



**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 NUMBER: LP/03/2022

In the matter between:

PRO SECURE (PTY) LTD

EXCIPIENT

and

THE SPECIAL INVESTIGATING UNIT

RESPONDENT

In Re:

THE SPECIAL INVESTIGATING UNIT

PLAINTIFF

and

DR THOKOZANI FLORENCE MHLONGO

FIRST DEFENDANT

PRO SECURE (PTY) LTD

SECOND DEFENDANT

ORDER

The following order is issued:

The exception is dismissed with costs, such costs to include costs consequent upon the engagement of two counsel.

JUDGMENT

K PILLAY J

[1] The second defendant (Pro Secure) excepted to the plaintiff's (SIU) particulars of claim on the following grounds:

- a. Locus standi;
- b. Non-joinder of the department;
- c. Review jurisdiction;
- d. Non-attribution of the alleged inconsistencies and contraventions to the tender awarded to the second defendant; and
- e. Fifth exception. If it is found that a case for judicial review has been made in terms of s 7 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), then second defendant excepts on the basis that the review was not instituted within 180 days.

[2] Subsequently, and solely in its heads of argument, delivered shortly before the hearing, the second defendant raised a sixth ground of exception. This ground asserts that a party to an unlawful contract retains the right to benefit from that contract in the absence of a factual determination of impropriety or malfeasance against said party.

[3] I will deal with the above first.

[4] At a Judicial Case Management before Modiba J, on April 25 2023, which was to deal with the exception, the following directives were issued:

- a. The excipient must submit its heads of argument and practice note no later than 15 May 2023.
- b. The respondent must submit its heads of argument and practice note by no later than 29 May 2023.

[5] Rule 15 of the Special Tribunal Rules¹ stipulates inter alia, that any party seeking to amend a pleading or document shall notify all other parties of his/her intention to amend and shall furnish particulars of the proposed amendment. Furthermore, such notice must state that unless a written objection to the proposed amendment is submitted within five days of delivery of the notice, the amendment will take effect.

[6] I am satisfied that the supplementary heads of argument fail to adhere to rule 15 of the Special Tribunal. The excipient was required to submit its heads of argument by 15 May 2023, but only did so on 24 July 2023, when it raised a new ground of exception.

[7] I agree with the plaintiff's counsel's submission that this is an irregular step, and is liable to be set aside which I do. I will therefore not deal with the issue raised by the sixth exception.

[8] Rule 28(1) of the Special Tribunal Rules provides for a situation in proceedings not expressly covered by these rules. In such an instance, the Tribunal has the authority to adopt any appropriate procedure, including invoking the High Court Rules. Exceptions in the High Court are governed by the provisions of rule 23 of the Uniform Rules.

[10] In order to succeed, an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular, the

¹ Special Investigating Units and Special Tribunal Act: Rules for conduct of proceedings in the Special Tribunals.

document on which it is based, can reasonably bear, no cause of action or defence is disclosed, failing this the exception ought not to be upheld.

[11] The pleading must be looked at as whole. In *McKenzie v Farmers' Co-operative Meat Industries Ltd*,² the following definition of “cause of action” was adopted:

‘...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove every fact, but every fact which is necessary to be proved.’³ The definition only relates to “material facts” and not to the *facta probantia* which are the facts necessary to prove the material facts.’

I deal with the exceptions as follows:

Lack of Locus Standi

[12] The second defendant alleges that the notice instituting civil proceedings disclose no basis upon which the plaintiff has a claim in its own name against the second defendant, nor is there any allegation that the second defendant has been guilty of any wrong referred to in s 2(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996 (“the Act”).

[13] It submits further that while it is accepted that s 4(1)(c) read with s 5(5) of the Act affords the plaintiff legal standing, in the cases which endorsed that view, the relevant state institution was cited as a co-plaintiff.⁴

[15] The second defendant submits that the plaintiff institutes these proceedings in its own name, notwithstanding that the department, and not the plaintiff, is the entity which is alleged to have suffered loss and an entitlement to damages. Additionally, the contention is that reliance on s 4(1)(c) and 5(5) as empowering provisions entitling plaintiff to institute civil proceedings in its

² *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16.

³ *Ibid* at 23.

⁴ *Special Investigating Unit and Another v Santa Kamogelo Atteridgeville Branch and Others* [2022] ZAST 65.

own name and without a justiciable cause of action constitutes unnecessary extension of power. It is argued that the Act does not explicitly permit the plaintiff to simply “step into the shoes of the department”, thus pursuing a cause of action to the exclusion of the true plaintiff (the department).

[16] There is no substance to this argument,⁵ for the reason set out on the issue of non-joinder.

Non-Joinder

[17] The issue of non-joinder is intertwined with the preceding issue. S 4(1)(c) of the Act, in conjunction with s 5(5), clearly empowers the plaintiff to initiate civil proceedings either in its own name or on behalf of the state institution implicated, before any court or Special Tribunal. This is set out in the particulars of claim. Modiba J emphasised this principle in *Special Investigating Unit v National Minister in the Department of Public Works and Another*⁶ at paragraph 43 as follows:

‘...The SIU has the power within the framework of its terms of reference as set out in Proclamation R.59 read with s 2(1)(a)(i), 2(2), 4(1)(c) and 5(5) of the SIU Act, to investigate the impugned lease agreements, collect evidence regarding acts and/ or omissions which are relevant to its investigation and institute civil proceedings in a Special Tribunal or any Court of law for any relief to which Public Works is entitled. It is accordingly authorised and has the requisite locus standi to bring this application in its name to recover losses Public Works suffered as a result of the alleged misrepresentations and maladministration.’

[18] Accordingly I find no substance in this ground of exception.

Failure to Disclose a Cause of Action

[19] On this ground, it is submitted by the excipient that the plaintiff’s particulars of claim does not aver to any facts to support its right to judgment

⁵ See *Special Investigating Unit and Others v Lekabe* [2022] ZAST 13 para 4.

⁶ *Special Investigating Unit v National Minister in the Department of Public Works and Another* [2022] ZAST 19.

against the second defendant, as opposed to that against the other defendants. The plaintiff, it is submitted, does not attribute any of the alleged inconsistencies and contraventions to the tender awarded to the second defendant. Furthermore, the second defendant complied with the requirements of the Request for Quotations (RFQ) and there is no allegation that their bid was non-responsive. Consequently, the appointment of the second defendant in terms of the RFQ is both lawful and valid. The plaintiff's claim that all contracts related to HEDP 0814/19/20 awarded to the second defendant were invalid, unlawful, irregular, and void ab initio lacks a factual basis. As a result, the plaintiff has failed to establish a cause of action against the second defendant.

[20] In its heads of argument, the plaintiff has appropriately referred to s 217 of the Constitution.⁷ This section emphasises the need for government departments to procure goods and services in a manner that adheres to the principles of that which is "...fair, equitable, transparent, competitive and cost-effective"⁸. This was highlighted by Modiba J in *Special Investigating Unit v National Minister in the Department of Public Works and Another*.⁹

[21] According to the particulars of claim, the plaintiff pleaded inter alia that the appointment of Pro Secure was contrary to the provisions of s 217 of the Constitution, the Public Finance Management Act 1 of 1999, National Treasury Regulations, Treasury Instruction Notes and the Supply Chain Management Policy of the Department. Furthermore, the particulars of claim sets out how Pro Secure received a payment significantly exceeding their initial bid. The particulars of claim set out, inter alia that:

- a. The RFQ sent to the second defendant was for 5000 automated hand sanitisers.
- b. The second defendant submitted a quote for R 137 150 for 5000 white electronic hand disinfectant dispenser and R 1 million for 5000 liquid sanitisers. The total quote being R 7 057 722, including vat.

⁷ The Constitution of the Republic of South Africa 1996.

⁸ S 217 of the Constitution.

This was highlighted by Modiba J in *National Minister in the Department of Public Works* above fn 6.

- c. The memorandum of appointment included the appointment of suppliers for manual dispensers, which contradicted the specifications listed in the RFQ. The RQF was specifically for the provision of manual dispensers, as outlined in bid number HEDP 0184/19/2020.
- d. The memorandum indicated that the second defendant would be contracted to supply 30 000 manual hand sanitisers at R 250 per unit and 900 000 refill bottles at R 170 each.
- e. However, the second defendant delivered 30 000 dispenser holders at R420 per unit and 900 000 litres of hand sanitisers at R170 each.
- f. The second defendant was paid R161 485 545.16, which was significantly higher than the bid for R 7 057 722.

[22] The plaintiff submits that there was evident favouritism toward a specific bidder and a failure to provide equal opportunities to all eligible bidders. Such actions would be contrary to the provisions of s 217 of the Constitution and other procurement regulations as set out in the particulars of claim.

[23] Having considered the above. I find that the second defendant has not adequately demonstrated that “upon every interpretation which the particulars of claim and any agreement on which they rely ‘can reasonably bear, no cause of action is disclosed’”.¹⁰

[24] The last objection, which pertains to the prescriptive period in terms of the Promotion of Administrative Justice Act (“PAJA”)¹¹ is meritless. It is important to state that the current proceedings were not initiated in terms of the provisions of PAJA but rather on principle of legality. This was affirmed in the decision of *Mapholisa N O v Phetoe N O and Others*.¹²

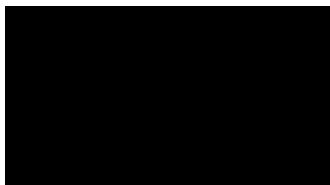
¹⁰ *Picbel Groep Voorsorgfonds v Somerville; Sable Industries Pension Fund v Nash and Others; Mitchell Cotts Pension Fund and Another v Nedbank Ltd and Another; Datakor Pension Fund and Others v Wynne-Jones & Company Employee Benefits Consultant (Pty) Ltd and Others* [2013] ZASCA 24; [2013] 2 All SA 692 (SCA); 2013 (5) SA 496 (SCA) para 26.

¹¹ Promotion of Administrative Justice Act 3 of 2000.

¹² *Mapholisa N O v Phetoe N O and Others* [2022] ZASCA 168; 2023 (3) SA 149 (SCA) para 17.

Order

[25] Consequently, the exception is dismissed with costs, such costs to include costs consequent upon the engagement of two counsel.



JUDGE K. PILLAY
MEMBER OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the Excipient: Advocate I Pillay SC

Attorney for the Excipient: Cox Yeats
Ncondo Chambers
45 Vuma Close
Umhlanga Ridge
Durban

Counsel for the Respondent: Advocate LG Nkosi-Thomas SC /
Advocate TM Makola

Attorney for the Respondent: The Office of the State Attorneys
SALU Building
Ground Floor
316 Thabo Schume Street
Pretoria
0001

Date of Judgment: 24 July 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 14H35 on 24 July 2024.