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: GP22/2021

In an application between:

The Special Investigating Unit	First plaintiff/ applicant
The Minister of Police	Second plaintiff/ applicant
The Minister of Health	Third plaintiff/ applicant
The Minister of Justice and Correctional Services	Fourth plaintiff/ applicant
and	
Hassan Ebrahim Kajee	Defendant/ respondent

JUDGMENT

Summary

Civil procedure – Exception – whether an exception may be brought by way of an application procedure – appropriate order when an exception is upheld – having filed an exception out of time, whether a defendant is *ipso facto* barred from filing it.

MODIBA J:

INTRODUCTION

[1] The plaintiffs in the main action apply in terms of Uniform Rule 30(1) to set aside the notice of motion supported by a founding affidavit styled 'Notice of Motion - Exception' the defendant filed dated 10 November 2022. The defendant opposes the application.

[2] For convenience, I refer to the parties as in the main action. I refer to this application as the Rule 30 application. I refer to the impugned notice of motion and founding affidavit as the exception application.

[3] In the main action, the plaintiffs seek to recover approximately R27 million from the defendant for damages the State suffered as a result of the alleged corrupt and collusive relationship between the erstwhile head of the office of the State Attorney, Johannesburg, Mr Gustav Lekabe (Mr Lekabe) and the defendant. At the time, the defendant was a practicing advocate and a member of the Johannesburg Society of Advocates. Mr Lekabe is alleged to have briefed the defendant as counsel for the State in a plethora of matters in which the defendant charged for legal fees not actually rendered, doubled-charged for similar work done in a specific matter and/ or double invoiced the Office of the State Attorney, Johannesburg and/ or overreached in his accounts delivered to the Office of the State Attorney, Johannesburg.

[4] The plaintiffs issued summons against the defendant in November 2021. The defendant is defending the action. He is yet to file his plea.

[5] During 2022, the parties got embroiled in an application by the defendant for an order compelling the plaintiffs to make available to him certain documents in terms of Uniform Rule 35(14). After much hesitation, on 26 August 2022, the plaintiffs complied with the defendant's request. Unsatisfied with the plaintiffs' response to his request, on 14 September 2022, the defendant filed an application to compel the plaintiffs to provide him with the requested documents. The plaintiffs opposed the application. On 16 September 2022, I dismissed the defendant's application to compel and directed

him to file his plea and counterclaim if any or an exception by 30 September 2022, failing which in terms of Tribunal Rule 13(3), he would be *ipso facto* barred from doing so.

[6] On 27 September 2022, the defendant filed a notice in terms of Uniform Rule 23(1) calling on the plaintiffs to remove several causes of complaint on the basis that the plaintiffs' claims are vague and embarrassing and lack the necessary averments to sustain a cause of action, failing which, he will file an exception. On 21 October 2022, the 15 days within which the plaintiffs ought to remove the causes of complaint expired without them doing so. They are adamant that their particulars of claim as amplified by the voluminous documents they made available to the defendant in response to his request in terms of Uniform Rule 35(14) are not excipiable and there is no merit to the grounds of exception the defendant seeks to rely on.

[7] In terms of Uniform Rule 23(1), the defendant's exception was due on 4 November 2022. The defendant subsequently filed the exception application. It is unclear when the exception application was served on the plaintiffs. Since it is dated 10 November 2022, it is improbable that it was filed prior to this date. It appears to have been uploaded on Caselines only on 22 November 2022. The defendant has not applied for condonation for the late filing of what he purports is his exception.

[8] On 22 November 2022, the plaintiffs filed a notice in terms of Uniform Rule 30(2)(b) to remove the exception application as it constitutes an irregular step. On 6 December 2022, the 10-day period within which the defendant ought to remove the irregular step expired without him doing so. On 8 December 2022, the plaintiffs filed the Rule 30 application. It is noteworthy that the plaintiffs filed the Rule 30 application timeously. In terms of Uniform Rule 30(2)(c) they had to file it within 15 days. They filed it 2 days after of expiry of the period in Uniform Rule 30(2)(b), that is, 13 days early.

[9] On 31 January 2022, the plaintiffs applied for the Rule 30 application to be enrolled for hearing. At that stage, the Rule 30 application was unopposed. I then directed the plaintiffs to file an application bundle for the Rule 30 application, a draft order and practice note with the view to determine the application on the papers filed.

In the event that I needed to hear counsel for the plaintiffs, the Tribunal Registrar would arrange a date for that purpose.

[10] The plaintiffs duly complied with the directive. On 17 February 2023, the defendant filed a notice of intention to oppose the Rule 30 application. On 17 February 2023, by my directive, the Tribunal Registrar enrolled the Rule 30 application for hearing on 21 February 2023. On 20 February 2023, the defendant filed an answering affidavit and a practice note.

[11] Counsel for the plaintiffs and the defendant's attorney appeared when the Tribunal convened on 21 February 2023. After a discussion on whether the Rule 30 application ought to be considered on an opposed or unopposed basis, counsel for the plaintiffs agreed that with the Rule 30 application being interlocutory in nature and in the light of it since being opposed, it is proper that I consider the application on an opposed basis.

GROUNDS RELIED ON BY THE PARTIES

[12] The plaintiffs seek the defendant's exception application set aside as an irregular step on the following grounds:

12.1 since the purported exception was delivered out of time, the defendant is *ipso facto* barred from filing it;

12.2 bringing an exception by way an application procedure is incompetent. So is the defendant's call on the plaintiffs to deliver an answering affidavit;

12.3 it is incompetent for the defendant to seek the dismissal of the plaintiffs claim as prayed for in the exception application.

[13] In his answering affidavit, the defendant initially opposed the Rule 30 application on the following grounds:

13.1 the Rule 30 application is defective for non-compliance with Uniform Rule 6(5)(a) and (b) as it was not brought in accordance with Form 2(a) and does not state the period within which he should notify the plaintiffs if he intends opposing the application;

13.2 the Rule 30 application does not comply with Tribunal Rule 10(1) which prescribes the same requirements in Tribunal proceedings as those Uniform Rule 6(5)(a) and (b) prescribes in High Court proceedings;
13.3 the defendant was within his right in terms of Tribunal Rule 10(10) to bring the exception by way of application;
13.4 the Rule 30 application is frivolous, vexatious and irrelevant because it is non-compliant on the grounds set out in 13.1 and 13.2 above;
13.5 by not informing the defendant of his right to oppose the Rule 30 application, the plaintiffs violated his right to *audi alteram parterm.*

[14] The defendant also denies that he failed to file the exception timeously as contended by the plaintiffs.

[15] Having regard to the aforegoing, it follows that the following issues stand to be determined:
15.1 whether the plaintiffs made out a proper case for the relief they seek in terms of Uniform Rule 30(1);
15.2 whether the defendant is *ipso facto* barred from filing an exception.

WHETHER THE PLAINTIFFS MADE OUT A PROPER CASE FOR THE RELIEF THEY SEEK IN TERMS OF UNIFORM RULE 30(1)

[16] For the reasons set out below, I am satisfied that the plaintiffs have made out a proper case for the relief they seek in terms of Uniform Rule 30(1).

[17] Civil proceedings brought in this Tribunal are regulated in terms of Tribunal Rules the Tribunal President has issued in terms of s9(1)(a) of the Special Investigating Unit and Special Tribunals Act.[1] The prevailing Tribunal Rules are those issued on 25 August 2020.[2] Tribunal Rule 28(1) gives the Tribunal a discretion to invoke the Uniform Rules to address a *lacuna* in Tribunal Rules.

[1] Act 74 of 1996.
[2] Published in Government Gazette No. 43647 on 25 August 2020.

[18] Since the Tribunal Rules contain no provision dealing with exceptions, the invocation of Uniform Rule 23 is proper when a party seeks to except to pleadings. This is more so that an exception may expedite proceedings, thereby promoting the purpose of the Tribunal's enabling legislation.[3]

[19] In terms of Uniform Rule 23(1), a party may except to a pleading on the basis that it is vague and embarrassing or lacks averments that would sustain a cause of action. Where the complaint is that the particulars of claim are vague and embarrassing, the defendant is required to afford the plaintiff an opportunity to remove the cause of complaint within 15 days. The defendant duly followed this procedure when it filed the notice of exception on 27 September 2022. Since the plaintiffs did not respond to the defendant's call to remove the cause of complaint, the defendant had to file an exception within a further 10 days.

[20] Properly interpreted with reference to the purpose of Uniform Rule 23 and 23(4) in particular, the wording used and the context, an exception is a pleading. Once it is filed, the opposing party does not need to replicate to it or file any further pleading. Uniform Rule 23(4) does not suggest that an application procedure may be used to bring an exception. It intrinsically excludes such a procedure.

[21] Once an exception is filed, if a party is desirous to have it heard, he may proceed to enrol it in terms of Uniform Rule 6(5)(f).

[3] Erasmus states as follows at RS 18, 2022, D1-297
"The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party against an embarrassment which is so serious as to merit the costs even of an exception. 10 An exception provides a useful mechanism for weeding out cases without legal merit. 11 Thus, an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial."

[22] The defendant did not file an exception as envisaged in Uniform Rule 23(1). He rather filed a notice of motion, supported by affidavit, calling on the plaintiff to file an answering affidavit. Herein lies the irregularity the plaintiffs primarily complain about.

[23] The defendant's attorney was adamant that he is entitled to use the application procedure. He vaguely referenced a practice in the Western Cape Division of the High Court where neither he practices nor the defendant practiced when he practiced as an advocate. He later addressed a letter to me to which he attached a copy of the commentary to Uniform Rule 23(1) in Erasmus to the effect that an exception may be enrolled for hearing in terms of Uniform Rule 6(5)(f). Yet, this is not the procedure he followed. He filed no exception in respect of which he applied for a hearing in terms of Uniform Rule 6(5)(f). He instituted the exception application and sought it enrolled for hearing in terms of Uniform Rule 6(5)(f).

[24] The defendant's belated reliance on Tribunal Rule 10(10) is inappropriate. Tribunal Rule 10 (10) provides as follows:

"Notwithstanding the aforegoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as may be necessary and set down at a time assigned by the Registrar or directed by the President of the Tribunal or the presiding member."

[25] The defendant clearly purported to bring an exception in terms of Uniform 23(1). He may not escape the irregularities in the procedure he followed by belatedly resorting to Tribunal Rule 10(10). This Tribunal Rule is akin to Uniform Rule 6(11) which regulates interlocutory and other incidental applications. An exception does not fall in this rubric of processes. It is not enrolled in terms of Uniform 6(11). Uniform Rule 23(1) specifically provides that an exception is enrolled in terms of Uniform Rule 6(5)(f). This is the Uniform Rule the defendant purported to use to enrol his exception application for hearing.

[26] During oral argument, the defendant's attorney abandoned the grounds of opposition set out in paragraphs 13.1,13.2,13.4 and 13.5 of this judgment. His insistence on the ground of opposition in 13.3 makes no sense as the latter ground is premised on the grounds in 13.1 and 13.2 which he abandoned.

[27] Having found that it was irregular for the defendant to bring an exception by way of application, it follows that his call on the plaintiffs to file an answering affidavit is equally irregular. This conclusion is supported by Uniform Rule 6(f)(5) which regulates the procedure for enrolling an application where no answering affidavit has been filed. It is consistent with Uniform Rule 23(4) which provides that it is not necessary to plead to an exception.

[28] It is also irregular for the defendant to seek a dismissal of the plaintiffs' action by way of an exception. Assuming that the defendant had filed a meritorious exception having followed the correct procedure, the appropriate relief is to uphold it. The effect of such an order is to destroy the part of the pleading objected to by way of exception. The remainder of the combined summons would remain intact. The plaintiffs may then follow the appropriate procedure to amend their particulars of claim.[4]

WHETHER THE DEFENDANT IS *IPSO FACTO* BARRED FROM FILING AN EXCEPTION

[29] Since an exception is a pleading, the plaintiff may object to it on the basis that it was filed out of time, provided that where it had to do so in terms of the applicable rules of procedure, it had placed the defendant under bar.[5] In terms of Tribunal Rule 13(3), if a defendant fails to file a plea- and/ or counterclaim or exception within the prescribed time, he is *ipso facto* barred from doing so. Having failed to file his purported exception within the 15 days' period prescribed in Uniform Rule 23(1), in terms of Tribunal Rule 13 (3), the defendant is *ipso facto* barred from filing a plea

[4] *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at para 30 to 31; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at para 79.
[5] See commentary in Erasmus RS 17, 2021, D1-310.

and/or counter claim or an exception. The Tribunal order of 16 September 2022 had warned him of this consequence.

COSTS

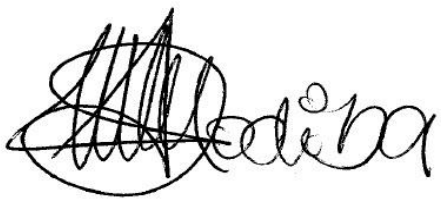
[30] In the event of the Rule 30 application being granted, the plaintiffs have prayed for costs on a punitive scale. The defendant's conduct in these proceedings warrant deprecation by way of such a cost order. Having practiced as an advocate in the High Court, he is familiar with the Uniform Rules of Court. He should have no difficulty understanding the Tribunal Rules. He has rather adopted dilatory conduct contrary to the applicable rules. He also ignored the Rule 30 application for almost 10 weeks, only to file opposition papers on the eve of the hearing after it had been enrolled for hearing on an unopposed basis, mounting a vexatious and frivolous opposition to the application.

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

ORDER

1 The defendant's notice of motion supported by a founding affidavit, purported to be an exception in terms of Uniform Rule 23(1) dated 10 November 2022 is set aside as an irregular step.

2 The defendant is ordered to pay the costs of the Rule 30 application on an attorney and client scale including the costs of two counsel.



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JUDGE L. T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the 1st – 4th applicants: Adv. DJ Joubert SC assisted by Adv. GVR Fouche

Attorney for the 1st - 4th applicants: Mr JR Pearton, Gildenhuys Malatji

Attorney for the respondent: Mr. A Minilal, Manilal Chunder and Company C/O Mr H Patel, HSP Attorneys

Date of hearing:	21 February 2023
Date of judgment:	28 February 2023

Mode of delivery: *this judgment was handed down electronically by transmission to the parties' legal representatives by email, uploading on Caselines and releasing to SAFLII. The time for handing down the judgment is deemed to be 10am.*