



DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	
SPECIAL TRIBUNAL	
CNR AMANDA AVENUE & RIFLE RANGE ROAD, OAKDEN	
	Signature of Is [redacted] Name [redacted]
2026 -01- 15	
C/A No: One	
REGISTRAR	

**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2(1)
OF
THE SPECIAL INVESTIGATING UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996
(REPUBLIC OF SOUTH AFRICA)**

CASE NO.: GP09/2019

In the matter between:

THE SPECIAL INVESTIGATING UNIT

First Plaintiff

THE MINISTER OF POLICE

Second Plaintiff

THE MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES

Third Plaintiff

And

KGOSISEPHUTHABATHO GUSTAV LEKABE

First Defendant

Consolidated with:

CASE NO: GP22/2021

THE SPECIAL INVESTIGATING UNIT

First Plaintiff

THE MINISTER OF POLICE

Second Plaintiff

THE MINISTER OF HEALTH

Third Plaintiff

THE MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES

Fourth Plaintiff

And

HASSAN EBRAHIM KAJEE

Second Defendant

JUDGMENT

Victor J

“There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the fundamental values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organized crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.”¹

Introduction

[1] The plaintiffs in this matter seek to amend their particulars of claim to include a cause of action relating to a future situation that may arise if at the trial, the Special Tribunal might find that the 547 payments made to the second defendant, Mr Kajee (Kajee) by the State Attorney, totalling R64 169 944.00 were as a result of administrative action. Then in that event the plaintiffs seek an order that all instructions given and authorisation of payments made to Kajee be reviewed and be set aside.

The plaintiffs’ submissions

[2] The intended amendment notwithstanding, the plaintiffs continue to assert that as a direct consequence of the first defendant, Mr Lekabe (Lekabe) being involved in a collusive and corrupt relationship with Kajee. Lekabe knew or ought to have known

¹ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)

that Kajee charged for professional services not rendered at all, or by double charging for similar work done in a specific matter, or charging for work not done, and/or by double invoicing the office of the State Attorney and/ or overreaching in his fee invoices delivered to the office of the state attorney over the period 2014 to 2018.

[3] The Plaintiffs contend that the Special Tribunal hearing the matter in due course may come to the conclusion that such conduct should be reviewed and set aside and that Kajee and Lekabe be jointly and severally liable to repay the said amounts to the plaintiffs, then in that event the plaintiff requires the assurance of having pleaded in the alternative. Hence the need for the amendment.

[4] In justifying the amendment, some four years after the institution of the action, the plaintiffs contend that once Lekabe delivered heads of argument in respect of the special pleas raised by him, it became necessary to seek the amendment. Lekabe pleads that the particulars of claim are premised on administrative action but that a review order was not pleaded by the plaintiffs.

[5] According to the plaintiffs Lekabe only raised this defence on 28 August 2025. That is two weeks before the commencement of the trial in his heads of argument. As a result, thereof, the plaintiffs decided that it would be prudent that should the Special Tribunal find that Lekabe's conduct did indeed constitute administrative action then in that event the legality review should be pleaded.

[6] The plaintiffs contend that the principle of legality, the rule of law and constitutional principles of transparent and accountable governance by public officials such as Lekabe who was head of the office of the State Attorney, is a primary consideration of the intended amendment that is contained in a notice dated 2 September 2025.

[7] Kajee did not object to the amendment. In fact, he refuses to attend the trial allegedly on medical grounds. A medical specialist from the Helen Joseph Hospital

testified that Kajee was perfectly capable of attending the trial before the Special Tribunal.

[8] Lekabe objects to the proposed amendment in that it is belated and out of time. He also asserts that the amendment is defective in that it is not accompanied by an affidavit addressing the issues raised by him, and that the amendment introduces a new claim which is not supported by the averments filed in the original particulars of claim. He also argues that the amendment should have been brought by way of a substantive application. It is noted that the plaintiffs did subsequently bring a substantial application to amend. He claims further that the new claim has prescribed and made in bad faith. Lekabe contends that the plaintiffs have had knowledge of this particular special plea for more than four years

[9] The plaintiffs insist that it was Lekabe's heads of argument that raised this point for the first time on the 28th of August 2025. This is the first time that the reasoning for his fourth special plea was explained.

[10] The plaintiffs argue that lateness does not deter the intention to amend in terms of tribunal rule 15 (1) and if successful would be entitled to do so by way of rule 15(4) of the Special Tribunal Rules.

[11] The plaintiffs contend that the cause of action and claim remain exactly the same and that the relief sought is only in the event of the Special Tribunal finding that the payments to Kajee were as a result of administrative action. All the witnesses to testify remain the same and the facts will remain the same. The plaintiffs continue to assert that Lekabe in his capacity as head of office of the State Attorney owed a duty of care to perform his functions in a proper manner and a lawful manner. In particular the South African taxpayers' money is involved. The plaintiffs plead that this unlawful collusive action between Lekabe and Kajee took place from 2014 and October 2018 when Lekabe was suspended. The plaintiffs contend that Lekabe knew or ought to have known that

Kajee was charging for professional legal services not rendered, double charging, double invoicing and overreaching.

[12] These facts were pleaded in the particulars of claim and accordingly the plaintiffs contend it is not a new cause of action. In the original particulars of claim as against Lekabe and Kajee before the consolidation of the actions, the causes of action seek repayment of the monies as the plaintiffs have suffered damages because of Lekabe's wrongful and unlawful breach of its statutory duties as head of the office of the State Attorney alternatively that his conduct was negligent and resulted in losses of millions of Rand to the State. The plaintiffs submit that it matters not whether the claim is one for damages or a legality review, the goal is unchanged.

[13] Clearly the plaintiffs' original claim has its genesis in damages arising out of the conduct of the attorney/counsel relationship. It is important to note that as between Lekabe and Kajee the relationship was one of attorney and client. The relationship is of a contractual nature as between attorney and counsel. It is essentially a contractual relationship of a collaborative nature.

[14] The plaintiffs submit the same evidence will be led, and the same witness will testify in the trial. The essential elements of a legality review in essence refers to the process of evaluating the legality and compliance of actions, decisions, contracts, policies, or practices with applicable laws, regulations, and legal principles. In this case a review would aim to ensure that the actions or decisions made in this case by a state body does not violate legal requirements or infringe on the rights of others. It involves checking whether certain actions or procedures are legally permissible under the jurisdiction's laws and ensuring that proper legal procedures are followed. A breach of a contractual relationship is very different to a legality review and in the result, it is clear that the legality review introduces a new cause of action.

[15] The relationship as between Lekabe and Kajee is really contractual in nature. The cause of action sounds in damages. The plaintiffs in seeking the amendment are

clear that they do not relinquish or concede that the payments to Kajee were as a result of administrative action. It is trite that an amendment which introduces a new cause of action where it is distinct from the original cause of action are separate despite both causes of action arising from the same conduct of the defendants. The *facta probantia* required to prove a legality review are not the same as those already pleaded for the damages action. Facts necessary to prove the legality review have not been pleaded.

[16] The plaintiffs contend that their replication denying that the payments were made as a result of administrative action stands. The amendment will enable the Special Tribunal to deal with what is a constitutional issue that it is in the interest of justice that the amendment be allowed.

[17] The plaintiffs relied on a number of cases in support of the principle that substantial latitude should be granted in allowing amendments.² The plaintiffs contend that there is no prejudice to the defendants and that they will not be worse off if the amendment is granted. The plaintiffs rely on case law to argue that that even if the amendment may cause the other party to lose its case, it should not dissuade a court from granting it. It matters not that the amendment is sought at a late stage. In this case the amendment was sought during the week that the trial when Lekabe sought to have his special pleas argued first.

[18] It was submitted that an appropriate cost order can remedy any prejudice. The modern trend is to allow the proper ventilation of the dispute between the parties. In relying on the case of *Macduff*³, it is the plaintiffs' case no matter whether there is a blunder however negligent or careless, the omission may be, the amendment should be allowed because of the public interest.

² *Moolman v Estate Moolman* 1927 CPD 27

³ *Macduff & Co v Johannesburg Consolidated Co. Ltd.*, 1923 T.P.D. 309, *Macduff* 1923 TPD 309

Lekabe's submissions

[19] Lekabe objected on the basis the amendment sought was an ambush as he had intended to argue his special plea first before the commencement of the trial. It was not brought by way of a substantive application, it was an ambush, it was made in bad faith and for the purpose of seeking a postponement. The plaintiffs had knowledge of the special plea for more than four years. The question of delay in bringing a legality review is fatal to the amendment. Lekabe urges that he is entitled to just administrative action. Lekabe quoted the provisions of the Constitution and PAJA in great detail. He submitted that the Special Tribunal should interpret the conduct as administrative action. Reliance was placed on the case of *Sentrachem vs Prinsloo*⁴ to deal with what is a new cause of action. Based on the dicta Lekabe argues that the legality review is by no means even close to the original cause of action pleaded. Placing reliance on the case to submit that an amendment is simply not there for the asking. Ultimately as stated by Ngcobo J in *Affordable Medicines*⁵

“...the question in each case, therefore, is, what do the interests of justice demand?”

The claims

[20] I do not deal with all the grounds of objection. It seems to me that the most important substantive objection relates to the difference in the original cause of action.

[21] Whilst a lot of latitude is granted in relation to amendments, the question is whether that same latitude should be applied in relation to legality reviews which constitute a clear and separate cause of action. It has been the basic jurisprudential principle that the greatest latitude is allowed in granting amendments.⁶ But this principle is not without limitations.

[22] It is necessary to analyse the pleaded particulars of claim in their present form.

⁴ *Sentrachem v Prinsloo* 1997 (2) SA 1(A) para 151 -166

⁵ *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 (3) SA 247 para 9

⁶ *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92:

The claims arising out of the direct relationship between the plaintiff and Lekabe and Kajee are pleaded as follows:

22.1 Claim A The State Attorney briefed Kajee in 17 matters at the rate of R1 450.00 per hour and R14 5000.00 per day. The total amount paid was R3 705 002.00. Kajee charged in excess of 10 hours per day. He over reached, double charged for legal services he did not render and rendered double invoices. In so doing he made misrepresentations which were false and fraudulent. Kajee overcharged by R692 350.00 and Kajee was unlawfully enriched by R692 350.00

22.2 Claim B During January to December 2015 Kajee was briefed to appear in 37 matters at the rate of R1 733.00 per hour and R17 330.00 per day. Kajee was paid a total amount of R5 710 176.00. He over reached, double charged for legal services he did not render and rendered double invoices. In so doing he made misrepresentations which were false and fraudulent. Kajee overcharged by R1 265 047.06 and Kajee was unlawfully enriched by R1 265 047.06.

22.3 Claim C for the period 2016 he was briefed in 67 matters at the rate of R18 000.00 and R18 000.00. Kajee was paid an amount of R13 839 062.00 and overcharged by an amount of R5 231 027.00. The plaintiffs plead that Kajee overcharged by charging in excess of 10 hours a day, over-reaching, he overcharged, double charging which services he did not render on the dates claimed. Kajee was enriched at the expense of the second plaintiff alternatively the third alternatively the fourth plaintiff alternatively the State attorney. Kajee's conduct was intentional or negligent misstatements or misrepresentations.

22.4 Claims D is relevant to the period January 2017 to December 2017 Kajee was briefed in 79 matters at the rate of R2 250.00 per hour and R22 500.00 per day. Kajee was paid R22 145 875 and paid allegedly overpaid R10 952 937.00

22.5 Claim E is relevant to the period 2018 at the rate of R2500.00 per hour and R25 000.00 per day. Kajee was paid R15 423 750. 00. He was overpaid an amount of R7 873 750.00. Kajee made false representations by way of his invoices. The plaintiffs suffered damages in the said amount. Further Kajee was unjustifiably enriched. Kajee was unjustly enriched in the said amount and the second alternatively the third alternatively fourth plaintiff alternatively the State attorney was impoverished.

22.6 Claim F Kunene Invoices. On 14 February 2018, Lekabe briefed Kajee on behalf of the office of the state attorney to act on behalf of the second plaintiff in the matter of Kunene vs The Minister of Police. Notwithstanding Kajee charged for the period 18 December 2017 to 13 February 2018 and rendered invoices to the Office of the State Attorney for alleged professional legal services notwithstanding the fact that he did not render any services in the Kunene matter. The total amount charged by Kajee R889 500.00

[23] Whilst not binding another Judge hearing this matter in due course, this cause of action, as pleaded is based on the elements of a delict. The alleged conduct as pleaded is a positive fraudulent act on the part of Kajee and an omission/or participation by Lekabe where a duty to act existed. The alleged conduct of both Kajee and Lekabe if proven would be wrongful, intentional or in the case of Lekabe negligent alternatively intentional. The cause of the alleged damage has a direct link to the alleged conduct

[24] In terms section 5 of the Special Investigating Units and Special Tribunals No 74 of 1996. (The SIU Act), the SIU has the power, inter alia, to ‘institute and conduct civil proceedings in a Special Tribunal or any court of law for – (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution; (ii) any relief relevant to any investigation; or (iii) any relief relevant

to the interests of a Special Investigating Unit'.⁷ The SIU also 'may institute and conduct civil proceedings in its own name or on behalf of a State institution in a Special Tribunal or any court of law'.⁸

Underlining for emphasis

[25] Accordingly a cause of action sounding in damages is permissible in terms of the SIU Act. This is based on primary legislation and the cause of action does not arise out of a Regulation or out of the Rules for Conduct of the Special Tribunal which would amount to subsidiary legislation.

Delay

[26] The question now arises is whether the plaintiffs have delayed in bringing a legality review. A cause of action accrues at the time of the initiation of proceedings; it cannot accrue four years later triggered by what is stated in heads of argument. The delay in pleading a legality review in this case is substantial. A further cause of concern is that the Special Tribunal is not a court of law.⁹ The case law is very specific when it comes to assessing and applying the delay principles in legality reviews. Every case on delay in legality proceedings refers to a court's inherent discretion. In terms of s172(1)(a) of the Constitution a court can declare invalid any law or conduct that is inconsistent with the Constitution, to the extent of its invalidity.¹⁰ The question is whether the Special Tribunal has the same powers as those envisaged in s172(1)(a) of the Constitution. Since the section refers to court powers, those powers may not grant the Special Tribunal same inherent powers to achieve a just and equitable.

⁷ Section 4(1)(c) of the SIU Act.

⁸ Section 5(5) of the SIU Act.

⁹ *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* 2023 (2) SACR 1 (CC)

¹⁰ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 63 referring to Gijima para 52.

[27] Notwithstanding the jurisprudence relating to delay in bringing legality reviews it is incumbent on the Special Tribunal to apply the principles established by the courts. The founding provisions of Constitution provide for the Supremacy of Constitution as defined in section 2. The Constitution is the supreme law of the Republic; and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. Accordingly, despite the Special Tribunal not being a court of law the precedent on delay set by the Constitutional Court in *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd*¹¹ must be followed. *Buffalo* endorsed the test followed in *Gqwetha*,¹² and later approved by the Constitutional Court in *Khumalo*.¹³ The Constitutional Court in *Buffalo* opined that

“the approach to delay in bringing a legality review, was, firstly, to examine whether the delay was reasonable. This was to be answered by considering its explanation. If, indeed, the delay was reasonable, the matter could be heard. But if the delay was unreasonable, the second enquiry was whether the interests of justice required it to be overlooked, and the matter heard. In that in assessing delay the first question to be determined is the reasonableness of the delay. If the delay is found to be unreasonable, the next question is whether it should nevertheless be overlooked in the interests of justice.”¹⁴

[27] Mabindla-Boqwana AJA in *Special Investigating Unit And Another V Engineered Systems Solutions (Pty) Ltd* analysed very carefully the principles and effect of delay in legality reviews. The explanation for the delay must cover the entire period and must be reasonable and justified.

“Where the delay is found to be unreasonable, there must be a basis for a court to exercise its broad discretion to overlook it. This must be gathered from the available facts. In this evaluation a number of factors must be taken into account. The first ‘is potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision. The potential prejudice to affected parties and the consequences of declaring conduct unlawful may in certain

¹¹ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 48.

¹² *Gqwetha v Transkei Development Corporations Ltd and Others* [2005] ZASCA 51; [2006] 3 All SA 245; 2006 (2) SA 603 (SCA) para 33.

¹³ *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 49.

¹⁴ *Buffalo* paras 48 and 50.

circumstances be ameliorated by [the Court]’s power to grant a just and equitable remedy and this ought to be taken into account’. The second factor to be considered is the nature of the impugned decision. This entails ‘a consideration of the merits of the legal challenge against that decision’. Navsa JA in *South African National Roads Agency Ltd v City of Cape Town*¹⁵ highlighted the point that the merits of the impugned decision are a critical factor in determining whether it is in the interests of justice to condone the delay. That ‘would have to include a consideration of whether the non-compliance with statutory prescripts was egregious’. A third factor to be considered is the conduct of an applicant.¹⁶

[28] In *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Limited t/a Eye & Lazer Institute*,¹⁷ Cameron J stated that:

‘[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.’¹⁸

[29] Furthermore consideration must be given to the principle arising from *Gijima* is that the court is obliged by virtue of the provisions of s 172(1)(a) of the Constitution to declare invalid any law or conduct that is inconsistent with the Constitution, to the extent of its invalidity.¹⁹ The Constitutional Court in *Buffalo* held that this applies when the unlawfulness is clear and undisputed.²⁰ It further went on to state that the *Gijima* principle should ‘be interpreted narrowly and restrictively so that the valuable rationale behind the rules of delay are not undermined’.²¹

¹⁵ *South African National Roads Agency Ltd v City of Cape Town* [2016] ZASCA 122; [2016] 4 All SA 332; 2017 (1) SA 468 (SCA).

¹⁶ *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* 2022 (5) SA 416 (SCA)

¹⁷ *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Limited t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 82.

¹⁸ *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd (Case no 216/2020)* [2021] ZASCA 90 (25 June 2021)

¹⁹ *Buffalo* para 63 referring to *Gijima* para 52.

²⁰ *Buffalo* para 66.

²¹ *Buffalo* para 71.

[30] In the result based on the above principles, I find the delay to be unreasonable. The explanation given that this cause of action arises out of heads of argument filed by the opposing party cannot justify the delay in these proceedings. Pleadings do not depend on issues raised by an opponent. A litigant must grasp the nettle from the outset and plead its cause of action. There is no sound factual basis in this case to justify the delay in pleading a legality review. In my view the plaintiffs' explanation does not pass muster and is therefore unsatisfactory. There is no basis to overlook the delay. The plaintiffs have pleaded a cause of action as I have outlined above and done so in terms of the SIU Act.

[31] The amendment to introduce a legality review is accordingly denied.

Costs

[32] The costs must follow the result. I am going to allow the costs of Advocate Brown's appearance and his preparation for the opposed hearing on the scale C. Mr Lekabe is a litigant and his own attorney. Accordingly, I do not allow attorney's fees for taxation.

Order

The following order is made:

1. The application for amendment is refused.
2. The plaintiffs are ordered to pay the costs of appearance and preparation of Adv Brown on scale C.



JUDGE M VICTOR
PRESIDENT OF THE SPECIAL TRIBUNAL

Appearances:

For the plaintiff: Adv DJ Joubert SC

Adv GVR Fouche

Instructed by: Gildenhuys Malatji Attorneys

For the first defendant: Adv D Brown

Instructed by: Mr K.G. Lekabe

For the second defendant: Mr H.E. Kajee (in person)

Date of hearing: 12 September 2025

Date of judgment: 15 January 2026.

Mode of delivery

This judgment is handed down by email transmission to the parties' legal representatives, uploading on Caselines and release to SAFLII and AFRICANLII. The time of delivery is deemed to be 12H00.

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	
SPECIAL TRIBUNAL	
CNR AMANDA AVENUE & RIFLE RANGE ROAD, OAKDENE	
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