

SOUTH AFRICA / JUDGMENT

Kajee v Special Investigations Unit and Others (GP22/2021; GP/09/2019) [2023] ZAST 16 (20 November 2023)

[2023] ZAST 16

COURT
Special Tribunal

BEFORE
L.T. Modiba

CASE / FILE NUMBER
GP22/2021

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN
THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF S2 (1) OF THE
SPECIAL
INVESTIGATING UNITS AND
(REPUBLIC
OF SOUTH AFRICA)
CASE
NO:GP22/2021
IN

THE APPLICATION
BETWEEN:

HASSAN
EBRAHIM KAJEE
APPLICANT/
DEFENDANT
AND
THE
SPECIAL INVESTIGATIONS
UNIT
FIRST
RESPONDENT/ PLAINTIFF
THE
MINISTER OF POLICE
SECOND
RESPONDENT/ PLAINTIFF
THE
MINISTER OF CORRECTIONAL
SERVICES
AND CONSTITUTIONAL
DEVELOPMENT

THIRD
RESPONDENT/ PLAINTIFF
THE
MINISTER OF HEALTH
FOURTH
RESPONDENT/ PLAINTIFF
CASE
NUMBER: GP/09/2019
AND

IN THE APPLICATION
BETWEEN:

THE
SPECIAL INVESTIGATING UNIT
FIRST
APPLICANT /PLAINTIFF
THE
MINISTER OF POLICE
SECOND
APPLICANT/ PLAINTIFF
THE
MINISTER OF JUSTICE AND
CORRECTIONAL
SERVICES
THIRD
APPLICANT/ PLAINTIFF
THE
MINISTER OF HEALTH
FOURTH
APPLICANT/ PLAINTIFF
AND
KGOSISEPHUTHABATHO
GUSTAV
LEKABE
FIRST
RESPONDENT
HASSAN
EBRAHIM KAJEE
SECOND
RESPONDENT
IN

RE:

ACTIONS
BROUGHT UNDER CASE NUMBERS: GP/09/2019 AND GP/22/2021

JUDGMENT**Summary:**

Application for the consolidation of two actions in terms of Uniform Rule 11 read with Tribunal Rule 28(1) – the application is opposed only to the extent that the second respondent seeks the notice of motion set aside as an irregular step in terms of Uniform Rule 30 read with Tribunal Rule 28(1) – irregular step application dismissed. It was brought frivolously and vexatiously. Punitive costs warranted. Proper case made for the consolidation of the two actions. Consolidation application granted. Costs are costs in the cause.

Modiba J:

- [1] This judgment is rendered in respect of two applications. The first is an application by the Special Investigation Unit (“SIU”) for the consolidation of actions instituted in this Tribunal under case numbers GP/09/2019 and GP/22/2021. I conveniently refer to this application as the consolidation application. The second is an application in terms of Uniform Rule 30 to set aside the notice of motion filed in the consolidation application. I conveniently refer to this application as the irregular step application.
- [2] In the action instituted under case number GP/09/2019, the SIU seeks a variety of relief against the first respondent, Mr Lekabe. In the action instituted under case number GP/22/2021, the SIU seeks a variety of relief against the second respondent, Mr Kajee. The relief it seeks in both actions is for damages the State suffered as a result of the alleged corrupt and collusive relationship between Mr Lekabe and Mr Kajee. When the SIU’s cause of action arose, Mr Lekabe was head of the office of the State Attorney, Johannesburg. Mr Kajee was a practicing advocate and a member of the Johannesburg Society of Advocates. They both no longer hold these positions. Mr Lekabe is alleged to have briefed Mr Kajee as counsel for the State in a plethora of matters in which the Mr Kajee 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.
- [3] To the extent both respondents in the consolidation application have not filed opposing papers, that application is unopposed. Mr Kajee seeks to resist the consolidation application by having the notice of motion filed in the consolidation application set aside as an irregular step. It is therefore necessary that I consider the irregular step application first.
- [4] Mr Kajee’s replying affidavit and heads of argument in the irregular step application were due on 1 and 8 September 2023 respectively. He is in default of filing these documents. His attorney withdrew as his attorney of record on 9 October 2023. The irregular step application is determined on the papers filed at the request of the SIU. At a case management meeting held in August 2023, Mr Kajee’s erstwhile attorney of record had objected to the irregular step application being determined on the papers. I had directed

that once the papers are filed, I will make a determination regarding the need for oral argument.

[5] At the case management meeting held on 18 October 2023, I gave Mr Kajee until 3 November 2023 to instruct a new attorney of record. He addressed a letter to me on 6 November 2023 informing me that he has approached attorneys who will decide on his instructions to them on 15 or 16 November 2023. They will require a deposit of R150,000 if they decide to accept his instructions. He is financially embarrassed. It will take him four to six months to raise these funds. When I handed down this judgment on 20 November 2023, Mr Kajee's proposed new attorneys had not come on record. He had also not updated the Tribunal whether they had accepted his instructions and in the event they had not, what further measures he has taken to secure legal representation.

[6] Pleadings in the irregular step application closed on 1 September

2023. Mr Kajee's attorney had five weeks before he withdrew from the record to enrol this interlocutory application for hearing. He did not enrol it. Mr Kajee has not explained the delay in having this application determined. He has also not sought an upliftment of bar. He had 10 months when he still enjoyed legal representation to do so. He has more than 15 years' experience as an admitted advocate during which he was a member of the Johannesburg Bar. He has offered no explanation why he is not in a position to prosecute these

interlocutory applications himself.

[7] It will not serve the interests of justice to afford Mr Kajee more than six months to raise funds for legal representation, under circumstances where his conduct of the action against him has been dilatory, and where he has the requisite legal knowledge and skills to conduct his case - at the very least in the present interlocutory applications. It will only unduly delay the further conduct of the action, from which he remains barred from participating.

[8] I therefore consider the irregular step application as requested by the SIU. I do so in the interests of justice.

THE IRREGULAR STEP APPLICATION

[9] Mr Kajee brings this application in terms of Uniform Rule 30 read with Tribunal Rule 28(1).

[10] Uniform Rule 30(1) provides as follows:

"30 Irregular Proceedings

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety

alleged, and may be made only if-

- (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity.
- (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days.
- (c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.
- (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.”

[11] Tribunal Rules do not contain a rule similar to Uniform Rule 30. It is for that reason that Mr Kajee seeks to invoke this rule. He places reliance on Tribunal Rule 28(1).

[12] Tribunal Rule 28(1) provides as follows:

“28. *Procedures Not Provided for in the Rules.*

- (1) If a situation for which these 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.”

[13] Mr Kajee relies on the following grounds to have the notice of motion in the consolidation application set aside:

13.1 The notice of motion is non-compliant to form in that it provides for truncated time periods not provided for in Tribunal Rules, specifically Rule 10(1) and 10(2)(b) and/ or Uniform Rule 6(5) (a) in that it required him to file a notice of intention to oppose within a day and his answering affidavit within four days of filing his notice of intention to oppose.

13.2 The Special Tribunal is not a court. It is therefore a quasi-judicial entity governed by the Promotion of Administrative Justice Act[1] (“PAJA”). It is bound by that legislation to ensure that no irregularities occur, parties adhere to rules of legality,

legitimate expectation and laws of general application.

13.3 Section 33 of the Constitution of the Republic of South Africa Act 108 of 1996 (“Constitution”) guarantees his right to fair administrative action. He enjoys the right of access to courts in terms of section 34 of the Constitution. This right includes the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or another independent and impartial tribunal or forum. Section 36 generally prohibits the limitation of these constitutional rights.

[14] The SIU opposes the application on the following grounds:

14.1 Mr Kajee is barred from filing pleadings in the action and has not demonstrated that he stands to suffer any prejudice if the irregular step application is dismissed.

14.2 The decision taken by a judge at a case management meeting is not subject to be review under PAJA.

14.3 Sections 33 and 34 of the Constitution are irrelevant for the purpose of an irregular step application.

Failure to comply with Uniform Rule 30(2)(b)

[15] This sub rule requires a party wishing to institute Uniform Rule 30 proceedings to serve a notice on its opponent within 10 days of becoming aware, specifying the particulars of the irregularity or impropriety alleged and giving him an opportunity to remove the cause of complaint within 10 days.

[16] Mr Kajee contends that the letter his attorney addressed to the SIU’s attorney on 3 July 2023 constitutes a notice in terms of Uniform Rule 30(2)(b). The SIU contends that it does not.

[17] The SIU’s complaint is trifling as it elevates substance over form. Mr Kajee’s letter meets the requirements in Uniform Rule 30(2)(b) in material respects. It is clear from the impugned letter that Mr Kajee considers the notice of motion to constitute an irregular step. He called on the SIU to either withdraw it or remove his cause of complaint failing which he will resort to remedies at his disposal in terms of the applicable procedural rules. He duly instituted the irregular step application within the prescribed period.

Non-compliance with Tribunal Rules

[18] Mr Kajee incorrectly asserts that Tribunal Rules 10(1) and 10(2)(b) and/or Uniform Rule 6(5) applies to the consolidation application.

[19] The applicable Tribunal Rules are 10(10) and 10(11), read with Tribunal Rule 19.

[20] On 15 June 2023, I held a case management meeting with the parties in the Lekabe matter. At that meeting, I gave the following directives:

20.1 The SIU shall bring the consolidation application by 30 June 2023.

20.2 Any respondent wishing to oppose the consolidation application should file his notice of intention to oppose by 3 July 2023 and their answering affidavit by 7 July 2023.

20.3 The SIU shall file their heads of argument on 21 July 2023 together with their replying affidavit, if any.

20.4 The respondents shall file their heads of argument by 26 July 2023.

[21] the SIU did not determine the above dates. They were properly issued by me in my capacity as the case manager at a case management meeting convened in terms of Tribunal Rule 19. All the parties are bound to follow these directives.

[22] I directed truncated times because the consolidation application is an interlocutory application. Contrary to the contention by Mr Kajee, it is not regulated by Tribunal Rule 10(1) which regulates normal applications. It is regulated by Tribunal Rule 10 (10) read with Tribunal Rules 10(11) and 19.

[23] Tribunal Rule 10(10) provides as follows:

“(10) Notwithstanding the foregoing sub-rules, 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.

(11) Rule 19 shall apply to all applications as the context allows and as determined by the Tribunal President or the presiding Member.”

[24] Tribunal Rule 19 subjects all Tribunal matters to judicial case management. I quote the relevant sub rules below:

“19. Judicial Case Management

(1) The primary objective of these Rules is to ensure the expeditious and cost-effective disposal of matters before the Tribunal which may, in a fitting case, include the abandonment of the application of any rules of evidence in accordance with section 9(3) of the Act.

(2) All matters in the Tribunal shall be subject to judicial case management.

(3)...

(4)...

(5)...

(6) At the first case management conference, the following general matters must be canvassed:

(a) Preliminary identification of the issues subject to further definition in the pleadings; and

(b) The timetable for the expeditious conduct and finalisation of the proceedings, including whether the following should be delivered and the applicable timeline in regard thereto:

(7) ...

(8) ...

(9) ...

(10) All interlocutory matters, if any, shall be dealt with at the second case management conference or at any postponed date thereof, such interlocutory matters to include a determination on the triable issues, absent agreement between the parties in regard thereto.”

[25] The purpose of case management is as stated in Tribunal Rule 19(1). The directives for the institution of the consolidation application and the filing of papers in that application was duly issued in terms of Tribunal Rule 10(10) read with Tribunal Rule 10(11) and the sub rules in Tribunal Rule 19 quoted above.

[26] The fact that Mr Kajee was not in attendance at the case management meeting is of no moment. He was served with the consolidation application under circumstances where he is ipso facto barred from filing a plea in terms of Tribunal Rule 13(3). Notwithstanding that he is barred from filing his plea, nothing precluded him from filing opposing papers in the consolidation application or seeking an extension of time to do so. As contended by the SIU, he opted to bring a frivolous and vexatious irregular step application.

Grounds in Respect of PAJA And Constitutional Rights

[27] The Tribunal is an adjudicative body established in terms of section 2 of the Special Investigating Units and Special Tribunals Act[2] (“the Act”). Its proceedings are conducted in terms of Tribunal Rules issued by the Tribunal President in terms of s9(1)(a) of the Act. As stated above, Mr Kajee has grounded the irregular step application on incorrect Tribunal Rules. He has not attacked the Tribunal President’s authority to issue Tribunal Rules. Nor has he attacked the constitutionality of the Tribunal Rules. Further, directives issued at a case management meeting convened in terms of Tribunal Rule 19 are not subject to review in terms of PAJA. In any event, even if they were, Mr Kajee has not set out sustainable grounds of review under PAJA.

[28] Mr Kajee stands to suffer no prejudice if the notice of motion is not set aside. He states as much in paragraph 4.3 of his founding affidavit.

“B) PURPOSE OF THIS APPLICATION

4.1...

4.2...

4.3 This application is brought on the basis that should the applicant [Mr Kajee] lay supine with the knowledge of an irregular step in the proceedings and chooses (sic) not to invoke Rule 30 proceedings at the appropriate stage of the litigation, then, the applicant brings upon severe prejudice upon himself in the matter by compromising and burdening himself and accruing liability in preparation in the main action. Further, he runs a risk and loses the opportunity to invoke Rule 30 later if an objection is raised at the hearing.”

[29] It is unclear what preparation Mr Kajee intends making in the main action which would compromise, burden and cause him to accrue liability when he is currently barred from filing a plea. Until he successfully applies for the upliftment of bar, he is precluded from further participating in the action.

[30] He has therefore failed to establish that the notice of motion in the consolidation application constitutes an irregular step and to demonstrate what prejudice he stands to suffer if it is not set aside. On the authority in LNG Scientific[3], Tribunal Rule 28(1) is invoked at the discretion of the presiding judge, judicially exercised. Mr Kajee has not made a proper case for the exercise of my discretion in terms of Tribunal Rule 28(1) in his favour.

[31] This irregular step application is frivolous and vexatious. It stands to be dismissed with punitive costs.

CONSOLIDATION APPLICATION

[32] Mr Lekabe’s counsel objected to the application being determined based on the papers filed. I directed that once the papers are filed, I will determine whether an oral hearing is necessary.

[33] As mentioned above, none of the respondents filed opposing papers. It is for that reason that I am determining the consolidation application on the basis of the papers filed.

[34] Having read the papers filed in the consolidation application, I am satisfied that a proper case is made out for the relief sought in that application.

[35] The SIU seeks a punitive cost order against Mr Lekabe because he refused to consent to the consolidation of the two actions, yet he had earlier pleaded the non-joinder of Mr Kajee. I am not persuaded that Mr Lekabe’s conduct warrants a cost order. The SIU would have had to bring the consolidation application in any event to obtain an order consolidating the two actions. Mr Lekabe’s conduct is clearly uncooperative. However, as he has not opposed the consolidation application. Therefore, there is no reason to mulct him with a punitive cost order.

[36] Ordering costs to be costs in the course is appropriate under these circumstances.

[37] Therefore, the following order is made:

ORDER

1. The irregular step application is dismissed with costs.
2. The separate actions the plaintiffs issued under case numbers GP/09/2019 and GP/22/2021 are consolidated in terms of Uniform Rule 11(1) read with Tribunal Rule 28(1).
3. The consolidated action shall proceed under case number GP09/2019.
4. The costs of the consolidation application are costs in the cause.

JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES Attorney for the applicants: Mr Pearton, Gildenhuis Malatji Attorneys Counsel for the applicants: Adv DJ Joubert SC assisted by Adv Van Rhyn Fouche Attorney for the applicant: No attorneys on record. Date of hearing: Not applicable. Application determined on the papers filed. Date of Judgement: 20 November 2023

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 date and time for delivery is deemed to be 10 a.m.

[1] 3 of 2000.

[2] 74 of 1996.

[3] Special Investigating Unit and Another v LNG Scientific (Pty) Ltd (GP03/2022).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAST/2023/16.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/kajee-v-special-investigations-unit-and-others-unknown-topic-ast-2023>

Prepared on 10 October 2026 · Esheria