IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2(1) OF THE SPECIAL INVESTIGATING UNIT AND SPECIAL TRIBUNALS ACT 74 OF 1996 (REPUBLIC OF SOUTH AFRICA)

CASE NO.: GP09/2019

In the interlocutory application for amendment between: -

KGOSISEPHUTHABATHO GUSTAV LEKABE	Applicant
and	
THE SPECIAL INVESTIGATING UNIT (SIU)	First Respondent
THE MINISTER OF POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE MINISTER OF HEALTH	Fourth Respondent

CASE NO: GP09/2019

In re:

THE SPECIAL INVESTIGATING UNIT	First Plaintiff
THE MINISTER OF POLICE	Second Plaintiff

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Third Plaintiff

and

KGOSISEPHUTHABATHO GUSTAV LEKABE First Defendant

Consolidated with:

CASE NO: GP/22/2021

THE SPECIAL INVESTIGATING UNIT First Plaintiff

THE MINISTER OF POLICE Second Plaintiff

THE MINISTER OF HEALTH Third Plaintiff

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Fourth Plaintiff

And

HASSAN EBRAHIM KAJEE Second Defendant

JUDGMENT

> **"Corruption has wounded our democracy and shaken people's faith in our institutions. If corruption is not arrested, the greatest damage will not be in the funds stolen, the jobs lost, or the services not delivered. The greatest damage will be to the belief in democracy itself,"** [1]

Introduction

[1] The applicant has launched an application in terms of Rule 28 to amend his special pleas. The notice of motion is headed Rule 28. The applicant advised the

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[1] President Ramaphosa while delivering his keynote address on 8 November 2023 at the 2023 National Dialogue on Anti-Corruption in Boksburg, east of Johannesburg

Tribunal that the reference to Rule 28 refers to the Uniform Rules of Court. In his heads of argument, the applicant submits that Uniform Rule 28 must be read with Rule 15 of the Special Tribunal Rules. This route is adopted by the applicant despite the fact that the Rules for the conduct of proceedings in the Special Tribunal includes Rule 15 which provides the amendment of pleadings as follows:

> "Rule 15(1) Any party desiring to amend any pleading or document shall notify all the other parties of his or her intention to amend and shall furnish particulars of the amendment.
>
> (2)
>
> (3)
>
> (4) Where a proposed amendment has been objected to, the party wishing to effect the amendment may, within five days' service of the notice of objection, institute an application for leave to amend and enrol it for hearing on the date designated by the Tribunal President or Member."

[2] Be that as it may the Tribunal in its expeditious cost saving approach will not raise this as an impediment because the applicant has overlooked the Special Tribunal Rule 15. The applicant's intention to amend is clear. It must be noted that the use of High Court Rules are only utilised when procedures are not provided for in the Tribunal Rules.

Tribunal Rule 28 provides:

> "if a situation arises for which the Special Tribunal 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." The Tribunal may, in the exercise of its powers and in the performance of its functions, or in any incidental matter, take any steps in relation to the hearing of a matter before it which may lead to the expeditious and cost-saving disposal of the matter, including the abandonment of the application of any rule of evidence in order to achieve the objects of the Act. "

Parties

[3] The first plaintiff in this trial action is the Special Investigations Unit (SIU) established in terms of section 2(1)(a) (i) of the Special Investigating Units and Special Tribunals Act No. 74 of 1996. (the SIU Act). After consolidation of two actions, the first defendant, Mr Kgosisephuthabatho Gustav Lekabe became the first defendant. The

action proceedings arose out of his alleged unlawful conduct when he was formerly the Head of the Office of the State Attorney in Johannesburg.

[4] The first defendant is now the applicant in these proceedings to amend his special pleas. He filed pleas incorporating special pleas on 2 September 2021 where four special pleas were raised. Again, on 14 February 2023 he filed a further eight special pleas. This application is a further addition of special pleas and is sought by way of an amendment to join a number of parties and entities to this action. It is uncertain to which plea it applies. I assume it is the second plea filed. For the adjudication of this application to amend it matters not.

The Applicant's intended amendment

[5] The first defendant wishes to amend his plea by the inclusion in all his special pleas of the words set out below. In the intended amendment, he wishes to amend his plea by raising 12 special pleas. In essence the special pleas which the applicant wishes to introduce relate to his submission that the SIU should have joined all the state officials and entities involved in the process of effecting payments to Mr Kajee, the second defendant in this action. He also wishes to introduce a point of misjoinder in relation to the citing of the fourth respondent, the Minister of Health.

[6] The applicant initially submitted that the SIU did not have has the necessary locus standi to sue on behalf of all these entities forming part of the cause of action but has withdrawn and conceded that the SIU can sue its own name as well as in its representative capacity of any relevant state department that has been referred to.

[7] The applicant has attached a Schedule to his heads of argument and asserts that the objective evidence demonstrates that the attorneys so identified in his Schedule have a direct and substantial interest in the action. He contends in the intended amendment

of the 12 special pleas that all the relevant heads of departments and others should have been joined to the proceedings.

[8] It is the applicant's case that other parties certified and authorised the payments that were paid over to Mr Kajee. In the circumstances the applicant contends that he cannot be held liable. He also asserts that the non-citation of the provincial state departments who approved and paid the relevant invoice of Mr Kajee should be joined. So in relation to every payment, it is the applicant's case that he as department head should not be held liable.

[9] The applicant's Schedule consists of many pages where he lists the names of the matters, the date of the invoice, the verification and certification by a particular instructing party. Although in relation many of the invoices, he approves payment of the amount reflected, there are other invoices where he is not the party ultimately authorising payment. The Schedule also reflects reductions and also reflects if there are any disallowances and if there are any by whom. This analysis in the heads of argument takes up several pages in support of his defence regarding the non-joinder.

Example where the applicant did approve payment.

DATE	VERIFIED AND CERTIFIED BY	PAYMENT APPROVED BY	AMOUNT	REDUCTIONS	DISALLOWANCES	EFFECTED BY
2013/05/28	SMITH	LEKABE	R 51 250,00	NONE	9 ITEMS	LEKABE
2013/06/24	SMITH	LEKABE	R107 812.50	NONE	1 ITEM	LEKABE

Example where the applicant did not approve the payment.

DATE	VERIFIED AND CERTIFIED BY	PAYMENT APPROVED BY	AMOUNT	REDUCTIONS	DISALLOWANCES	EFFECTED BY
2014/11/19	DHULAM	DHULAM	R 55 100,00	1 ITEM	NONE	DHULAM
2014/12/04	SAHEB	DHULAM	R 55 100,00	2 ITEMS	NONE	DHULAM

Wording of the intended amendments.

[10] The applicant essentially seeks to amend his special pleas by relying on the non-joinder of state attorneys, various provincial departments and various Ministers. He also raises the point of misjoinder of the Minister of Health. The applicant's intended amendments are set out below.

[11] By adding the words first defendants seventh special plea after the first defendant special plea the wording is as follows:

"in the light of the fact that all invoices rendered by Kajee in the different matters in which you were was briefed were all verified and certified correct fair reasonable and due to Kajee as the alleged services were rendered to the satisfaction of various attorneys and these attorneys are named there are some city attorneys and that the aforesaid attorneys have not been cited as interested defendants and thereby pleads the defence of non-joinder."

[12] By adding the applicant's eighth special plea as follows:

"as it is an established fact that some of Kajee's invoices rendered in matters dealt with by different attorneys and different matters were approved for payment by various attorneys of the Department of Justice Financial instructions and they have not been cited as interested defendants holding the plea of non-joinder."

[13] By adding the applicant's ninth special plea as follows:

"In as much as various named attorneys who represented the MEC of Health, Provincial Department briefed Kajee as counsel who in turn rendered invoices and claims against the first defendant and the MEC has not been cited in these proceedings."

[14] By adding the applicant's 10th special plea as follows

"In as much as Mr. Nemakonde acted as an attorney of record in a matter in which he was when representing MEC Co-Operative Government and Traditional Affairs, Gauteng Provincial Department briefed Kajee as counsel who in turn rendered invoices for the services that he allegedly rendered, which form part of the Plaintiffs claims against the First Defendant, the

MEC has not been cited in these proceedings as an interested Plaintiff, First Defendant pleads the defence of non-joinder."

[15] By adding the applicant's 11th special plea as follows:

"In as much as Mr. Mafiri acted as attorney of record in a matter in which he represented the MEC Education, Gauteng Provincial Department briefed Kajee as counsel who in turn rendered invoices for the services that he allegedly rendered which form part of the Plaintiffs claims against First Defendant and the that MEC has not been cited in these proceedings and the first defendant pleads the defence of non – joinder"

[16] By adding the applicant's 12th special plea as follows:

In as much as Mr Mphephu and Ms. Malherbe acted as attorneys of record in matters in which they were representing the Minister of Public Works, briefed Kajee as counsel who in turned rendered invoices for the services he allegedly rendered, some of which form part of the Plaintiff's claim against First Defendant, and the Minister has not been cited in these proceedings as an interested Plaintiff, First Defendant here pleads the defence of non-joinder."

[17] By the addition of the 13th special plea as follows

In as much as Mr. Dhulam purportedly acted as attorney of record in a matter in which he was representing the MEC Agriculture Gauteng Provincial Department, briefed Kajee as counsel who in turn rendered invoices and the services that eh allegedly rendered, which forms part of the plaintiff's claims against the First Defendant, and the MEC has not been cited in these proceedings as an interested Plaintiff, First Defendant hereby pleads the4 defence of non-joinder."

[18] By adding the applicant's 14th special plea as follows:

"In as much as Mr Mhephu acted as attorneys of record in a matter in which he was representing MEC E- Government, Gauteng Provincial Department briefed Kajee as counsel, who in turn rendered invoices for the services that he allegedly rendered, which in turn form part of the Plaintiff's claims against the first Defendant and the MEC has not been cited in these proceedings as an interested Plaintiff, First Defendant hereby pleads the defence of non-joinder."

[19] By adding first defendants 15th special plea as follows:

"In as much as Ms. Matlala acted as attorney of record in a matter in which she was representing the MEC Human Settlements, Gauteng Provincial Department, briefed Kajee in the matter as counsel, who in turn rendered invoices for the services that he allegedly rendered, which form

part of the invoices on which Plaintiff's claims are based, and the MEC has not been cited in these proceedings as an interested Plaintiff, First Defendant hereby pleads the defence of non-joinder of the MEC."

[20] By adding the words first defendant 16 th special plea as follows:

"In as much as Mr. Jwara acted as attorney of record in a matter in which he was representing the Human Rights Commission briefed Kajee in the matter as counsel, who in turn rendered invoices for the services that he allegedly rendered, which form part of the invoices on which Plaintiffs claim are based and the Commission has not been cited in these proceedings as an interested Plaintiff, the First Defendant pleads the defence of non-joinder "

[21] By adding the words to the applicant's 17 th special pleas follows:

"In the light of the fact that the Office of the State Attorney never acted on behalf of the Minister of Health in any of the matters which form part of the Plaintiff's claims in respect of which Kajee rendered invoices which are part of the Plaintiff's claims against the First Defendant in this matter, the Minister has been wrongly cited in this matter. Consequently, the First Defendant hereby pleads the defence of misjoinder of the Minister in these proceedings."

[22] By adding the applicant's 18 th special plea as follows:

"In as much as Mr. Nemakonde acted as attorney of record in a matter in which he was representing the Minister of Education as a result of which he briefed Kajee to represent the Minister in the matter as counsel, who in turn rendered invoices for the services that he allegedly rendered , which form part of the invoices on which Plaintiff's claims are based, and the Minister has not been cited in these proceedings as an interested Plaintiff, the First Defendant hereby pleads the defence of non-joinder."

The applicant's submission

[23] At the hearing of the application, Mr Brown, counsel on behalf of the applicant persisted in his submission that the parties listed in the Schedule attached to the heads of argument ought to be joined in these proceedings. A further submission is that if he is unable to amend his plea in the manner sought by including all parties he believes are relevant, he would be prejudiced. In other words, the applicant contends that he cannot plead in a vacuum where the parties material to his case are not joined.

[24] Counsel on behalf of the applicant also submitted that if judgment were to be awarded against him, he would have to start a new trial action against them and this would be time consuming and costly.

[25] The applicant invites the Special Tribunal to postulate a situation where if the amendment is not granted, then it means the listed attorneys are declared as having no direct and substantial interest in the matter of the litigation, yet they fully participated in the payments to Mr Kajee. The Schedule shows that the applicant only authorised 40% of the payments to Mr Kajee. This would be untenable according to him. The applicant contends that if these third parties are not joined it would mean that persons may have adverse findings made against them and they would not have been granted an opportunity to justify their conduct in relation to Mr Kajee's invoices.

[26] Counsel for the applicant submitted that the Court has a discretion whether to grant or refuse an amendment. He contends that several considerations apply when considering the grant of an amendment: it must not cause prejudice to the other side, it must be in the interest of justice and there is the consideration of convenience as well. He submitted that the intended amendment met all these requirements. He submits that the applicant will be prejudiced as he will be unable to sue the other wrongdoers in this trial action as he would have to start from scratch after the trial if there are other wrongdoers.

The respondents' case

[27] The respondents have objected to the amendment. The respondents' case is that it is not for a litigant, in this case the applicant, to dictate which alleged wrongdoer must be sued.

[28] Wunsch J held that it is not obligatory to join all of two or more wrongdoers in an action. [2]

> "That the joinder of joint wrongdoers as defendants in actions for damages for negligence is permitted but not compulsory and that an action against one would not be defeated by the omission to take action against one or more others in the same or a different action is clear from the Apportionment of Damages Act 34 of 1956. And see Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 171. There are, of course, other reasons why it is, or may be advisable, for both joint wrongdoers to be joined. …That the joinder of joint wrongdoers as defendants in actions for damages for negligence is permitted but not compulsory and that an action against one would not be defeated by the omission to take action against one or more others in the same or a different action is clear from the Apportionment of Damages Act 34 of 1956. And see Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 171."[3]

[29] The respondents do not enter into the merits of the claims against either the first defendant or second defendant and submit that at this stage the Special Tribunal cannot in this interlocutory application adjudicate the merits. The respondents argue that the Schedule attached to the applicant's heads of argument is consistent with entering into the merits at this stage.

[30] Adv Fouche on behalf of the respondents submitted that the applicant's attempt to join third parties in this way, has questionable motives. The submission is almost suggestive of an abuse of court process. Caution must be exercised when assessing this, as a litigant is entitled to traverse such due process rights to which he may be entitled to. For this reason, the power to grant an amendment or not based on questionable motives cannot be considered at this stage.

[31] The respondents in response to the applicant's contention that he would be prejudiced should he not be granted this amendment because he would not be able to pursue the other joint wrongdoers, explain that he has misconstrued s 2(2) of the Apportionment of Damages Act no 34 of 1956. (the Act).

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[2] *Sasfin (Pty) Ltd V Jessop And Another* 1997 (1) SA 675 (W)
[3] Id n3 at page 682

[32] Section 2 of the Act in relevant part provides:

> CHAPTER II.
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> **JOINT OR SEVERAL WRONGDOERS.**
>
> (1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.
> 1A …
> 1B …
> (2) Notice of any action may at any time before the close of pleadings in that action be given
>
> (a) by the plaintiff;
>
> (b) by any joint wrongdoer who is sued in that action,
>
> to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action."
>
> *Underlining for emphasis*

[33] In relation to the alleged misjoinder of the Minister of Health, the respondents assert that Minister of Health cannot be ignored as a plaintiff simply because there has been the consolidation of the two actions. The Minister was a plaintiff in the other proceeding which was joined with this one.

[34] The respondents submit that it is up to them to decide whom to join. The respondents submit that in any event the applicant should have issued third party notices to whomsoever he wished to join.The respondents argue that as plaintiffs they have elected to sue the applicant in his capacity as head of the office of the State Attorney as the wrongdoer and this is perfectly permissible in law.

[35] The respondents argue that the introduction of the special pleas will not be dispositive of the matter as the applicant himself signed off on some of the payments and therefore must meet that case. Accordingly, there is at least an undisputed amount of payments that the applicant signed off on being 40% of the payments to Mr Kajee.

[36] The respondents submit that a party must not only have a substantial interest in the matter but in the outcome.

[37] The respondents submit that the applicant will not be prejudiced and is wrong when he asserts he will be precluded from joining the others. The applicant has misinterpreted of Section 2 (2) of the Act which provides that a joint wrongdoer can bring any joint wrongdoer to the action. Counsel for the respondents explained that this means that the applicant is not prejudiced as he can go against other wrongdoers at any time before the close of pleadings and thereafter with the leave of the Tribunal. The respondents argue that the applicant should have adopted the correct procedural rule.

Conclusion

[38] All the parties' arguments above, summarise the pleaded case and the amendment sought to be introduced and the objection to it.

[39] The purpose of rules of court such as the Uniform Rules of Court have an important purpose and cannot be disregarded. The court rules establish and maintain order in the adjudication process and ensure consistency justice to all the litigating parties. Madlanga J whilst dealing with a departure from court rules in the interests of justice made it clear that rules governing the court process cannot be disregarded and serve an undeniably important purpose.

In *Eke v Parsons* Madlanga J stated:

> "Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose." [4]

[40] Litigating parties are entitled to consistency in the way their cases are pleaded. A higher court has an inherent discretion in implementing the rules to ensure justice. The Special Tribunal does not enjoy inherent jurisdiction. However, it would be a

[4] *Eke v Parsons* 2016 (3) SA 37 (CC) para

quantum leap for a court to completely circumvent an existing procedural where parties are joined to an action by way of an amendment without notice having been given to the parties concerned. Giving notice to parties who are to be joined in proceedings preceded our constitutional era. But even more so in our present constitutional era, it would be impermissible to join parties to proceedings without notice. This is not a case where the interests of justice require the departure from court rules without prejudicing the many persons and entities which the applicant intends joining to this action and to do so without giving proper notice. In this case it is not in the interests of justice to depart from the existing joinder and third party procedure to bring parties into an existing action.

[41] Bins-Ward J in *Absa v Meiring* stated that

> "The purpose of procedural rules of court has always been, and remains, the efficient administration of justice, and any construction of them that would conduce to a hampering effect would be dubious; cf Motloung and Another v Sheriff, Pretoria East and Others 2020 (5) SA 123 (SCA) ([2020] ZASCA 25) para 27, citing Ncoweni v Bezuidenhout 1927 CPD 130, in which Gardener JP said, 'if there is a construction [of a rule of procedure] which can assist the administration of justice I shall be disposed to adopt that construction"[5]

[40] In *Affordable Medicines Trust and Others v Minister of Health and Others* Ngcobo J confirmed the principles relating to the grant of an amendment:

> "The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?"[6]

[41] Having considered the above jurisprudential principles relating to the amendment of pleadings which include principles pertaining to good faith and interests of justice, it nevertheless remains important that caution be exercised. More particularly it is

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[5] *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC) para 13
[6] *Affordable Medicines Trust And Others v Minister of Health And Others* 2006 (3) SA 247 (CC)

impermissible to allow an amendment to introduce third parties to action proceedings by circumventing the correct procedure, based for example on the interests of justice or convenience, or the lack of prejudice to the opposing party. The integrity and the implementation of the proper rules relating to the joinder of parties must be upheld.

[42] To flout the Uniform Rules of Court pertaining to the joinder of parties would be inconsistent with the purpose of the Uniform Rules. To allow an amendment where the applicant seeks to do, by introducing third parties by way of amendment, really amounts to a circumvention of the rules of court.

[43] Rampai J in *Louw vs Grobler* explained that the purpose of the Uniform Rules of Court is to regulate the litigation process, procedures and the exchange of pleadings.

> "The entire process of litigation has to be driven according to the rules. The rules set the parameters within the course of litigation has to proceed. The rules of engagement, must, therefore, be obeyed by the litigants."[7]

[44] The failure to adopt the correct uniform rule of court to join parties to proceedings cannot be cured by an amendment. An amendment cannot cure an invalidity or a future invalidity. The interest of justice nor convenience can require this. Hence the reliance by the applicant on the interests of justice cannot require the avoidance of the existing rules of court for the joinder of alleged joint wrongdoers. An amendment to a pleading is an impermissible procedure to join parties to proceedings.

[45] The non-joinder point submitted by the applicant must according fail.

[46] In regard to the misjoinder of the Minister of Health. The Minister sues in his official capacity as such. In *Farocean Marine (Pty) Ltd v Minister of Trade And*

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[7] *Farocean Marine (Pty) Ltd v Minister of Trade and Industry* 2007 (2) SA 334 (SCA) para 8

Industry [8] it was confirmed that a Minister has the power to commence legal proceedings to recover monies.

> "Proceedings on behalf of the State may be commenced both in the name of the State or the Government and in the name of a nominal plaintiff or applicant, usually the Minister as the embodiment of the department. who has overall control, authority and responsibility for the Department of Trade and Industry', the question is not whether the plaintiff is authorised to do so, but whether the Minister has set out the necessary requirements for liability."

Accordingly, the mis-joinder point must fail.

[47] In the result the amendment sought by the applicant is denied.

Costs

[48] The costs must follow the result. The question is, does it justify the appointment of two counsel? Both a senior junior and a senior counsel. The error in the amendment is really of a rather basic in nature. In my view it does not justify the appointment of two counsel. Because of the importance of the case to the State I would allow the cost of one counsel only and that being senior counsel.

Order

The application is dismissed with costs and include the cost of one counsel being senior counsel.

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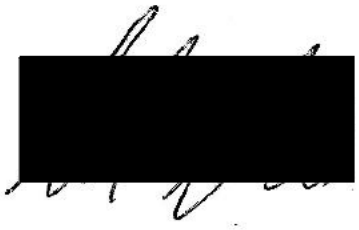
[8] *Louw v Grobler and Another (3074/2016) [2016] ZAFSHC 206 (15 December 2016*



JUDGE M VICTOR
PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES

Attorney for the applicant: No attorneys on record.

Counsel for the applicant: Adv D Brown

Attorney for the respondents: Mr Pearton, Gildenhuys Malatji Attorneys

Counsel for the respondents: Adv DJ Joubert SC assisted by Adv Van Rhyn Fouche

Date of hearing: 4 February 2025

Date of Judgement: 17 February 2025

Mode of delivery: This judgment is handed down by sending it by email to the parties' legal representatives, loading on CaseLines and release to SAFLII and AFRICANLII. The time for delivery is deemed to be 14H00.