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: GP/04/2022

In the matter between:

SPECIAL INVESTIGATING UNIT	**First Plaintiff**
ESKOM HOLDINGS SOC LTD	**Second Plaintiff**

and

THULANI ZULU	**First Defendant**
COMMODITY LOGISTICS MANAGERS AFRICA (PTY) LTD (Reg No. 2011/006762/07)	**Second Defendant**
SIBA GRAND BUSINESS ENTERPRISES (PTY) LTD (Registration No: 2014/159833/07)	**Third Defendant**

JUDGMENT

---

[1] The plaintiffs issued summons against the defendants, in which several orders were sought by way of relief. The first plaintiff is the Special Investigating Unit (SIU) which also represented the second plaintiff

(Eskom), in terms of sections 41(c) and (5) of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the Act), in instituting the action against the defendants. The action arose from investigations by the SIU into malfeasance, and unlawful and irregular conduct at Eskom. The defendants each filed an exception to the Particulars of Claim, which is opposed by the plaintiffs.

[2] By way of background, the action is based, in essence, on the unlawful, irregular payment of monies by the second defendant, Commodity Logistics Managers Africa (Pty) Ltd) (Commodity Logistics) and the third defendant, Siba Grand Business Enterprises (Pty) Ltd (Siba) to the first defendant, Thulani Zulu (Zulu). I shall refer to the defendants inerchangeably either by the abbreviated names I have set out, as first, second and third defendant respectively or collectively as “the defendants”. Zulu was employed as a Middle Manager in the Coal Supply Unit of Eskom. During the period of his employment as such, Commodity Logistics secured a coal transportation contract with Eskom and Siba held a sub-contract with Commodity Logistics for the transportation of coal and/or for haulage.

[3] The plaintiffs allege that by virtue of his employment with Eskom, Zulu was subject to various common law and statutory obligations and duties, as well as obligations and duties arising from policies and codes relevant to his employment. These included the duty to exercise the utmost good faith, trust, honesty and integrity, the duty to avoid any

conflict of interest between his personal interests and that of Eskom, the duty not to act unlawfully, receive or engage in any form of bribery, corruption, inducement or “kickback”, and the duty to disclose to, account for and pay over to Eskom any benefits, arising from his employment, offered or provided to him his family or his relatives.

[4] The plaintiffs allege that during 2016, Commodity Logistics had substantial business dealings with Eskom, including a coal supply contract, in respect of which Commodity Logistics was paid a substantial amount of money. During the period 2018 to 2021 Commodity Logistics sub-contracted to Siba thirty percent (30%) of it coal transportation contract with Eskom, for which it paid Siba substantial amounts of money. It is alleged that during the period 4 July 2016 to 21 January 2020, Commodity Logistics paid substantial amounts of money into Zulu’s bank account, either directly or indirectly, totalling Two Million Seven Hundred and Eighty Nine Thousand Two Hundred Rand (R2 789 200.00). It is further alleged that on 28 December 2018, Siba paid an amount of Eight Thousand Five Hundred Rand (R8 500.00) into Zulu’s bank account.

[5] The plaintiffs further allege that these monies were secret profits received by Zulu as an employee of Eskom, and that these payments constituted kickbacks, gratuities, bribes, corruption, inducement and/or other benefits as a reward for the role that Zulu played in ensuring that Eskom awarded business and/or contracts to Commodity Logistics, and

for ensuring that the latter awarded a sub-contract to Siba. With regard to the liability of the defendants, the plaintiffs allege that they are jointly and severally liable to pay to Eskom the secret profits in the amounts I have indicated earlier.

[6] Consequently, the plaintiffs seek the following relief against the first, second and third defendants, jointly and severally, the one paying the other to be absolved:

"11.1 Payment in the sum of R2 789 200.00;

11.2 Payment in the sum of R8 500.00

11.3 Statement and debatement of account of all amounts paid to the First Defendant by the second and third Defendants as secret profits or other unlawful benefits and/or received by the Second (Sic) Defendant arising from his business dealings with the Second and Third Defendants;

11.4 Payment of whatever sum may be determined as owing after a statement and debatement of account under prayer 11.3 in addition to amounts referred to in paragraphs 11.1 and 11.2 above;

11.5 Interest at the applicable prescribed rate on each of the amounts referred to in paragraphs 11.1, 11.2 and 11.4 from date of judgment to date of payment;

11.6 Costs of suit".

[7] Zulu excepted to the Particulars of Claim on the basis that they do not disclose a cause of action and lack averments that are necessary to sustain a cause of action. He set forth four grounds in support of his exception:

7.1 Eskom procures goods and services in the manner prescribed by, *inter alia*, section 217 of the Constitution of South Africa, the Public Finance Management Act, National Treasury Regulations and its own internal policies. The procurement process involves a three-stage consideration by various Bid Committees. The plaintiffs have not alleged that Zulu was a member of any of those committees, or that he had the authority to ensure that a procurement contract was awarded to Commodity Logistics. There is therefore no basis to conclude that Zulu received bribes, kickbacks or any inducement from the Commodity Logistics and Siba;

7.2 A sub-contract agreement is between the main contractor and the sub-contractor. In the present case, Commodity Logistics was required to submit its bid to Eskom, accompanied by a memorandum of agreement between it as the main contractor and the sub-contractor. Therefore, neither Eskom nor Zulu had a role to play in the appointment of a sub-contractor. The plaintiff also failed to plead the role played by Zulu in ensuring that Commodity Logistics awarded the sub-contract to Siba;

7.3 Zulu's duties, as Middle Manager, as pleaded in the Particulars of Claim do not indicate that such duties included the procurement of contracts. The Particulars of Claim therefore lack averments necessary to sustain the cause of action;

7.4 With regard to the allegation that in 2016, while Zulu was a Middle Manager in the coal supply unit, Commodity Logistics had substantive

business dealings with Eskom, the plaintiffs have not pleaded the nature of such business dealings, nor have they pleaded that such substantive business dealings fell within the scope of Zulu's employment with Eskom.

[8] Commodity Logistics and Siba also excepted to the Particulars of Claim on the basis that they lack the necessary averments to sustain the action against them. In essence, the grounds they advance are as follows:

8.1 The allegations in the in the Particulars of Claim do not establish a cause of action entitling Eskom to the alleged unlawful payments made by Commodity Logistics and Siba to Zulu, in that the plaintiffs do not allege how or why Zulu's breach of his duties entitles Eskom the payments of the amounts claimed. Further, in failing to state what loss Eskom suffered as a result of Zulu's alleged receipt of unlawful payments, it is not clear on what basis the Commodity Logistics and Siba are liable to Eskom for the alleged unlawful payments.

8.2 The Particulars of Claim do not establish that Commodity Logistics and Siba are jointly and severally liable to Eskom for payment of the amounts claimed.

8.3 The Particulars of Claim do not establish Eskom's entitlement to the accounting it requires from the contractors, as Commodity Logistics is a contractor to Eskom and Siba is a sub-contractor to Commodity Logistics.

[9] The plaintiffs made written submissions in answer to the exceptions taken by the three defendants. With regard to Zulu's exception, the plaintiffs' answer was that the claim against Zulu is based on a breach of his contractual, common law and statutory duties. The schedule of payments to Zulu by Commodity Logistics and Siba detailed in the Particulars of Claim are the basis for the allegations of illegality, and that they constituted reward for the role that Zulu played in ensuring the award of the contract and sub-contract. With regard to the complaint that the plaintiffs did not plead that Zulu's duties included the procurement of contracts or the nature of the substantial business dealings with Eskom that they allege, the plaintiffs assert that these grounds must be considered in the light of whether plausible evidence can be led or not in this regard. Their assertion is that these grounds of exception are without merit and do not render the Particulars of Claim excipiable.

[10] With regard to the exception and grounds therefor, raised by Commodity Logistics and Siba, the plaintiffs point out that they set out a detailed schedule of payments made by Commodity Logistics and Siba to Zulu, which they allege were secret profits, kickbacks etc, as I indicated earlier. They allege that Commodity Logistics and Siba interfered with the contractual relationship between Zulu and Eskom by making the unlawful payments to Zulu, entitling Eskom to claim the unlawful payments from the defendants, as such amounts should have been for the benefit of Eskom and not Zulu's benefit.

[11] The ground that no basis has been laid for the joint and several liability of the three defendants has, so the plaintiffs contend, is also answered by their contention that the liability of the defendants is premised on the interference by Commodity Logistics and Siba with the contractual relationship between Zulu and Eskom, as such payments assisted Zulu in the breach of his contractual obligations to Eskom, particularly the duty to account to Eskom and pay over to it any payments he had received.

[12] With regard to the third ground that the plaintiffs have shown no basis for Eskom's entitlement to an account from Commodity Logistics and Siba, the plaintiffs contend that regard must be had to the nature of the complaint, in order to determine if there is a basis for the defendants to account to Eskom. They contend that the plaintiffs set out in the particulars the circumstances of the matter, entitling it to an account from Commodity Logistics and Siba. On a reading of the complaint, the defendants seem to require evidence in order to conclude the duty to account. The plaintiff's contend that this is a matter for evidence (at the trial)

[13] The legal principles with regard to exceptions have been well established in our law. Although Tribunal Rule 13 (1) makes provision for the filing of an exception, the Tribunal Rules do not specifically provide for the basis upon which an exception may be raised, nor do the Rules make provision for the procedure by which an exception may be

raised and brought to court. In terms of Tribunal Rule 28, where procedures are not provided for in the Rules, the Tribunal may adopt any procedure that it deems appropriate in the circumstances, including the invocation of the High Court Rules. Rule 23 of the Uniform Rules of Court hence finds application in this matter. It is perhaps useful to set out the provisions of Rule 23 (1):

> "Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that —
>
> (a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, 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 such notice; and
>
> (b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph *(a)* is received, or within 15 days from which such reply is due, deliver the exception."

[14] Uniform Rule 18(4) is also applicable in this matter, bearing in mind the nature and grounds of the exceptions raised by all three defendants, the provisions of which are:

"(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

[15] It is trite that the plaintiffs' claim must disclose a cause of action, which means that the Particulars of Claim must contain every fact which is necessary for the plaintiffs to prove, but not every piece of evidence necessary to prove each fact. It is trite that courts endeavour to look benevolently, rather than over-critically at the impugned pleading, but must be careful not to take benevolence too far in reading into the pleading what is not there. [See *First National Bank of South Africa Ltd v Perry NO 2001(3)SA 960 (SCA)* and *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Company Ltd 1944 AD 444.*].

[16] Unless the excipient can show that on every interpretation of the pleading, a cause of action cannot be established, the exception should not be upheld. 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. If it does not have that effect the exception should not be entertained. [*See Erasmus Superior Court Practice RS 21, 2023, D1-296/7.,*and the numerous cases cited therein]. Where the excipient alleges that necessary averments to sustain a cause of action have not been made, the court is required to examine carefully the content of the pleading in the light of the grounds for the exception. The first respondent, Zulu complains that while his duties as a Middle Manager have been set out by the plaintiffs, they fail to allege that such duties included procurement/awarding of contracts. They have furthermore, not pleaded any details of what role he played in influencing the award of the sub-contract by Commodity Logistics to Siba.

[17] The plaintiffs set out what Zulu's duties were as a Middle Manager in the Coal Supply Unit, thereafter provided a detailed schedule of payments received by Zulu from Commodity Logistics and Siba, and followed that with the averments that such payments constituted secret payments, kickbacks, gratuities, bribes inducements and/or other benefits, which Zulu was not entitled to receive. As a consequence of receiving such payments, Zulu breached the duties to Eskom, which the plaintiffs outlined in the Particulars of Claim. In my view, it was not necessary for the plaintiffs to set out what was Zulu's role or how he influenced the awarding of the contracts. Those are matters for evidence. There are sufficient facts pleaded for Zulu to render a plea.

[18] With regard to the second and third defendants, it is noted that the Particulars of Claim are not very elegantly worded. In my view, the plaintiffs could have elaborated on the reasons for their claim that the second and third defendants were jointly and severally liable with Zulu to repay the impugned amounts to Eskom. Looking at the Particulars of Claim as a whole, it is clear that the plaintiffs rely on the vast sums of money paid to Zulu to claim that there was malfeasance, unlawfulness and irregularity surrounding such payments. Zulu, as an employee, *prima facie*, appears not to have been lawfully entitled to such payments. It should also be borne in mind that the court must proceed from the premise that the allegations in the Particulars of Claim are true, and that the pleading must be considered as a whole, unless the

impugned section or paragraph stands on its own or refers to a separate cause of action.

[19] That is clearly not the case in this matter. The case against the defendants is intrinsically linked to the relationship amongst them, leading to the payment of the monies set out in the Particulars of Claim. The plaintiffs have averred that malfeasance, corruption and unlawfulness were, *inter alia*, features relevant to the payments, entitling the plaintiffs to recover such amounts. The joint and several liability of the defendants to repay, to Eskom, the amounts received by Zulu, stems from the same corrupt relationship alleged by the plaintiffs. Similarly the debatement of account sought by Eskom from Commodity Logistics and Siba is in respect only of all the payments made by them to Zulu and /or his family or other beneficiaries, over and above the payments set out in the Particulars of Claim. In the circumstances, I am unable to find that on every interpretation of the Particulars of Claim, no cause of action has been established. Such averments or facts which the defendants allege are missing and are essential to sustain the cause of action are, in fact, matters to be dealt with in evidence at the trial.

[20] I pause to mention that no documentation has been placed before this Tribunal to indicate that the plaintiffs were given the requisite notice in terms of the proviso in Rule 23(1), calling upon them to remove the cause of complaint. I am cogniscent of the fact that a number of Case

Management Meetings were held in this matter and particularly with regard to the filing of further pleadings and the hearing of the exception. As the plaintiffs have not raised this as an issue, I accept that this must have been resolved at the stage of case management.

[21] In my view the exceptions must fail, as they would not dispose of the matter in whole or in part. This, however, does not close the doors to the defendants, as they would be entitled to re-argue these points at the trial.

[22] In the circumstances, I make the following order:

22.1 The exception raised by the first defendant is dismissed with costs;

22.2 The exception raised by the second and third defendants is dismissed with costs

_____

JUDGE S NAIDOO
MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the plaintiffs:	Adv D Mtsweni
Attorney for the plaintiffs:	The State Attorney, Pretoria

Email:	StelaZondi@justice.gov.za
Counsel for the 1st respondent:	Adv L Nyangiwe
Attorney for the 1st respondents:	Rams Attorneys
Email:	kmotshwane@ramsattornrys.co.za
	ksegami@ramsattorneys.co.za
	wmoeketsane@ramsattorneys.co.za
Counsel for 2nd & 3rd defendants:	Adv (Ms) Makhaye
Attorney for 2nd & 3rd defendants:	Koikanyang Incorporated
Email:	junaid@ock.co.za
Date of hearing:	19 August 2022
Date of judgment:	13 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.*