**NOT REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

**Case No. 3658/2016**

In the matter between

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| **THE SPECIAL INVESTIGATING UNIT** | **Applicant** |

and

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| **THE MEC FOR HEALTH FOR THE PROVINCE OF THE EASTERN CAPE** | **First Respondent** |
| **SS obo LS** | **Second Respondent** |
| **THE SHERIFF OF THE HIGH COURT MTHATHA, HM NTSIKENI** | **Third Respondent** |

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**JUDGMENT**

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**HARTLE J**

[1] The applicant, purportedly on the basis of certain powers bestowed upon it pursuant to the provisions of the Special Investigation Units and Special Tribunals Act. 74 of 1996 ("The Act") seeks an order granting it leave firstly to

intervene and be joined as a second defendant in a finalized action ("the action") by the second respondent against the first respondent under Mthatha High Court case number 3658/16 pursuant to which damages were awarded in the second respondent's favour. Secondly, the applicant seeks an order that a writ of execution issued in favour of the second respondent in that action in order to enforce payment of the judgment debt be stayed pending finalization of the present application and allied to that, that the first respondent be interdicted and restrained from paying over any amounts to the second respondent in terms of the order granted by the Mthatha High Court on 30 May 2019 ("the order"). Thirdly, the applicant prays that the order be rescinded and set aside.

[2] The rescission relief is principally to allow for a reprise of the quantum hearing which culminated in the order with it at the helm as the second defendant evidently in its own right. Its objective would be to remedy certain maladministration which it alleges occurred during the hearing having a prejudicial outcome for the first respondent, and which it maintains it is constitutionally mandated and obliged to vindicate. How it intends to vindicate the first respondent's position is by raising a so-called "public healthcare defence" to the claim which was not raised in the litigation at a *de novo* hearing. It believes that this will ameliorate the burden on the State to have to pay damages to the second respondent in an exorbitant lump sum payment for future medical expenses whereas the first respondent is in its view well placed to provide such services in kind and will likely succeed with such a defence at a new trial given the chance to interpose itself as a defendant as it intends by the remedy sought.

[3] The second respondent gave birth to a daughter who is the subject of the litigation, ("LS"), on 21 September 2015 at the Mthatha General Hospital. She suffered brain damage during the course of the hospital's delivery of her with

resultant cerebral palsy. The second respondent instituted an action against the first respondent for the recovery of damages which she had suffered in her personal and representative capacity as a result of the negligence of the first respondent and/or her employees.

[4] The merits in this action were conceded by way of an order of court dated 10 September 2018.

[5] The trial on quantum proceeded over a period of four days during May 2019.

[6] During the course of the trial on quantum, the first and second respondents, through their legal representatives, negotiated a settlement of a number of issues/heads of damages by having regard to the various expert reports and joint minutes filed on behalf of the parties.

[7] On 13 May 2019 the second respondent led evidence on issues which the parties could not agree on and, after evidence had been led by her, they finally settled the matter. This settlement was incorporated in the order.

[8] In the process of settling the matter, the first and second respondents were each represented by both a senior and a junior advocate. The State Attorney, Mthatha, was the attorney of record for the first respondent in the conduct of her defence of the trial action.[1]

[1] Neither the State Attorney, nor Solicitor-General, appointed in terms of section 2 of the State Attorney Act, No. 56 of 1957 (the latter after the launch of the present application) were joined in these proceedings despite the taint of impropriety made against the State Attorney, Mthatha, of maladministration. As an afterthought the applicant alleged in its replying affidavit that the State Attorney has indicated via correspondence that it did not wish to participate in the matter and that it would abide the order of this court. This correspondence was identified as an annexure to the applicant's replying affidavit, but was evidently not attached.

[9] The final court order[2] which the applicant believes it is both entitled and compelled to challenge on the basis prayed for in its notice of motion[3] reads as follows:

> "IT IS ORDERED THAT:
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> 1. The Defendant pay to the Plaintiff the sum of R375 000.00 in her personal capacity, as and for damages, together with interest at the legal rate from a date 14 days after the grant of this Order to date of payment thereof.
> 2. The Defendant pay to the Plaintiff, in her representative capacity as mother and natural guardian of (LS), the amount of R17 267, 355.00, as and for damages together with interest thereon at the legal rate from a date 14 days after the granting of this Order to date of payment.
> 3. The amount set out in Paragraph 2 above include the costs occasioned with the establishment, registration, administration and management of a Trust to be established for the benefit of (LS).
> 4. The sums referred to in Paragraph 1 and 2 above, together with all interest payable thereon, if any, be paid into the Trust Account of the Plaintiff's Attorney, Dayimani Inc. with the following details:
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> | Bank Name | : First National Bank |
> | Branch Code | : 260553 |
> | Account Name | : M. Dayimani Inc. |
> | Account number | : 62782299195 |
> | Branch | : MTHATHA Plaza |
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> 5. The Defendant be ordered to pay Plaintiff's costs of suit, together with all reserved costs, if any, which costs shall furthermore include:
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> 5.1 The costs of two Counsel;
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> 5.2 The travelling and accommodation costs of Plaintiff's legal representatives attending Court and consultation with the witnesses;
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> 5.3 The costs of the representative for consultations and trial;
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> 5.4 the costs of the hearing of the matter on 6, 7, 9, 10 and 30 May 2019 including Counsels' day fees;
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> 5.5 The travelling costs, reservation and appearance fees, if any, together with the costs of consultations and the preparation of their reports and joint minutes, if any, and the qualifying fees, if any, of the expert witnesses in respect of whom the Plaintiff filed Rule 36 (a) and (b) notices.
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> 6. The net balance remaining, after paying and recovering all costs and expenses for which the Plaintiff is liable, including her fees as between Attorney and own Client shall be dealt with as follows:
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> 6.1 Dayimani Inc. are directed to cause a Deed of Trust, to be named the "(LS) TRUST" to be registered by the Master of the High Court incorporating the provisions normally to be found in an inter vivos trust within 3 months of the date of

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[2] A "final court order" is defined in section 4A of the State Liability Act, No. 20 of 1957, well at least for purposes of execution, as one given or confirmed by a court of final instance; or given by any other court where the time of noting an appeal against the judgment or order to a higher court has expired and no appeal has been lodged. There is no question that we are dealing here with a final court order.

[3] The applicant does not challenge the issue of liability in the trial action and the earlier order granted on 10 September 2018. Its concern is only with the quantum order which it seeks to rescind in its entirety, even though the part of the award representing the agreed to compensation for future medical expenses is in the sum of only R13 241 323.00.

this Order, or such longer period as the Master may on application direct, with the following additional provisions;[4]

6.2 The Trustees to be appointed of their successor in title, will, if possible, consist of three Trustees, being the Plaintiff, a Chartered Accountant and an Attorney, and shall have the powers of assumption;

6.3 The Trustees shall be exempt from furnishing security;

6.4 The Trustees shall hold and administer the Trust Fund for the benefit of (LS).

6.5 The Trustees shall apply the net income of the Trust Fund for the maintenance and benefit of (LS) and if at any time it is not adequate for the purpose, the capital thereof;

6.6 The Trust shall terminate on the death of (LS), alternatively in accordance with the Trust Deed.

7. It is recorded that the aforementioned Trust is subject to the provisions of the Trust Property Control Act 57 of 1988 as amended."

[10] The first respondent failed to pay the amount awarded to the second respondent without delay in clear contravention of the provisions of section 3 of the State Liability Act, No. 20 of 1957, resulting in her attorneys having issued out the writ of execution to attach the first respondent's bank account.[5]

[11] It is not clear how far the second respondent's attorneys got with the process of execution, or if the issue of the writ in September 2019 necessarily prompted the launch of the present application (seven months after the grant of the order), but the present application was issued shortly after the second respondent adopted the requisite procedures in terms of the State Liability Act to exact payment of the award.

[12] The applicant's supposed mandate and authority to achieve what the applicant suggests is permissible by the relief it seeks has its basis in the fact that in the action and during the quantum trial, the first respondent "failed in any

[4] It is not clear if the trust has been established yet. I suspect however that it has not yet been registered for two reasons. Firstly, the award payable in terms of the order was never paid to the second respondent's attorneys and, secondly, no trustees were cited in the present application on the basis of the obvious interest that they would have in the present proceedings.

[5] Ironically the failure of the accounting officer of the provincial health Department to have paid the judgment debt timeously constitutes financial misconduct as referred to in the Public Finance Management Act, No. 1 of 1999, and constitutes an offence. See section 3 (16)(a) of the State Liability Act. The issue of the present application seems however to have deftly diverted the attention away from this misconduct.

way, manner or form (to) raise the 'public healthcare defence' whereby the First Respondent would undertake to provide all future medical care, treatment and/or assistive devices and appliances at state institutions at no alternatively nominal costs to the second respondent," thereby preventing the trial court from making a finding as to whether or not the future medical services required by the child can be provided to her at state institutions at no or lesser costs than the first respondent will be in for by virtue of the lump sum which her legal representatives agreed to pay as contemplated in the order for such expenses. The first respondent's failure in turn, so the applicant asserts, is a result of the fact that her expert witnesses "were never instructed by (her) legal representatives to compile a report regarding the suitability of the aforesaid institutions to provide for (LS's) future hospital and medical expenses as well as assistive devices and appliances, despite the fact that such evidence was readily available (this the applicant has purported to prove via the present application)[6] and (which) instructions ought to have been provided to them". The applicant further bemoans the fact that "none of the expert witnesses instructed by both parties" commented on the first respondent's ability and need to provide all future medical care and/or treatment as well as assistive devices and appliances at state institutions to the child despite the fact that the provincial Health Department manages various institutions which are willing, able and have the necessary capacity to provide for her future hospital and medical needs as well as assistive devices and appliances.

[13] There is no dispute that the public healthcare defence was not a feature in the action. The second respondent, who is the only respondent who opposes this application "admits" (for her part) that such a "defence" was neither raised and/or dealt with by the experts. Her attorney, Mr. Dayimani, who is the deponent to the answering affidavit on her behalf, further concedes that the first

[6] More so in its replying affidavit.

respondent, by implication, did not instruct her legal representatives to raise this aspect because it never became an issue in the trial. However, the second respondent assures the court that the agreement of compromise was reasonably and responsibly reached and the conduct of the legal representatives involved beyond reproach.

[14] This guarantee by the second respondent that no impropriety taints the order or that that the legal representatives engaged by the first respondent did not make themselves guilty of any wrongdoing and that such inference is not borne out by what happened at the time when the trial was settled, was not gainsaid by the applicant. Indeed, the nub of its case and the premise for its present involvement is instead justified on the basis set out in paragraph 12 of its founding affidavit which reads as follows:

> "12.1 In the light of the dictum enunciated in **NGUBANE (SUPRA) and THE MEC FOR HEALTH AND SOCIAL DEVELOPMENT GAUTENG V DZ (SUPRA)**, the First Respondent was obliged to raise **the public healthcare defence and thus produce evidence that it can provide medical treatment and/or assistive devices and/or appliances required by the minor child at the same or higher standard at lesser cost than provide medical care to the minor child in the future**. Accordingly, the failure to raise the public health care defence and hence adduce the aforesaid evidence had prevented the Court from making a finding as to whether or not the private future health care services can be provided to the minor child at state institutions at no lesser costs to the Second Respondent. Consequently, the dismal failure to raise the public health care defence set out in the **MEC FOR HEALTH AND SOCIAL DEVELOPMENT GAUTENG V DZ (SUPRA)** as well as NGUBANE (SUPRA) had exposed the First Respondent to a significant financial prejudice via the award in respect of future hospital and medical expenses in the amount of R13 241 323.00.
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> 12.2 Accordingly, the evidence of the health care institutions set out hereinabove which are able, amenable and willing to provide the minor child with physiotherapy, occupational therapy, speech and language therapy, dietetic services as well as orthotic assistive devices and equipment was never placed before the Court. Hence, the court did not make a finding on the public health care defence. In this regard, the Applicant respectfully submits that it was **this omission and hence mal-administration of the trial action which had exposed the First Respondent to significant damages and caused it potential financial loss** as envisaged by section 4 (1) (c) (i) to (iii) of the Act.[7] Consequently the Applicant is entitled to institute proceedings to prevent these potential losses as authorized by the Act.
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> 12.3 In additional to the issues outlined hereinabove, it is apparent that the Plea filed by the

[7] These are distinct subsections yet were indiscriminately lobbed together by the applicant.

> First Respondent fails to raise the public health care defence which is a prerequisite before evidence is led thereon. In this regard, I draw attention to the contents of annexure "A3" hereto which in no way, manner or form deals with the public health care defence or the ability of the aforesaid institutions to provide for the minor child's future hospital and medical expenses as well as assistive devices and appliances.
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> 12.4 Accordingly, there was a genuine *bona fide* defence available to the First Respondent which was never placed before the Court and notwithstanding the fact that the First Respondent had instructed a plethora of expert witnesses in the domains of occupational therapy, physiotherapy, speech and language therapy, dietetic services and orthotics. It is respectfully submitted that it is this omission which has prompted the present application for the intervention sought herein in order to ensure that this defence is placed before the Court whereupon the Court would be in a position to make an appropriate value judgment regarding the claim for the minor child's future hospital and medical treatment as well as assistive devices and appliances. It hence appears that the trial action was mal-administered by the First Respondents legal representatives who despite being aware of the public health care defence failed to instruct expert witnesses to comment thereon and to place evidence regarding same before the court which would have drastically reduced the Plaintiff's claim for future hospital and medical expenses."

[15] The issue for determination is whether this claimed "maladministration" can be brought within the framework of the applicant's terms of reference as set out in the Proclamation on which it relies, and whether it was justified in launching the present proceedings for the reasons claimed by it.[8]

[16] Evidently the applicant in its founding affidavit puts the offending behaviour at the core of its entitlement no higher than "maladministration" and a dismissal failure or omission on the part of the "first respondent" (sic) that has caused "potential loss" to the Department.[9] It interchangeably attributes the alleged maladministration to the first respondent, the expert witnesses engaged by her and unidentified legal representatives (who have incidentally not been joined in these proceedings). As an aside no finger has been pointed at the second respondent or her legal representatives for having played a role in the contended for maladministration. Indeed, the second respondent and LS are

[8] Subsection 4 (1) (c) has to be read together with the preamble to section 4. All functions exercised by the SIU both investigative and litigative must be within the terms of reference of the authorising proclamation.

[9] The applicant appears to equivocate regarding whether there has been a loss that must be recovered and a potential loss which can be prevented by the proposed relief it seeks.

innocent victims of this unfortunate saga who have been denied the right to execute on a legitimate order of this court on the premise that the applicant has superlative powers in terms of the Act to interpose itself in the finalized action and go back to square one, as it were, to undo the perceived harm that the Act seeks to protect.

[17] As can be seen above, the applicant relies on two judgments in support of its contention that the first respondent's mere failure to have raised the public healthcare defence constitutes maladministration within the meaning of the Act and the proclamations on which it relies, thus bestowing on it the power and obligation to vindicate the first respondent's position.

[18] The first of these is Ngubane v SA Transport Services[10]. In this matter the Supreme Court of Appeal held that evidence by the plaintiff of the cost of the use of private medical services and hospital facilities would discharge the onus of proving the costs of those expenses "unless, having regard to all the evidence, including that adduced in support of an alternative and cheaper source of medical services,[11] it can be said that the plaintiff has failed to prove on a preponderance of probabilities that the medical services envisaged are reasonable, and hence that the amounts claimed are not excessive."[12] (The court in MSM obo KBM v MEC for Health, Gauteng Provincial Government[13] refers to this as 'the mitigation of healthcare costs defence.")

[19] The second is MEC for Health & Social Development Gauteng v DZ obo

[10] 1991 (2) SA 756 (A).

[11] While a plaintiff bears the general onus to prove his/her damages and the quantum thereof, a defendant would be required to adduce evidence in support of his/her contention, that is to say, that for the period over which the anticipated provision of medical services will be required, or for some shorter period, medical services of the same, or an acceptably high, standard will be available to the plaintiff at no cost or for less than that claimed by him/her.

[12] At paras 22-22.

[13] 2020 (2) SA 567 (GJ) at par 27.

WZ[14] in which the Constitutional Court, far from confirming that "the public healthcare defence" is a general defence available to Health Departments, held that it is open to a court to develop the common law to allow for payments in kind or periodic payments instead of a lump sum payment if the factual foundation is established for such a development in any particular case.

[20] In MEC for Health, Gauteng Provincial Government v PN[15] the Constitutional Court reaffirmed this principle that High Courts have the power to develop the common law and that the MEC for Health can, *where the issue of damages has not yet been finalized*, amend his/her plea to request that the common law be developed (assuming a proper factual foundation exists therefor), whether the action was issued, or the merits decided before DZ.

[21] The court in MSM obo KBM v MEC for Health, Gauteng Provincial Government[16] indeed went on to the develop the common law following the Constitutional Court's prompt in DZ, finding that certain medical services required by the child, who suffered a similar fate to LS, were capable of being provided by specialists at the Charlotte Maxeke Johannesburg Academic Hospital in that scenario, a public health care facility, and that the MEC should be ordered to render such services to the child and the mother at the hospital with a fall back option that if the hospital is unable to do so, the mother would be entitled to approach the judge in chambers for an order directing the MEC to pay them the amount claimed for the relevant service.

[22] The applicant contends that these judgments "are the relevant applicable legal principles" which "permit" the first respondent to provide for all the

[14] 2018 (1) SA 335 (CC).
[15] [2021] ZACC 6 at para [26]. This judgment was delivered on 1 April 2021 after the launch of the present application.
[16] *Supra*. This judgment was delivered on 18 December 2019.

child's future medical aid and/or treatment as well as assistive devices and/or appliances at state institutions.[17]

[23] Regarding the question whether if such a defence had been raised it might have made a difference at the trial in *this* action (and not merely in principle), the applicant averred that "based on investigations conducted with the Department" it has learnt that the first respondent operates various hospitals in the Eastern Cape with cerebral palsy units, and contends that these hospitals are adequately equipped with staff and equipment to provide the specific services required by the child which for the moment are intended to have been compensated for by the

[17] In its replying affidavit the applicant referred to a further order granted by this court on 13 August 2015 in Putuma v Member of Executive Council responsible for Health in the Eastern Cape Province (Mthatha Case No. 2572/13) on the basis of which it was contended that the MEC could have been under no illusion regarding her obligation to raise the public health care defence because it had effectively been employed in Putuma before. (See the excerpt from paragraph 12 of the applicant's founding affidavit where it sought to stress both the obligation on the part of the first respondent to have raised the defence and lead evidence thereanent, and that she was *aware* of such obligation.) The relevant paragraphs of the innovative order provide as follows:

> "7. The defendant is directed to provide free of charge to the plaintiff and (K) the medical services and medical supplies itemized in annexures 'B' and 'C' to this order at the Nelson Mandela Academic Hospital ("the Hospital") (or a public hospital nominated by the chief executive officer of the Nelson Mandela Academic Hospital) for the duration of their lives, or such other duration as may be specified in any particular instance in annexures 'B' and 'C' of this order, provided that in relation to the medical supplies itemized in annexure 'C' to this order, the defendant may provide free of charge to the plaintiff and (K) any generic equivalent medical supplies.
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> 8. The defendant undertakes that all equipment to be provided in terms of Annexure 'B' and 'C' will be of a standard equivalent to that as stipulated in the various expert reports filed of record or alternatively as provided in the private health care sector or at an acceptably high standard.
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> 9. The defendant furthermore undertakes that all services to be provided in terms of Annexure 'B' and 'C' hereto will be of a standard equivalent to that as provided in the private sector or alternatively at an acceptably high standard.
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> 10. In order to access all the medical services and medical supplies itemized in annexure 'B' and 'C' to this order at the Hospital as and when they become due, the Deputy Director: Clinical Support Services will act as liaison person. The present incumbent is Mr SG Tshaka ... The defendant undertakes to notify the plaintiff's attorney and the (K)Trust in writing of any change of the incumbent within 14 (fourteen) days of such occurrence.
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> 11. The defendant shall furnish the plaintiff and the Trust with all tests results undertaken in terms of this order within 14 (fourteen) days of such results having become available.
>
> 12. Either party may apply to this court in terms of rule 6 of the rules of this court for the variation of annexure 'B' and 'C' on good cause shown and/or for the enforcement of this order."

order sought to be impugned to the tune of R13 241 323.00.[18] (The applicant co-incidentally claims that this is the extent of the harm by the omission of the first respondent's legal representative to raise the public health care defence which it seeks to correct.) Additionally, the applicant alleges that the institutions operated by the first respondent at the listed hospitals are "able, willing and amenable" to provide the child with the listed services, which are instead compensated for by the lump sum damages award.

[24] The first respondent has not opposed the application or taken any view on the drastic remedy sought, leaving the applicant to proclaim that the relief sought is justified because the court is dealing with "blatant unanswered maladministration." The third respondent has also not opposed the application. The second respondent however opposed the application and raised several points *in limine*. These are summarized as follows:

24.1 the delay in launching the application and concomitant failure to seek condonation for such delay;
24.2 the applicant's lack of *locus standi*;
24.3 the impermissibility of the applicant being entitled to be joined as a party in the finalized action;
24.4 whether the applicant is entitled to rescind the order made under circumstances where the matter was settled by way of compromise between the first and second respondents;

[18] The applicant purported in reply and at great length to bolster its case that the public healthcare defence was a sustainable one in the circumstances of the second respondent's claim. This attention to the issue was ostensibly prompted by Mr Dayimani's criticism that the applicant's conclusion that the defence was a slam dunk as it were, was based on hearsay evidence concerning the aspect of what services the first respondent could have provided if this defence had been on the table and based on what evidence. The applicant also sought to counter the view expressed by Mr Dayimani, based on his professional involvement in and experience of litigating in several actions of this nature, that he did not believe such a conclusion to be a valid or a reliable one.

24.5 whether the applicant has established an entitlement to lead additional evidence at the trial which has already been finalized; and

24.6 whether the applicant is entitled to the relief it seeks in the notice of motion.[19]

[25] The Act, as last amended by section 8 of the Judicial Matters Amendment Act, No. 11 of 2012 ("the amendment act 2012") has a far-reaching purpose as is indicated by its long title:

> "To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration 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; to provide for the revenue and expenditure of Special Investigating Units; to provide for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units; and to provide for matters incidental thereto."

[26] Section 4 (1) (c) on which the applicant relies to justify the institution of the present application was introduced by the amendment act 2012. Prior to the amendment the SIU was entitled to institute proceedings only in a Special Tribunal if, arising from its investigations, it had obtained evidence substantiating any allegation contemplated in section 2 (2).

[27] The amended section 4 (1) (c) authorizes the applicant to institute and conduct civil proceedings in both a Special Tribunal and "any court of law". What it would seek to achieve in either forum, assuming the exercise of such litigating function being within the Unit's framework of its terms of reference as indicated by the relevant proclamation in each instance, includes:

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[19] As can be seen below, considering the view I take in this matter the main point which disposes of the matter is the second respondent's objection to the applicant's lack of standing to bring the present application.

"(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."

[28] Section 5 (5) was also introduced by the amendment act 2012. It provides that:

"Notwithstanding anything to the contrary in any law and for the performance of any of its functions under this Act, a Special Investigating Unit 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."

[29] The Memorandum on the objects of the Judicial Matters Amendment Bill, 2012, with particular regard to clauses 3 and 4 that we are presently concerned with, clarified the basis for the changes as follows:

**"2. OBJECTS OF BILL**

**2.1 Clauses 1, 3, 4 and 5**

The amendments proposed by clauses 1, 3, 4 and 5 of the Bill seek to further regulate the litigation functions of an SIU in terms of the SIU Act. The original purpose behind the enactment of the SIU Act was to create a mechanism in terms of which civil litigation flowing from the investigations by an SIU into serious cases of malpractice (including corruption) and maladministration could be dealt with more speedily. The mechanism for this, namely a dedicated Special Tribunal created by sections 2(1)(b) and 7 to 10 of the SIU Act, is intended to adjudicate on matters brought before it by a dedicated SIU which, in turn, was directly involved in the investigation of the matters in question.
This intention manifests itself clearly in the long title and in section 4(1)(b) and (c) of the SIU Act, which provides for—

- the establishment of SIU's for the purpose of investigating serious malpractices or maladministration 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 or any category thereof, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by any SIU; and
- the functions of an SIU, which are, amongst others, to collect evidence regarding acts or omissions relevant to its investigations and, if applicable, to institute proceedings in a Special Tribunal against the parties concerned, and to present evidence in proceedings brought before a Special Tribunal.

However, this clear purpose has been affected by some decisions of our courts of law that severely limit the locus *standi in iudicio* of an SIU. *The proposed amendments are therefore intended to allow an SIU to litigate on behalf of State institutions*.

> *One of the reasons for affording an SIU this power to litigate on behalf of State institutions is to assist with the recovery of losses suffered by State institutions as a result of serious malpractice (including corruption) and maladministration. Generally, a State institution may recover losses through the Office of the State Attorney. However, in instances where the State institution neglects to recover such losses, an SIU can be used for this purpose.*" (Emphasis added)

[30] In South African Association of Personal Injury Lawyers v Heath[20] and others the Constitutional Court observed that there can be no quarrel with the purpose sought to be achieved by the Act or the importance of that purpose. The court also reflected on the peculiar tension that exists between the need on the part of government to confront threats to the democratic state, and the obligation on it to do so in a manner that respects the values of the Constitution.[21]

[31] As was stated by the court:

> "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. *That purpose must, however, be pursued in accordance with the provisions of the Constitution.*" [22] (Emphasis added)

[32] Whilst corruption clearly constitutes criminal conduct, malpractice and maladministration are less damning concepts but, assuming them to be of serious proportion, cause the same harm to the democratic state.

[33] Neither concept is defined in the Act but imply linguistically the opposite of regular practice or administration in the conduct of the affairs of state institutions. Regular practice or administration would be consistent with the

[20] 2001 (1) BCLR 77 (CC).
[21] At par [2].
[22] At par [4].

proper exercise of public powers within the bounds of the Constitution.

[34] This "special" machinery that avails the applicant, which empowers it to go beyond routine investigations conducted by conventional law enforcement agencies, combined with its authority to litigate in its own name or that of the state institution in order to claim relief *relevant* to any investigation, or in its interests (which can only concern parochial interests related to the performance of its mandated functions), or any relief *to which the state institution concerned is entitled*, must of course be pursued strictly in accordance with the provisions of the Constitution.

[35] The proclamation on which the applicant relies for its entitlement to bring these proceedings (emanating from its investigations conducted by its terms of reference) provides the starting point for the enquiry.

[36] Proclamation R.21 of 2018[23] reads as follows:

> **"Proc R.21 of 13 July 2018: Referral of matters to existing Special Investigating Unit (*Government Gazette* No. 41771)**
>
> **as amended by**
>
> | **Notice** | ***Government Gazette*** | **Date** |
> |---|---|---|
> | R.33 | 42577 | 12 July 2019 |
>
> "PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
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> WHEREAS allegations as contemplated in section 2 (2) of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996) (hereinafter referred to as the "Act"), have been made in respect of the affairs of the Department of Justice and Constitutional Development in so far as it relates to the office of the State Attorney and all branches thereof, established in terms of section 1 of the State Attorney Act, 1957 (Act No. 56 of 1957) (hereinafter referred to as "the office of the State Attorney");

[23] Published in Government Gazette No. 61771 dated 13 July 2018 and later amended by R.33 published in Government Gazette No. 42577 dated 12 July 2019.

AND WHEREAS the office of the State Attorney or the State suffered losses that may be recovered;
AND WHEREAS I deem it necessary that the said allegations should be investigated and civil proceedings emanating from such investigation should be adjudicated upon;
NOW, THEREFORE, I hereby, under section 2(1) of the Act, refer the matters mentioned in the Schedule in respect of the office of the State Attorney, for investigation to the Special Investigating Unit established by Proclamation No. R. 118 of 31 July 2001 and determine that, for the purposes of the investigation of the matters, the terms of reference of the Special Investigating Unit are to investigate as contemplated in the Act, any alleged–

(*a*) serious maladministration in connection with the affairs of the office of the State Attorney;
(*b*) improper or unlawful conduct by employees or officials of the office of the State Attorney;
(*c*) unlawful appropriation or expenditure of public money or property;
(*d*) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
(*e*) intentional or negligent loss of public money or damage to public property;
(*f*) offence referred to in Parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), and which offences were committed in connection with the affairs of the office of the State Attorney; or
(*g*) unlawful or improper conduct by any person, which has caused or may cause serious harm to the interests of the public or any category thereof,

which took place between 1 January 2013 and the date of publication of this Proclamation or which took place prior to 1 January 2013 or after the date of publication of this Proclamation, but is relevant to, connected with, incidental or ancillary to the matters mentioned in the Schedule or involve the same persons, entities or conduct investigated under authority of this Proclamation, and to exercise or perform all the functions and powers assigned to or conferred upon the said Special Investigating Unit by the Act, including the recovery of any losses suffered by the office of the State Attorney or the State, in relation to the said matters in the Schedule.*

Given under my Hand and the Seal of the Republic of South Africa at Johannesburg this 10th day of July Two thousand and eighteen.

(Signed)
**CM RAMAPHOSA**
**PRESIDENT**

By Order of the President-in-Cabinet:
(Signed)
**TM MASUTHA**
**MINISTER OF THE CABINET**

**SCHEDULE**

[Sch. substituted by Proc R.33 of 12 July 2019.]

1. For purposes of this Schedule the expression "legal services" must be interpreted to include legal advisory services; litigation services; appointment of legal practitioners to render legal advisory or litigation services; any professional service required for legal or litigation purposes, including the appointment of any intermediary or subject matter expert; and support services for legal or litigation purposes, including the appointment of any interpreter, transcriber or tracer.

2. Maladministration in connection with the affairs of the office of the State Attorney in relation to—
   (*a*) legal services that were provided, or procured, by the office of the State Attorney in the performance of its functions as contemplated in section 3 of the State Attorney Act, 1957 (Act No. 56 of 1957), on behalf of—

(i) the Gauteng Department of Health and the Eastern Cape Department of Health in respect of claims based on medical negligence; or
(ii) the South African Police Service in respect of claims based on wrongful arrest or detention, assault or malicious prosecution; or

(*b*) the verification, approval or processing for payment of any invoice or account received in relation to legal services provided or procured in terms of paragraph (*a*).

3. The procurement of legal services, as contemplated in paragraph 2 (*a*) of this Schedule, by the office of the State Attorney, or payments which were made in respect thereof, in a manner that was—
(*a*) not fair, competitive, transparent, equitable or cost-effective; or
(*b*) contrary to manuals, policies, procedures, prescripts, instructions or practices of, or applicable to the office of the State Attorney,
and any related unauthorised, irregular or fruitless and wasteful expenditure which the Department or the State incurred as a result thereof.
4. Any unlawful or irregular conduct by—
(*a*) employees or officials of the office of the State Attorney; or
(*b*) any other person or entity,
relating to the allegations referred to in paragraphs 2 or 3 of this Schedule."

[37] The applicant's terms of reference were not challenged by the second respondent, and it can therefore be accepted for present purposes that the validity of the proclamation is not in issue and that the scope thereof can be brought within one or other of the grounds referred to in section 2 (2) of the Act.

[38] The latter section provides that the President may whenever he deems it necessary on account of any of the grounds mentioned in sub-section (2) by proclamation in the Government Gazette refer the matter to an existing special investigating unit for investigation.[24] The applicant claims to be such a unit and

[24] Section (2) (2)(a) – (g) of the Act provides that the President may exercise his powers on the grounds of any alleged:

"(a) serious maladministration in connection with the affairs of any State institution;
(*b*) improper or unlawful conduct by employees of any State institution;
(*c*) unlawful appropriation or expenditure of public money or property;
(*d*) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
(*e*) intentional or negligent loss of public money or damage to public property;
(f) offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences was [sic] committed in connection with the affairs of any State institution; or [Para. (f) substituted by s. 36 (1) of Act 12 of 2004.]
(g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof."

is indeed legitimately seized with an investigation as is provided for by its terms of reference.

[39] Section 4 (1)(a) – (h) of the Act confirms that the functions of a special investigating unit (within the framework of its terms of reference as set out in the proclamation referred to in section 2 (1) of the Act) are to:

> **"**(*a*) to investigate all allegations regarding the matter concerned;
> (*b*) to collect evidence regarding acts or omissions which are relevant to its investigation;
> (*c*) 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;
>
> *(d)* to refer evidence regarding or which points to the commission of an offence to the relevant prosecuting authority;
> (*e*) to perform such functions which are not in conflict with the provisions of this Act, as the President may from time to time request;
> (*f*) from time to time as directed by the President to report on the progress made in the investigation and matters brought before the Special Tribunal concerned or any court of law;
> (*g*) upon the conclusion of the investigation, to submit a final report to the President; and
> (*h*) to at least twice a year submit a report to Parliament on the investigations by and the activities, composition and expenditure of such Unit."

[40] Self-evidently the applicant must concern itself only with the mandated investigation and would have to justify that arising from that which it is entitled to investigate that a basis exists to institute and conduct civil proceedings to claim any relief *to which the State institution itself is entitled*. Although the applicant is now authorised to institute these proceedings in place of the State institution concerned nothing has changed in my view since the last amendment to the Act in the sense that the proclamation does not give the applicant the right to relief where no such right would otherwise have been available to that

institution itself.[25] The proclamation certainly does not grant the applicant the power to take over the functions of decision making institutions or functionaries, or such as in this instance, to revisit or question the basis for an agreement of compromise that comes at the end of the conduct of a lengthy trial to settle a court action.

[41] The applicant's insists that its discovery, pursuant to its investigation of the state attorney's affairs, of the simple fact that the public health care defence was not raised in the conduct of the first respondent's defence of the action, *per se* elevates it to the kind of serious maladministration envisaged under section 2 (2) and as outlined in its terms of reference, which must according to the applicant now fall to be vindicated pursuant to the provisions of section 4 (1) (c) of the Act by the relief which it presently seeks.

[42] Indeed, the applicant appears to accept further as a certainty, based simply on the principles stated in Ngubane and DZ, that the second respondent would have been "disentitled" to expenses for future hospital and medical treatment in the amount of R13 242 323.00. The fallacy of this argument is in the applicant's own recognition that only a court can make such a value judgment, that is, whether in any particular case a basis exists to depart from the traditional manner of compensating a claimant in a lump sum for future medical expenses on the basis of the public healthcare defence, which has only recently gained serious traction.

[43] As for the principle enunciated in Ngubane, which was decided in 1991 already, is the applicant seriously suggesting that in every case where the Health Department failed to counter the plaintiff's proof of future medical expenses

[25] Special investigating Unit v Mfeketo & 20 similar matters 2001 (1) SA 1089 at pages 1102 and 1003; Special Investigating Unit v Kim Diamonds (Pty) Ltd 2004 (2) SA 173 at 182.

based on the cost of the use of private medical services and hospital services with evidence of a sufficiently cogent nature to disturb the presumption that such (private healthcare) care was reasonable by producing evidence that medical services of the same or higher standard, at no or lesser cost than private medical healthcare would have been available to the plaintiff in future (in other words by invoking the "mitigation of healthcare costs defence"), that such an omission automatically falls to be brought within the purview of the Proclamation to be investigated and vindicated on the basis envisaged by section 4 (1) (c) of the Act long after that proverbial stable door has closed?[26] I think not.

[44] In any event the Constitutional Court has endorsed that this novel approach in moving for an order that falls outside of the ordinary prescripts of the law of delict (referring to the "once and for all rule"), by raising the public healthcare defence which requires a particular value judgement to be made in order to determine whether it is justified in any particular case, avails a Health MEC in cases where the issue of damages has not yet been finalized.[27]

[45] Nothing other than the first respondent's failure (including the state attorney, Mthatha's, or its legal adviser's by implication since their services were engaged to advise her in respect of the conduct of her defence of the action) to have pleaded or raised the public healthcare defence or to have adduced evidence in support of such a defence has been ringfenced by the applicant as constituting the unlawful or improper conduct sought to be vindicated by the launch of these proceedings.

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[26] The converse of this assumption is, as what stated by the court in Ngubane that: "By making use of private medical services and hospital facilities, a plaintiff, who has suffered personal injuries, will in the normal course (as a result of enquiries and exercising a right of selection) receive skilled medical attention and, where the need arises, be admitted to a well-run and properly equipped hospital. To accord him such benefits, all would agree, is both reasonable and deserving. For this reason it is a legitimate - and as far as I am aware the customary - basis on which a claim for future medical expenses is determined."

[27] PN *Supra* at par [26].

[46] In my view it is doubtful that a mere failure to raise the defence, whether or not such a defence may have been a sustainable one to use the applicant's expression and might have made a difference to the outcome of the action, constitutes the kind of serious misconduct contended for in the Act or as specified in the terms of reference without more.

[47] It is the State Attorney's conduct that was intended to be put under the scope by the Proclamation in question and that of the legal advisor's procured by them, but we are none the wiser in this instance regarding who the responsible persons are who or against what standard such person's conduct is to be measured as falling short and constituting "serious maladministration in connection with the affairs of the office of the state attorney" in the context of claims based on medical negligence against, in this instance, the Eastern Cape Department of Health.[28] Who is seriously going to suggest that in the thousands of similar cases that have gone before the legal advisors employed did not professionally apply their minds to the settlement orders that were granted or in persuading the court through the testimony adduced that the plaintiffs' claims for future medical expenses was reasonable in each instance? Was there a circular or an office directive or something compelling that person or office to have acted differently than the professional standard employed by them in this case under discussion or the several that have gone before? It has not even been suggested that the responsible person might have made himself guilty in this instance of professional negligence by failing to have pleaded or to have raised the public healthcare defence or to have tendered evidence in support of such

[28] The applicant sought in its head of argument to raise the sceptre of the first respondent's officials and/or legal representatives having "violated the provisions of section 195 (1) (a) (b) (d) (g) of the Constitution" (sic) in their administration of the trial action. The applicant also purported, for the first time in its replying affidavit, to add another string to its bow, namely that the first respondent *knew* about Putuma, but did not raise the public health care defence, as if to suggest something more sinister capable of been construed as "maladministration".

defence.

[48] Whilst the schedule of the category of cases the applicant is entitled to look into is very broad, the Constitutional mandate is to investigate and litigate only in respect of serious instances of corruption and maladministration as envisaged by the Proclamation in question. Even though this country has been seriously vexed by the issue of the Health Departments' liability to pay out increasingly large damage awards in medical negligence cases, and the inevitable reduction in resources to meet its constitutional obligation progressively to realize the right to health care services for the general public in the ordinary course, this fact does not elevate that concern to a matter of serious maladministration within the meaning of the Act or the Proclamation.[29] The fact that the judiciary has recently contributed in large measure to finding a solution in concluding that the common law may be developed, and then in fact developing the common law in the instance of MSM (after taking into account all the interests of all the concerned parties), demonstrates that we are dealing with a bigger problem that requires judicial innovation and legislative reform. This kind of correction, under the guise of the Act, does not fit in with the Act's clear purpose stated in its long title and should not be countenanced in violation of the second respondent and other litigant's rights to finality in their litigation based on a mere finding under the mantle of the current investigation that the state's legal advisors simply failed to raise the public healthcare defence.

[49] I cannot agree therefore that the applicant has made out a case to bring the omission it complains of within the ambit of the Proclamation and in the circumstances its supposed jurisdiction to vindicate this complaint as one emanating from its investigations (which I assume for present purposes was at

[29] DZ supra at par [45]; MSM supra at par 178; The South African Law Commission Issue Paper 33, Project 141 "Medico-legal Claims" (SALC issue paper) at par 2.20, page 16.

least validly enquired into) on one or other of the three grounds provided for in section 4 (1) (c) (the applicant incidentally could not even pick one of them), holds no water.[30]

[50] The applicant incidentally submitted that it was "entitled to institute the present proceedings" as these proceedings are "similar in nature" and aimed at preventing the payment of the sums of money by the first respondent which it believes, if the public health care defence can be raised by it (or the first respondent) in a revised quantum trial, will ameliorate the Department of Health suffering "damages" or "losses" as contemplated by this subsection. Confusingly it also refers to "potential losses" which it seeks to protect, this no doubt borne out by the fact that the damages award has yet to be paid over to the second respondent.[31] Patently the applicant has lost sight of the fact that the first respondent has not suffered damages or an abstract loss. She was ordered by the court to pay this sum of monies to the second respondent as damages for her loss of patrimony (in respect of her anticipated future medical expenses) based on the negligence of the first respondent's servants. It is also simply ludicrous to suggest that we are here dealing with a potential loss and that the applicant is justified in preventing this whereas the Department is inexcusably in breach of

[30] See also SIU v MEC for Health, Province of the EC and NS obo XS, Mthatha case No. 694/14 (judgment delivered 1 December 2020) in which Tokota J remarked in an application more or less similar to the present one, in dealing with the question whether a court can allow the SIU to reopen cases in which they were not involved, that; " if the organs of State clothed with powers to investigate corruption and related maladministration in the government resulting in wasteful and irregular expenditure were allowed to re-open cases in which they were not involved, that would bring about chaos and uncertainty." This case speaks to the ill-conceived objective of the applicant in seeking to involve itself, at great cost and prejudice to a plaintiff who has obtained a judgment fair and square in re-opening a trial where the defendant raises no complaint of impropriety concerning its finality, in order to reverse it under the guise of the powers it supposedly has in the proclamation. See also paragraphs [14] and [15] and Tokota J's conclusion (at par [21]) that he is not persuaded that the proclamation (the same one in contention here) authorises the applicant to endeavour to re-open cases as well as his further view that "(i)f it does so…it is *ultra-vires* the powers of the President." Leave was granted to the applicant in March of this year to appeal against the judgment.

[31] The applicant startingly asserts that the "failure" to raise the defence "significantly prejudiced the first respondent by exposing it to a damages claim in (the) sum of R13 241 323.00 based on the joint minutes of the expert witnesses". The first respondent has not suffered "damages". She was fairly ordered to compensate the second respondent for her damages in this sum *inter alia* based on the negligence of her staff at the hospital.

its obligations to meet payment of the judgment debt. I would be more concerned that the first respondent's advisors are overlooking the Department's accounting officer's financial misconduct in not paying the judgment debt to the second respondent thereby permitting unnecessary interest to accrue.

[51] I accordingly conclude, in favour of the second respondent, that the applicant has no *locus standi* to seek the relief which it does. This is because the contended for "maladministration" has not been brought within the ambit of the applicant's terms of reference. The dispute or complaint as identified by the applicant therefore does not fall to be adjudicated upon in terms of section 4 (1) (c) of the Act. I believe that this finding is dispositive of the matter.

[52] The second respondent filed an application in terms of rule 6 (5)(d)(iii) and (e) to request that the court deal with her preliminary objections separately before at the hearing on the basis that these would be dispositive of the matter. The applicant vociferously opposed this application in lengthy papers filed and even raised an objection of its own that the application was not supported by an affidavit of the second respondent herself.

[53] It is unnecessary for me to determine this interlocutory application. The second respondent properly referred to all the preliminary objections in her answering affidavit already (in respect of which the second respondent endorsed her support by way of a confirmatory affidavit) and the applicant could not have been under any illusion that these would not be argued at the hearing, yet Mr. Namkan who appeared for the applicant insisted that the issue of maladministration was so inextricably interwoven with these that I could not fairly dispose of the matter on the basis proposed by Mr. Schoeman who appeared for the second respondent. Mr. Namkan's understanding of what this court was supposed to determine however, in order to conclude whether there

was maladministration, was whether the public healthcare defence was sustainable or not, which misses the more significant point of whether or not the *alleged* misconduct could be brought within the purview of the Proclamation.

[54] I do not blame the second respondent for bringing the interlocutory application out of caution and for the several reasons stated therein. It was said to be necessitated by the very late filing of the applicant's replying affidavit, together with two other interlocutory applications, the one being for condonation and the second asking this court to strike out certain averments made by Mr. Dayimani in his affidavit which the applicant thought prejudicial to its assertion that the public health care defence was "sustainable" in all the circumstances.

[55] The second respondent was not inclined unnecessarily to oppose the application for condonation indicating that she did not wish to incur additional costs and/or potentially protract the matter further. She fairly conceded that she would abide the court's decision in this respect but nonetheless still recorded her objection that the replying affidavit was delivered hopelessly out of time (some eight months after the answering affidavit had been delivered and twelve court days before the hearing of the matter); that it relates almost exclusively to the sustainability argument in respect of the public health care defence; that it is unnecessary prolix (it runs into more than 300 pages), contains repetitive matter, legal argument and content that does not take the matter further; that it contains allegations which ought to have been made in the applicant's founding papers; that its timing (in respect of its filing) and the voluminous nature thereof appears to have been a stratagem on the applicant's part to force a postponement of the matter; and that she had been cumulatively prejudiced by the applicant's conduct of the proceedings in this respect.

[56] All of these objections to my mind have merit. I am further inclined to agree with the submission made on behalf of the second respondent that the application for condonation fails to properly explain the time lapses, why the applicant had not adhered to its own undertakings given regarding the conduct of the proceedings or why it had not adhered to the case flow management directives issued in the matter. The issue of the application at all has had huge implications for LS and her mother who have still not enjoyed the benefit of the compensation awarded and would in my view - according to the accommodation the applicant sought by the time the matter was argued before me to instead refer the matter for the hearing of oral evidence to determine the merits of the public health care defence (against the objection on the part of the second respondent that she had not had adequate time at her disposal to file a rejoinder to the volume of fresh papers she had been served with at the doors of the court to deal with the merits of such defence), have caused further unnecessary delay and hardship.

[57] The second respondent's acceptance for present purposes that the public health care defence was not raised as an issue at the quantum trial (without agreeing that this constituted maladministration for purposes of bringing the application within the ambit of the Act and relevant Proclamation) in my view offered a practical solution to the conundrum. I add that I did have regard to the replying affidavit to gauge the applicant's views in response to the preliminary objections. However, I do not consider it necessary to have regard to the merits of the public health care defence at all. (In an ordinary application for rescission a defendant need do no more than establish a *prima facie* defence likely to succeed at trial.)

[58] It was also unnecessary in my view to deal with the striking out application because Mr. Dayimani's view of the sustainability or not of the

public health care defence (assuming the applicant was ever to get over the hurdle of interposing itself in the finalized action on the basis of the joinder and intervention relief sought) was not an issue that needed to be determined. I accept that such a defence notionally existed but was not taken in the litigation for reasons that I am certain the first respondent can explain.

[59] Regarding the issue of costs, these must follow the result. The second respondent prayed for costs on a punitive scale. I am inclined to agree with Mr Schoeman that the second respondent was unnecessarily put to costs that will not be recovered on the party and party scale and that this court should express its displeasure at the way in which the applicant has conducted itself in the matter.

[60] In the premises I issue the following order:

1. The application is dismissed with costs on the scale of attorney and client, such costs to include the costs of two counsel.

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**B HARTLE**
**JUDGE OF THE HIGH COURT**

DATE OF HEARING: 20 November & 10 December 2020
DATE OF JUDGMENT: *30 August 2021

*Judgment delivered electronically on this date by email to the parties.

*APPEARANCES:*

*For the applicant : Mr. S Nankan instructed by W T Mnqandi & Associates, Mthatha (ref. WTM/ZT/SUI006).*
*For the first respondent : NIL.*
*For the second respondent : Mr A D Schoeman SC together with Mr. L Sambudla instructed by Dayimani Inc., Mthatha (ref. Mr Dayimani).*
*For the third respondent : NIL.*