IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D16012/2016

In the matter between:

SILVERMOON INVESTMENTS 145 CC
trading as OCEAN ECHO PROPERTIES **PLAINTIFF**

and

THE MINISTER, NATIONAL DEPARTMENT OF
PUBLIC WORKS AND HUMAN SETTLEMENTS **FIRST DEFENDANT**

THE SPECIAL INVESTIGATING UNIT **SECOND DEFENDANT**

ORDER

The following order is made:

1. The application to remove the second defendant from the proceedings is dismissed.
2. The application to file a new counterclaim is granted.
3. The application to amend the plea is granted.
4. Each party shall pay its own costs.

JUDGMENT

Mathenjwa J

Introduction

[1] There are three applications before court. In the first application the plaintiff in the main action, Silver Moon Investment CC, seeks an order declaring that the second defendant, the Special Investigating Unit (the SIU) does not have locus standi to participate and should be removed as a party from the action proceedings. In the second and third applications the second defendant in the main action, the SIU, seeks leave to file a fresh counterclaim and amend its plea.

[2] The parties shall be referred to by their designations in the main action. The SIU opposes the plaintiff's application, and the plaintiff opposes the SIU's applications. The first defendant in the main action, the Minister, National Department of Public Works and Human Settlements undertook to abide by the court's decision. Since the three applications are interwoven, I firstly deal with the plaintiff's application, then the SIU's applications and finally, the issue of costs.

Factual background

[3] In June 2016 the plaintiff instituted an action for contractual damages against the first defendant. The claim was for the amount of R17 229 294.85 plus interest in respect of rental by the first defendant from 1 May 2016 and for the amount of R1 930 068.37 in respect of tenant installations plus interest calculated from 1 February 2016. The action arose from a written lease agreement concluded by the plaintiff and the first defendant on 21 June 2005 in terms of which the plaintiff leased premises to the first defendant for occupation by the Vehicle Identification Safeguarding Unit of the South African Police Services (SAPS). By written addendum in July 2005 the parties agreed to renew the lease by a further five years from the date of termination of the

main agreement. Furthermore, on 23 July 2008 the parties concluded a further addendum in terms of which the plaintiff leased additional space to the first defendant.

[4] The first defendant opposes the action and filed its special plea and plea to the plaintiff's particulars of claim. On 29 November 2016 the SIU filed its application for leave to intervene and join as a second defendant in the action proceedings. Neither the plaintiff nor first defendant objected to the SIU's joinder application, instead the plaintiff filed a notice to abide. Consequently, on 17 February 2017 the SIU was joined as a second defendant in the main action. On 22 February 2017 the SIU filed its plea and counterclaim to the plaintiff's particulars of claim. In the counterclaim the SIU sought repayment of the amount of R37 617 938 which was allegedly an overpayment for rentals by the first defendant to the plaintiff as from 31 August 2016 in respect of short spaces provided by the plaintiff to the first defendant. On 23 March 2023 the SIU withdrew its counterclaim and tendered costs but did not withdrew its plea.

[5] After the SIU had withdrawn its counterclaim, the plaintiff instituted an application to remove the SIU from the proceedings and the SIU sought leave to file a new counterclaim and to amend its plea. In its intended new counterclaim the SIU seeks a declaratory order in terms of which the main lease agreement, addendums thereto as well as extensions in respect thereof is declared invalid and set aside in terms of s 172(1)*(a)* of the Constitution in view of the fact that the procurement process which preceded same had violated s 217(1) of the Constitution. The SIU claims that the plaintiff should repay to the first defendant the sum of R94 053 363.82, which is inclusive of interest. The plaintiff opposes the application.

[6] Therefore, the issues for determination in these applications are:

(a) whether the SIU who was joined by a court order as a party can be removed from the proceedings;

(b) whether the underlying causa that justified the second defendant's joining in the litigation still existed;

(c) whether the SIU's delay in filing a fresh counterclaim was unreasonable or not;

(d) whether or not the delay should be condoned, and

(e) whether or not the SIU should be allowed to amend its plea.

Locus standi of the SIU

[7] The plaintiff contends that the SIU applied to join in the proceedings for purposes of presenting evidence before the court which once received, may result in a dismissal of the action proceedings. The plaintiff allowed the SIU to join in because the SIU expressed an intention to file a counterclaim. After the SIU had withdrawn the counterclaim, the only remaining defences to the plaintiff's claims are:

(a) the special plea of prescription raised by the first defendant;

(b) the first defendant's plea on the merits which is no more than a bare denial;

(c) the SIU's plea of prescription, and

(d) the SIU's plea on the merits to the extent that it still has any relevance.

[8] The plaintiff submits that the first defendant's plea on the merits raises the issue of what is described as short spaces. However, the SIU's withdrawal of the counterclaim entails that the issues relating to the short spaces were abandoned or withdrawn by the SIU. Since the SIU had withdrawn its counterclaim the only basis on which it can continue to be involved in the proceedings is for the purposes of defending the action on the plea of prescription, which was also raised by the first defendant. The plaintiff submits that the Special Investigating Units and the Special Tribunals Act[1] (SIU Act) which enables the SIU to institute civil action does not empower both the SIU and the first defendant to conduct the same litigation. The SIU Act does not give the SIU any power to defend legal proceedings brought against an institution, particularly where the institution itself is defending such proceedings and more so when the defence raised is the same.

[9] The SIU states that once it was joined in the action proceedings it lodged a counterclaim against the plaintiff seeking repayment in the amount of R37 617 938. The sum being claimed was for overpayments made for the short spaces that the plaintiff had given in the leased premises. The amount of R37 652 151.92 was recovered as a result of the counterclaim instituted by the SIU. Because the money it had sought in the counterclaim had been obtained, the SIU was compelled to withdraw the counterclaim.

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[1] Special Investigating Units and the Special Tribunals Act 74 of 1996.

[10] The SIU disputes that it does not have locus standi in the main action. The SIU contends that it has a direct and substantial interest in the outcome of the litigation as its investigations have yielded evidence of mala administration and fraudulent misrepresentation during the procurement process and leasing agreement completion by the plaintiff and staff of the first defendant. It contends that it has raised defences which the first defendant has not raised in keeping with its mandate to prevent the effects of serious mala administration and losses being suffered by the State. The SIU further contends that by not opposing its joinder application the plaintiff had acquiesced to the order of joinder and cannot thereafter seek relief that is contrary to such an acquiescent. The SIU also wanted to provide evidence in the action proceedings, which, if received, could lead to the action proceedings being dismissed. These allegations were not denied by the plaintiff in the joinder application. Finally, the SIU submits that the issue of locus standi was finally determined by the court and the same parties or their privies cannot re- litigate it in a later suit.

Analysis of the law

[11] Both counsel for the plaintiff and the SIU made lengthy submissions regarding the locus standi of the SIU to participate in the proceedings. The Uniform rules of court make provision for the court to set aside a court judgment or order that was taken by default in the absence of another party,[2] and to rescind a judgment or order that was erroneously granted,[3] or granted as a result of a mistake common to the parties.[4] The plaintiff does not allege that the court order joining the SIU in the proceedings was taken by default, nor granted erroneously nor as a result of mistake common to the parties. Mr *Aboobaker SC* for the plaintiff could not refer to any authority that supports his contention for removal of the SIU from the proceedings, but argues that since the SIU was joined in for purposes of instituting a counterclaim, the underlying causa that entitled the SIU to participate in the proceedings no longer existed after the SIU having withdrawn its counterclaim. Mr *Nankin* for the SIU submits that the issue of the SIU's participation in the proceedings is res judicata, because it was finally decided upon by the court. Furthermore, Mr *Nankin* argues that there is no rule or other authority that supports the plaintiff's contention for removal of the SIU from the proceedings.

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[2] Uniform rule 31(2)*(b)*.
[3] Rule 42(1)*(a)*.
[4] Rule 42(1) *(c)*

Inherent powers of the High Court

[12] It is instructive that the Uniform rules do not make provision for removal of a party who was joined by order of a court in the proceedings. It is apposite that parties engage in litigation to resolve legal disputes that can be resolved by application of the law.[5] A person who was not a party in the proceedings can join in and participate as a party if he or she has a direct and substantial legal interest in any order the court might make in the proceedings.[6] The direct and substantial interest must relate to the order or the outcome of the litigation,[7] or if the order sought will affect that person's rights or interest.[8] In terms of common law the High Courts had inherent powers to decide a matter where there was no legislation that regulated the given situation. The nature of the court's inherent powers in common law was re-stated in *Ex parte Millsite Investment Co (Pty) Ltd*[9] where the court held that:

'... apart from powers specifically conferred by statutory enactments and subject to any specific deprivations of power by the same source, a Supreme Court can entertain any claim or give any order which at common law it would be entitled so to entertain or give... The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales where no specific law provides directly for a given situation'.

[13] The Constitution preserves and entrenches the inherent powers of the High Court. Section 173 of the Constitution bestows the High Court with powers to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. Courts have re-affirmed that under the new constitutional dispensation the High Court continues to claim inherent power for purposes of 'holding the scales of justice where no specific law directly provides for a given situation'.[10] Given the novelty of the issue before court, the court cannot sit back and avoid to hear the matter on the basis that there is no legislation regulating the situation. The circumstances in the present matter requires the court to invoke its inherent powers for purposes of administering justice between the parties. Next, I consider whether the defence of res judicata is applicable to these proceedings.

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[5] Section 34 of the Constitution.
[6] *Klaase and Another v Van der Merwe NO and Others* 2016 (9) BCLR 1187 (CC) para 45.
[7] *Lebea v Menye and Another* 2023 (3) BCLR 257 (CC) para 30.
[8] *Snyders and Others v De* Jager (Joinder) 2017 (5) BCLR 604 (CC) para 9.
[9] *Ex parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at 585F-H.
[10] *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 47.

Defence of res judicata

[14] The common law doctrine of res judicata means that a matter has been decided. It bars continued litigation on a matter that has been decided on the same issues between the same parties.[11] Res judicata presupposes that the judgment of a competent court on any claim is correct, and is based on a public policy that litigation should be brought to finality.[12] Although the ambit of the doctrine over the years has been relaxed on the common law requirements that the relief claimed and the cause of action should be the same in both the matter in question and the earlier judgment, the requirements that the parties must be the same and that the same issue must arise remain intact.[13]

[15] In determining whether the defence of res judicata is applicable to these proceedings, the court must first determine whether the issues on the facts and law that were determined by the earlier court are the same issues on facts and law that are before this court for determination.[14] In the earlier court the plaintiff abided by the court's decision, therefore the order does not deal expressly with the issues on facts or law. Therefore, the issues should be considered against the background of the case as it was presented in the earlier court.[15] In its application at the earlier court the SIU explained that its interests in the trial action arose from its responsibilities under the SIU Act. In terms of the preamble to the SIU Act, the SIU was established 'for the purpose of investigating serious malpractices or mala administration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public and of instituting and conducting civil proceedings in any court of law or a Special Tribunal in its own name or on behalf of State institutions'.

[16] The plaintiff does not argue that the SIU was incorrectly joined in the proceedings but contends that due to change of circumstances the SIU no longer has a direct interest in the proceedings. The factual matrix has changed and the SIU was

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[11] *Baphalane Ba Ramokoka Community v Mphela Family and Others; In re: Mphela Family and Others v Haakdoornbult Boerdery CC and Others* 2011 (9) BCLR 891 (CC) para 31.
[12] *Bertram v Wood (*1893) 10 SC 177 at 180.
[13] *Smith v Porrit and Others* 2008 (6) SA 303 (SCA) para 10.
[14] *Democratic Alliance v Brummer* [2022] ZASCA 151 para 13.
[15] Ibid para 15.

no longer legally entitled to be a party to the proceedings. The issues have been narrowed down to the question of whether the SIU still has a direct interest to remain a party in the proceedings. It is clear that the issue on the facts and law that were before the earlier court are not the same as the issue on the facts and law to be determined in this court. Thus, the defence of res judicata does not arise in the present matter. Next, I consider whether the SIU still has locus standi to remain in the proceedings.

[17] In determining whether the SIU has a direct interest to the litigation it is appropriate to allude to its application to join in and determine whether the causa underlying its joining in still exist. In the supporting affidavit in its notice of motion to join in the SIU averred that the results of the investigation conducted by its members, revealed improper conduct on behalf of both the plaintiff and certain officials in the employment of the first defendant, thus it was doubtful that the first defendant would make available to court the facts which reveal fraudulent conduct by its employees. The SIU stated that it was desirous of presenting evidence before court which may result in a dismissal of the action proceedings. The salient points of the SIU's case for joining in were that:

(a) In its summons the plaintiff has claimed payment from the first defendant in respect of tenant installation to the leased properties, whereas the lease agreement included tenant installation at the costs of the plaintiff.

(b) From 10 January 2007 to September 2016 the plaintiff was overpaid the sum of R18 528 426.49 for the lease;

(c) The first defendant's Bid Adjudicating Committee (BAC) members had approved an extension of lease agreement with an escalation of 10 per cent for the period 1 January 2015 to 31 December 2015 despite the terms of the Supply Chain Management (SCM) circular prescribing a maximum escalation of 4.7 per cent causing the first defendant to suffer financial loss in the sum of R1 529 779.43.

(d) The BAC members extended the lease agreement for the period 1 January 2016 to 31 December 2016 with an escalation rate of 10 per cent contrary to the SCM circular which provided for maximum escalation of 5.2 per cent causing the first defendant to suffer financial prejudice to the sum of R726 951.24.

[18] The court order that joined in the SIU evidences that it had a direct interest in the proceedings. The issue is whether the SIU continues to have direct interest in the proceedings after it had withdrawn its counterclaim. It is apparent from the issues raised in the SIU's application to join in that should its allegations be found to be true, the plaintiff's claim against the first defendant is likely to be dismissed at the trial. Even after the SIU had withdrawn its counterclaim, its defences against the plaintiff still stand. Therefore, the SIU still has the necessary locus standi to participate in the proceedings. Thus, the plaintiff's application to remove the SIU from the proceedings should be dismissed. Next, I deal with the leave to file a new counterclaim and amendment to the plea.

New counterclaim and amendment of the plea

[19] The SIU contends that the plaintiff had provided short spaces to a significant value, through intentional and fraudulent misrepresentation made by Mr Naidoo on behalf of the plaintiff during the procurement process, which led to the conclusion of the main lease agreement, addendum thereto, and extensions thereof as well as execution of the agreements. The SIU further contends that its new counterclaim shows that the procurement process was contrary to the National Treasury circular. Furthermore, it argues that the plaintiff has tacitly accepted that it was overpaid for the short spaces by permitting the first defendant to deduct a portion of the monthly rentals payable to the plaintiff during the period 2009,2012, 2017 and 2018 in the sum of R37 652 151.92. The counterclaim will not materially and adversely affect the plaintiff or first defendant's interest in finality of the matter as the main action is still pending before court and no trial date has been set. Also, the plaintiff is at liberty to file a plea to the counterclaim and respond to the alleged violation of s 217(1) of the Constitution and the resultant declaration of invalidity of the tender process.

[20] Counsel for the SIU argues that in considering the delay in delivering the new counterclaim, the case must be distinguished from a case where the second defendant did nothing from the date of its joining in in 2017. An initial counterclaim was lodged and the delay in delivering the new counterclaim was approximately five and a half months after the initial counterclaim was withdrawn.

[21] It is necessary, the argument went, for the SIU to amend its plea to align it with the fresh counterclaim. It submits that the proposed amendment could not prejudice the plaintiff since it can plead to the amended plea and raise whatever defences it deems necessary.

[22] The plaintiff argues that the applications for leave to file a new counterclaim and amendment to the plea are frivolous and vexatious because the order of invalidity sought by the SIU relates to a period from 26 October 2018 to sometime in 2023. On 26 October 2018 Olsen J, granted a court order with consent from the SIU to eject the first defendant and the SAPS from the property. The period in respect of which the lease agreement is sought to be declared invalid is the precise period in which the first defendant was occupying the premises pursuant to the order of Olsen J, not in terms of the lease agreement. Thus, the SIU has no entitlement to a declaration of invalidity of the lease agreement relating to the period from 26 October 2018 to the present date. Furthermore, on 21 December 2018, Masipa J, found that the lease agreement between the parties terminated on 31 March 2017. The plaintiff submits that the claim for declaration of invalidity of the agreement is moot because the agreement is already terminated. The plaintiff further submits that the applications are mala fide because when the SIU sought leave to intervene in the action and launched a counterclaim based on short spaces in 2016 it could have also applied for a declaration of invalidity of the lease agreement. The plaintiff further disputes that it consented to the set-off in respect of the alleged overpayment, instead it has instituted an action under case no. D8821/2018 to recover the rentals which the first defendant had failed to pay from March 2017 to September 2018.

[23] It is appropriate to point out that although the first defendant had initially undertaken to abide by the court's decision, during the hearing of the matter Mr *Gajoo SC* for the first defendant submitted that it emerged from the investigation carried by the SIU that the employees of the first defendant colluded with the plaintiff in misrepresenting the short spaces provided in the leased premises. For that reason, the first defendant supports the SIU's application to file a new counterclaim and amendment to the plea.

Analysis of the law

Declaration of invalidity of an agreement that has been terminated

[24] This brings me to the plaintiff's contention that since Masipa J's judgment terminated the lease agreement on 31 March 2017, the SIU cannot seek invalidation of the contract that was already terminated, and since Olsen J granted an order evicting the first defendant from the leased premises on 26 October 2018, the SIU has no claim for overpayment in respect of short spaces after 26 October 2018 to date. It is appropriate to point out that both court orders granted by Olsen and Masipa JJ did not declare the lease agreement invalid. In the judgment Masipa J stated that the lease agreement would be terminated on 31 March 2017 whereas Olsen J evicted the first defendant from the leased premises and suspended operation of the order for 12 months, ending on 26 October 2019. Therefore, in terms of Olsen J's order the first defendant and the SAPS would still occupy the leased premises up to 26 October 2019. It is not clear how the plaintiff obtained two different court orders which evicted the first defendant and SAPS from the leased premises on different dates. However, the plaintiff's contention about the interpretation of the two court orders will be determined by another court during the main action hearing.

[25] The plaintiff's contention that the relief sought by the SIU in the intended counterclaim was moot because the lease agreement has expired, is defeated by the plaintiff's own version. The plaintiff has instituted action proceedings for payment of the amount that was set-off by the first defendant from March 2017 to October 2018. It is not in dispute that there are rights and benefits that accrued to the plaintiff in terms of the allegedly terminated agreement. While the lease agreement might have terminated, there are rights and benefits that accrued to the parties from the inception of the agreement. Thus, there is still a lis between the parties arising out of the terminated agreement. Even if the plaintiff's contention was correct that the lease agreement terminated on 31 March 2017 or that the first defendant was no longer occupying the premises in terms of the lease agreement after 26 October 2019, the claim for invalidity of the lease agreement relates to the period from inception of the lease agreement and not limited to the period after the court orders. Thus, the previous court orders are not a barrier to the institution of a counterclaim. Next, I consider the delay in filing the counterclaim.

The late filing of a new counterclaim

[26] In the light of the conclusion I have reached in this matter, I do not deal with the issue raised by the SIU on the authority of the deponent who deposed to the plaintiff's affidavit. Uniform rule 24(1) requires a defendant who counterclaims to deliver its counterclaim together with the plea within the time frames prescribed by the rules. Rule 24 prescribes three ways in which a counterclaim may be delivered. Firstly, it must be simultaneously delivered with a plea; secondly if it was not delivered at the same time with the plea, it can be delivered with the consent of the plaintiff and thirdly if it was not delivered at the same time with the plea and the plaintiff refuses consent, then, it can be delivered with a leave of the court.[16] Thus, a party seeking to introduce a counterclaim at a later stage should first obtain consent from the plaintiff and only approach the court if the consent is denied.[17] To succeed in the application the defendant must provide a reasonable explanation for the delay, and an entitlement to the counterclaim.[18] In explaining the delay the defendant is not required to establish a more onerous requirements in order to succeed.[19] Rule 24(1) confers a discretion to the court to allow or not allow a late filing of a counterclaim.[20]

[27] Regarding the plaintiff's contention that the SIU did not seek its consent to file the counterclaim prior to approaching the court, the SIU referred this court to correspondence between the parties attorneys wherein the plaintiff stated that should the defendants file any counterclaim they will oppose it. In my view when the plaintiff had made it known to the defendants, as in the present matter, that it will oppose the filing of a counterclaim, it will be a fruitless exercise for the defendants to continue requesting the plaintiff's consent. The plaintiff had clearly communicated its attitude to the filing of a counterclaim, therefore, the SIU was entitled to approach the court as it did after the plaintiff had informed it that it will oppose the filing of a new counterclaim.

[28] The ultimate consideration in an application for condonation is the interests of justice which must be determined relative to the facts and circumstances of each

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[16] *Shell SA Marketing (Pty) Ltd v JG Wasserman t/a Wasserman Transport* 2009 (5) SA 212 (O) para 20.
[17] *Wigget v Wannenburgs* 2022 JDR 1621 (GJ) para 12.
[18] *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* 2012 (3) SA 143 (GSJ) para 8.
[19] *Hosch-Fömrdertechnik South Africa (Pty) Ltd v Brelko CC and Others* 1990 (1) SA 393 (W) at 395G-H.
[20] *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* para 12.

case.[21] Some of the factors that are relevant in determining the interests of justice in a particular case are the nature of the relief sought, the extent and cause of the delay, the effect of the delay to the administration of justice or to the other litigant, the reasonableness of the explanation for the delay and the importance of the issues raised.[22] In assessing the delay the court undertakes a two leg enquiry. The court examines whether the delay is unreasonable or undue, and if so, whether the court should exercise its discretion to overlook the delay.[23] In the first leg of the enquiry the court considers an explanation offered for the delay and in the absence of any explanation, the delay would be unreasonable.[24] In the second leg of the enquiry, when considering whether the unreasonable delay should be overlooked, the delay is not considered in abstract, but relative to the challenged decision, and with potential for prejudice to the other party.[25] In *Khumalo v MEC for Education*,[26] Skweyiya J elaborated on the factors that should be considered when the court considers unreasonable delay. At paragraph 57 the court stated as follows:

'An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.' (Footnote omitted.)

[29] Both counsel for the first and second defendants contend that the period of delay for the delivery of the counterclaim is five and a half months commencing from the time the SIU withdrew its counterclaim. The plaintiff's counsel argues that the period for the delay should be calculated from the date the SIU filed its plea. Its apposite that the SIU's initial counterclaim was in respect of the overpayment to the plaintiff for the short spaces. It is not suggested that the SIU was not or could not have been aware of the factors that would render the tender process and subsequent lease agreement constitutionally invalid at the time it filed its plea and initial counterclaim. Therefore, the period for the delay in delivering the new counterclaim commences from 22 February 2017, the date when the SIU filed its plea.

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[21] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) para 20.
[22] Ibid.
[23] *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 49.
[24] Ibid para 50.
[25] *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (CC) para 33.
[26] *Khumalo v MEC* above fn 23.

[30] In considering whether the delay should be condoned the court considers the nature of the application and the merits of the challenge. The SIU's involvement in the proceedings emanates from an investigation and discovery of irregularities in the tender process between the plaintiff and the first defendant. It is not clear from the papers before court whether the investigation was completed or still continuing at the time the SIU filed its plea. The SIU did not offer any explanation for the delay in the papers before court. However, it refers to the background and chronology of events in explaining the delay in court. The chronology of events shows that the SIU filed its initial counterclaim at the same time as its plea. Since then, the plaintiff had instituted a number of interlocutory applications in respect of which the court has delivered judgments.

[31] It is appropriate to state upfront that the inordinate delay of five years and the failure by the SIU to adequately explain the delay in its papers is very concerning. However, in considering whether the delay should be condoned the court considers that the present case is distinguishable from run of the mil cases. The SIU litigates on behalf of the State to recover moneys that are allegedly embezzled through fraudulent means from the coffers of the nation. The issues in the present matter go beyond the interests of the SIU and the plaintiff. The outcome in this matter does not only affect the SIU, it is a matter of general public importance .[27] The concession by the counsel for the first defendant that the investigation by the SIU revealed that the plaintiff fraudulently colluded with the first defendant's employees in providing short spaces contrary to the agreement of lease further distinguishes the matter from other cases. Despite shortcomings in the SIU's case pertaining to the lengthy delay and inability to explain it, the court cannot overlook fraudulent transaction, more particularly when the counsel for the first defendant who is a party to the alleged fraudulent transaction admitted that the investigation revealed that the alleged irregularities occurred. In *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another*[28] Mbha JA cited with approval Lord Denning's dicta in *Lazarus Estates Ltd v Beasley* [1956 1QB (CA) at 712 when he said:

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[27] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC) para 27.
[28] *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another* [2020] ZASCA 74 para 29.

'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything...'.

Allowing delivery of the new counterclaim will not prejudice the plaintiff, since it will plead to the counterclaim and the issues will be fully ventilated. On the other hand, if the counterclaim is not allowed, it is not only the plaintiff who will suffer prejudice, but the taxpayers as well because their moneys that are allegedly embezzled through the faulty tender process and consequent lease agreement will not be recovered from the plaintiff. This then brings me to the application for amendment to the plea.

Amendment of the plea

[32] The court has a discretion which must be exercised judicially whether to grant an amendment.[29] An amendment will be always allowed unless it is mala fide or will cause injustice to the other party which cannot be cured by an order for costs, or the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.[30] In the absence of prejudice to the other party leave to amend can be granted at any stage of the proceedings.[31] The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties.[32]

[33] It is not in dispute that after the SIU had withdrawn its initial counterclaim the plaintiff invited it to amend its plea to reflect the changed circumstances. Likewise, if the SIU succeeds in introducing a new counterclaim as I have concluded above, it should be allowed to amend its plea to align it with the relief sought in the fresh counterclaim. The plaintiff will not be prejudiced by allowing the amendment since it will also be entitled to plead to the amended plea. Furthermore, the amendment is not mala fide, is necessary for an adjudication of the counterclaim and full ventilation of the matter at the trial. For all the above reasons the amendment to SIU's plea should be allowed.

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[29] *YB v SB and Others* 2016 (1) SA 47 (WCC) para 9.
[30] *Moolman v Estate Moolman* 1927 CPD 27 at 29.
[31] *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A-B.
[32] *Ergo Mining (Pty) Limited v Ekurhuleni Metropolitan Municipality and Another* [2020] 3 ALL SA 445 (GJ) para 8; *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638A.

Costs

[34] This then brings me to the issue of costs. The general rule is that costs follow the results. Applying the general rule in this case, the plaintiff, should be liable for the costs of the applications to remove the SIU from the proceedings and filing of the counterclaim. The SIU in applying for leave to amend was seeking an indulgence and is liable to pay the costs of the application[33]and the plaintiff should pay the costs of opposing the application. I am of the view that a fair and just order is that each party pays its own costs.

Order

[35] In the premises the following order is made:

1. The application to remove the second defendant from the proceedings is dismissed.
2. The application to file a new counterclaim is granted.
3. The application to amend the plea is granted.
4. Each party shall pay its own costs.

[redacted]

Mathenjwa J

[redacted]

[33] *D A v Marais and Others* [2020] ZAGPJHC 10 para17.

Case information

Date of hearing:	3-5 June 2024
Date of judgment:	27 August 2024
Appearances:	
For the plaintiff:	Mr T N Aboobaker SCj
Assisted by:	S Morgan
Instructed by:	Ronica Naidoo and Associates
Counsel for the first defendant:	Mr V I Gajoo SC
Assisted by:	Shandu
Instructed by:	The State Attorney KwaZulu-Natal
Counsel for the second defendant:	Mr S Nankan
Instructed by:	The State Attorney KwaZulu-Natal