

SOUTH AFRICA / JUDGMENT

# Special Investigating Unit v Czakhele Enterprise (Pty) Ltd and Others (KN/04/2022) [2023] ZAST 14 (3 November 2023)

[2023] ZAST 14

COURT  
Special TribunalBEFORE  
L T ModibaCASE / FILE NUMBER  
KN/04/2022

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IN  
THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF S2 (1) OF THE SPECIAL  
INVESTIGATING UNIT AND  
SPECIAL  
TRIBUNALS ACT 74 OF 1996  
(REPUBLIC  
OF SOUTH AFRICA)  
CASE  
NO. KN/04/2022

In

the matter between :      SPECIAL  
INVESTIGATING UNIT  
APPLICANT  
AND  
CZAKHELE  
ENTERPRISE (PTY) LTD  
1ST  
RESPONDENT  
THEMBISILE  
OTTILIA HLENGWA  
2ND  
RESPONDENT  
MASHIBELA  
BUSINESS ENTERPRISE CC  
3RD  
RESPONDENT  
PATRICK

SIBUSISO MABASO  
4TH  
RESPONDENT  
SIZAKELE  
MABASO  
5TH  
RESPONDENT  
THE  
DEPARTMENT OF BASIC EDUCATION,  
KWAZULU  
NATAL PROVINCE  
6TH  
RESPONDENT  
MEMBER  
OF THE EXECUTIVE COUNCIL  
FOR  
EDUCATION KWAZULU NATAL, PROVINCE  
7TH  
RESPONDENT  
JENNY  
NAIDOO N.O.  
8TH  
RESPONDENT  
LAL  
RAMBARAN  
9TH  
RESPONDENT  
FUSI  
EPHRAIHM RADEBE  
10TH  
RESPONDENT  
HAZEL  
B KHUMALO  
11TH  
RESPONDENT  
BHEKITHEMBA  
V MLAMBO  
12TH  
RESPONDENT  
PHATHIWE  
PATRICA BHENGU  
13TH  
RESPONDENT  
P  
MVELASE  
14TH  
RESPONDENT  
L  
J BOIK  
15TH  
RESPONDENT

THULISILE  
MASINGA  
16TH  
RESPONDENT  
THULISILE  
P CHILIZA  
17TH  
RESPONDENT  
NF  
MKHIZE  
18TH  
RESPONDENT  
GUGU  
HADEBE Judiciary@2024  
19TH  
RESPONDENT  
NA  
ZULU  
20TH  
RESPONDENT

## JUDGMENT

### Summary

Application to strike out in terms of Uniform Rule 23(2) read with Tribunal Rule 28(1). Whether the material sought to be struck out is scandalous and irrelevant and will cause prejudice to the twelfth respondent if not struck out. The application partially upheld with costs.

Application to compel discovery in terms of Uniform Rule 35(12) read with Tribunal Rule 17(4) – the Special Investigating Unit’s grounds of opposition lack merit. Application succeeds with costs.

### MODIBA J

- [1] The twelfth respondent seeks an order compelling the Special Investigating Unit (“SIU”) to comply with its notice in terms of Uniform Rule 35(12) (“notice”). It contends that the SIU only partially complied with this notice. The SIU opposes the application to compel on the basis I will deal with shortly. The twelfth respondent also seeks an order striking out certain material from the SIU’s answering affidavit in the application to compel. The SIU also opposes the latter application.
- [2] The background facts in the two applications are largely common cause.
- [3] The SIU has cited the twelfth respondent in a review application it filed on 7 November 2022, seeking a variety of relief against various respondents including the twelfth respondent. The twelfth respondent filed its notice of intention to oppose on 2 December 2022. On 14 June 2023, the SIU filed a notice of set down, enrolling the review application for default judgment on 15 August 2023. The application for default judgment was duly enrolled.

However, I removed it from the roll because the SIU had not filed a practice note and draft order.

- [4] On 18 August 2023, the twelve respondent filed the notice, calling on the SIU to make available to it specified documents for inspection and copying. It considered the said notice defective. On 21 August 2023, it delivered a second notice. The latter notice includes material details what were omitted from the notice filed on 18 August
2023. To resolve the dispute between the parties, it is not necessary to delve into the details added to the notice filed on 21 August
2023. The notice called on the SIU to comply with the twelfth respondent's request within 10 days. This period expired on 4 September
2023. The SIU only responded on 29 September 2023 by partially complying with the notice.
- [5] Meanwhile, on 22 August 2023, the SIU delivered its first notice to amend its notice of motion in the review application. On 12 September 2023, it filed a notice withdrawing its notice to amend. On the same day, it filed another notice to amend. The twelfth respondent instituted the application to compel on 20 September 2023.
- [6] It is prudent to deal with the latter application first because if it succeeds, then the application to compel stands to be considered excluding the material struck out from the answering affidavit.

#### APPLICATION TO STRIKE OUT

- [7] The twelfth respondent instituted this application by notice filed on 25 October 2023 informing the SIU that at the hearing of its application to compel, it will apply for specified content in the SIU's answering affidavit deposed to on 24th October 2023 by its attorney of record Stella Tamensi Zondi, struck out with costs on the grounds I will deal with shortly.
- [8] When the Tribunal sat to hear oral argument in the application to compel on 26 October 2023, the initial response by council for the SIU from the bar was that the application to strike out was filed less than twenty-four hours ago, the SIU has not filed opposing papers and he holds no instruction in respect of the application. I offered to stand the matter down to afford him an opportunity to obtain instructions. I also emphasized that there is often hardly a need to file opposing papers in an application to strike out, unless the SIU would like to place evidence before the Tribunal to oppose the application. Such applications are brought in terms of Tribunal Rule 10(10) which is akin to Uniform Rule 6(11). Postponing the application, even if it is only for oral argument at a later stage, will unnecessarily escalate costs. Therefore, a request for postponement should be carefully considered before being made to this Tribunal.
- [9] Council for the SIU subsequently submitted that the SIU opposes the application, and he has obtained instructions to argue the application on the papers.

- [10] I now turn to consider the material the twelfth respondent wants struck out, its reasons for the request and the SIU's basis for opposition. Before I do so, I consider the applicable legal principles and authorities relied on by the parties.
- [11] Tribunal Rules do not have a rule regulating applications to strike out. Tribunal Rule 28(1) confers a discretion on the presiding judge to invoke the applicable Uniform Rule to address a lacuna in Tribunal rules. The present circumstances are appropriate for the invocation of Uniform Rule 23(2). It provides as follows:
- “(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter, and may set such application down for hearing within five days of expiry of the time limit for the delivery of an answering affidavit or, if an answering affidavit is delivered, within five days after the delivery of a replying affidavit or expiry of the time limit for delivery of a replying affidavit, referred to in rule 6(5)(f): Provided that —*
- “(a) the party intending to make an application to strike out shall, by notice delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and*
- “(b) the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.”*
- [12] The twelfth respondent relied on the principles set out below as referenced in the cited authorities.
- [13] Two requirements must be met before a striking-out application can succeed: (i) the matter sought to be struck out must be scandalous, vexatious or irrelevant; and (ii) the court must be satisfied that if such a matter is not struck out the party seeking such relief would be prejudiced.[1]
- [14] Scandalous allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory.[2]
- [15] A vexatious matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.[3]
- [16] Irrelevant allegations do not apply to the matter at hand and do not contribute one way or the other to a decision of that matter. The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation.[4]
- [17] As a general rule, questions of credibility ought not to be raised in affidavit proceedings.[5]
- [18] The SIU sought to place general reliance on Gefen and Another V De Wet No and Another[6] to persuade me not to strike out the material the twelfth respondent identified as subject to be struck out. Its reliance on this

## judgment

is misplaced. The judgment deals with the striking out of a defence and not the striking out of scandalous and irrelevant material. Striking out the material identified by the twelfth respondent will not have the effect of striking out the SIU's grounds of opposition in the application to compel.

### Ad paragraph 14

- [19] The twelfth respondent requires the words that appear after the comma in line 3 i.e.: “and the Twelfth Respondent’s attorneys .... is not warranted” struck out on the grounds that it is unfounded, defamatory, and irrelevant. It contends that it will be prejudiced if that aspect is not struck out as it seeks to colour the Tribunal’s mind on the aforesaid allegations and influence it in determining the dispute between the parties.
- [20] Counsel for the SIU contended the SIU attorney believed that since it had communicated to the twelfth respondent that it is no longer seeking relief against it, the filing of heads of argument was unwarranted. Later in this judgment, I find that the stance the SIU had taken regarding the application to compel was wrong. Thus, its attorney wrongly believed that it was no longer necessary for the twelfth respondent to file heads of arguments in its application to compel. Even if the attorney for the SIU held that believe for the reasons it has advanced, it does not justify accusing the twelfth respondent’s attorney for outrageously refusing to withdraw the application to compel and using it as a “careful ploy to build more costs where it is not warranted”.
- [21] I find that the words sought to be struck out are indeed unfounded, defamatory, and irrelevant. They stand to be struck out. The twelfth respondent will be prejudiced if the relevant words are not struck out as the SIU seeks to influence the Tribunal’s decision against it.

### Ad paragraph 16, 17 and 18

- [22] The twelfth respondent contends that the entire content is inadmissible on the grounds that it constitutes exchanges in negotiations to attempt a settlement that was not reached. It further contends that it will be prejudiced if these paragraphs are not struck out as the SIU seeks to influence the Tribunal’s decision against it.
- [23] The SIU contends that it included these paragraph in support for its application for condonation for the late filing of its answering affidavit. Having studied these paragraphs, I agree with the SIU. The paragraphs (and the correspondence referenced therein) do not constitute exchanges between the parties in negotiations to attempt a settlement that was not reached. The parties were articulating their respective cases and blaming each other for the costs of the interlocutory application, which the SIU considered to be unnecessary. There was no attempt made to settle that application.

[24] I find that disclosing the relevant correspondence to the Tribunal is not prejudicial to the twelfth respondent. Therefore, its request that it be struck out is dismissed.

Ad paragraph 18

[25] The twelfth respondent contends that Annexure SM5 is the same document as “SM4” and is unnecessarily repetitive and prolix. It is prejudiced with unnecessary costs if it is not struck out.

[26] Indeed SM5 is the same document as SM4. However, the twelfth respondent’s request lacks merit. To identify the document as being the same as SM4, the twelfth respondent’s attorney had to peruse it. Thus, the prejudice complained of has already been suffered. It is up to the twelfth respondent to seek a remedy by arguing for the costs of perusing this document in the review application. Therefore, the twelfth respondent’s request to strike out SM5 is dismissed.

Ad paragraph 21

[27] The twelfth respondent seeks the words “that sanity will prevail” struck out on the grounds that it is defamatory, unfounded, and irrelevant. It will be prejudiced if these words are not struck out as they seek to colour the Tribunal’s mind on the aforesaid allegations and influence it in determining the dispute between the parties.

[28] The contention by counsel for the SIU that ‘these words were not intended to be used and that the SIU intended to mean that the parties will reach each other’ amounts to a concession that the words ought not to be used. Contrary to the submission by counsel for the SIU, these words were clearly directed by the attorney for the SIU to the attorney for the twelfth respondent. As contended by the twelfth respondent, the words are defamatory, unfounded, and irrelevant. It is also unprofessional and disrespectful for an officer of this court to address another officer of this court in that manner. Further, the words stand to be struck out as they seek to colour the Tribunal’s mind on the parties’ respective cases in the application to compel and influence it in determining the dispute between the parties. They stand to be struck out.

Ad paragraph 26.3

[29] The twelfth respondent seeks the entire content of this paragraph struck out on the grounds that it constitutes argument. It will be prejudiced if it is not struck out as it is not based on fact which it can respond to and is included by the SIU to influence the Tribunal’s decision.

[30] The contention by counsel for the SIU that his client was entitled to advance argument in its answering affidavit to bolster its factual averments is shocking. Reserving argument for inclusion in heads of argument is a long-standing practice in our courts. This paragraph falls to be struck out for the reason advanced by the twelfth respondent.

APPLICATION TO COMPEL

- [31] The SIU's main grounds of opposition in the application to compel morphed as that application unfolded. Initially, the SIU contended that the application is rendered moot by the fact that it intends amending its notice of motion to delete the prayer in respect of which it seeks relief against the twelfth respondent. I conveniently refer to this prayer as prayer five. The SIU further contended that, that being the case, the twelfth respondent is not entitled to an order compelling it to comply with its notice. It also contended that the notice is defective as it fails to specify the rule on which the request to make documents available for inspection and copying is made.
- [32] In reply to the SIU's grounds of opposition, the twelfth respondent contended that the SIU has not effected its intended amendment because it has not filed its amended pages as required in terms of Tribunal Rule 15(5). Further, even if the SIU were to file its amended pages, a prayer seeking the costs of opposition from the respondents who oppose the review application remains in the notice of motion. I conveniently refer to this prayer as the prayer for costs. The twelfth respondent hitherto filed a notice of intention to oppose the review application. Therefore, the SIU would effectively persist in seeking relief against it albeit only limited to an order for costs. Thus, it is entitled to insist on compliance with its notice as it requires the documents specified in the notice to answer to the SIU's allegations and prayer for costs against it.
- [33] The twelfth respondent pointed out that it remains open to the SIU to deliver its amended pages in accordance with Tribunal rule 15(5), and furthermore to deliver a notice of withdrawal of the review application against the twelfth respondent.
- [34] In the evening on the day before the hearing of the present applications, the SIU filed its amended pages. It contended that effecting its proposed amendment renders the application to compel moot.
- [35] By filing its amended pages, the SIU effectively conceded that its initial stance to the application to compel was wrong. It had failed to file its amended pages as required in terms of tribunal Rule 15(5). Hence, it remedied this omission. Regrettably for the SIU, as contended on behalf of the twelfth respondent, effecting its amendment does not resolve the dispute between the parties in the review application and in the application to compel.
- [36] The issue between the parties is very narrow. It is whether in the review application, there is still a live dispute between the SIU and the twelfth respondent and if there is, whether the twelfth respondent has made out a proper case for the relief it seeks in the application to compel.

- [37] The filing of the SIU's amended pages only removes prayer five from the SIU's notice of motion. The prayer for costs remains. The SIU's contention that since the twelfth respondent has not filed its answering affidavit, effectively, it is not opposing the main application, therefore, there is no live dispute between the parties. Thus, the SUI's contention that the twelfth respondent is not entitled to the relief it seeks in the application to compel, lacks merit.
- [38] In my view, the SIU is attempting to pressure the twelfth respondent into abandoning its notice of intention to oppose. Its amended notice of motion kicks the review application for touch, thus creating the current conundrum between the parties to avoid costs consequent upon withdrawing the review application by failing to follow the prescribed procedure for withdrawing legal proceedings. The procedure is set out in Tribunal Rule 21 (1). It provides as follows:
- "A party wishing to withdraw the proceedings must deliver a notice of withdrawal in which it tenders costs of suit as soon as possible."*
- [39] During oral argument, I stood the matter down to afford the SIU an opportunity to obtain an instruction to comply with the abovementioned subrule. Counsel for the SIU agreed to the standing down of the matter. When the hearing resumed, he submitted that the SIU's processes for obtaining any instruction that includes tendering costs are long. Therefore, I should proceed to adjudicate the matter on the merits.
- [40] Regrettably, by persisting with a completely unfounded opposition, mounted to avoid complying with Tribunal Rule 21(1), the SIU has escalated costs in this matter. It is for that reason that this subrule requires the filling of a notice to withdraw as soon as possible. Had it done so; this application would not have been necessary.
- [41] If the SIU intends withdrawing the review application against the twelfth respondent, I find that it has not followed the correct procedure. For the reasons advanced by the twelfth respondent, a live dispute remains between the parties. The twelfth respondent has filed a notice of opposition. It remains cited in the main application. There are allegations made against it in the founding affidavit, which it is entitled to answer to. If it does, it remains liable for costs as prayed for in the SIU's notice of motion. Thus, a live dispute between the parties remains. Even if the SIU were to amend its notice of motion to delete the prayer for costs, thus avoiding tendering a notice to withdraw the application, and that amendment renders the twelfth respondent's opposition of the review application nugatory, a dispute in respect of the cost of the current application and the costs of the review application will remain. If the SIU does not intend to withdraw the application against the twelfth respondent, then the twelfth respondent is not only obligated to file an answering affidavit, but it also has the right to do so. However, it is not for this Tribunal to speculate what step any of the parties will take to absolve themselves from the current conundrum.

[42] The SIU's complaint that the twelfth respondent has failed to specify the rule under which the request is made is rendered trifling by the fact that it has partially complied with the notice. It would not have done so if it was not aware of the rule relied on by the twelfth respondent and prejudiced by its failure to specify the applicable subrule. Therefore, this complaint lacks merit.

[43] On the papers filed in this matter, the twelfth respondent has made out a proper case for the relief sought in the application to compel. It meets the requirements in R35(12). I have already found that it remains a party in the review application. The documents required are referenced in the founding affidavit filed in the review application. This subrule allows it to call for the inspection of the documents and to make copies thereof at any time before the hearing.

[44] An order in terms of the draft order filed by the twelfth respondent stands to be granted.

#### ORDER

1. The below content which appears in the Special Investigating Unit's ("SIU") answering affidavit filed in the twelfth respondent's interlocutory application is struck out:

1.1 The words that appear after the comma in line 3 i.e.: "and the Twelfth Respondent's attorneys .... is not warranted" in paragraph 14.

1.2 The words "that sanity will prevail" in paragraph 21.

1.3 The entire content of paragraph 26.3.

2. Within five (5) days from date of this order, the SIU shall make available to the twelfth respondent for its inspection and allow it to make a copy or transcription or furnish it with a true copy of those parts of the undermentioned documents which are relevant to it:

2.1 All evidence defined in Section 4(1)(b) of the Special Investigating Units and Special Tribunal Act 74 of 1996 ("The Act");

2.2 All and any reports made by the SIU in terms of Section 4(2) of the Act;

2.3 The documents referred to in the undermentioned paragraphs of the SIU's founding affidavit in the review application deposed to on 31 October 2022 by Mafeka Andrew Ngubane:

2.3.1 The documents referred to in paragraph 4.

2.3.2 All documents describing and evidencing the deviation process referred to in paragraph 15.

2.3.3 All documents regarding the election of officials referred to in paragraph 31.

2.3.4 The procurement pack referred to in paragraph 62.

2.3.5 The CSD report submitted at the time of quoting by first and third respondents in consequence of what is stated in paragraphs 66 to 70 and 92 inclusive.

2.3.6 The documents in the pack and/or those generated by the Department officials concerned referred to in paragraph 152; and

2.3.7 The referral to the relevant prosecuting authority referred to in paragraph 214.

3. The twelfth respondent is granted leave, in the event of the SIU failing to comply with the order in paragraph 2 above, to supplement these papers insofar as may be necessary and to apply for such further or alternate relief that may be relevant.
4. The SIU is ordered to pay the twelfth respondent's costs of both the application to compel and the application to strike out on an opposed basis.

JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES Attorney for the Applicant: Anand-Nepaul Attorneys Counsel for the Applicant: Mr Nepaul Attorney for the Respondent: Ms S Zondi, State Attorney, Pretoria Counsel for the Respondent: Adv L Mgwetyana Date of hearing: 26 October 2023 Date of Judgement: 3 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] Helen Suzman Foundation v President of The Republic of South Africa and Others 2015 (2) SA 1 (CC) at par 27-28.
- [2] Ibid. See also Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 377b-c quoting Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) at 566D.
- [3] Ibid.
- [4] Ibid.
- [5] Jones v John Barr & Co (Pty) Ltd and Another 1967 (3) SA 292 (W) at 296c quoting Morgendaal v Ferreira, 1956 (4) SA 625 (T) quoting Morgendaal v Ferreira, 1956 (4) SA 625 (T) at p. 268B.
- [6] Gefen and Another v De Wet No and Another 2022 (3) SA 465 (GJ) at paragraph 27.

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