



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

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: LP/01/2020

In the application to strike out between:

CAREL SCHMAHL

FIRST APPLICANT

and

JOHANN CHRISTIAAN KILIAN

SECOND APPLICANT

SPECIAL INVESTIGATING UNIT

RESPONDENT

In the matter between:

SPECIAL INVESTIGATING UNIT

PLAINTIFF

and

**PHINEAS KG AHLISO LEGODI
SCHMAHL**

**FIRST DEFENDANT CAREL
SECOND DEFENDANT**

JOHANN CHRISTIAAN KILIAN

THIRD DEFENDANT

JUDGMENT

Application for a declaration that when it withdrew its particulars of claim on 13 October 2021, the Special Investigating Unit (SIU) withdrew its action against the applicants –
Held: withdrawal of actions is regulated by Tribunal Rule 21(1). In its letter of 13 October 2021 as well as its notice of withdrawal, the SIU did not withdraw its action in terms of Tribunal Rule 21(1). *Maswanganyi v Road Accident Fund 2019 (5) SA 407 (SCA)*. *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1991 (3) SA 787 (T)* at 791H, applied.

Application to strike out – whether the SIU failed to amend its particulars of claim as directed by the Tribunal in its 9 September 2021 judgment – whether the SIU failed to serve its particulars of claim in terms of Uniform Rule 4 - whether these failures render the SIU claim subject to striking out

Held: the SIU failed to amend its particulars of claim as directed by the Tribunal. The manner in which the SIU has pleaded its case in the 14 October 2021 particulars of claim continues to offend Uniform Rules 18(4) and 18(10). In terms of Uniform Rule 18(12), non-compliance with these sub uniform rules presents a jurisdictional basis for an application to strike out in terms of Uniform Rule 30. *Minister Van Wet en Orde V Jacobs 1999 (1) SA 944 (O)* at 957H/I and 958B—C applied.

Held - Uniform Rule 4(1)(a) requires documents initiating proceedings to be served by the Sheriff. Under the present circumstances, the invocation of Uniform Rule 4(1)(a) is ill-considered as service of the particulars of claim does not amount to instituting a new action. Further, the particulars of claim were properly served by email in terms of Tribunal Rule 6 (4).

MODIBA J:

- [1] Carel Schmahl (Mr Schmahl) and Johan Christian Kilian (Mr Kilian) as the first and second applicants have applied for an order declaring that on 13 October 2021, the Special Investigation Unit (SIU) withdrew its action against them. In the alternative, they seek an order to strike out the SIU's action. The SIU is opposing the application.
- [2] For convenience, I jointly refer to the applicants as such. I refer to the respondent as the SIU.

- [3] On 6 October 2020, the SIU instituted an action against the applicants as well as Mr Phineas Legodi by issuing and serving on these parties a combined summons.
- [4] In February 2021, the SIU sought to amend its particulars of claim attached to the combined summons. The applicants formally opposed the application. In a judgment handed down on 9 September 2021, I upheld some of the grounds of objection raised against the proposed amendments and dismissed others. In paragraph 2 of the order set out in the judgment, I directed the SIU to file its amended particulars of claim within 15 days of the judgment. The current dispute between the parties arose from the implementation of this directive.
- [5] On 1 October 2021, the SIU filed its amended particulars of claim in compliance with the directive. Unsatisfied that the SIU has complied with the directive, the applicants resorted to express their complaint by way of a letter dated 8 October 2021, demanding that the SIU withdraw the claim against them. Alternatively, the applicants demanded that the SIU further amend its particulars of claim by 12 October 2021.
- [6] The SIU opted to withdraw its amended particulars of claim. It did so on 13 October 2021. On 14 October 2021, the SIU filed another set of particulars of claim (the 14 October 2021 particulars of claim). It appears that the applicants remain dissatisfied of the SIU's particulars of claim as further amended. On 5 November 2021, the applicants filed the present application.

[7] What stands to be determined in this application is whether the applicants correctly contend that, when the SIU withdrew its particulars of claim on 13 October 2021, it effectively withdrew the whole action against them. If I find that it did not, then I ought to determine whether the applicants have made out a case to strike out the SIU's claim.

WHETHER THE SIU WITHDREW THE ACTION AGAINST THE APPLICANTS

[8] The applicants' contention that the SIU withdrew its action against them lacks merit.

[9] Tribunal Rule 21(1), regulates the withdrawal of proceedings. It provides that:

“(1). A party seeking to withdraw the proceedings must deliver a notice of withdrawal in which it tenders the costs of suit as soon as it is possible.”

[10] On the authority in *Maswanganyi*¹ relied on by the SIU, the Tribunal remains seized with all the issues raised in the action and will dispose of them by handing down a judgment, unless the partie(s) expressly withdraw the issues from judicial consideration by either withdrawing the action in its entirety or abandoning a claim or a defence.

[11] It clearly appears from the SIU's letter of 13 October 2021 as well as its notice of withdrawal that this is not what it has done. As correctly argued by the SIU, it did not deliver a notice of withdrawal in terms of Tribunal Rule 21(1).

¹ *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA)

[12] On the authority in *Group Five*², after the SIU withdrew the 13 October particulars of claim, the summons remained effective, *albeit* without the particulars of claim. They were akin to a simple summons. All that the SIU was required to do, to regularise its action against Mr Legodi and the applicants is to file a declaration within 15 days of the withdrawal of its particulars of claim.³ It delivered amended particulars of claim on 14 October 2021, well within the required 15-day period. As a result, the SIU's action against Mr Legodi and the applicants remains pending before this Tribunal.

APPLICATION TO STRIKE OUT

[13] The applicants fail to identify the Rule in terms of which they bring this application. This is not fatal to the application. The Tribunal Rules do not make provision for an application to Strike Out. In such a case, Tribunal Rule 28(1) empowers the Tribunal to invoke the applicable Uniform Rule. The Uniform Rules that regulate an application to strike out are rules 30 and 30A. The applicants have not filed notices as required in terms of Uniform Rule 30(1) and 30A (1). In their letter dated 13 October 2021, they only complained about non-compliance with the judgment.

[14] For the first time in this application, the applicants complain that service of the particulars of claim does not conform to Uniform Rule 4(1)(a). The SIU does not take these points. I therefore make nothing of these shortcomings.

² *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791H

³ See Uniform Rule 20(1).

[15] I address the applicants' complaints below.

Non-compliance with the court order

[16] The applicants complain that when it filed the 14 October 2021 particulars of claim, the SIU failed to comply with Tribunal Rule 15(6). As correctly pointed out by the SIU, the Tribunal Rules contain no such sub rule. In their heads of argument, the applicants make reference to Tribunal Rule 15(10). It provides as follows:

"Amendment of Pleadings

(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."

[17] This Tribunal Rule is completely inapplicable under the present circumstances as the filing of a Tribunal 15(1) notice is not required for the SIU to comply with the Tribunal's judgment.

[18] The applicants proceeded to expressly specify the reasons why they contend that the SIU have failed to comply with the Tribunal's 9 September 2021 judgment. A thorough examination of the judgment and the papers filed in this application reveals that indeed, as complained by the applicants, the SIU has failed to comply with the Tribunal's judgment in that it failed to:

18.1 separately plead the terms of the contracts upon which it relies;

18.2 separately plead the damages emanating from each contract on which it bases its cause of action.

- [19] The complaint that the SIU still failed to attach the written contracts on which it relies lacks merit. The contracts are attached to the 14 October particulars of claim. So is the complaint that the SIU failed to plead the terms of the implementing agent agreement. The terms are clearly pleaded in paragraph 4.6 and 4.7 of the 14 October 2021 particulars of claim.
- [20] The SIU's contention that the applicants are not entitled to a striking out order under these circumstances, but that they should either file an application compelling the SIU to comply with court order or to resort to another exception is simply ill-considered. The purpose of the present application is to sanction the SIU for non-compliance with the applicable Uniform Rule and the Tribunal's directive as set out in the 9 September 2021 judgment.
- [21] The manner in which the SIU has pleaded its case in the 14 October 2021 particulars of claim continues to offend Uniform Rules 18(4) and 18(10). In terms of Uniform Rule 18(12), non-compliance with these sub uniform rules is a jurisdictional basis for an application to strike out in terms of Uniform Rule 30.⁴ The applicants are accordingly entitled to act in terms of Rule 30.
- [22] Therefore, this ground of complaint stands to be partially upheld in respect of the complaints dealt with in paragraph 22 of this judgment. However, given the great public interest in the matter, the interests of justice would not be served by striking out the SIU's claim on a technicality at this stage. Justice would

⁴ *Minister Van Wet en Orde V Jacobs* 1999 (1) Sa 944 (O) at 957H/I and 958B—C.

better be served by granting an order compelling the SIU to comply with the 9 September 2021 judgment.

[23] The non-compliance complained of in these proceedings warrants an order directing the Tribunal Registrar to furnish the Head of the SIU and the Director of its Legal Services Department with a copy of the 9 September 2021 and this judgment for noting and appropriate action within their respective authority.

Non-compliance with Uniform Rule 4(1)(a)

[24] Uniform Rule 4(1)(a) requires that documents initiating proceedings ought to be served by the Sheriff. Under the present circumstances, the invocation of Uniform Rule 4(1)(a) is ill-considered for the reasons that follow.

[25] Tribunal Rule 6 provides for the service of documents in Tribunal proceedings. Therefore, the invocation of Uniform Rule 4(1)(a) is inappropriate. In terms of Tribunal Rule 6, service of documents by the Sheriff is one of several ways in which documents may be served. Tribunal Rule 6 does not expressly require that the Sherriff serve document initiating proceedings. The applicants have not set out why in light of Tribunal Rule 6(4), which expressly provide for service by email, that manner of service is not appropriate in the present circumstances.

[26] Even more problematic for the applicants is that service of the amended particulars of claim in compliance with the Tribunal's order does not amount to commencement of proceedings. As already stated, the SIU action against Mr Legodi and the respondents remained pending even only on the strength of summons standing as simple summons.

[27] This ground of complaint stand to be dismissed.

[28] In the premises, the application to strike out stands to succeed.

COSTS

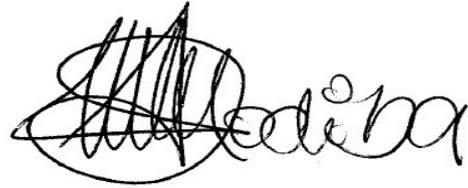
[29] The applicants have unnecessarily incurred the costs of this application because the SIU has failed to comply with the Tribunal's judgment. On the authority in *Gamlan Investments*⁵, the costs should be borne by the SIU as party who occasioned them. The applicants should not be out-pocketed under the present circumstances.

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

ORDER

1. The application succeeds.
2. The Special Investigating Unit (SIU) shall pay the applicants' costs on the attorney and client scale.
3. The SIU is directed to comply with the Tribunal's 9 September 2021 within 10 days of this judgment.
4. The Tribunal's Registrar is directed to furnish the head of the SIU and the Director of its Legal Services Department with the 9 September 2021 and this judgment for noting and appropriate action within their respective authority.

⁵ *Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd* [1996 \(3\) SA 692 \(C\)](#) at 704I–705A.



JUDGE L. T. MODIBA
MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Attorney the applicants: Mr IJ Croukamp, Izak Croukamp
Attorneys

Counsel for the respondent: Adv. P Loselo

Attorney for the respondent: Ms. S Zondi, Office of the State
Attorney, Pretoria

Date full set of legible documents were
filed with the Tribunal: 30 March 2022

Date of Judgment: 28 April 2022

Mode of delivery: *this judgment was handed down electronically by email to the parties' legal representatives, loading on Caselines and publishing on Saffii and on the Department of Justice and Constitutional Development's website. The time of delivery is deemed to be 10am.*