15. Further, in *Nova Property Holdings Ltd v Corbett and Others*⁵, the Court indicated that –

"It is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts. The considerations that serve the interests of justice, such as that the appeal will traverse matters of significant importance which pit the rights of privacy and dignity on the one hand, against those of access to information and freedom of expression on the other hand, certainly loom large before us. However, the most compelling, in my view, is that a consideration of the merits of the appeal will necessarily involve a resolution of the seemingly conflicting decisions...

⁵ (20815/2014) [2016] ZASCA 63; [2016] 3 All SA 32 (SCA); 2016(4) SA 317 (SCA)

judgments, including that of the court a quo ..."

THE SIU'S APPLICATION FOR LEAVE TO APPEAL

16. Notwithstanding the grounds of appeal referred to above, upon analysis, it seems that the SIU's application for leave to appeal is focused on two aspects;

- Whether the view expressed in its letter of 12 November 2019 to Eskom is reviewable in that it is not administrative in nature and not reviewable under the Proclamation of Administrative Justice Act 3 of 2000, as amended or the principle of legality.
- Whether the court misinterpreted section 5(7) of the SIU Act
- Whether the court erred in finding that the civil proceedings referred to in section 5(7) of the SIU Act are aimed at recovering any losses that a state institution might have incurred as civil proceedings could include disciplinary proceedings
- The court erred in finding that the SIU acted *ultra vires*,
- whether the SIU conceded that the Proclamation was not applicable; and of course, the last issue pertaining to punitive costs (dispensed with under preliminary matter).

Ultra Vires

17. The SIU is a creature of statute and therefore can only perform the functions which it possesses in law. It cannot perform functions that it does not possess⁶. Several courts have located the purpose of the SIU Act in its long title as being to provide mechanisms for the investigation of serious malpractices or maladministration in connection with the administration of state institutions, state assets and public money as well as any conduct which may seriously hamper the interests of the public for the adjudication of civil matters emanating from such investigations⁷.
18. The proclamation clearly confines the SIU's actions to aspects related to Medupi and Kusile. As far as employee declarations of interest are concerned, it indicates that such interests must have traded with Eskom. In light of this, it is clear that the report on Mr Mthembu in relation to the Proclamation read with section 5(7) and the purpose of the SIU in its long title, were *ultra vires* and therefore irrational. The SIU acted outside of its mandate as reflected in the Proclamation. As a creature of statute, the SIU is precluded from exceeding its legislative mandate. I will not revisit the judgment, save to say that at the time of issuing the report, the SIU was well aware and had received confirmation

⁶ *Toto v Special Investigating Unit and Others* 2001(1) SA 673 (E) at 685 C-E

⁷ *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at paragraph 54 (Heath)

from Eskom that the entities that Mr Mthembu failed to declare had never bid for any Eskom business nor were they involved with any contractors or suppliers of Eskom. This made any further investigation or reference thereto in any form or to anyone not to be the business of the SIU as far as the Proclamation that enabled its investigation at Eskom or its own legislative powers are concerned.

19. It is also a non-starter to suggest that the legal proceedings envisaged in Section 5(7) of the SIU Act include disciplinary hearings.

20. Section 5(7) states as follows:

“(7) If during the course of an investigation, any matter comes to the attention of the Head of Special Investigating Unit which, in his or her opinion, justifies the institution of legal proceedings by a state institution against any person, he or she may bring such matter to the attention of the state attorney or the institution concerned, as the case may be.”

21. A legal proceeding is an activity that seeks to involve the authority of a tribunal with a view of enforcing a law; and this may be by way of application proceedings or action proceedings. A disciplinary hearing, on the other hand, is a formal process used by an employer to address issues relating to an employee's work; which issues may include misconduct, etc. Disciplinary

hearings are not legal proceedings in character nor standing in respect of rights, privileges and application bestowed.

22. Section 5(7) must be read in its totality. It starts off by referring to "if during the course of an investigation..." meaning an investigation in terms of its long title and the Proclamation issued. This means that whatever the SIU uncovers must be capable of being located within the confines of the legislation and the specific Proclamation. Only then does it go further to state that "...any matter comes to the attention..." meaning there is no restriction in how many or how much matters come to their attention as far as those that may lead to the institution of legal proceedings are concerned. This latter part cannot be independent of the need to conduct an investigation within the confines of the Proclamation.

The review application

23. The SIU is of the opinion that the view expressed in its report to Eskom is not administrative in nature and thus not reviewable under PAJA or the principle of legality. That the view expressed is not final nor determinative and further that it has no direct external legal effect on the rights of Mr Mthembu.
24. In *Heath* the contention was that the investigative powers vested in the SIU by the Act are highly intrusive, that the exercise of such powers would constitute

an invasion of privacy and would cause irreparable damage to the members' professional reputation. Faced with this contention, the court surmised the purpose of the SIU Act as follows:

[54] The purpose of the Act appears from its long title which is referred to in paragraph [1] above. That purpose is to provide mechanisms for the investigation of "serious malpractices or maladministration in connection with the administration of State institutions, state assets and public money as well as any conduct which may seriously harm the interests of the public," and for the adjudication of civil matters emanating from such investigations.

[58] The primary purpose of the Act is to enable the state to recover money that it has lost as a result of unlawful or corrupt action by its employees or other persons. The public money contemplated by the Act, is the money of a State institution that has been paid out or expended, and which that institution is entitled to recover. Hence the special mechanism for the investigation by the SIU and the recovery of money through the ST.

25. In *Masuku*⁸, it was accepted that the SIU's report may be reviewed on the principle of legality – further stating that the test for such review is a factual enquiry, on whether the impugned decision is rational. In *Minister of Defence v Motau*⁹ it was reiterated that as regards the test for rationality;

".....For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given. It is also well established that the test for rationality is objective and is distinct from that of reasonableness."

⁸ Paragraph 5

⁹ 2014(5) SA 69 (CC) at [69]

26. The principle of legality therefore acts as a safety net to give the court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. Further that it includes review on grounds of irrationality and on the basis that the decisionmaker did not act in accordance with the empowering legislation.
27. Once accepted that the SIU report is reviewable, the next step becomes whether the report on Mr Mthembu is rationally connected with the purpose for which the SIU was empowered to enquire into various allegations in terms of the Proclamation.
28. It is true that the function of the SIU is to investigate matters and not make determinations. They investigate and report. As aptly stated in Masuku¹⁰, the distinction as to whether the SIU investigates matters and not determine them is not relevant to whether the decisions are reviewable or not. It just defines the type of decision a review audits for rationality.
29. Whilst the SIU report on Mr Mthembu does not impose any sanction, it has influence or impact on him and in his person, suffered harm as a result of the report. His letters pleading with the SIU ahead of launching his review

¹⁰ Paragraph 18

application are testament to such harm. It is precisely because of the effect of the report on Mr Mthembu, that the SIU is called upon to act within the ambit of its enabling legislation and the Proclamation. What Eskom chose to do with the report is secondary to the SIU's actions. Otherwise, the SIU cannot be held accountable for its actions.

30. Lastly, as aptly stated in *Masuku* at paragraph 24;

"[24] Can it therefore be said that a statutory body, responsible for investigating and presenting a report that can be damagingly critical of an individual, should not be accountable for such action, and not be susceptible to an audit for rationality in respect of the criticisms it advanced, merely because the outcome of the investigation is not final and is intended to be of use only for another entity or person, who is an actual decision-maker, and whose ultimate decision, in turn, is one freely taken, regardless of the contents of the report ? In my view, the public interest is not well served by such unaccountability."

31. As I see it, the SIU does not have reasonable prospects of persuading a court on appeal that this court erred in its findings on the SIU's actions and report in relation to Mr Mthembu.

32. I therefore remain of the view that considering the facts in this matter, there are no reasonable prospects that the SIU will persuade a court of appeal otherwise.

In addition, there is no compelling reason why the appeal should be heard, the issues here are crystal clear and straightforward.

33. I therefore find that the SIU's application for leave to appeal ought not to succeed.

Costs

34. There is no reason why costs should not follow the event.

Order

35. The SIU's application for leave to appeal is dismissed, with costs.

36. The order granted on 2 February 2023 be amended to read as follows:

[36.1] The report titled "Investigation in terms of Proclamation No 11 of 2018 issued in terms of section 2(1) of the Special Investigating Units and Special Tribunals Act (Act 74 of 1996) and published in Government Gazette No 41561 Dated 6 April 2018 into the Affairs of Eskom Holdings SOC Limited: Possible Misconduct by Officials or Employees, dated 12 November 2019 is hereby reviewed and set aside.

[36.2] The SIU is ordered to pay the costs, on an attorney client scale.



M A LUKHAIMANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appearances:

For the Applicant:	M Majozi
Instructed by:	Shandu Attorneys Inc
For the First respondent:	WR Mokhare SC (with him M Kgatla)
Instructed by:	The State Attorney, Pretoria
Date heard:	9 May 2024
Date order delivered:	30 July 2024