IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE SPECIAL INVESTIGATIONS UNIT AND SPECIAL TRIBUNALS ACT 74 OF 1999

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: GP09/2019

In the matter between:

THE SPECIAL INVESTIGATING UNIT (SIU)	First Plaintiff
THE MINISTER OF POLICE	Second Plaintiff
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Plaintiff
and	
KGOSISEPHUTHABATHO GUSTAV LEKABE	Defendant

JUDGEMENT

SIWENDU J

Introduction

[1] The Special Tribunal (Tribunal) is called to determine two applications, involving:

[1.1] An exception by the defendant against Claims A, B, C, D, E of the plaintiffs' particulars of claim; and

[1.2] An application by the plaintiffs declaring that the Notice of Bar served by the defendant in terms of Tribunal rule 13(7) is an irregular step and or proceeding in terms of the Uniform rule 30(2)(b) of the Uniform rules of Court.

[2] The second application raises an important procedural issue in respect of the conduct of proceedings before the Tribunal and the interpretation of the Tribunal rules. It also brings to the fore the question of when a party can invoke of the Uniform rules of the High Court in the conduct of matters before the Tribunal.

[3] These applications stem from an action instituted by the plaintiffs against the defendant in terms of section 4(1) (c) (i) read with S 5(5) of the Special Investigation Units and Special Tribunals Act 74 of 1996 (Act)[1] to recover as:

- Claim A, a sum of R 2.5m alternatively R2 m
- Claim B, a sum of R 1.5m alternatively R 1m
- Claim C, a sum of R 1021 440,00, alternatively R 521 440.00
- Claim D, a sum of R 300 000,00 alternatively R 150 000,00
- Claim E, a sum of R 692 350; R1 265 047,06; R5 231 026.00; R10 952 937.00; R 7 873 750 and R 889 500

[4] **The action follows an investigation into allegations of maladministration of the affairs of the Office of the State Attorney**, and allegations of improper or unlawful conduct by employees and official of that Office, mandated by Proclamation N R21 of 2018 published in Government Gazette 41771, read with Proclamation R33 of 2019 (dated 22 July 2019). It is alleged that the conduct resulted in unlawful appropriation or expenditure by the second plaintiff.

[5] **The office of the State Attorney over which the defendant served as the Head is generally appointed in terms of S 3 of the State Attorneys Act 56 of 1957 (as amended), to defend the various State Departments in claims brought**

[1] Based on the terms of the prevailing Proclamation, the SIU is authorised to institute and conduct civil proceedings before the Tribunal for any relief including the recovery of damages, or losses and to determine the procedure to be followed in conducting its investigations.

against them. The Office, which is staffed by duly admitted attorneys and or legal practitioners, has the authority to brief counsel to represent it where necessary.

[6] **It is not necessary to traverse all the details of the particulars of claim, save to state that viewed collectively, the basis for the claims against the defendant is premised on an alleged contravention of Treasury Regulation 1.2.2.4, as well as s 45(a), (b) and (c) of the PFMA**.

[7] It is further alleged that the defendant breached the duty of care he owed as a professional attorney. It is averred amongst others, that in at least two instances, he subverted the administration of justice, and, despite instructions to the contrary, he denied the second plaintiff the opportunity to properly defend cases brought against the second plaintiff or afford the department the opportunity to make a rational compromise. It is alleged that his conduct resulted in an unauthorised settlement of the claims and a payment of damages, in amounts higher than each case merited.

[8] Over and above the alleged breach of the duty of care owed to the second plaintiff as a professional attorney, the plaintiffs claim he was negligent and denied the second plaintiff the opportunity to properly defend the cases as stated in paragraph above.

The Notice of Exception and Irregular Step

[9] **On 20 December 2019, in response to summons instituting the action, the defendant served a notice styled "Notice of Exception in terms of Rule 18" on the plaintiffs. The grounds for exception raised in the notice are that the particulars of claim do not comply with Rule 18(4) and (10)[2] respectively**. In view of what transpired at the hearing, I need not dwell on the contents of the exception, save for only that part of the notice served, relevant for this judgement. The notice concluded that:

"FURTHER BE PLEASE[D] to take notice that [the] Plaintiffs are hereby granted an opportunity to remedy the aforesaid defects within 15 days hereof otherwise [the] Defendant

[2] Rule 18 deals with the requirements for pleadings generally. A pleader must provide a clear and concise statement of material facts on which the claim is based with sufficient particularity to enable the other party to plead. Where a plaintiff sues for damages, these must be set out in a manner that will enable the defendant to assess the quantum. Special provisions and requirements apply when a plaintiff sues for damages arising from personal injuries.

will proceed to set the exception down for hearing within the period prescribed by the rules" [sic]

[10] It is a common cause that the plaintiffs did not respond to the notice. **It is further common cause that after the lapse of fifteen days, the defendant did not deliver the exception as it would have been required in the High Court under Uniform rule 23[3]. Instead, on 22 January 2020 the defendant filed a further notice in terms of Tribunal Rule 13(7)**. The notice reads:

"BE PLEASED TO TAKE NOTICE that the First, Second and Third Plaintiffs are requested to deliver their answer to the Defendant's Rule 18 Notice within five (5) days of service of this notice failing which the Plaintiff will be ipso facto barred and the exception will be set down for hearing on an unopposed roll on a date to be allocated by the Registrar"

[11] **On 6 February 2020, the plaintiffs served a rule 30(2)(b) notice calling on the defendant to withdraw the Tribunal rule 13(7) notice of bar on account that it was an irregular step**. The plaintiffs claim that the defendant misconstrued, misinterpreted and incorrectly applied Tribunal rule 13(7).

[12] Part of the complaint by the plaintiffs is that Tribunal rule 13(7) only deals with actions and can only be applied when a party fails to file a pleading. They claim that as is the case in respect of proceedings before the High Court, under Uniform rule 23, dealing with exceptions, there was no further action or pleading required of the plaintiffs after receiving the notice. The plaintiffs contend that on the contrary, a further step was required of the defendant, to *deliver* his exception after the expiry of the period. The defendant failed to do so. [emphasis added]

[13] **The matter raises the type of issue envisaged by Tribunal Rule 28 (1) of the Tribunal rules. As a result, at the Case Management meeting held with the parties on 14 May 2021, the *lacuna* in Tribunal rules became evident. I was of the view that procedural clarity and certainty is required**. As a result, I directed the parties to make formal submissions in respect of the proper interpretation and application of Tribunal rule 13(7) on the one hand, and how when to apply the Uniform rules of the High Court in Tribunal proceedings. I had envisaged a disposal of the

[3] Rule 23 deals with exceptions. It provides that the party bringing the exception may deliver an exception and set it down within the period provided for filing subsequent pleadings provided it affords an opportunity to the opponent to cure the cause for complaint.

matter purely on the papers. However, the question of the correct interpretation of the Tribunal rules, and the procedure to be followed are important questions which called for oral ventilation.

Application of the Tribunal and Uniform rules

[14] **s 9(1)(a) of the Act[4] empowers the President of the Tribunal to make rules to regulate the conduct of proceedings before the Tribunal as well as the process, the form and the content by which proceedings are brought. Conjoint with the power conferred in s 9 (1)(a) is the power to amend or repeal such rules in s 9(1)(b), provided that the amended rules are published in the Government Gazette.**

[15] The first Tribunal rules were published on 18 October 2019 in Government Gazette No 42783. The amended Rules were published on 25 August 2020. Tribunal Rule 13 at issue remained the same in both sets of published rules.

[16] Tribunal rule 13 deals with Action Proceedings and states that:

"13 (3) Any party who fails to deliver a plea within the period as aforesaid shall be *ipso facto* barred.

……

13(7) If any party fails to deliver any other pleading within the time period laid down in these Rules or within any extended time allowed in terms thereof, any other party may by notice to the other parties, require the defaulting party to deliver such pleading within five days of such notice. Any such defaulting party failing to deliver such pleading within the stipulated time or within such further period as may be ordered or agreed shall be *ipso facto* barred"

[17] **Unlike in proceedings before the High Court, regulated by Uniform rule 23, Tribunal rule 13 does not provide for the process and procedure for prosecuting and adjudicating exceptions**.

[18] The relevant Uniform rule 23 which governs the procedure for bringing an exception before the High Court reads as follows:

"23(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may

[4] The section provides the President of the Tribunal with broad powers to make rules to regulate the conduct of proceedings, the power to amend or repeal the rules and, in consultation with parties appearing take any steps which may lead to the expeditious and cost saving disposal of matters before it amongst others.

apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that -

(a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of notice; and
(b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.

……

23(4) Wherever any exception is taken to any pleading or an application to strikeout is made, no plea, replication or other pleading over shall be necessary."

[19] A number of points arise. First, the plaintiffs take issue with the manner in which the defendant brought the exception. As already stated, the defendant merely filed a notice styled as a "Notice in terms of Rule 18." He did not *deliver* an exception as would have been required under Rule 23(1)(b) of the Uniform rules. **A question also arose as to whether there is a valid exception for adjudication before the Tribunal**.

[20] The second concern involves the *standing* of the notice of bar, and whether the service is an irregular step. The defendant sought to have the notice of exception adjudicated on an unopposed basis because he claims plaintiffs failed to respond to the notice of exception.

[21] The defendant's premise was that viewed as a whole, the intention was not to subject the Tribunal to the wholesale application of the Uniform rules of the High Court. He argued that the Tribunal rules do not articulate that Uniform rules would be applicable where there is a lacuna in its rules. Having regard to Tribunal rule 28, this is incorrect. I deal with this later in the judgment.

[22] Despite this view, Mr Makhambeni (for the defendant) in his heads of argument, accepted that the Tribunal is empowered to formulate and regulate its proceedings. He accepted that at the heart of adjudication process is the expeditious finalisation of matters before the Tribunal. He agreed that the Tribunal rules do not provide for a period when a plaintiff is expected to respond to the exception. He also acknowledged that Tribunal rule 28 forms a part of the conspectus of applicable rules available for consideration.

[23] Yet, he contended that the intention was not to introduce the "long-winded procedure" of the High Court. He persisted with the view that the notice the defendant filed in terms of Uniform rule 18 was a proper exception. He argued that the defendant was not obliged to follow Uniform rule 23. He contended that the Uniform rules cannot be applied unless "stated [that] firmly with patent clarity". [sic]. During the argument, he reformulated this point, by raising the bar, contending freshly that the Tribunal can only apply Uniform rules in its proceedings in exceptional circumstances.

[24] In opposition, Mr Fouche contended that, by serving the notice of bar, the defendant was opportunistic. The plaintiffs were not obliged to respond to the notice. He argued that based on Tribunal rule 28, the exception could only have been legitimately and correctly brought in terms of Uniform rule 23. He contended that the only obvious step open to the defendant was to follow the procedure in Uniform rule 23. There was no further step required of the plaintiffs.

[25] It merits restating once more hat the Tribunal has the same status as the High Court.[5] From this vantage point, Tribunal rule 28 (1) provides that:

> "If a situation for which these Rules do not provide, arises in proceedings or contemplated proceedings, the Tribunal may adopt any procedure that it deems appropriate in the circumstances, including the invocation of the High Court Rules"

[26] The rule renders, the Uniform rules applicable to the Tribunal where there is a *lacuna* in its rules. The provision does so without the conditions and or standard contended by the defendant.

[27] In addition to the above, Tribunal rule 19 (2) makes it clear that all matters before the Tribunal are subject to Judicial Case Management. When a matter is assigned, a Tribunal Member is obliged to case manage matters and hear all interlocutory applications. Read together, these Tribunal rules are designed to allow for the expeditious and cost effective resolution of cases.

[28] On a plain reading, Tribunal rule 13(7) notice can only be filed in relation to pleadings. The notice filed by the defendant is not a pleading. The argument by the defendant means the exception would have been decided by default without a

[5] Special Investigating Unit v Ledla Structural Development (Pty) Limited and 39 Others Consulting Case No GP07/2020 and Special Investigating Unit and Another v Caledon River Properties (Pty) Ltd and Others Case No GP/17/2020

ventilation of the issues. Such an approach is not provided for in the Tribunal rules and is not intended by Tribunal rule 22 dealing with default judgments. It is also inconsistent with terms of the notice the defendant's own notice "to set the exception down".

[29] A further inconsistency in the defendant's argument is that he invoked Uniform rule 18 as the basis for excepting to the particulars of claim. With the same breath, he argued for an adoption of a contrary position when it came to the application of the Uniform rules to the proceedings of the Tribunal. Despite his reliance on Uniform rules when it came to the issuing of the notice of exception, he did not deliver the exception as would have been required under Uniform Rule 23.

[30] I pause to mention that in the case between the *SIU v Jacob Basil Hlatshwayo and Another GP 20/2020* before Tribunal Member Modiba J, an interlocutory application in terms of Rule 30/30A was not determined because on the facts before her, the party who raised it agreed it may be ignored. It is fitting that some guidance is provided to parties without confining the discretion of presiding members.

[31] When read in their proper context, it is clear that the Tribunal rules envisage that a hybrid approach would be adopted, where there is a *lacuna* in the Tribunal rules. Given that the status of the Tribunal is that of a High Court, despite its own rules, the uniform rules are intended to be supplementary and or complementary to the Tribunal rules. There is no legal basis to support the interpretation advanced by Mr Makhambeni. The defendant had no legal basis to file the Tribunal rule 13(7) notice in this case. The step taken was inconsistent with the intention behind the rule.

[32] I agree that in this instance, there was nothing for the plaintiffs to respond. Even if there was, the only step open to the defendant was to apply to the Registrar to set the exception down for hearing. In any event, the mandated Judicial Case Management would have foreshadowed any procedural and or interlocutory concerns the defendant had.

[33] Consistent with the overall scheme of the Tribunal rules, where a party finds that there is a gap or lacuna in the Tribunal rules, and is uncertain of how the uniform rules should be applied, that party must immediately approach the Tribunal for Judicial Case Management and/or further direction in the conduct of the matter rather than

incur unnecessary costs. The approach by the defendant had the effect of protracting the litigation.

[34] What exacerbates the defendant's position is that when questioned about the merits of the purported exception, he withdrew it halfway through the proceedings. Even though I find the decision sound, the impression is that the points were raised purely to arbitrage the Tribunal rules and procedure to his advantage. They were without merit. Such conduct is to be discouraged.

[35] This leaves the question of costs. Implicit in Tribunal rule 21 is that a withdrawal of a proceedings must be accompanied by a tender of costs. This rule has implications for the determination costs, which must follow the result. I however take account that the costs pertaining to preparing the written submissions were also at the instance of the Tribunal. The defendant need not be saddled with all those costs. I note that the plaintiffs engaged two Counsel. I observe however that, the issues raised were not complex. It is fair that I limit the costs of Senior Counsel to those associated with settling the papers and exclude the costs for appearance.

Accordingly, I make the following Order:

a. The defendant's application brought in terms of Tribunal rule 13(7) is dismissed;
b. The defendant is ordered to pay the costs of the above application, however appearance costs for the day shall be limited to the costs of Junior Counsel;
c. The defendant is ordered to pay the costs of the exception including to costs of two counsel.

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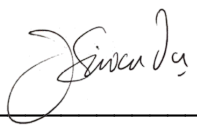

JUDGE T. SIWENDU

MEMBER OF THE SPECIAL TRIBUNAL

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading onto Case Lines. The date and time for delivery is deemed to be 10am on 23 August 2021

APPEARENCES

Counsel for the Plaintiffs:	Adv D.J. Joubert SC
	with him
	Adv Fouche
Attorney for the Plaintiffs:	Gildenhuys Malatji Inc
Counsel for the Defendant:	Adv Makhambeni
Attorney the Defendant:	P. L Samuels Attorneys
Date of hearing:	11 August 2021
Date of Judgment:	23 August 2021