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IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE SPECIAL INVESTIGATIONS UNIT AND SPECIAL TRIBUNALS ACT 74 of 1996

Case No. GP11/2020

In the matter between:

SPECIAL INVESTIGATING UNIT	Plaintiff
And	
MANTSU KABELO LEHLOENYA	First Defendant
PROFESSOR MKHULULI LUKHELE	Second Defendant
MEMBER OF THE EXECUTIVE COUNCIL FOR THE GAUTENG DEPARTMENT OF HEALTH	Third Defendant

***In re*:**

MANTSU KABELO LEHLOENYA	First Defendant
And	
MANEMOLLA DAVID MAKHURA (in his personal and official capacities)	First Third-Party
GAUTENG PROVINCIAL GOVERNMENT	Second Third-Party
MKHULULI LUKHELE	Third Third-Party
ARNOLD LESIBA MALOTANA	Fourth Third-Party
THANDIWE LORAINE PINO	Fifth Third-Party
LEDLA STRUCTURAL DEVELOPMENT (PTY) LTD	Sixth Third-Party

JUDGMENT IN THE EXCEPTION, APPLICATION TO STRIKE OUT AND SPECIAL PLEA TO THE FIRST DEFENDANT'S THIRD-PARTY NOTICE

MODIBA J:

Mode of delivery: *this judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time of delivery is deemed to be 10am on Monday 25 October 2021.*

INTRODUCTION

[1] Organs of State, officials who exercise authority over such organs and state functionaries, have an enormous responsibility to fulfil their constitutional and statutory obligations. If they fail to do so, they may be held accountable for their constitutional and statutory breaches, even in their personal capacities. In fact, it is in the public interest that they are held accountable. There are various means in terms of the constitution and statute to hold them accountable. These include the judicial system. An attempt to hold them accountable through the judicial system will only succeed if the proper procedure is followed and there is a legal basis for their liability.

[2] This is precisely what the first defendant, Mantsu Kabelo Lehloenya (Ms Lehloenya), sought to achieve when she issued the third party notice to secure the joinder of seven third parties to the above action (the main action). The said parties are David Makhura in his personal capacity and official capacity as the Premier of Gauteng (Premier Makhura), the Gauteng Provincial Government (GPG), the Department's erstwhile Head of Department (HoD) Professor Mkhululi Lukhele (Professor Lukhele), its Chief Operating Officer Arnold Lesiba

Malotana (Mr Malotana) and Chief Director: Procurement Thandiwe Lorraine Pino (Ms Pino). They are the first to fifth third party respectively.

[3] Although Ms Lehloenya has also cited Ledla Structural Development (Pty) Ltd (Ledla) and Beadica 423 CC (Beadica) as the sixth and seventh third parties respectively, she seeks no relief against them. She only seeks to join them as third parties due to the interest they may have in these proceedings.

[4] In the main action, the Special Investigating Unit (SIU) seeks to recover from Ms Lehloenya the loss the GPG and/ or the State suffered when she, as the Gauteng Department of Health's (the Department) Chief Financial Officer (CFO), awarded contracts to Ledla and Beadica in 2020 for the procurement of Covid 19 PPE items. Ms Lehloenya denies liability to the GPG and/or the State. In the event that the Tribunal finds her liable to the GPG and/or State, Ms Lehloenya seeks an indemnity or contribution from the first to fifth third parties by way of the third party notice.

[5] Premier Makhura and the GPG have taken two steps in response to the third party notice. Firstly, they seek to have it struck out as an irregular proceeding. Secondly, they have excepted to it on the basis that it fails to disclose a cause of action. Ms Lehloenya is opposing both the application to strike out and the exception.

[6] Professor Lukhele on the other hand, has filed a special plea to the third party notice. He contends that the third party notice is bad in law because the basis on which Ms Lehloenya seeks relief against him as a third party is inapplicable to the circumstances alleged in the main action. Professor Lukhele has also taken issue with the competency of the third party procedure under these circumstances. Ms Lehloenya is opposing the special plea.

[7] Mr Malotana, Ms Pino, Ledla and Beadica have not entered the fray.

[8] The Tribunal heard the above interlocutory issues separately from the rest of the issues in the main action. Hence, this judgment only addresses Premier Makhura

and the GPG's application to strike out and exception, as well as Pro Lukhele's special plea.

BACKGROUND

[9] In the main action, the SIU's cause of action against Ms Lehloenya and Professor Lukhele is for breach of various constitutional, statutory and regulatory duties that arise out of their respective employment contracts with the GPG.

[10] The SIU alleges that its investigations uncovered that Ms Lehloenya awarded contracts to Ledla and Beadica irregularly and unlawfully in breach of the procurement system as regulated by the applicable constitutional, statutory and regulatory provisions, causing the Department to incur irregular, fruitless and wasteful expenditure in the amount of R29,6 million, alternatively R3,9 million in respect of Ledla, and R13,8 million in respect of Beadica, as envisaged in the Public Finance Management Act[1] (PFMA). The SIU seeks to hold Ms Lehloenya liable for these losses.

[11] As against Professor Lukhele, the SIU alleges that contrary to his employment duties, Professor Lukhele failed to take appropriate steps to prevent the alleged breaches by Ms Lehloenya and the resultant irregular, fruitless and wasteful expenditure incurred by the Department, to enforce the applicable procurement prescripts and to take disciplinary steps against Ms Lehloenya. Therefore, the SIU contends that it is just and equitable that Professor Lukhele is held jointly and severally liable with Ms Lehloenya for the consequential financial losses the GPG and/ or the State suffered.

[12] Although Ms Lehloenya was employed as the Department's CFO and Professor Lukhele as its Head when the SIU's cause of action arose, the SIU seeks relief

[1] Act 1 of 1999

against them in their personal and private capacities. It alleges that since they acted unlawfully and wrongfully, intentionally, alternatively negligently when they allegedly breached their employment duties, they have forfeited state protection.

[13] The SIU seeks no relief against the Member of the Executive Council for Health (MEC), who is the executive authority as well as the representative of the Department. It merely cited her for the interest she may have in the action. The MEC is not opposing the action.

[14] Both Ms Lehloenya and Professor Lukhele are opposing the action. They filed a plea. Ms Lehloenya subsequently amended her plea.

[15] In her amended plea, Ms Lehloenya denies that she breached her contractual duties as alleged by the SIU. She also denies that the SIU is entitled to claim the losses allegedly suffered by the Department from her in any capacity. In the event that the Tribunal finds that she did not breach her contractual duties, the SIU action stands to be dismissed.

[16] In the event that the Tribunal finds that Ms Lehloenya did breach her contractual duties, Ms Lehloenya has pleaded various averments that lay the basis for the claims she intends pursuing against Premier Makhura, the GPG, Professor Lukhele, Mr Malotana and Ms Pino in her third party notice.

[17] Ms Lehloenya alleges that when she awarded the impugned contracts:

17.1 in the wake of the Covid 19 pandemic, the GPG and Premier Makhura as its Executive Head centralized the function for the procurement of Covid-19 items for the Department. The centralization of the procurement function placed extra-ordinary and additional responsibilities on her as the Department's CFO, thereby creating the risk of harm and loss to the GPG;

17.2 at all material times, when she awarded the contracts, she acted in the course and scope of her employment and within the scope of her authority.

Alternatively, the alleged acts and/ or omissions were in pursuance of the GPG business;

17.3 there is a statutory and regulatory process that Professor Lukhele as HoD had to follow to investigate the alleged breach and make a finding that the Department has incurred losses as a result of irregular, fruitless and or/ wasteful expenditure. Having failed to follow that process and in the absence of any finding to that effect, Ms Lehloenya denies that the Department has incurred irregular, fruitless and or/ wasteful expenditure. Therefore, this action is incompetent.

17.5 the SIU lacks the competency to declare that she has forfeited state protection. Therefore, she has not forfeited state protection as alleged.

[18] As against Premier Makhura and the GPG, Ms Lehloenya alleges that:

18.1. there was a legal duty on Premier Makhura and the GPG to ensure that the centralisation of procurement does not result in unlawful contracts being concluded, thereby causing irregular expenditure or/and fruitless and wasteful expenditure claimed in these proceedings. Premier Makhura and the GPG failed to fulfil that duty. Therefore, they should be declared joint wrongdoers, alternatively, they should be held jointly and severally liable for the alleged losses;

18.2. Premier Makhura and the GPG are vicariously liable for the loss allegedly incurred by the Department because, they should reasonably have known when they centralised the procurement of Covid 19 items that they were creating the risk of harm to the GPG, and that irregular or/and fruitless and wasteful expenditure, as envisaged in the PFMA, may result from the risk of harm they created.

18.3. Premier Makhura and the GPG are liable for the loss to the GPG and/or the State because after 6 April 2020, alternatively 28 May 2020, in breach of their constitutional and statutory duties, they permitted

payments to Ledla and/or Beadica when they had a duty to stop such payments.

18.4. given that Ledla and Beadica have duly performed in terms of the impugned contracts, the GPG has been enriched at the expense of Ledla and/or Beadica and/or other third parties in the sum of money for the goods these entities supplied to the Department. As a GPG official at the time, she has not been enriched. Therefore, it is in the public interest to refuse double recovery on behalf of the State by the SIU and to prevent loss to Ms Lehloenya;

[19] As against Professor Lukhele, Ms Lehloenya alleges that although she was the CFO at the Department from 1 February 2018 until 1 August 2020, she only performed her duties until 28 May 2020. By agreement with Professor Lukhele, she ceased functioning as CFO on 28 May 2020. They further agreed that 1 August 2020 is her effective date of resignation. Consequently, she is not responsible for any payments to Ledla and Beadica after 6 April 2020, alternatively 28 May 2020.

[20] She further alleges that Professor Lukhele together with Mr Malotana and Ms Pino, approved payments to Beadica after 6 April, alternatively 28 May 2020, under circumstances where the GPG had announced additional controls to mitigate the risk of non-compliance with procurement prescripts and had put a moratorium on payments to service providers until they had been cleared from participating in irregular procurement. By failing to mitigate the aforesaid risk and by failing to take steps to avert further payments to Ledla and Beadica, Professor Lukhele, Mr Malotana and Ms Pino breached the statutory duties they owe to the Department.

THE THIRD PARTY NOTICE

[21] The basis for Ms Lehloenya's claims under the third party notice are as set out in paragraphs 16 to 19 above. She specifically seeks the following relief against the relevant third parties jointly and severally, the one paying the other to be absolved:

21.1 a contribution or indemnification, on the basis that they are joint wrongdoers as contemplated in section 1 of the Apportionment of Damages Act[2]; and

21.2 a declaration that these parties are joint wrongdoers as contemplated in section 2 of the Apportionment of Damages Act.

[22] In addition, although she only articulated this further claim in paragraph 133 of her amended plea, referenced in paragraph 22 of her third party notice, and did not specifically pray for it, Ms Lehloenya also seeks indemnity against Premier Makhura in terms of section 125 of the Constitution, for the risk of harm allegedly created by the GPG and he, as described earlier. Premier Makhura did not specifically deal with his alleged liability in terms of section 125 of the Constitution. Nonetheless, to succeed in terms of section 125, Lehloenya must set out a cause of action based on that section.

[23] Lastly, in her heads of argument, Ms Lehloenya has urged the Tribunal to consider joining Premier Makhura *mero muto* as it is in the public interest that he answers the allegations against him.

[2] Act 34 of 1956

THE EXCEPTION AND APPLICATION TO STRIKE OUT

[24] In terms of Rule 23(1) of the Uniform Rules, a party may except or object to any pleading on the basis that it is vague and embarrassing or it fails to disclose a course of action.

[25] It is trite that an exception or objection may be taken to irregularities of substance in a pleading and that a third party notice is a pleading. It is also trite that, in order to determine the validity of the exception, I have to accept, for the purpose of the exception, that the allegations in Ms Lehloenya's third party notice are true and consider whether, on those allegations, Ms Lehloenya will succeed in making out a case for the relief that she seeks against the relevant third parties. In other words, I have to determine whether she has disclosed a cause of action that will result in her succeeding in obtaining the relief that she seeks against the relevant third parties, in the event that she proves her allegations against them at the trial.

[26] It is also trite that, in terms of Rule 30, the irregularities that may be purged out from legal proceedings by way of a striking out order are those of form and not of substance.[3] The irregular proceeding complained of ought to be one that brings the legal proceedings one stage nearer to completion.[4] There is no controversy that the third party notice is a proceeding that brings the legal proceedings a step closer to completion and that it may be the target of an application to strike out where irregularities of form are alleged.

[27] Premier Makhura and the GPG excepted to the third party notice on the basis that it fails to disclose a course of action. They also seek it struck out as an irregular proceeding. They rely on largely the same grounds, set out below:

27.1 the third party notice is incompetent;

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[3] *Singh v Vorkel 1947* (SA) 400 (C) at 406

[4] *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grogor* 1984 (1) SA 152 (W) at 153 (C)

27.2 Ms Lehloenya has not advanced any allegations that sustain relief against Premier Makhura in his personal capacity;

27.3 the third party notice discloses no cause of action against Premier Makhura and the GPG.

[28] I consider the grounds of exception and striking out in turn. I find that only the first ground deals with an irregularity of form. The rest relate to an objection to the substance of what is pleaded in the third party notice.

Is the third party notice incompetent?

[29] Premier Makhura and the GPG contend that to the extent that Ms Lehloenya seeks to join them to the action as third parties, the third party notice is incompetent because on Ms Lehloenya's case as pleaded, the SIU is a representative Plaintiff on behalf of the State in terms of section 4(1)(c) and 5(5) of the Special Investigating Units and Special Tribunals Act[5] (the SIU Act). Therefore, Premier Makhura, to the extent Ms Lehloenya seeks to join him in his official capacity, and the GPG, are already parties in these proceedings, represented by the SIU.

[30] On Ms Lehloenya's case as pleaded, the third party notice is indeed incompetent for the reason advanced on behalf of Premier Makhura and the GPG. It is incompetent for Ms Lehloenya to issue a third party notice against Premier Makhura in his official capacity and the GPG who are effectively plaintiffs in the action, represented by the SIU. As plaintiffs, Premier Makhura and the GPG cannot be third parties as envisaged in Uniform Rule 13 (1). In other words, they cannot be joined as third parties in their own action.

[5] 74 of 1996

[31] As entitled in terms of Tribunal Rule 13(1), Ms Lehloenya has filed a plea to resist the SIU's representative action. If her defences are upheld, the SIU action will be dismissed.

[32] It is important to point out that Ms Lehloenya's citation of the SIU in the third party notice is inconsistent with its citation in the summons. The SIU instituted the action in its own right as entitled in terms of section 4(1)(c) of the SIU Act, and not in the representative capacity on behalf of the Department or the GPG as pleaded in the third party notice. Nonetheless, this is of no moment. Tritely, a party stands or falls by its case as pleaded.

[33] This ground is singularly fatal to Ms Lehloenya's third party claim against the GPG and the Premier in his official capacity. Therefore, the third party notice stands to be struck out as against these parties.

[34] Nonetheless, since it was argued, I proceed to determine the exception as raised against these third parties. Since Ms Lehloenya's claim against Premier Makhura in his personal capacity is not tainted by the same formal defects, I also consider the exception to the extent that it is raised by Premier Makhura in his personal capacity.

Does Ms Lehloenya make out a case against Premier Makhura in his personal capacity?

[35] Referencing the allegations set out in paragraphs 33 to 38 of Ms Lehloenya's third party notice, Premier Makhura contends that these allegations do not establish Ms Lehloenya's entitlement to a contribution or indemnification by Premier Makhura in his personal capacity. For this reason, Premier Makhura contends that the exception in respect of the abuse of power claim should be upheld.

[36] Ms Lehloenya has set out her cause of action based on abuse of power in paragraphs 33 to 38, where she has referenced paragraphs 4 to 5, 8 to 11, 15, 17, 18, 37, 49, 66, 86, 101, 108, 113, 114, 130, to 133 of her amended plea. The relevance of the latter paragraphs to the abuse of office claim is not apparent because in these paragraphs, Ms Lehloenya sets out her defence to the SIU as well as the main basis for her third party claims against all the third parties. In paragraph 33 to 38 of the third party notice, she alleges that Premier Makhura abused his public office when he:

36.1 directed, caused or failed to prevent GPG officials from awarding contracts irregularly and making payments to Ledla and Beadica;

36.2 exceeded his authority and acted with reckless indifference, thereby acting unlawfully when he authorised the issuing of circular No 3 of 2019/2020, centralizing procurement for PPE items for the Department, knowing that it would create the risk of harm or result in harm to the GPG;

36.3 breached his public duty, causing damage to the State;

Therefore, Ms Lehloenya contends, Premier Makhura should be held personally liable for the loss or damage to the GPG and/or the State for an indemnity or contribution to her in terms of the Apportionment of Damages Act.

[37] Ms Lehloenya's abuse of authority claim for an indemnity or contribution in terms of section 1 and 2 of the Apportionment of Damages Act against Premier Makhura in his personal capacity suffers from the same substantial defect as her claim against Professor Lukhele in that, it is bad in law. For reasons set out more fully under professor Lukhele's special plea, the exception in respect of Ms Lehloenya's abuse of authority claim stands to be upheld.

Does the third party notice disclose a cause of action against Premier Makhura and the GPG?

[38] Ms Lehloenya seeks to pursue Premier Makhura and the GPG in respect of four claims articulated in paragraph 18 above.

[39] On the following basis, Premier Makhura and the GPG contend that the third party notice fails to set out a cause of action:

39.1 Ms Lehloenya has not asserted a valid legal basis for a right to an indemnity or contribution against Premier Makhura and the GPG arising from contract or statute;

39.2 her claim for the declaration of Premier Makhura and the GPG as joint, alternatively concurrent wrongdoers and on the basis of vicarious liability or unjustified enrichment is incompetent.

Claim for an indemnity or contribution against Premier Makhura and the GPG arising from contract or statute

[40] It was contended on behalf of Premier Makhura and the GPG that "Ms Lehloenya ought to have alleged a right, arising from contract or by statute or from the law, to an indemnity in respect of, or a contribution towards, the SIU's claim against her. A right to contributory damages based on contributory negligence or other

breaches of the law is not such a contribution or indemnity within the meaning of Rule 13(1)(a)."[6]

[41] Given that the third party procedure is competent under these circumstances as reasoned in paragraphs 29 to 33 above, Ms Lehloenya may not pursue any claim against the Premier and the GPG, including for an indemnity or contribution as contemplated in Rule 13(1). This sub rule regulates the procedure that any party to an action such as Ms Lehloenya, who alleges a right to a contribution or indemnity from a third party may follow to pursue such a claim. It does not make provision for a substantive right to an indemnity or contribution as does section 1 and 2 of the Apportionment of Damages Act. As already found, by virtue of being plaintiffs in the action, if Ms Lehloenya does have a right to a contribution or indemnity against Premier Makhura and the GPG, it is not one she may pursue through the third party procedure.

[42] Ms Lehloenya's failure to plead a right to an indemnity or a contribution arising from contract or by statute or from the law, gives rise to a different problem. It is a defect that does not relate to the form of her claim. It rather relates to the root of her third party claim, as it is bad in law. This is the mainstay of Professor Lukhele's special plea. Reasons for this conclusion are set out more fully under the special plea below.

Joint, alternatively concurrent wrongdoer claim

[43] Premier Makhura and the GPG seek to resist this claim on the basis that no facts are pleaded to sustain the conclusion that Premier Makhura and the GPG are joint, alternatively concurrent wrongdoers with Ms Lehloenya. Ms Lehloenya has clearly pleaded in her third party notice, referencing her amended plea, the facts on which she seeks to rely for such a conclusion.

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[6] See paragraph 70 of Premier Makhura and the GPG's heads of argument.

[44] The difficulty with Ms Lehloenya's joint, alternatively concurrent joint wrongdoer claim lies less in the facts pleaded as it does in the legal conclusion sought to be drawn from the pleaded facts as contended by Professor Lukhele in his special plea. For reasons fully dealt with under Professor Lukhele's special plea, Ms Lehloenya's joint, alternatively concurrent joint wrongdoer claim cannot be sustained as it is bad in law.

[45] *Olitzki Property Holdings*[7] is of no assistance to Ms. Lehloenya because she has not pleaded that Premier Makhura and the GPG owed her a legal duty of care. Ms. Lehloenya rather pleaded that these third parties owe a legal duty of care to the GPG. It is paradoxical that the GPG, including the Premier as its Executive Head, would owe the legal duty of care to itself. Even if she had pleaded that these parties owe her the duty of care, she has no cause of action against the GPG and the Premier as third parties based on section 1 and 2 of the Apportionment of Damages Act, as the SIU claim against her is based in contract, while her claim against Premier Makhura and the GPG is based in delict.

Vicarious liability claim

[46] As correctly argued on behalf of Premier Makhura and the GPG, a claim for vicarious liability is not available to an employee sued by her employer.

[47] It is trite that an employer is vicariously liable for the delicts of an employee committed in the course and scope of her employment. Such liability arises by reason that the employer has, for his own ends, created the risk that resulted in the employee causing another person harm. Therefore, the employer's liability is co-extensive and identical in every respect with the liability of the employee. It is the employee's co-extensive and identical liability that renders the employer

[7] *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) (2001 (8) BCLR 779, para 12

liable as a result of a delict committed by an employee, to compensate the person who suffers damage as a result of the employee's delict.

[48] Here, the alleged harm has not been suffered by another person. It has allegedly been suffered by the GPG as Ms Lehloenya's erstwhile employer. Therefore, the GPG and Premier Makhura as its executive head, cannot be held vicariously liable to itself together with Ms Lehloenya for the breach Ms Lehloenya caused it.

[49] Further, Ms Lehloenya will only be liable if she is found to have forfeited state protection. In that event, she is not entitled to any recourse against Premier Makhura and the GPG as her employer.

Restitution or unjustified enrichment claim

[50] Ms Lehloenya has formulated her claim for unjustified enrichment or restitution against the Premier and the GPG as follows: the GPG, through the Department, received Covid 19 PPE items delivered by Ledla and Beadica in terms of the impugned contracts. The GPG has retained the items. The GPG has been enriched at the expense of Ledla, Beadica's and/or other third parties in the amount of the value of the Covid 19 PPE items. Ms Lehloenya has not been enriched. It would be in the interest of public policy, and to prevent injustice to her if this Special Tribunal prevents double recovery by the State.

[51] To succeed on the basis of unjustified enrichment, Ms Lehloenya must satisfy the Tribunal that:

51.1 the GPG has been enriched at her expense;

51.2 she has been concomitantly impoverished;

51.3 there is no legal basis for the retention of the enrichment by GPG. Therefore, the GPG has a legal duty under these circumstances to restore the enrichment to her up to the level of her impoverishment.[8]

[52] Premier Makhura and the GPG except to Ms Lehloenya's claim based on unjustified enrichment or restitution on the sole basis that she has not alleged that she has been impoverished to the extent the GPG has been enriched.

[53] Indeed, Ms Lehloenya has not pleaded that she has been impoverished. She has pleaded that it is Ledla, Beadica and other third parties who have been impoverished. Therefore, on her case as pleaded, it is Ledla, Beadica and the other third parties who have a claim for unjustified enrichment or restitution against the GPG and not her. Unsurprisingly, she has not alleged a claim for restitution to herself. Correctly so, because there is no basis for it. This renders her claim for an indemnity or contribution on the basis of unjustified enrichment contradictory. Her contention that the SIU claim against her will amount to double recovery if allowed, is rather a possible defence to the SIU claim against her, which should be pleaded in her plea.

[54] Therefore, Ms Lehloenya has no claim for an indemnity or contribution against Premier Makhura and the GPG based on unjustified enrichment.

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[8] See LAWSA Vol 17 3rd Ed referencing *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 3 All SA 1 (SCA); 2003 5 SA 193 (SCA) 202F-H; *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 3 All SA 236 (SCA); 2001 3 SA 482 (SCA) 490 ff; Du Plessis SA Law of *Unjustified Enrichment* 1; Eiselen and Pienaar *Unjustified Enrichment: A Casebook* 28-29; Scott *Unjust Enrichment* in SA Law 4-7; Sonnekus *Unjustified Enrichment in SA Law* 64ff; Visser *Unjustified Enrichment* 157.

Whether Premier Makhura ought to be held liable in terms of Section 125 of the Constitution

[55] Section 125 of the Constitution vests the Gauteng Province's executive authority in the Premier. It goes on to set out the scope of his executive authority. His scope of authority includes implementing national legislation except in areas excluded by the Constitution, implementing and administering provincial legislation, developing and implementing provincial policy and coordinating the functions of the provincial administration and its Departments. Section 125(6) requires that the Provincial Executive acts in accordance with the Constitution.

[56] The third party notice is sparse on allegations that sustain a finding that the Premier and his Executive breached section 125 of the Constitution as well as the basis for such allegations. Even more problematic for Ms Lehloenya is that in the event of any breach, section 125 does not provide for the liability of the kind she seeks to hold Premier Makhura for under the third party notice.

[57] The argument advanced on behalf of Ms Lehloenya, purportedly on the authority of *Olitzki Property Holdings* does not remedy this defect. Ms Lehloenya has not pleaded a common law duty owed to her by Premier Makhura. Under these circumstances, such a duty may not be imputed by inference or statutory interpretation. In other words, even if it is found that Premier Makhura breached section 125, Ms Lehloenya has not established the right to a remedy against Premier Makhura based on this section.

[58] Therefore, there is no legal basis, in terms of section 125 of the Constitution to hold the Premier and his Executive liable for an indemnity or contribution to Ms Lehloenya.

[59] In the premises, Premier Makhura and the GPG's exception stands to be upheld.

THE SPECIAL PLEA

[60] Professor Lukhele opposes the third party notice on the following two grounds.

60.1. he seeks a dismissal of Ms Lehloenya's third party notice on the basis that the SIU's claims against Ms Lehloenya and Professor Lukhele as set out in its particulars of claim are based in contract and not delict. Therefore, he cannot be held liable for a contribution or indemnification as contemplated in section 1 or declared a join wrongdoer in terms of section 2 of the Apportionment of Damages Act 34 of 1956 because the Act does not apply under the circumstances;

60.2. he also contends that the third party procedure is not appropriate in the circumstances.

[61] It follows that two issues stand to be determined:

61.1 whether the Apportionment of Damages Act applies under the circumstances; and

61.2 whether the third party procedure against Professor Lukhele is appropriate under the circumstances.

Whether the Apportionment of Damages Act applies under the circumstances

[62] To determine this question, I am guided by the trite legal principle that the right to indemnity only arises in contract, express or implied, by statute or where it is implied by law.[9]

[63] It follows that to succeed in her claim against Professor Lukhele, Ms Lehloenya must show that she has a right against him for an indemnity or contribution arising in contract, statute or by law.

[64] Ms Lehloenya has not pleaded in her third party notice, a right in contract on which she basis her claim for an indemnity or contribution against Professor Lukhele. Although she alleges breach of statutory and regulatory duties against Professor Lukhele, she has similarly not pleaded a right to an indemnity or contribution derived from the Constitution, Statutes and Regulations allegedly breached by Professor Lukhele.

[65] Ms Lehloenya has solely based her right to indemnification or contribution on section 1 and 2 of the Act. As correctly argued on behalf of Professor Lukhele, these provisions do not apply in the circumstances of the SIU's claim. I find so for the reasons that follow.

[66] The purpose of the Act, which defines its scope of application, as expressly provided for in its long title, is 'to amend the law relating to contributory negligence and the law applicable to joint wrongdoers in delictual damages claims and to provide for other incidental matters'. Consistently with the Supreme Court of Appeal's (SCA) decision in *Thoroughbred Breeders*, section 1, in terms of which Ms Lehloenya seeks indemnity against Professor Lukhele, ought to be interpreted against the purpose of the Act as expressly set out in its long title.

[9] *Eimco (SA) Pty Ltd v P Mattioda's Construction Co (SA) (Pty) Ltd* 1967 (1) SA 326 (N) at 332H-333A (Par 28 heads)

The words used, purpose and context of the Act limits its application to delictual claims.

[67] Further, section 2(1) expressly provides for two or more people (in this case Ms Lehloenya and Professor Lukhele), to be sued in the same action (in this case, in the SIU action against Ms Lehloenya and Professor Lukhele, in which Ms Lehloenya seeks to sue Professor Lukhele under a third party notice) were it is alleged that such persons (Ms Lehloenya as a defendant and Professor Lukhele as a third party) are jointly and severally liable in delict to a third person (the GPG and/ or the State), for the same damage (the irregular, fruitful and wasteful expenditure).

[68] Herein lies another fatal difficulty with Ms Lehloenya's third party claim. The SIU's claim against Ms Lehloenya and Professor Lukhele arises out of their contracts of employment with the GPG and not in delict. A finding that Ms Lehloenya is liable to the Department in delict will never be made, as it is not the basis for the SIU's claim against Ms Lehloenya. Therefore, Ms Lehloenya will never succeed in making out a case for an order in terms of section 2, that Professor Lukhele and she are jointly and severally liable in delict to the SIU, the GPG and/ or the State.

[69] Therefore, Ms Lehloenya's attempts to sue Professor Lukhele as a joint wrongdoer in order to seek an indemnity or contribution against him for the same damage in respect of the alleged irregular, fruitless, wasteful expenditure in the action instituted against her by the SIU, is crippled by the fact that the SIU's claim against her and Professor Lukhele is based in contract and not in delict.[10]

[70] The reason for the limitation in the scope of the Act is that the question of contributory negligence, and consequently, apportionment of liability, does not arise in a contractual claim. A contractual claim, for example a claim for

[10] In *Thoroughbred Breeders Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at para 74, the auditors' claim for contributory negligence against Thoroughbred Breeders contractual claim for damages was dismissed on the basis that Act 34 of 1956 does not apply to contractual claims.

contractual damages, follows a material breach of contract, period. Fault in the form of negligence is not a relevant consideration when determining whether a party has breached a contract or not. The determination is solely made with reference to the terms of the contract.

[71] The SIU bears the onus to prove the causal link between the terms of the employment contract Ms Lehloenya allegedly breached and the irregular, fruitful and wasteful expenditure which the GPG incurred after 6 April 2020, alternatively 28 May 2020. Should the SIU succeed, Ms Lehloenya is liable to the GPG and/or the State for the pleaded loss. She is not entitled to an indemnity or contribution by Professor Lukhele in terms of the Act. Any alleged negligence in delict on Professor Lukhele's part is not a valid defence and consequently, can never reduce Ms Lehloenya's proved liability to the SIU, the GPG and/or the State.

[72] Professor Lukhele's liability for these payments is part of the case the SIU seeks to establish against Professor Lukhele in the same action. Ms Lehloenya has no basis in terms of the Act to pursue Professor Lukhele for any losses suffered by the State as a result of these payments.

[73] Ms Lehloenya's reliance on *Lillicrap*[11] is misplaced. A delictual claim for pure economic loss arising from a breach of contract is incompetent unless it arises independently from the contractual obligations allegedly breached. The primary purpose of a contractual claim is to enforce an agreement, or compensate for the non-fulfilment of its terms. A delictual claim is directed primarily at *compensation for the breach of a legal duty of care*. Such a legal duty must exist independently from the terms of the contract. Ms Lehloenya has not pleaded a legal duty of care owed to her by Professor Lukhele, that exists independently from the obligations that arise from Professor Lukhele's employment contract with the GPG.

[11] Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A)

[74] Holtzhauzen[12] is also of no assistance to Ms Lehloenya for the same reason. In Holtzhauzen, the SCA recognized the limitations of a delictual claim under these circumstances as echoed in Lillicrap.

[75] In the premises, I find that there is no basis in law for a declaration that Professor Lukhele is a joint wrongdoer as contemplated in section 2 of Act No 34 of 1956. Neither is there a basis in law to find that he is liable to indemnify Ms Lehloenya in terms of section 1.

[76] This conclusion straddles Ms Lehloenya's third party claim against all the third parties against whom she seeks an indemnity or contribution, namely Premier Makhura, the GPG, Malotana and Pino, warranting its dismissal.

Whether the third party procedure is appropriate under these circumstances

[77] Professor Lukhele contends that the third party procedure is inappropriate because:

77.1 he is already a party to the main action;

77.2 the issues that arise in the SIU's contractual claim against Ms Lehloenya and Professor Lukhele are different from the issues that arise in Ms Lehloenya's third party delictual claim against Professor Lukhele.

[78] The first point was abandoned during legal argument. Correctly so, because the purpose of a third party notice is to allow a defendant to institute a claim against a third party in the case the plaintiff has brought against him. The fact that Professor Lukhele is a defendant in the SIU action, does not render Ms Lehloenya's third party notice incompetent. He is not a defendant qua Ms Lehloenya. The purpose of the party notice is to join him in the latter capacity to

[12] *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) (17 September 2004)

allow Ms Lehloenya to pursue her case against him. This interpretation of Rule 13 (1) is consistent with Rule 13 (8).[13]

[79] A third party notice is not only competent where the same cause of action is pursued against a defendant and her third parties. It is also competent where the same issues stand to be determined. Rule 13 (1)(b) expressly provides so. There are overlapping issues to be determined in the SIU's contractual and in Ms Lehloenya's delictual claim. These include the alleged breached of contract, which could constitute a wrongful act in delictual terms, provided that the legal duty of care is alleged; and the irregular, fruitless and wasteful expenditure which could constitute a contractual loss or a patrimonial loss in delict.

[80] For these reasons, I find that the grounds raised by Professor Lukhele do not render the third party procedure incompetent in the circumstances.

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[13] Rule 13 (8) provides that:
"(8) Where a party to an action has against any other party (whether either such party became a party by virtue of any counter-claim by any person or by virtue of a third party notice or by any other means) a claim referred to in sub rule (1), he may issue and serve on such other party a third party notice in accordance with the provisions of this rule. Save that no further notice of intention to defend shall be necessary, the same procedure shall apply as between the parties to such notice and they shall be subject to the same rights and duties as if such other party had been served with a third party notice in terms of sub rule (1)."

WHETHER THE TRIBUNAL OUGHT TO JOIN PREMIER MAKHURA *MERO MUTO*

[81] Ms Lehloenya has not pleaded a non-joinder point *in limine* in respect of Premier Makhura. Therefore, her enticement to the Tribunal, set out in her heads of argument, to join Premier Makhura *mero motu* is nothing but a desperate attempt to entangle Premier Makhura in these proceedings. For the reasons that follow, having considered Ms Lehloenya's joinder *mero motu* invitation, it is rejected.

[82] By virtue of Ms Lehloenya's enticement, the joinder of Premier Makhura would not be *mero motu*. If she had a valid non-joinder point, Ms Lehloenya ought to have pleaded it.

[83] Be that as it may, Premier Makhura is aware of these proceedings and was free to join them if he discerned an interest that justified his participation independently from the GPG as represented by the SIU. Rather, the GPG and he mounted a very strong objection to their joinder through Lehloenya's third party notice. They are successful in their objections to Lehloenya's third party notice. Therefore, there is no justification for criticising them for not joining the proceedings.

[84] The Tribunal may not join Premier Makhura *mero moto* without reason. There has to be a proper legal basis for him to be joined. For reasons set out in this judgment, none is present. Further, the order sought by the SIU is not prejudicial to him. Neither is it incapable of being executed without him.

CONCLUSION

[85] For the reasons stated above, Ms Lehloenya may not join the GPG and Premier Makhura as parties to the SIU action against her because these parties are plaintiffs in the action represented by the SIU.

[86] Further, Ms Lehloenya has failed to establish a proper legal basis for the joinder of Premier Makhura in his official and personal capacity, the GPG, Professor Lukhele, Mr Malotana and Ms Pino under the third party notice either as joint, alternatively concurrent wrongdoers. She has also failed to establish a proper legal basis against the GPG and Premier Makhura as its executive head in terms of vicarious liability or unjustified enrichment or restitution.

[87] Whatever defence Ms Lehloenya believes she has against the GPG and Premier Makhura that diminish her liability as pleaded by the SIU, should be set out in her plea. The SIU will stand or fall by its case as pleaded in its particulars of claim. The SIU is only confined to recover from Ms Lehloenya the damages it proves against her in this action.

[88] No reason has been advanced as to why costs should not follow the course in all three interlocutory proceedings.

[89] In the premises, the following order is made:

ORDER

1. Premier Makhura in his official capacity and the Gauteng Provincial Government's (GPG) application to strike out succeeds with costs.

2. Ms Lehloenya's third party notice is struck out as against Premier Makhura and the GPG.

3. Premier Makhura in his personal and official capacity and the GPG's exception is upheld with costs.

4. Professor Lukhele's special plea is upheld with costs.

5. Ms Lehloenya's third party claims against Premier Makhura in his personal and official capacity, the GPG, Professor Lukhele, Mr Malotana and Ms Pino are dismissed.

6. The above costs are inclusive of the costs of two counsel where so employed.

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JUDGE L. T. MODIBA

MEMBER OF THE SPECIAL TRIBUNAL

APPEARANCES

For the Plaintiff (The SIU): No appearance. Abides the Tribunal's decision.

For the First Defendant (Ms Lehloenya): Adv. Sunday Ogunronbi, instructed by Mr Thabo Kwinana, KMNC Attorneys

For the Second Defendant and Third Third Party (Professor Lukhele): Adv. Daniel Berger SC, instructed by Mr Anton Roskam, Haffegee Roskam Savage Attorneys

For the First and Second Third Parties (Premier Makhura and the Gauteng Provincial Government: Adv. Ngwako Maenetje SC, assisted by Adv. Ndumiso Luthuli, instructed by Mr Daniel Nyantsaza, Harris Nupen Molebatsi Attorneys

Date of hearing: 19 August 2021

Date of judgment: 25 October 2021