IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A99/2025

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED.
(4) Date: 15 April 2026
Signature: _ [redacted]

In the matter between:

KUBWA KAZI CONSTRUCTION CC	1ST Appellant
LEBAKA CONSTRUCTION CC	2ND Appellant
KUBWA KAZI CONSTRUCTION AND LEBAKA CONSTRUCTION JV	3RD Appellant
M. JACOB PHUNGULA	4TH Appellant
VERONICA Z. MABENA	5TH Appellant
JOY M. SEALE	6TH Appellant

And

THE SPECIAL INVESTIGATING UNIT ("THE SIU")	1ST Respondent
EKURHULENI METROPOLITAN MUNICIPALITY	2ND Respondent
CIVEC CIVIL ENGINEERING CONSULTANTS CC	3RD Respondent
	(Interested Party)
MAHLOMOLA D KOMANE	4TH Respondent
	(Interested Party)
THEMBELIHLE P MOGAPI	5TH Respondent
	(Interested Party)
YOLISA MASHILWANE	6TH Respondent
	(Interested Party)

JUDGMENT

NYATHI J (MNGQIBISA-THUSI J AND SWANEPOEL J CONCURRING)

A. INTRODUCTION

[1] This is an appeal in terms of s 8(7) of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("the SIU Act") read with Rule 49 of the Uniform Rules of Court, against the whole of the judgment and order of Naidoo J sitting in the Special Tribunal, delivered on 14 January 2025.

[2] The respondents did not appear at the hearing of the appeal, despite proper notice having been served. They also filed no heads of argument. The matter accordingly proceeded unopposed, and this Court determined the issues on the basis of the record, the appellants' heads of argument and oral submissions.

B. BACKGROUND

[3] The dispute arises from the Vosloorus Hospital Taxi Rank contract (Tender PT 01-2014), awarded to the first to third appellants, acting as a joint venture ("the JV").

[4] The SIU and the Municipality instituted action in the Special Tribunal seeking repayment of R1 973 028.11, being the amount certified and paid under Interim Payment Certificate 5 for materials (canopies) alleged to have been fraudulently claimed as "materials on site".

[5] The appellants defended the claim and raised a counterclaim for monies allegedly owed to them under the Vosloorus contract and under the Bluegum View contract.

[6] In a preliminary hearing, the Tribunal upheld:

i. the respondents' jurisdictional plea,

ii. the respondents’ prescription plea (in respect of the Bluegum View counterclaim), and

iii. dismissed the appellants’ cause-of-action plea relating to the fifth and sixth appellants.

The appeal lies against these rulings.

C. GROUNDS OF APPEAL

The appellants primarily argue that the Tribunal erred—

(a) in finding that a proper cause of action existed against the fifth and sixth appellants, despite an absence of pleaded facts establishing **knowledge of fraud;**

(b) in concluding that it lacked jurisdiction to entertain the appellants’ counterclaims, notwithstanding that the SIU and Municipality elected to proceed in the Tribunal on the same indivisible contracts; and

(c) in treating the counterclaims as prescribed when, in terms of the GCC[1], the right to retention payment arises only upon the issue (or deemed issue) of completion certificates.

ISSUE 1: WHETHER THE RESPONDENTS PLEADED A CAUSE OF ACTION AGAINST THE FIFTH AND SIXTH APPELLANTS

[7] The particulars of claim rely on fraudulent misrepresentation in relation to invoice KK1339-IN05. However, the pleading attributes the fraudulent conduct expressly to the **first to fourth appellants.**

[8] While the respondents cited the fifth and sixth appellants as members/directors of the JV entities, they did not plead knowledge, participation, recklessness, or intent on their part. These elements are mandatory to sustain liability under:

common-law fraudulent misrepresentation, and

section 64 of the Close Corporations Act, which requires that a person be *"knowingly a party"* to the fraudulent conduct. (See *Larkin v Registrar of*

[1] In the context of South African construction law, GCC stands for the General Conditions of Contract for Construction Works.

Companies 1985 (3) SA 551 (A) and *Philotex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA).

[9] The Tribunal held that the mere fact of membership and signature of the JV agreement "imputed" liability to the fifth and sixth appellants. With respect, this was a misdirection. Liability in fraud cannot be imputed; it must be pleaded and proven. The test is whether, assuming the facts pleaded are true, the pleading discloses a cause of action. (McKenzie *v Farmers' Co-operative Meat Industries* 1922 AD 16; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T); *Fairoaks Investment Holdings (Pty) Ltd v Oliver* 2008 (4) SA 302 (SCA).)

[10] In the absence of pleaded *facta probanda* establishing knowledge or participation, the particulars of claim lack essential averments. The Tribunal ought to have upheld the special plea.

Finding on Issue 1:

The appeal succeeds. The claim against the fifth and sixth appellants does not disclose a cause of action and ought to have been dismissed at the preliminary stage.

ISSUE 2: JURISDICTION OF THE SPECIAL TRIBUNAL TO HEAR THE COUNTERCLAIMS

[11] The Tribunal found that it lacked jurisdiction because:

a. the SIU Act exists solely to recover losses of the State,

b. defendants are not entitled to assert counterclaims, and

c. the counterclaims relate to contractual disputes not forming part of the SIU's referral.

[12] This reasoning is flawed for several reasons:

(a) Rule 13(1) of the Tribunal Rules expressly permits a plea with or without a claim in reconvention.

(b) The SIU elected the forum. Once the SIU chose to litigate in the Tribunal on an indivisible contract, principles of fairness, equity, and avoidance of multiplicity of proceedings require that the contractor be permitted to raise its corresponding claims before the same forum. If a party makes an election, once made, he cannot first take one road and then turn back and take another. This much was made clear by the SCA in **Chamber of Mines v National Union of Mineworkers 1987 (1) SA. 668 (A**) at 690E-691B. and **Administrator, Orange Free State v Mokopanele** 1990 (3) SA 780 (A).

(c) The counterclaims stem from the identical contracts covered under the Proclamation and the SIU investigation mandate.

(d) Nothing in the SIU Act excludes reciprocity. The Tribunal is a civil forum; counterclaims are inherently civil in nature. A multiplicity of proceedings should be avoided. In **Makhanya v University of Zululand** 2010 (1) SA 62 (SCA) the SCA emphasised that a forum with jurisdiction must hear the matter.

[13] The Tribunal therefore erred in declining jurisdiction.

Finding on Issue 2:

The appeal succeeds. The Special Tribunal does have jurisdiction to entertain the appellants' counterclaims.

ISSUE 3: PRESCRIPTION

[14] The counterclaims relate to **retention monies** under the GCC. Such amounts become due only upon the issue of a Certificate of Completion and/or Final Approval Certificate, neither of which were issued. If the employer wrongfully withholds a certificate, the doctrine of fictional fulfilment applies. The leading case in this area, **MacDuff & Co Ltd (in Liquidation) v Johannesburg Consolidated Investment Co Ltd** (1924 AD 573) encapsulates the principle: a party that deliberately obstructs the fulfilment

of a condition is treated as if the condition has been met, thus binding it to its contractual obligations.[2]

[15] Where a certificate is wrongfully withheld, the doctrine of fictional fulfilment applies, and prescription begins only when the obligation becomes due.

[16] The Tribunal erred in treating the counterclaims as prescribed.

Finding on Issue 3:

The appeal succeeds. The counterclaims have not prescribed.

CONCLUSION AND ORDER

[17] For the above reasons, the following order is made:

Order

1. The appeal is upheld with costs.

2. The ruling of the Special Tribunal dated 14 January 2025 is set aside and replaced with the following:

[2] Excerpt from Adv. Christi Hattingh – LinkedIn 16 February 2025.

2.1 The special plea that the particulars of claim fail to disclose a cause of action against the fifth and sixth appellants is upheld.

2.2 The plaintiff may amend the particulars of claim within 10 (ten) days hereof.

2.3 The respondents' jurisdictional plea is dismissed.

2.3 The respondents' prescription plea is dismissed.

3. The matter is remitted to the Special Tribunal for further proceedings on the merits before a different Tribunal member.

4. The respondents shall bear the costs of this appeal jointly and severally, the one or more paying the others to be absolved, on a party and party scale to be taxed at scale B, including costs of counsel.

[redacted]

J.S. NYATHI
Judge of the High Court
Gauteng Division,
Pretoria

I agree:

MNGQIBISA-THUSI J
Judge of the High Court
Gauteng Division, Pretoria

I agree:

[redacted]

SWANEPOEL J
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 08 October 2025

Date of Judgment: 15 April 2026

On behalf of the Appellants: Adv. A.J. Glendinning

Applicant's attorneys: LM du Toit Attorneys Inc.

On behalf of the Respondents: *No Appearance*

Respondent's attorneys: State Attorney.

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 15 April 2026.