IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: 2017/2015

Reportable

In the matter between:

MEC FOR HEALTH, EASTERN CAPE **Applicant**

and

KHUMBULELA MELANE **Respondent**

and

SPECIAL INVESTIGATING UNIT **Applicant**

and

MEC FOR HEALTH, EASTERN CAPE **1st Respondent**

KHUMBULELA MELANE **2nd Respondent**

JUDGMENT

MBENENGE JP:

Introduction

[1] At the heart of these proceedings is a quest to rescind orders granted on diverse occasions in favour of Ms Khumbulela Melane in her personal capacity and representative capacity as mother and guardian of *L* against the Member of the Executive Council responsible for Health in the Eastern Cape Provincial government sued in a nominal capacity.[1]

[2] There are, in essence, two applications, one brought by the MEC and the other by the Special Investigating Unit (the SIU),[2] against Ms Melane.

[3] Additionally, there are proceedings ancillary to the applications, about which more will be said at relevant points in the course of this judgment.

The parties

[4] In the first application, the applicant is the MEC and the respondent is Ms Melane. In the second application, the applicant is the SIU, and the first and second respondents are the MEC and Ms Melane, respectively.

[5] For the sake of convenience, the parties shall henceforth be referred to as cited in the main action,[3] and the SIU shall continue being referred to as such.

Background

[6] In light of the manifold issues falling to be determined in this application, the setting out of the relevant background facts, in some detail, is necessary.

The main action

[7] The history of this case dates as far back as July 2015, when Ms Melane launched an action seeking to recover, from the defendant, R12 240 000, as and

[1] Otherwise hereinafter referred to as the MEC.
[2] Established in terms of section 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the SIU Act).
[3] Ms Melane shall be referred to as the plaintiff, whilst the MEC shall be referred to as the defendant.

for damages allegedly suffered consequent upon the labour to deliver *L* and as the result of which *L* sustained severe brain damage.[4] It is alleged that this, in turn, resulted in *L* suffering from permanent spastic palsy complicated by epilepsy, which arose from the negligent conduct of employees of the Eastern Cape Provincial Department of Health[5] at the All Saints and Nelson Mandela Hospitals.

[8] On 29 September 2015, the defendant, through the Mthatha State Attorney's Office, delivered a plea signed, *inter alia*, by counsel in private practice placing in dispute both liability and *quantum*. The plea constituted a bare denial, but no moment of this was made by the plaintiff.

[9] Upon the closure of the pleadings, on 06 October 2015, the plaintiff's attorneys of record delivered a notice in terms of rule 35 of the Uniform Rules of Court (the Rules),[6] requiring the defendant to make discovery.

[10] The defendant did not give heed to the rule 35 notice.[7] Not even letters subsequently written demanding discovery on pain of an order compelling discovery yielded any positive result.

[11] By notice dated "*09 June 2014*"[8] served on the state attorney on 23 August 2017, the defendant was notified that the plaintiff would, on 29 August 2017, seek an order compelling discovery.

[12] The order compelling the defendant to make discovery "*within five (5) days of* [the] *order*" was, however, obtained on 28 August 2017.

[13] The state attorney was notified of the order on 31 August 2017.

[14] By notice served on the state attorney on 06 September 2017, the defendant was notified that an application to strike out the defendant's defence would be made on 12 September 2017. The affidavit filed in support of the application is

[4] The main action.
[5] The Department.
[6] The notice incorporates notices in terms of sub-rules 35 (1), 35 (6), 35 (8), 35(10), and 35 (12), all at once.
[7] The initial one was served on 06 October 2015 and the subsequent one on 23 November 2016 after the state attorney had intimated that the initial one could not be traced.
[8] *Sic.*

signed by the plaintiff but does not state the place and the date on which it was attested.

[15] By order dated 12 September 2017, the defendant's defence in the main action was struck out. There was no appearance for the defendant on that occasion.

[16] Despite the order, on 15 September 2017, the defendant served the state attorney with the long-sought discovery affidavit and medical records relating to the treatment of the plaintiff. These documents were served under cover of evenly dated letter, worded:

> "As discussed kindly find attached a copy of the defendant's discovery affidavit. Please note that we will file same on Monday, 18 September 2017.
>
> We would like to highlight that this matter was previously handled by Mr Mlola who has since resigned and the matter was then allocated to [Mr Nondlazi] last month (August) hence the delay in serving and filing our discovery affidavits. In the circumstances, we propose that [the] court order dated 12 September 2017 (striking out the defendant's defence) be abandoned."

[17] The main action had, meanwhile, been set down for hearing on 20 September 2017, on which date, and at the instance of the defendant, it was postponed to afford the defendant's camp time to consider the order of 12 September 2017 and, if so advised, launch an application to rescind the order.

[18] On 23 January 2018, after notifying the defendant of her intention to amend the particulars of claim by increasing the quantum of damages claimed to R28 200 000, the plaintiff set down the main action for hearing on 22 May 2018.[9]

[19] On two occasions,[10] the defendant's camp tried unsuccessfully to refer *L* for examination by the defendant's experts.

[20] Then came 22 May 2018. On that day, the plaintiff's counsel sought to lead evidence in respect of the merits based on affidavits deposed to by the plaintiff and her expert witness, Professor Van Toorn.

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[9] The amendment was perfected on 16 May 2018.
[10] 23 February 2018 and 12 March 2018.

[21] The defendant was represented by counsel, professing to attend court on a "*watching brief*" basis. In part, the relevant portion of the transcript reads:

> "Court: Can I just enquire, Mr Qitsi, on what bases are you here?
>
> Mr Qitsi: M'Lord I'm here because I find it when I'm here that there was a default judgment, I was not aware of that, I was misled by those who instructed me, but I am informed that the . . . defence was struck off and we didn't received it.
>
> Court: Yes.
>
> Mr Qitsi: So I am here on those bases, M'Lord, there is nothing I will say in this application.
>
> Court: So one can say it is really a watching brief?
>
> Mr Qitsi: Yes."

[22] Pursuant to an *ex tempore* judgment, based on affidavit evidence, the court granted an order holding the defendant liable for all proven damages suffered by the plaintiff arising from the negligent treatment of the plaintiff and *L* and postponed the issue of *quantum* for later determination.

[23] A further notice, intended to amend the particulars of claim by increasing the *quantum* from R28 200 000 to R40 200 000, was delivered on 07 September 2018.

[24] After embarking on extensive preparation, the plaintiff set down the matter for hearing on *quantum* on 11 February 2019.

[25] On 28 January 2019, the Norton Rose Fulbright South Africa/Smith Tabata Inc. consortium delivered a notice of acting "*as correspondent attorneys*" in this matter, having been instructed to "*assist the state attorney in these matters*." It is not in dispute that this instruction was informed by the fact that the state attorney was suffering beneath the load, and lacked the capacity to handle the deluge of medical negligence cases flooding the High Court in the Eastern Cape.

[26] On 08 February 2019, the defendant, through its correspondent attorneys, served postponement application papers contending, in the main, that the

defendant's team was not ready to run the trial as "*neither counsel, nor . . . the* [d]*efendant's new attorneys of record* [were] *fully briefed with a full set of the papers*." The application was opposed.

[27] On the hearing date (11 February 2019), the application for postponement was refused. The defendant's counsel nevertheless remained during the hearing on a "*watching brief*" basis. On the strength of affidavit evidence, the court granted judgment on *quantum* in favour of the plaintiff.[11]

The rescission proceedings

[28] On 15 July 2019 the defendant launched an application[12] seeking, in the main, an order -

(a) rescinding and setting aside the order granted on 12 September 2017 striking out the defendant's defence in the main action;

(b) reinstating the defendant's plea in the main action; and

(c) rescinding and setting aside the order on *quantum* granted on 11 February 2019.

[29] The affidavit filed in support of the application is deposed to by Mr Zekhaya Bastile, a senior legal administration officer in the employ of the Department, allegedly duly authorised thereto "*on behalf of the* [defendant]."

[30] The mainstay of the defendant's case is that the judgment obtained on 11 February 2019 was predicated on affidavits which contained patent deficiencies warranting some degree of scrutiny in an opposed motion and, given the nature of the matter, the *quantum* involved and the wider impact of the award, ought to have been brought to the attention of the court prior to it granting the impugned order. The affidavit on the strength of which the order was granted, deposed to by the plaintiff who lacked the knowledge of the steps taken to procure expert

[11] Payment of R34 233 344 to the plaintiff in her representative capacity as mother and natural guardian of *L*; R2 567 501 for the establishment etc of the trust for the benefit of *L*; and R375 000 to the plaintiff in her personal capacity.
[12] Otherwise also conveniently referred to as "*the MEC application.*"

summaries and the steps taken by her legal representative, constituted inadmissible hearsay evidence, in that the allegations were not confirmed by her attorney. The amounts on *quantum* consist of duplications, inaccuracies and incongruities so much so that the default judgment ought to have been refused; the startling amounts awarded for future medical expenses is not justifiable with due regard to previous comparative awards. In these circumstances, contends Mr Bastile, the defendant has a *bona fide* defence to the *quantum* awarded to the plaintiff in her representative capacity.

[31] The explanation tendered for the defendant's default relative to the order of 28 August 2017 is that Mr Nondlazi became seized of the matter at a late stage, after the departure of a colleague who had previously handled the matter.

[32] There being no facts at its disposal to enable it to contest liability, the defendant is not bent on rescinding and setting aside the order of 22 May 2018 on liability.

[33] In so far as it may be contended that there was a delay in launching the rescission application and in delivering the replying affidavit, condonation therefor is also being sought.

[34] In support of the application to condone the delay in launching the rescission application, it has been alleged that Norton Rose was not aware that the defendant's defence had been struck out until so advised by Mr Sakhela on 08 February 2019 after the affidavit in support of the relevant application for postponement had been prepared. The application was brought as soon as possible after 11 February 2019, still with an incomplete file.

[35] The following excerpt from Mr Bastile's affidavit captures the essence of the defendant's explanation for the laches in launching the rescission application:

> "It was only after the appointment of the consortium on 28 January 2019 and the lapse of several months during which Norton Rose persisted with efforts to piece together a discernible record, obtaining the advice of senior counsel and finally obtaining the order of 11 February 2019 on 11 June 2019, that the defendant was in a position to proceed with this application.

> The application has been launched at the earliest possible time after 11 February [2019], bearing in mind that the defendant still does not have all the relevant documents pertaining to the conduct of this matter nor a complete court file in its possession. The defendant has had to proceed with what it now has at its disposal. Should further documents become available prior to the hearing of this application, the defendant reserves the right to amplify this affidavit to the extent necessary."

[36] The plaintiff delivered notice to oppose the MEC application on 30 July 2019.

[37] Meanwhile, the SIU launched its rescission application[13] on 28 July 2020. The application embodies structured relief sought in two parts (Part A[14] and B). In essence, the SIU seeks an order rescinding and setting aside all the orders granted in favour of the plaintiff in the main action as also an order granting it leave to intervene and be joined as the second defendant in the main action.

[38] The deponent to the affidavit filed in support of the SIU application is Mr Bongani Tshuku, a project manager stationed in Pretoria. The SIU, having been mandated thereto, conducted investigations into serious allegations of corruption and maladministration in, *inter alia*, the Office of the State Attorney, Mthatha regarding medical negligence cases involving the Department. According to Mr Tshuku, such investigations yielded cogent and irrefutable evidence of maladministration in how the Department and its legal team, including the state attorney, handled the main action.

[39] According to the SIU, the maladministration consisted principally in -

(a) the failure to heed the plaintiff's discovery notice and, subsequent thereto, the order compelling such discovery, resulting in the defence of the defendant being struck out on an unopposed basis;

[13] Otherwise also conveniently referred to as "*the SIU application*."
[14] In the main, Part A is a quest for interdictory relief restraining payment of and staying the execution of monetary payments awarded to the plaintiff on 11 February 2019 pending the finalisation of the rescission application.

(b) not taking steps to avoid judgment on liability and on *quantum* being taken by default, in instances where a plethora of defences,[15] including the public health defence,[16] which could and should have been raised at pleading stage and pursued at trial stage; and

(c) the failure to apply for the rescission of the impugned orders at the earliest available opportunity in circumstances where that could and should have been done.

[40] In granting the impugned orders, contends the SIU, the court was unaware of the *bona fide* defences set out above and maladministration of the main action by the state attorney at both liability and *quantum* stages. It is further contended that the SIU neither has control over nor the power to dictate to the Department's attorneys as to how to litigate its rescission application, hence it is compelled to litigate in its own capacity as authorised by the SIU Act to protect the interest of the Department. Upon joining as the second defendant in the main action, the SIU seeks "*to participate therein and to produce the necessary evidence which would demonstrate a bona fide defence to both issues of quantum and liability to prevent potential losses from being suffered by the* [Department]."

[41] It is not in dispute that the parties to the MEC application had reached an agreement that the plaintiff could hold in abeyance the delivery of her affidavit in opposition thereto pending settlement negotiations "*resulting in tacit abandonment of the strict procedures of* [r]*ule 6*." The negotiations yielded nought. Against this background, the plaintiff's answering affidavit in the MEC

[15] Some of which are that the plaintiff had not satisfied the American College of Obstetrician and Gynaecologists (ACOG) and American Academy of Paediatricians (AAP) criteria for intrapartum asphyxia to be sufficient to cause neonatal encephalopathy and consequent cerebral palsy; the failure to raise the fact that L's Apgar scores at five and ten minutes were not less than three and five which indicated that L was not terribly asphyxiated at birth, which could not have been possible if L suffered intrapartum asphyxia as contended for by the plaintiff; that L's Apgar scores at five and ten minutes were 6/10 and 6/10 indicative of the fact that L was not terribly asphyxiated at birth and certainly not indicative that L's set of circumstances certify the ACOG and the AAP criteria for intrapartum asphyxia to be sufficient to cause L's cerebral palsy, which requires that L's Apgar score must be less than six beyond five minutes.

[16] The upshot of which is that Nelson Mandela Hospital is an institution of excellence which can provide for future medical care, treatment, therapies, assertive devices and appliances in respect of L at no cost, which would be a reasonable standard similar to that in the private sector and which would drastically reduce the *quantum* of damages.

application was served more than a year after the launch of the application on 20 August 2020, with a request for condonation for such late delivery.

[42] The deponent to the answering affidavit is Mr Ngqiqo Sakhela, the plaintiff's attorney who has, at all times relevant hereto, been handling this litigious matter. The authority of Mr Bastile to depose to the affidavit in support of the MEC application on behalf of the defendant is disputed on the ground that he lacks personal knowledge of the facts testified to by him. The stance of the plaintiff on the merits is, in a nutshell, that -

(a) the defendant is, by reason of the defence having been struck out, and absent the purging of her shortcomings and the resurrection of her defence, precluded from participating in the main action;

(b) the defendant has acquiesced in the impugned judgments and their legal effect with the result that she is precluded from seeking to undo the orders;

(c) the order striking out the defendant's defence and its legal effects are *res judicata*;

(d) the defendant has not established any procedural irregularity warranting interference by way of rescission or at all; and

(e) no *bona fide* defence to the main action has been established.

[43] In her affidavit filed in opposition to the SIU application, delivered on 21 October 2020, the plaintiff adopted the same stance advanced in opposition to the MEC application. The testimony of Mr Tshuku in the affidavit filed in support of the SIU application is challenged on the basis that it constitutes inadmissible hearsay evidence and opinion evidence of an expert nature; there are no supporting affidavits by persons with the relevant expertise. The delay in filing the affidavit, which the court is asked to condone, is said to have been caused "*by the out of court settlement negotiations which started after the service of the defendant's rescission application was instituted, the need to first draft a comprehensive answering affidavit in opposition to the defendant's application*

for rescission so as to avoid an unnecessary duplication of work and costs in circumstances where the plaintiff is impecunious, a decision to engage the services of a new senior counsel to advise and act in the present application brought by the SIU, and the additional time the new senior counsel required to become conversant with all the relevant facts and documents."

[44] By notice dated 03 November 2020, the defendant, in pursuit of its opposition to the MEC application, required the plaintiff to produce for inspection-

(a) the affidavit in support of the application culminating in the grant of the order of 28 August 2017, the relevant notice of set down and proof of service of the relevant application papers on the state attorney;

(b) the affidavit in support of the application resulting in the grant of the order of 12 September 2017, the relevant notice of set down and proof of service of the relevant application papers on the state attorney;

(c) the filing sheets and proof of service on the state attorney of all the plaintiff's rule 36 (9) (a) and (b) notices;

(d) the files in other similar action proceedings and in relation to which it is contended the defendant has not paid in terms of judgments granted in favour of the various plaintiffs in the actions;

(e) proof of service of the amended pages pertaining to the amendment of the particulars of claim increasing the *quantum* from R12 240 000 to R28 200 000; and

(f) proof of service of the amended pages pertaining to the amendment of the claim from R28 200 000 to R40 200 000.

[45] On 09 July 2021, the plaintiff set down the MEC application for hearing on 16 September 2021.

[46] On 30 August 2021, the defendant served the plaintiff with a notice of application for postponement of the MEC application premised on the ground that the application should await the finalization of the SIU application, in keeping with an agreement allegedly concluded by the parties.

[47] The plaintiff opposed the postponement application. The existence of the agreement to first dispose of the SIU application was disputed, the contention being that there existed no reason to hold the MEC application hostage to the SIU application, which related to much of the same matter.

[48] The replying affidavit in the SIU application was delivered just over a year after the answering affidavit had been filed, on 07 September 2021. The affidavit is replete with legal arguments and quotations from statutory provisions. It is lengthy, with the deponent thereto seeking to justify the prolixity by stating that the issues for determination are complex and that "*the information contained* [therein] *is necessary to enable the court to come to a fair and just conclusion in the case*." Condonation for the late delivery of the affidavit is sought principally on the ground that the proceedings were hampered by the Corona-virus pandemic and resulting lockdown levels which rendered it well-nigh impossible for the SIU to consult meaningfully with the relevant witnesses who eventually filed reports and confirmatory affidavits.

[49] The delivery of the SIU's replying affidavit attracted an application by the plaintiff to strike out averments construed as constituting new matter in reply which ought to have been contained in the founding affidavit. The plaintiff also filed an affidavit resisting the SIU's request for condonation of the late delivery of the replying affidavit.

[50] The MEC and SIU applications, and the defendant's postponement application were enrolled for hearing on 16 September 2021. On that day, the applications were postponed and the parties placed on terms regarding the delivery of outstanding papers. Costs occasioned by the postponement were

reserved for determination by the court hearing the applications. Most significantly, the court recorded that-

> "3. The parties agree that the matters warrant a hearing in the fourth term of 2021 if possible, and agree to make representations to the Judge President of the Eastern Cape Division of the High Court for a mutually convenient date upon which the matters can be heard, for a minimum of three days.
>
> 4. The parties agree that a full bench . . . hear the matter, subject to the Directive of the Judge President."

[51] On 04 October 2021, the parties' attorneys in the MEC and SIU applications filed a joint practice note which, in part, reads:

> "**WHEREAS** this joint practice note is presented to the Judge President by the parties with common understanding of the nature and complexity of the issues involved in these matters and the fact that the matters warrant a hearing in the fourth term of 2021 by the full bench and the application for postponement of the application for rescission of the judgment in favour of Khumbulela Melane be heard by a single judge, a full bench not being warranted be heard before the SIU application against Khumbulela Melane and obviously the application of the rescission of judgment in favour of Khumbulela Melane.
>
> **WHEREAS** the MEC is not a party to the application by the SIU against Khumbulela Melane second respondent/ defendant and is disputing that the rescission application brought by the MEC against Khumbulela Melane is to be heard before the outcome of dispute between the SIU and Khumbulela Melane and in the circumstances has brought an application to postpone her application for rescission of judgment in favour of Khumbulela Melane."

[52] Pursuant to the practice note, on 18 November 2021, the parties' legal representatives attended a case flow management conference at my chambers. Amidst representations by the defendant's counsel, Mr *Van der Linde*, that the MEC application be postponed and the SIU application be heard first, a directive was issued that both rescission applications and any postponement application that the defendant might pursue be heard by a full court on 18 to 20 January 2022. The parties were urged to deliver all outstanding papers to ensure that on the hearing dates nothing would be outstanding.

[53] Upon availing the documents requested by the defendant in terms of items 1, 2, 5 and 6 of its rule 35(12) notice to Norton Rose, on 13 December 2021, the

defendant delivered a supplementary founding affidavit on 21 December 2021. The affidavit sets out irregularities that beset -

(a) the setting down of the application to compel discovery;

(b) the inadequate *dies* afforded the defendant to comply with the order compelling discovery; and

(c) the affidavit filed in support of the application to strike out the defendant's defence.

More about this later

[54] The defendant also delivered a notice to amend her notice of application for postponement so as to read-

> "1. that the agreement between the parties that the rescission application previously set down on the opposed motion court roll of Thursday 16 September 2021 be postponed and be held in abeyance pending the outcome of the SIU application be upheld;
>
> 2. that [the] application be postponed and held in abeyance accordingly."

[55] The replying affidavit in the MEC application was delivered on 11 January 2022. Condonation for the late delivery of the affidavit is sought in the affidavit itself. The delay is said to have resulted from intervening events giving rise to the view by the defendant's camp that the MEC application would be held in abeyance pending the final determination of the SIU application, which was overtaken by the directive that the applications proceed on 18 to 20 January 2022 and that all outstanding documents be filed.

[56] The proposed amendment to the postponement application notice was objected to by the plaintiff, and this resulted in the defendant giving notice that, on the hearing date, she would seek the leave of court for the amendment to be effected.

[57] The defendant intends abiding the decision of the court in the SIU application. Norton Rose has, however, caused to be filed an affidavit disavowing

any malfeasance on its part in the handling of the case since entering the fray of the contest.

The hearing

[58] At the hearing, before this court, constituted in terms of section 14 (1)*(a)* of the Superior Courts Act 10 of 2013, there were three applications, namely:

(a) the application for a stay of the MEC application;

(b) the application for rescission by the MEC; and

(c) the application for intervention and for rescission by the SIU.

Application for a stay of the MEC application

[59] The application to postpone and/or hold in abeyance the MEC application, including the application for the amendment of the notice to postpone the MEC application, was dealt with first. On behalf of the defendant, it was contended that the parties had previously agreed to hold in abeyance the MEC application pending the finalisation of the SIU application and that the agreement should be given effect to. The plaintiff contended otherwise, pointing to dilatoriness on the part of the defendant whilst at the same time disputing the existence of the agreement.

[60] After hearing argument, the following order was issued:

> "The application to amend the notice of motion in the postponement application and to postpone the MEC's rescission application pending the finalisation of the SIU's application is refused with costs. Such costs to include those consequent upon the engagement of two counsel. The reasons for this order shall be furnished in the main judgment in case number 2017/2015."

[61] Here are the reasons for the order.

[62] To begin with, the principles applicable to an application for the grant of a postponement are of relevance in determining the issues at hand. First, the court has a discretion as to whether an application for a postponement should be granted

or refused.[17] Add to this the cardinal rule that an application for a postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.[18]

[63] The proceedings sought to be stayed were launched on 11 February 2019, and relate to a minor child of which this court is the upper guardian.

[64] The existence of the agreement relied on by the defendant is hotly contested. This was the case even on two previous occasions. On one such occasion, the defendant was advised as follows:

> "We maintain that the MEC application for rescission is a separate independent application and should be heard separately from the SIU application. The MEC has filed a notice to abide the SIU application and cannot thereafter wait for the SIU's application to be heard first so that her application can be heard only if the SIU's application is unsuccessful."[19]

[65] This court was of the view that the agreement on which the postponement application was predicated was simply one of convenience. Mr *Van der Linde* was hard put to explain why, in light of the directive issued on 18 November 2021, the SIU and MEC applications should not, for practical reasons, be heard all at once.

[66] In any event, even if the parties had reached an agreement as alleged, the court has a discretion to refuse a postponement even when the parties have agreed to postpone the matter.[20]

[67] The SIU and MEC applications are inextricably bound up with each other and need to be considered against the general history of the case. As at the hearing date, all papers had been filed and the parties were all ready and rearing to argue the merits of both applications, having previously delivered heads of argument. Similarly, the court had read the voluminous papers in both applications.

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[17] *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NMS) at 314 – 315; also see *Persadh v General Motor SA (Pty) Ltd* 2006 (1) SA 455 (SE) at 459 E – G.
[18] *Myburgh Transport* case *supra* 315 E.
[19] Extract from a letter dated 08 November 2022.
[20] *National Police Service Union v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112 E.

[68] In an instance such as this one, one may do no better than refer to *MEC for Health, Eastern Cape and Another v Kirland investments (Pty) Ltd*.[21] In that case Cameron J (for the majority of the Constitutional Court) held:

> "On the contrary, there is a higher duty on the state to respect the law to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."

These remarks apply with equal force in this matter.

[69] It is as well for us to remind ourselves of the following remarks by Lord Woolf:[22]

> "Without effective control . . . the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield . . . In this environment, questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable."

But for the directive issued on 18 November 2021, these proceedings would, in all probability, still be far from finalisation.

[70] The court could not discern any advantage such as, for instance, the saving of costs, in the approach contended for by the defendant. Postponing the case with a view to giving effect to the alleged agreement would have elevated form over substance and not serve the interests of justice. Nor could the court find justification on principle for granting the postponement.

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[21] (CCT 77/13) [2014 ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014); also see *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143; [2016] 4 All SA 842 (SCA); 2017 (2) SA 63 (SCA) (30 September 2016) and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) SA 173 (C) at 181 F – H, where it was held:

> "The date for this hearing had been arranged between the parties early this year in consultation with the Judge President. That special arrangement has, without explanation, been ignored . . . By attempting to postpone this matter and thus cause further delay, the applicants might suffer an extended period of anxiety. There was reason which could be justified on principle for granting the postponement and accordingly it was refused."

[22] Access to Justice, Interim Report (Lord Chancellors Department, June 1995); Access to Justice, Final Report (London: HMSO, 1996), paras 4 and 5 of the Interim Report, Chapter 3.

[71] Whatever agreement there might have been, it was subsumed on 18 November 2021 when the directive that all three applications would be heard by this court on 18 to 20 January 2022 was issued.

[72] It is against this background that a more pragmatic approach was adopted and both rescission applications were heard all at once.

[73] Costs were sought against the defendant on the punitive attorney and client scale. Cognisance should, however, be taken of the fact that this litigation was conducted by the parties in a dilatory and clumsy manner. The parties and their legal representatives shunned their responsibility to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards hearing and adjudication.[23] None of the parties is blameless on this score. The plaintiff delayed unduly in responding to the defendant's rule 35 (12) notice, but then again nothing prevented the defendant from invoking the provisions of rule 30A[24] when the plaintiff was being dilatory in giving heed to the notice. The court was of the view that where, as here, the parties contributed to the delays, a punitive attorney and client costs award was not warranted, hence it granted the cost order it did.

Late delivery of affidavits

[74] As mentioned in the foregoing background, in some instances it took approximately a year for the parties concerned to deliver the outstanding affidavits. They unduly allowed each other latitude to deliver papers out of time and arrogated to themselves the right to "*tacit abandonment of the strict procedures of rule 6*."

[23] *Cf* rule 37A (2) (c).
[24] The rule provides:

> "(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, . . . any other party may notify the defaulting party that or she intends, after the lapse of ten days from the date of delivery of such notification, to apply for an order -
> *(a)* that such rule, notice, request, order or direction be complied with; or
> *(b)* that the claim or defence be struck out.
> (2) Where a party fails to comply within the period of ten days contemplated in sub rule (1), application may or notice be made to the court and the court may make such order thereon as it deems fit."

[75] This approach falls foul of the principle enunciated in *Waltloo Meat and Chicken SA (Pty) Lty v Silvy Luis (Pty) Ltd and Others*.[25] In that case Poswa J stated that the view held by some that insistence on compliance with adherence to time limits provided in the rules is formalistic, is incorrect; such time limits are, no doubt, based on considerations of fairness and the avoidance of litigation by ambush. The court further held that it could not have regard to affidavits and annexures thereto delivered out of time without condonation therefor having been sought and obtained, as the court could not have regard to information not properly placed before it. It remains the discretion of the court whether or not to have it admitted as evidence by granting an application for condonation of such late delivery.[26]

[76] Only the defendant sought, by way of substantive application, condonation for the late delivery of her replying affidavit and the supplementary founding affidavit. The other parties adopted a lackadaisical attitude and contented themselves with merely stating, in the relevant affidavits, that condonation for the late delivery is being sought, without the launch of a substantive application, which is what rule 27 contemplates.

[77] The defendant has made out a good case for the condonation she is seeking. Only once some of the documents sought in the rule 35 (12) notice had been availed, was the defendant better placed to deliver her replying affidavit and supplement her cause of action by way of a supplementary affidavit. The request for the acceptance by the court of the supplementary founding affidavit was not opposed. The plaintiff also did not place any evidence before the court to refute the alleged irregularities. The reason for this is not far to seek - the allegations made therein are self-evident.

[78] Having regard to the merits of the matter seen as a whole and the fact that none of the parties stands to thereby suffer any prejudice, it would be in the

[25] 2008 (5) SA 461 (TPD).
[26] *Waltloo, supra* paras 28 - 30 at 472 D / 473 E.

interests of justice to condone the late delivery of answering and replying affidavits, and for the court to accept the defendant's supplementary founding affidavit.

[79] This brings us to a consideration of the issues falling to be determined in these proceedings.

Authority to depose to affidavits

[80] The authority of certain deponents to affidavits filed in these proceedings was disputed; the authority of Mr Bastile to depose to the affidavit in support of the MEC application is disputed, and so is the authority of Mr Sakhela to depose to the answering affidavit in the SIU application.

[81] This contention ought not to detain us any further. It is trite law that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit.[27] For this reason, the applications will be disposed of on the strength of credible admissible evidence embodied in all affidavits filed of record. The MEC application, having been the first to be launched, will be dealt with first.

The MEC application

[82] The MEC application is founded on rule 42 (1) (a) or the common law. In my view, the invocation of the rule effectively disposes of the application with the result that nothing more need be said about the common law. The rule gives the court a discretion to rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby at the instance of, *inter alia*, the party affected by such order or judgment.

[83] It has been held that the purpose of rule 42 (1)(a) is to correct expeditiously an obviously wrong judgment or order,[28] so much so that a dilatory litigant may be non-suited on the ground that the application was launched after the lapse of a

[27] *Ganes & Another v Telecom Namibia Ltd* (608/2002) [2003] ZASCA 123; [2004] 2 All SA 609 (SCA) (25 November 2003).
[28] *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471 E - F

reasonable time.[29] Once the court holds that an order was erroneously sought or granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order;[30] it is not necessary for a party to show good cause for the rule to apply.[31]

[84] It is trite law that an order or judgment is erroneously granted if there was an irregularity in the relevant proceedings.[32]

[85] At this juncture, two orders come to the fore namely, the order of 28 August 2017 compelling the defendant to make discovery and the one dated 12 September 2017 striking out the defendant's defence. It is common cause that on both occasions, the defendant was absent in court. The circumstances under which the orders were sought and obtained require close scrutiny.

[86] The facts on which the resolution of the MEC application turn speak for themselves. In the first place, whereas the plaintiff had notified the defendant that it would seek an order compelling discovery on 29 August 2017, the order was sought and obtained the day before, on 28 August 2017. Second, the defendant was not afforded the requisite five days period within which to comply with the order compelling discovery; the order directing compliance was served on the defendant's attorneys on 31 August 2017, yet the application to strike out was delivered on 6 September 2017, and not on 7 September 2017. Also, the affidavit filed in support of the application to strike out bears no date and place of attestation thereon.

[87] There can be no doubt that a litigant who, having notified the other that relief will be sought on a specified date, proceeds to obtain the order on another day is committing an irregularity. In the same vein, it is irregular for a court to grant an order on a day that is different from that specified in the relevant notice.

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[29] *First National Bank of Southern Africa Ltd v Van Rensburg NO*; in re *First National Bank of Southern Africa Ltd v Jurgens* 1994 (1) SA 677 (T) at 681 B - G.
[30] *Naidoo v Somai* 2011 (1) SA 219 (KZD) at 220 F - G; also see *Rossitter and Others v Nedbank* (96/2014) ZASCA 196 (1 December 2015).
[31] *Bakoven*, *supra*, 471H; also see *Mutweba v Mutweba* 2001 (2) SA 193 (Tk) at 199 I - J; *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at 597 I - 598 B.
[32] *De Wet v Western Bank Ltd* 1979 (2) (SA) 1031 (A) at 1038 D; *National Pride* case, *supra*, 593 F- 594 I.

This is akin to a situation where a litigant seeks a judgment against the other before expiry of the *dies induciae*.[33] In that situation, as here, the court lacks the power to condone the irregularity. In any event, there is nothing to show that attention was paid to the discrepancy on the dates. The same shortcoming bedevils the service of the order compelling discovery.

[88] What of the shortcoming in the affidavit filed in support of the application to strike out? Regulation 4 (1) of the Regulations Governing the Administering of an Oath or Affirmation[34] provides:

> "Below the deponent's signature or mark the commissioner of oath shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration."

[89] The provisions of rule 4 (1) are directory. The court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the Regulations depending upon whether substantial compliance with them has been proven or not.[35]

[90] However, where, as here, condonation is required, an explanation for that non-compliance must be provided on affidavit so as to enable the court to exercise its discretion in favour of or against granting such an indulgence.[36] There is nothing to show that condonation was applied for and granted when the application to strike out was moved. The ineluctable conclusion is, therefore, that the affidavit on the strength of which the order of 12 September 2017 was granted was not properly commissioned, which renders the affidavit fatally defective and the resulting proceedings irregular.

[91] In light of the procedural irregularities mentioned above, the orders of 28 August 2017 and 12 September 2017 were erroneously sought and erroneously granted within the meaning and contemplation of rule 42 (1)(a). There is also

[33] *Goosen v Mthethwa* (LCC 27 R/ 2010) [2010] ZALCC 22 (18 August 2010).
[34] Published under GNR1258 in GG 3619 of 21 July 1972.
[35] *Ladybrand Hotels v Stellenbosch Farmers* 1974 (1) SA 490 (O).
[36] *Oosthuizen v Steyn* 2021 (4) SA 307 (GP), para 32.

nothing, from the facts of this matter, that precludes the court from exercising its discretion against rescinding the impugned orders.[37]

[92] The following remarks by Mpati P in *Government of the Republic of South Africa and Others v Von Abo*[38] are apposite in this instance:

> "[18] However, it matters not whether the first order was appealable or whether the appeal had been perempted. As a matter of logic the second order arose from the first order and has no independent existence separate from the first order. As the second order was given in consequence of the first order, and would not nor could have been given if it were not for the first order, it follows that if the first order is wrong in law, the second order is legally untenable. Whether the appellants were ill-advised not to appeal against the first order, but rather to try and comply with it, should not have the unacceptable result that this court is held to a mistake of law by one of the parties. I can put it no better than Jansen JA in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23F:
>
> > '(I)t would create an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part. . . .;'
>
> [19] In *Paddock* the principle of the court not being bound by what is legally untenable was applied in the narrower context of a legally wrong concession by one of the parties during proceedings, but the principle is equally valid in the present context. It would be similarly intolerable if, in the current situation, this court would be precluded from investigating the legal soundness of the first order, as a result of the incorrect advice followed by the appellants or an incorrect concession made by them."

[93] In light of the shortcoming besetting the order of 28 August 2017 referred to above (the initial order), the subsequent orders given in consequence of the initial order could not have been issued had it not been for the initial order. The order of 12 September 2017 is, in any event, in and by itself, and for the aforementioned reasons, similarly irregular. As a result, the subsequent orders granted on the basis that the defendant's defence had been struck out namely, the orders on the merits and on *quantum* granted on 22 May 2018 and 11 February 2019, respectively, also fall to be rescinded; they arose from the orders that preceded them which have no separate independent existence from the initial and/or subsequent order.

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[37] Compare *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC), para 53, where it was held:

> "It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its own order. The precise wording of rule 42, after all, postulates that a court '*may*', not '*must*', rescind or vary its order - the rule is merely an '*empowering section and does not compel the court*' to set aside or rescind anything. This discretion must be exercised judicially."

[38] 2011 (5) SA 262 (SCA); [2011] 3 All SA (SCA) [2011] ZASCA 65; 283/10 (4 April 2011) para 18.

[94] In her heads of argument, Ms *Goedhart*, who appeared for the defendant in the MEC application, contended that "[i]*t follows that the subsequent orders granted on the basis that the defendant was not before court as its defence had been struck out also fall to be rescinded*." At the hearing she, however, adopted a benevolent approach and contended that the order on the merits need not be rescinded. This concession is, in light of the trite legal position referred to above, nothing to go by as it is, in any event, not binding on this court.

[95] The conclusion reached on the MEC application renders it unnecessary for this court to consider whether the orders of 22 May 2018 and 11 February 2019 were granted in the absence of the defendant within the meaning and contemplation of rule 42 (1) (a). It suffices to mention that there is merit in the contention raised by Ms *Goedhart* that the appearance of counsel on a "*watching brief*" basis for a client that has been barred is inconsequential because the rule is not meant to cover litigants who, upon being afforded due process, elect to be absent.[39]

The SIU application

[96] Very belatedly,[40] the SIU, without seeking to condone the launch of its rescission application after the lapse of a reasonable period, has sought to join the instant proceedings and launch a separate application to rescind the order obtained by the plaintiff against the defendant and to intervene as a further defendant in the main action.

[97] The conclusion reached on the MEC application has paved the way for the resumption of the main action from the stage where pleadings have closed.

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[39] *Cf Zuma*, para 56, where it was held:

> "Mr Zuma alleges that this court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words "granted in the absence of any party affected thereby …." exist to protect litigants whose absence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absence."

[40] The SIU application was launched on 30 July 2020, the last of the orders sought to be rescinded having been granted on 11 February 2019, resulting in a delay of just over 18 months.

[98] This leaves the issue for determination in the SIU application being whether, in light of the conclusion reached on the MEC application, the SIU is entitled to -

(a) rescind and set aside all orders granted in favour of the plaintiff in the main action; and

(b) intervene and be joined as the second defendant in the main action.

[99] The SIU application is premised on the ground that the impugned orders were products of maladministration and irregular and improper conduct on the part of the Department's officials alternatively, its legal representatives in the main action. More pertinently, the SIU's lamentation is that the Department and its legal team (the Mthatha State Attorney) were not vigilant in defending the main action; *bona fide* defences available to the defendant which could and should have been raised were not called to aid.

[100] Because the defendant did not seek to rescind the order on liability, whereas the SIU does, argues the SIU, the issues requiring determination are different in the MEC and SIU applications. Were the SIU rescission application to be granted, the SIU would, upon being joined as the second defendant, enter the fray of the main action and raise the *bona fide* defences.

[101] The case of the SIU is also captured in the SIU's founding affidavit as follows:

> "In view of the fact that the [SIU] has no control over [the defendant] and cannot dictate to it or [its present attorneys of record] as to how to litigate its rescission application, it has been compelled to litigate in its own capacity as authorised by the preamble to… and section 4 (1) (c) (i) of the [SIU Act] in order to protect the interest of the [defendant] and it has hence instituted this action."

[102] To begin with, at the instance of the defendant, the orders granted in favour of the plaintiff, including that on liability, have been proven to be irregular and thus liable to be set aside. The corollary of this is that the main action will resume from the stage where pleadings closed.

[103] The commencement *de novo* of the main action entails a re-opening of the case in its entirety. Nothing will prevent the defendant, if so advised, from

augmenting its plea to include the so-called public health defence or any other defence not called to aid by the defendant's initial legal team or the relevant departmental officials. This is especially so if one has regard to the fact that a fresh legal team has been engaged to represent the defendant. Nor, as far as this court is concerned, would the defendant, having signalled acceptance of the order on liability, be precluded from conceding such liability on whatever legally recognised legal basis. It would otherwise be speculative of this court to predict what defences may or may not be raised once the main action resumes.

[104] The *locus standi* of the SIU to intervene as a litigant and/or rescind orders on the basis that the Department concerned and/or the Office of the State Attorney was/were remiss and did not act in the interest of the State has been the subject of pronouncement in this Division on no less than three occasions.[41] A reading of the relevant pronouncements points to one thing namely, that the SIU Act and the Proclamation issued thereunder do not, upon a proper interpretation, clothe the SIU with the *locus standi* to intervene and re-open cases fully canvassed in a court of law; the remedy lies in recovering damages from the errant state attorney or relevant departmental official. In light of the view the court takes of this matter, it is not necessary to pronounce on the correctness or otherwise of these judgments and to decide the question whether the SIU has the *locus standi* to seek an order rescinding and setting aside an order on the ground that it is the product of maladministration in circumstances such as the present.

[105] As a matter of logic, and even accepting that the SIU has the requisite *locus standi*, it is not available to the SIU to litigate over an issue that no longer exists. The defendant has secured an order rescinding and setting aside the impugned orders, with the result that nothing, as between the SIU and the plaintiff, remains to be rescinded.

[41] *Special Investigating Unit v MEC for Health, Province of the Eastern Cape and Another* (694/14) [2020]ZAECMHC 57; [2020] JOL 49113 (ECM); 2021 (1) SACR 645 (ECM) (1 December 2020); *Special Investigating Unit v MEC for Health, Province of the Eastern Cape* (3658/2016)[2021] ZAECMHC 32 (30 August 2021); and *Special Investigating Unit v HT Belladona Projects (Pty) Ltd* (unreported decision by Rugunanan J delivered on 18 January 2022)

[106] I am mindful of the close connection between *locus standi* and ripeness or mootness and that *locus standi* has unfortunately sometimes been characterised as an issue of ripeness or mootness.[42] In my view, a less confusing approach that recognises the difference between these notions is preferred.

[107] The enquiry into whether the person who has claimed the relief has the right and interest to do so or is the correct person before court denotes *locus standi* in the strict and true sense of the word. That scenario is, in my view, different from the one where, as here, the enquiry is moot because the judgment of the court can have no practical effect, usually because the dispute has been resolved or because an event has occurred that renders consideration of the matter academic.[43] The SIU application is disposed of on the basis that the issue between the SIU and the plaintiff is of no practical relevance, hence on this requirement, the SIU application does not pass muster.

[108] In so far as the SIU seeks to intervene in the main action, it is incumbent on it to establish that it has a direct and substantial interest in the subject matter of the case between the plaintiff and the defendant.[44]

[109] In this regard rule 12[45] is of significance. It reads:

> "Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action, may notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or defendant. The court may upon such application makes such order, including any order as costs, and give such directions as to the further procedure in the action as to it may seem meet."

[110] The grant of leave to intervene as a co-defendant is in the discretion of the court, which is signified by the use of "*may*" in rule 12.

[111] The test applied regarding whether a person can seek to intervene is to ask whether that person could have been sued as a party. Joinder is competent on the basis, *inter alia*, that the party whose joinder is in question has a direct and substantial interest in the subject matter of the proceedings. It is not sufficient for

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[42] *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A).
[43] *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) (para 17); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (para 21).
[44] *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC) at 4 (G) - 5 (A)
[45] Of the Rules.

a party seeking intervention to merely allege an interest in the action; such party must give *prima facie* proof of the interest and right to intervene.[46] It is also required of an applicant to make the application seriously and not frivolously.[47]

[112] Has the SIU met the requisite threshold? I think not. There is, at this stage, no conceivable basis for believing that the main action will be beset by maladministration. It can, at this stage, not be said that the SIU has a right that is likely to be adversely affected by the order sought[48] entitling it to intervene in the main action. On this requirement, too, the SIU application must fail.

Conclusion

[113] In sum, the defendant's quest to have the orders granted in favour of the plaintiff in the main action has yielded the intended results. Even though the defendant had signalled acceptance of the order on liability, that order, too, has, by operation of law, to be rescinded as it cannot stand if the order in consequence of which it was granted is set aside. Resultantly, the SIU's quest to rescind the orders has been rendered redundant

[114] One last item bears mentioning. This case has stagnated, with the parties not doing much to bring it closer to the finish line. It requires constant judicial case management. This will be catered for in the order that follows.

Costs

[115] Generally, costs follow the event. At the hearing, the defendant maintained that, in the event of success in the MEC application, costs ought to be in the cause. That stance will be revered. The MEC elected to abide the decision of the court in the SIU application. Only the plaintiff opposed that application. There is no reason why the SIU should not be liable for the plaintiff's costs of opposition in the SIU application.

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[46] *Elliot v Bax*: In re *Bax v African Life Assurance Society Ltd* 1923 WLD 228, at 231, followed in *Ex parte* Marshall: In re *Insolvent Estate Brown* 1951 (2) SA 129 (N*).*
[47] *Ex parte Moosa*: In re *Hassim v Harop- Allin*1974 (4) SA 412 (T); [1974] 3 All SA 604 (T); *Minister of Local Government and Land Tenure v Sizwe Development*: In re *Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (Tk) at 676H -J - 679 A.
[48] *SA Riding.*

Order

[116] The order that I grant is the following:

1. The application launched by the Member of the Executive Council for the Department of Health, Eastern Cape Provincial Government (the MEC) against Ms Khumbulela Melane (Ms Melane) under Case No. 2017/2015 (the main action) succeeds, to the following extent:

1.1 the orders granted in the main action in favour of the plaintiff against the MEC on 28 August 2017, 12 September 2017, 22 May 2018 and 11 February 2019 are hereby rescinded and set aside in their entirety;

1.2 the plea of the MEC as defendant in the main action is hereby reinstated; and

1.3 the costs of this application shall be in the cause.

2. The application launched by the Special Investigating Unit (the SIU) against the MEC and Ms Melane under Case No. 2017/2015 is refused, with the SIU to pay the costs occasioned by Ms Melane's opposition of the application.

3. The parties' legal representatives in the main action are directed to avail themselves before Van Zyl DJP for a case management conference convened for the purpose of determining the future conduct of the main action. The time, venue and mode of the conference shall be determined by the DJP in consultation with the parties' legal representatives.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

GOOSEN J:

I agree.

G GOOSEN

JUDGE OF THE HIGH COURT

NORMAN J:

I agree.

T V NORMAN

JUDGE OF THE HIGH COURT

Counsel for the MEC (application to stay proceedings):	*H J Van de Linde SC*
Instructed by:	Norton Rose Fulbright SA Sandton C/o Smith Tabata Attorneys Mthatha

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Counsel for the respondent (MEC application):	*A Katz SC* (with him, *A Mdeyide*)
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Counsel for the SIU (rescission application):	*S Nankan* (with him, *S Zimema*)
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Counsel for the respondent (SIU rescission application):	*A G Dugmore SC* (with him, *L Sambudla*)
Instructed by:	Sakhela Inc. Mthatha
Heard on:	18, 19 and 20 January 2022
Delivered on:	22 March 2022