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 No: GP/09/19

In the matter between:

SPECIAL INVESTIGATING UNIT	**First Plaintiff**
THE MINISTER OF POLICE	**Second Plaintiff**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**Third Plaintiff**

and

KGOSISEPHUTHABATHO GUSTAV LEKABE	**Defendant**

JUDGMENT

---

[1] The three plaintiffs issued summons against the defendant, Kosisephuthabatho Gustav Lekabe (the defendant/Mr Lekabe), the former Head of Office of the State Attorney, Johannesburg (the State Attorney), in which several orders were sought by way of relief. The first plaintiff is the Special Investigating Unit (SIU) which also represented the second plaintiff, the Minister of Police and the third plaintiff, the Minister of Justice and Correctional Services (Minister of Justice), in terms of the provisions of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the Act), in instituting the action against the defendant. The action arose from investigations by the SIU into malfeasance, and unlawful and irregular conduct at the Office of the State Attorney, Johannesburg. The defendant responded by filing eight special pleas and a plea over in respect of the merits. The current application brought by the defendant is in terms of Rule 33(4) of the Uniform for a separation of the special pleas from the main trial and the hearing thereof. The application is opposed by the plaintiffs. For convenience, I shall refer to the parties as they are cited in the summons, with the necessary abbreviations.

[2] By way of background, the action is based, in essence, on damages suffered by the Office of the State Attorney, who falls under the jurisdiction of the Minister of Justice, being the cabinet minister responsible for the conduct of attorneys employed at the Office of the

State Attorney, Johannesburg. Damages are claimed under five heads – Claim A to Claim E. Claims A to D relate to actions for damages instituted by members of the public, against the Minister of Police, in respect of various shooting incidents, as well as unlawful arrest and detention involving the South African Police Service (SAPS). Claim E relates to an alleged collusive and corrupt relationship between the defendant, Mr Lekabe and one Advocate Kajee (Kajee), who was briefed to represent the Office of the State Attorney in various matters, including those mentioned under Claims A to D. As a result of such a relationship, Kajee either charged for services he did not render or overcharged for the services he did render, and was accordingly paid by the State Attorney. This resulted in the State Attorney suffering damages in vast sums of money.

[3] As I indicated, the defendant raised eight special pleas on various aspects of the plaintiffs' case, to which the SIU answered. It would useful to list these in order to contextualise this application. They are:

3.1 Non-joinder in respect of Kajee. The defendant alleges that Kajee should have been joined as a defendant in view of the allegations by the plaintiffs that he and Kajee were involved in a collusive and corrupt relationship. The consequence of such relationship was that the defendant wrongfully and unlawfully breached his statutory duties, and

caused payments to be made to Kajee, which resulted in the plaintiffs' suffering damages;

3.2 Misjoinder of the defendant, as it was Kajee and the plaintiffs who instituted actions against the Minister of Police who were paid the money and not the defendant. The latter was therefore erroneously joined to this action;

3.3 Prescription in respect of Claim D, where the defendant alleges that the debt arose on or about 22 June 2016, while the claim was instituted on 5 December 2019;

3.4 The defendant appears to have been erroneously listed two special pleas as the third special plea. The special plea in respect of Claim D was listed as the third special plea. I will proceed on the assumption that the defendant intended for this to be the fourth special plea. The latter relates to prescription in respect of Claim E, which the defendant alleges relates to the period January 2013 to December 2016. The claim was instituted on 5 December 2019, with the result that this claim has been extinguished by prescription;

3.5 On any conceivable and reasonable construction, paragraphs 38 and 39 of the Particulars of Claim lack averments necessary to sustain any cause of action against the defendant;

3.6 the claims of the plaintiff's are based on administrative action which has not been set aside as legally invalid and therefore wrongfulness or

unlawfulness cannot be relied upon. All the claims in the plaintiffs' Particulars of Claim fall to be dismissed;

3.7 The first plaintiff lacks authority to act on behalf of the second and third plaintiffs, and it has not shown that it has such written authority. If it had such authority, it would have attached it to the Particulars of Claim; and

3.8 The empowering provisions of the Act, read with the Proclamations (referred to in para 2 of the Particulars of Claim) empower the SIU to investigate maladministration and not to bring the current action. In addition, the reference to the State Liability Act 20 of 1957 in the Particulars of Claim do not contain the necessary averments to demonstrate that the SIU has the requisite *locus standi* to act on behalf of the second and third plaintiffs.

[4] I deal now with the plaintiffs' answer to the application. The defendant concedes that the first special plea of non-joinder is dilatory in nature and will not dispose of the action against him. In the light of that concession the plaintiffs indicated that they have instituted action against Kajee, and at a pre-trial meeting held in March 2022, the parties in this matter discussed the possibility of consolidating Claim E in this matter with the action instituted against Kajee. The consolidation will be done either by agreement or by way of an application to court There is,

therefore, no reason to adjudicate this special plea separately from the main action.

[5] With regard to the second special plea of misjoinder, the plaintiffs contend that their claims are not based on pecuniary damages but on the fact that the defendant settled the claims instituted by members of the public, without authority to so, that he committed funds of the second respondent, in contravention of Treasury Regulations, as well as the relevant provisions of the Public Finance Management Act and that he breached the duty of care as an attorney, which he owed to the second plaintiff. Evidence will have to be led in respect of this special plea, with the same witnesses having to testify at the trial. It would not be convenient to separate this special plea from the main trial.

[6] As I indicated earlier, the defendant cited two special pleas as the third special plea, being in respect of Claims D and E respectively. With regard to Claim D, the plaintiffs allege that the date that the Minister of Police was obliged to pay the plaintiff in the action instituted against him was 22 June 2016, as a result of an unauthorised settlement of that matter by the defendant. An investigation into unauthorised settlements by the defendant was only launched after the latter's suspension on 18 September 2018. It was only after that investigation that the defendant's

wrongdoing was uncovered and the facts giving rise to the debt became known to the plaintiffs. Prior to that and while the defendant was in office, he concealed his wrongdoing.

[7] With regard to the special plea in respect of Claim E, the plaintiffs proffered a similar argument as in respect of Claim D, that they only became aware of the facts giving rise to the debt after 18 September 2018, and they would need to lead evidence in this respect. Therefore, this special plea and that in respect of Claim D cannot conveniently be dealt with separately from the trial in this matter.

[8] The fifth special plea relates to paragraphs 38 and 39, which the defendant alleges disclose no cause of action. The plaintiffs' answer to this is that this is not a special plea but more in the nature of an exception. The two paragraphs are the first facts pleaded against Kajee and should be read together with all the other paragraphs relevant to this claim. The defendant cannot attack parts of a pleading but should take exception to the whole document. This special plea cannot be separated from the rest of the issues under Claim E and requires evidence to be led in order to establish the amounts paid to Kajee. Therefore, it cannot conveniently be dealt with separately.

[9] The plaintiffs' answer to the sixth special plea is that the defendant had not alleged any facts from which it could be established what administrative action he is referring to. The plaintiffs are unable to comprehend this special plea, in the absence of any further evidence or facts. The defendant would have to lead evidence to establish that his actions amount to administrative action. The plaintiffs deny that the defendant's unauthorised settlements amount to *"administrative action"* as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This special plea too cannot be determined on the papers as evidence would have to be led in respect thereof.

[10] With regard to the seventh special plea, the plaintiff's assert that the way to challenge or dispute a person's authority to act on behalf of a party is in terms of uniform Rule 7, and without adducing evidence, it would be impossible to adjudicate this special plea. The plaintiffs, in any event, point out that Section 5(5) of the Act, which has been pleaded in paragraph 2 of the Particulars of Claim, entitles the SIU to institute and conduct civil proceeding in its own name or on behalf of a state institution

[11] The plaintiff's assert that in respect of the eighth special plea, it is unclear whether the applicant's case is that the SIU does not have *locus*

standi to act on its own or whether it does not have *locus standi* to act on behalf of the second and third plaintiffs. This special plea is intertwined with the seventh special plea, so that the submissions in respect of a Rule 7 notice/application apply in this special plea as well. The special plea will not dispose of the action, as the locus standi of the SIU has been set out in paragraph 2 of the Particulars of claim. Sec 5(5) of the Act applies equally to this special plea.

[12] This Tribunal has been called upon to decide:

12.1 whether it is appropriate to grant the application for separation of the special pleas from the plea over on the merits;

12.2 the eight special pleas, in the event that the separation application is granted.

[13] Uniform Rule 33(4) provides as follows:

> "If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately".

[14] As a starting point it is useful to bear in mind that the aim of Rule 33 is to achieve a speedy and cost-effective finalisation of litigation. There are a number of factors which must be considered in determining an application for separation. Convenience is a key factor, and it is well settled in our law that "The word 'convenient' within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration." (See Erasmus, Superior Court Practice, D1- 437 and the cases cited therein).

[15] A court (or a Tribunal such as this) is under a duty to ensure that it is convenient and proper to try an issue or issues separately from those to be decided in the trial. Therefore, the separation of issues is not simply there for the asking, and the party seeking such an order must satisfy the court of such convenience. Such a party is required to place sufficient information or evidence before the court to enable it to exercise its discretion properly and meaningfully. I turn now to deal with the evidence and arguments before me in support and opposition of the application for separation.

[16] It is common cause that the SIU has instituted action against Kajee and that Claim E will be consolidated with that action. The non-joinder of

Kajee to this action was therefore not pursued with any vigour, with Mr Makhambeni conceding that this special plea will not be dispositive of the matter. In view of Mr Fouche's confirmation that the plaintiffs will consolidate Claim E with the action against Kajee, it is not necessary to deal further with the first special plea, as it would serve no purpose to do so. The arguments in respect of the second special plea of misjoinder of the defendant, in my view, ignores the basis of the claims enunciated in the Particulars of Claim. The defendant's argument is that he was not the recipient of the monies paid to the four plaintiffs who instituted actions against the Minister of Police, nor the monies claimed by Kajee, to whom such monies were paid. The plaintiffs are claiming payment of the monies from the defendant who was never in receipt of such monies. On this basis, he has no direct and substantial interest in the matter and ought not to have been joined as a defendant.

[17] The defendant did not mention at all the plaintiffs' cause of action against him, which I have set out in para [5] above, nor respond in argument to the plaintiffs' assertions that he has misread the summons and the basis of the claims against him. I mention that during oral argument, I pointed out to Mr Fouche that the relief claimed in the summons does appear to claim payment of pecuniary damages from the defendant. That does not, however, alter the plaintiffs' pleaded cause of action, nor does it lend support for the defendant's contention

that he has no direct or substantial interest in the action. Any pleading may be amended according to the relevant Rules. In my view the arguments proffered in respect of the special plea of misjoinder cannot be sustained and do not support the prayer that this special plea be heard separately.

[18] The third and fourth special pleas are closely linked and can conveniently be dealt with together. The defendant has raised prescription as a ground for hearing the special pleas separately and for dismissal of the claims against him. Once again, the defendant has either misread the summons or chooses to ignore the plaintiffs' pleaded case. It is clear that the various payments in Claims A-D were made over a period from 2016 to 2018 and that in respect of Claim E, payments to Kajee were made over the period 2013 to 2018. The defendant's unlawful conduct and malfeasance was only uncovered after his suspension in September 2018. The plaintiffs claim that it was only after the defendant's suspension that they became aware of the facts giving rise to the debts.

[19] In this connection, they rely on the provisions of section 12(3) of the Prescription Act 68 of 1969 which stipulates that a debt shall not deemed to be due until the creditor has knowledge of the identity of the

debtor and of the facts from which the debt arises, provided that the creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care. The fact of the plaintiffs' knowledge can only be established by leading *viva voce* evidence to establish when they became aware of the debt or whether they could, by the exercise of reasonable care, have gained such knowledge earlier than they claim to have become aware of the debts. The defendant insisted that the issue of prescription could be decided on the papers, without the need for *viva voce* evidence, but did an about-turn when I confronted Mr Makhambeni with the proposition that prescription was fact-driven and that *viva voce* evidence would have to be led to establish the date of the plaintiffs' knowledge of the debt. He then adopted the stance that even if he failed on prescription, the plaintiffs could not get past the other special pleas. I will deal with those shortly. It is obvious, in my view, that the special pleas of prescription in respect of Claims D and E also cannot conveniently be heard separately.

[20] It is trite that one cannot raise a special plea or, for that matter, an exception to part of a pleading. The defendant seeks to have paragraphs 38 and 39 dismissed. In my view, this is not permissible, as those paragraphs must, correctly, be considered in conjunction with the rest of the averments in respect of Claim E. This can be conveniently considered at the trial, with any further evidence or documents being led

to deal with any challenge thereto. This special plea also cannot conveniently be heard separately.

[21] I turn now to deal with the sixth special plea, which the defendant argues cannot be overcome by the plaintiffs, and will have the effect of disposing of the entire action brought against the defendant. The defendant argues that the plaintiffs' claims are premised on administrative action which has not been set aside as legally invalid. Therefore, no claims can flow from such action. If the plaintiffs now seek to set aside the actions/decisions of the defendant, they would have to bring an application for condonation and explain fully why they delayed for so long. It was raised both by the plaintiffs and the presiding officer that no basis has been laid in the defendant's Founding papers, or indeed anywhere, supporting this contention. Mr Makhambeni simply side-stepped this lacuna in his papers, insisting that the defendant's conduct amounts to administrative action and proceeded to quote extensively from case law involving administrative action, the duties of an administrator on the issue of illegality and the effect of the plaintiffs' failure to obtain a declarator of legal invalidity and set aside the decisions of the defendant.

[22] It was pointedly raised that the defendant's conduct/decision does not fall within the definition of *"administrative action"* as contained in PAJA. Mr Makhambeni averred that the plaintiffs have it wrong and that

section 1 of PAJA must be read in conjunction with the definition of administrative action in section 239 of the Constitution of South Africa. I am in agreement that, on the face of it, the defendant cannot be said to be an administrator as envisaged in PAJA, nor are his decisions included in the definition of *"administrative action"*. I further point out that Mr Fouche directed my attention to the provisions of section 239 of the Constitution, and I found that the defendant's reliance on that section to clarify the definition of *"administrative action"* is misplaced. Section 239 is contained in Chapter 1, under "General Provisions" in the Constitution and deals with the definitions and meaning of *"national legislation"*, *"organ of state"* and *"provincial legislation"*. Nowhere in that section is any mention made of *"administrative action".*

[23] It is clear that the issue of whether the defendant's actions can be regarded "administrative action" raises a serious dispute, which cannot be resolved on the papers. The defendant himself will have to lead evidence to establish this argument, if he persists therein. Therefore, all the arguments put forward in support of the defendant acting as an administrator are not relevant for purposes of this application and will not be considered. It is clear that this special plea too cannot be decided on the papers. For the sake of clarity, I cite the definitions of "administrative action" and "decision" as contained in section 1 of PAJA, from which it appears, on the face of it that the defendant's actions fall

outside the scope of PAJA. The matter can, of course, be fully ventilated at the trial:

In this Act, unless the context indicates otherwise-

'administrative action' means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) *(d)*, *(e)* and *(f)*, 126, 127 (2), 132 (2), 133 (3) *(b)*, 137, 138, 139 and 145 (1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the

Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4 (1);

'decision' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly;

[24] The seventh and eighth special pleas essentially revolve around the *locus standi* of the SIU to act on behalf of the second and third plaintiffs in this matter and will be dealt with together. In spite of paragraph 2 of the Plaintiffs' Particulars of Claim setting out fully the empowering legislation and related Proclamations that permit it to sue in its own name or on behalf of other state organs, the defendant persists in his argument that the SIU ought to have proved that it has authority to represent the second and third plaintiffs by filing some sort of letter of authority from those two plaintiffs. This challenge is worrying in spite of the clear provisions of the Act and Proclamations, as well as pronouncements of this Tribunal on the issue of the *locus standi* of the SIU (See, for example, *SIU v F Mpofana & 72 Others, Case No. GP 13/2021, delivered on 10 February 2022. At para 26*). Such challenges not only escalate costs unnecessarily but cause delays in the finalisation of matters, thus causing such cases to fall foul of the

established and salutary practice and Constitutional requirement that litigation should be finalised as expeditiously and cost-effectively as possible.

[25] The defendant was unable to say what authority he relies on for his assertion that the SIU lacks locus standi as it ought to have attached letters of authority from the second and third plaintiffs. The empowering provisions of the Act are section 4(1)(c)(i) read with section 5(5) of the Act. The empowering Proclamations are 21 of 2018, signed on 10 July 2018 and published in Government Gazette No. 41771 on 13 July 2018, read with Proclamation No 33 of 2019, signed on 13 June 2019 and published in Government Gazette No. 42577 on 12 July 2019. (I pause to note that the plaintiffs erroneously record the date of publication of the latter Proclamation as 22 July 2019). As the wording of the relevant sections of the Act as well as the two Proclamations are clear and unambiguous, it is not necessary to cite those provisions here. Consequently, it is my view that, the seventh and eighth special pleas have no merit and deserve no further attention at this stage.

[26] Counsel for both parties addressed me on the issue of costs, with Mr Makhambeni asking for the separation application to be granted with costs to be costs in the special pleas or the main action. Alternatively, should the court not grant the separation application, costs should stand over for determination at the trial. Mr Fouche sought the dismissal of the separation application with costs, including the costs of two counsel. Mr Makhambeni opposed this last request on the basis that the matter was an uncomplicated matter which did not require the attention of two counsel. Mr Fouche's response was that two counsel have always been involved in this matter. Both counsel correctly conceded that the issue

of costs lies in the discretion of the court. I am alive to the fact that such discretion must be exercised judiciously, taking into account all relevant factors, to arrive at a decision that brings fairness and equity to bear upon all parties concerned. I have considered the submissions of both counsel in respect of this issue and, in the exercise of the discretion that I am allowed, I am of the view that as this is an interlocutory application, the interests of justice will best be served if the costs are ordered to stand over.

[27] In the circumstances, I make the following order:

27.1 The application for separation of the special pleas, in terms of Uniform Rule 33(4) is dismissed;

27.2 The costs of this application are to stand over for later determination.

_____

JUDGE S NAIDOO
MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the applicants:	Adv PW Makhambeni
Attorney for the applicants:	PL Samuels Inc
Email:	plsamuels@mweb.co.za
Counsel the 1st respondent:	Adv GVR Fouche
Attorney for the 1st respondents:	Gildenhuys Malatji Attorneys
Email:	lpearton@gminc.co.za
Date of hearing:	8 June 2022
Date of judgment:	9 June 2022