

**MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE, ECONOMIC DEVELOPMENT,  
ENVIRONMENTAL AFFAIRS AND TOURISM (EASTERN CAPE AND OTHERS // THE LEGAL  
PRACTICE COUNCIL AND OTHERS  
CASE NUMBER: 2091/2021**

Our firm represented the *amicus* (friend of the court) namely, the South African Medical Malpractice Lawyers' Association, in an application where the State, *inter alia*, sought to limit execution against State assets once a judgment had been obtained against the State. We were successful in convincing the court that such execution should be allowed as provided for in the State Liability Act.



**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, MAKHANDA**

**REPORTABLE**

**Case No: 2091/2021**

**Date Heard: 11-13 April 2022**

**Date Delivered: 21 June 2022**

**In the matter between:**

**MEMBER OF THE EXECUTIVE COUNCIL FOR  
FINANCE, ECONOMIC DEVELOPMENT,  
ENVIRONMENTAL AFFAIRS AND TOURISM  
(EASTERN CAPE)**

**First Applicant**

**HEAD OF DEPARTMENT EASTERN CAPE**

**PROVINCIAL TREASURY**

**Second Applicant**

**MEMBER OF THE EXECUTIVE COUNCIL FOR  
HEALTH, EASTERN CAPE PROVINCE**

**Third Applicant**

**HEAD OF DEPARTMENT FOR HEALTH (EASTERN CAPE)**

**Fourth Applicant**

**THE PREMIER, EASTERN CAPE PROVINCE**

**Fifth Applicant**

**and**

**THE LEGAL PRACTICE COUNCIL**

**First Respondent**

**THE BOARD OF SHERIFFS**

**Second Respondent**

**ABSA BANK LIMITED**

**Third Respondent**

<b>NATIONAL DEPARTMENT OF HEALTH</b>	<b>Fourth Respondent</b>
<b>NATIONAL TREASURY OF SOUTH AFRICA</b>	<b>Fifth Respondent</b>
<b>HENNIE JORDAAN N.O. (SHERIFF FOR KING WILLIAMS TOWN COURT, KING WILLIAMS TOWN)</b>	<b>Sixth Respondent</b>
<b>MARKS THAPELO MANGABA N.O. (SHERIFF, JOHANNESBURG CENTRAL)</b>	<b>Seventh Respondent</b>
<b>IG BEZUIDENHOUT N.O (DEPUTY SHERIFF, HIGH &amp; LOW) WILLIAMS TOWN</b>	<b>Eighth Respondent</b>
<b>FANIE HERMAN N.O. (DEPUTY SHERIFF FOR CENTURION EAST)</b>	<b>Ninth Respondent</b>
<b>ASIPHE MANISE</b>	<b>Tenth Respondent</b>
<b>BABALWA VANTYI-GWAZU</b>	<b>Eleventh Respondent</b>
<b>ANDILE GWAXU</b>	<b>Twelfth Respondent</b>
<b>BAPHATHE NDIYA</b>	<b>Thirteenth Respondent</b>
<b>POZILE DLUNGANE</b>	<b>Fourteenth Respondent</b>
<b>APHELELE NDAMASE</b>	<b>Fifteenth Respondent</b>
<b>LULEKA NOPHUZA</b>	<b>Sixteenth Respondent</b>
<b>LULEKA NTLAKA</b>	<b>Seventeenth Respondent</b>
<b>NOBUHLE NDZALA</b>	<b>Eighteenth Respondent</b>
<b>PETER BOUCHER</b>	<b>Nineteenth Respondent</b>
<b>GRACE JESSICA BOUCHER</b>	<b>Twentieth Respondent</b>
<b>MAPHELO ANELISIWE</b>	<b>Twenty-First Respondent</b>
<b>LULEKA MBINDA</b>	<b>Twenty-Second Respondent</b>
<b>CHATHA MAHILIHILI</b>	<b>Twenty-Third Respondent</b>
<b>NOMBUSO VIRONIC MAKALUZA</b>	<b>Twenty-Fourth Respondent</b>
<b>NOSIPHO AUDREY KATTYA</b>	<b>Twenty-Fifth Respondent</b>
<b>ANEZIWE TSIPA</b>	<b>Twenty-Sixth Respondent</b>
<b>ZODWA TETYANE</b>	<b>Twenty-Seventh Respondent</b>

<b>VUYANI MAYIBENYE</b>	Twenty-Eighth Respondent
<b>SIYOLISE SITHANGA</b>	Twenty-Ninth Respondent
<b>BABALWA MBOKODI</b>	Thirtieth Respondent
<b>NOLOYISO ANELISA MIRANDA MXONYWA</b>	Thirty-First Respondent
<b>ZIKHONA NDWEBI</b>	Thirty-Second Respondent
<b>NOMFUNDO MNTUYEDWA</b>	Thirty-Third Respondent
<b>NO-ONEST MVELO</b>	Thirty-Fourth Respondent
<b>NOWAM YOBO</b>	Thirty-Fifth Respondent
<b>NOZIBELE SIKADE</b>	Thirty- Sixth Respondent
<b>LUSANDA MPHIKISWA</b>	Thirty-Seventh Respondent
<b>THANDISWA NOYILA</b>	Thirty-Eighth Respondent
<b>NIWE MADYIBI</b>	Thirty-Ninth Respondent
<b>ZIKHONA QWABE (nee MPOFU)</b>	Fortieth Respondent
<b>THEMBISA SIPHETHUKANA</b>	Forty-First Respondent
<b>NELISWA MBOLA</b>	Forty-Second Respondent
<b>NONESI MBUTUMA</b>	Forty-Third Respondent
<b>VOYI VUYISWA</b>	Forty-Fourth Respondent
<b>NOWETHU C. THAFENI</b>	Forty-Fifth Respondent
<b>NELISWA MTUTUZELI</b>	Forty-Sixth Respondent
<b>NOKULUNGA SOMTHI</b>	Forty-Seventh Respondent
<b>NOSANGE GLADILE</b>	Forty-Eighth Respondent
<b>YONELA SAHLULO</b>	Forty-Ninth Respondent
<b>ASIPHE GOGOSE</b>	Fiftieth Respondent
<b>SANDISILE MATOWANE</b>	Fifty-First Respondent
<b>DUDULA INC.</b>	Fifty-Second Respondent
<b>W LANGSON &amp; ASSOCIATES</b>	Fifty-Third Respondent

<b>MJULELWA INC.</b>	<b>Fifty-Fourth Respondent</b>
<b>WIM KRYNAUW ATTORNEYS</b>	<b>Fifty-Fifth Respondent</b>
<b>ZYN NDZABELA INC.</b>	<b>Fifty-Sixth Respondent</b>
<b>AKHONA PELE ATTORNEYS</b>	<b>Fifty-Seventh Respondent</b>
<b>MGWESHE NGQELENI INC</b>	<b>Fifty-Eighth Respondent</b>
<b>M DAYIMANI INC.</b>	<b>Fifty-Ninth Respondent</b>
<b>DAYIMANI SAKHELA INC.</b>	<b>Sixtieth Respondent</b>
<b>Mc WILLIAMS &amp; ELLIOTT ATTORNEYS</b>	<b>Sixth-First Respondent</b>
<b>MT KLAAS ATTORNEYS</b>	<b>Sixty-Second Respondent</b>
<b>MPENDULO STOYILE ATTORNEYS</b>	<b>Sixty-Third Respondent</b>
<b>MPAMBANISO ATTORNEYS</b>	<b>Sixty-Fourth Respondent</b>
<b>CINGA NOHAJI INC.</b>	<b>Sixty-Fifth Respondent</b>
<b>O JOUBERT ATTORNEYS</b>	<b>Sixty-Sixth Respondent</b>
<b>T A NKELE AND SONS INC</b>	<b>Sixty-Seventh Respondent</b>
<b>WT MNQANDI &amp; ASSOCIATES</b>	<b>Sixty-Eighth Respondent</b>
<b>CAPS PANGWA &amp; ASSOCIATES</b>	<b>Sixty-Ninth Respondent</b>
<b>NONXUBA INC.</b>	<b>Seventieth Respondent</b>
<b>S BOOI &amp; SONS</b>	<b>Seventy-First Respondent</b>
<b>NTYATYEKA ATTORNEYS</b>	<b>Seventy-Second Respondent</b>
<b>NIEHAUS Mc MAHON</b>	<b>Seventy-Third Respondent</b>
<b>FUNKA SICITHI</b>	<b>Seventy-Fourth Respondents</b>
<b>MSITSHANA &amp; ASSOCIATES</b>	<b>Seventy-fifth Respondent</b>
<b>BONGIWE MAPETU</b>	<b>Seventy-Sixth Respondent</b>
<b>NCEBAZAKHE MPOFOLWANA</b>	<b>Seventy-Seventh Respondent</b>
<b>WELEKAZI GOWANA</b>	<b>Seventy-Eighth Respondent</b>
<b>NOXOLO MATROKO</b>	<b>Seventy-Ninth Respondent</b>

<b>AMANDA THEMBI PETER</b>	Eightieth Respondent
<b>ANDISWA NGOXOZA</b>	Eighty-First Respondent
<b>KHUNJULWA PAYI</b>	Eighty-Second Respondent
<b>NOSIPHO SANDI</b>	Eighty-Third Respondent
<b>N. GAMEDE ATTORNEYS</b>	Eighty-Fourth Respondent
<b>LULEKA QHUPA</b>	Eighty-Fifth Respondent
<b>NOSIPHIWO MTHI</b>	Eighty-Sixth Respondent
<b>PERSONAL INJURY PLAINTIFF LAWYERS ASSOCIATION ('PIPLA')</b>	Eighty-Seventh Respondent

*Summary – Stay of execution of judgment – common law and s 173 of Constitution – rule 45 of rules of court – delictual debt arising from medico-legal claim – s 3 of State Liability Act, 20 of 1957 – attachment of right title and interest to credit balance in bank account of government department – duties of accounting officer and treasury – Public Finance Management Act, 1 of 1999 – finality of judgments – variation of final orders – once and for all rule – development of common law.*

## **JUDGMENT**

**EKSTEEN J:**

[1] *"I can get no remedy against this consumption of the purse: borrowing only lingers and lingers it out, but the disease is incurable".*<sup>1</sup> The despairing cry resonates through the applicants' case. The third applicant, the Member of the Executive Council for Health, Eastern Province (the MEC for Health), and the fourth applicant, the Head of the Department of Health, Eastern Cape (the HOD for Health) lament that they struggle to meet their Constitutional obligations in the face of their deteriorating

<sup>1</sup> *William Shakespeare: Henry IV, Part 2*

financial wellbeing, which they ascribe to the ever increasing, never ending burden of medico-legal claims. They have, from time to time, received additional grants from national government, but they contend, that due to the parlous state of the public purse, there is no prospect of further grants. Accordingly, they sought an interim interdict to suspend the execution of all judgments by judgment creditors with delictual damages awards arising from medico-legal claims.

[2] The application was initially launched as an urgent application on 21 July 2021, but it was postponed on several occasions. The urgency of the application dissipated, as the respondents gave an undertaking not to proceed with execution, pending a decision by this court. A significant number of plaintiff respondents and attorney respondents entered an appearance to oppose, and further respondents were joined at the instance of the applicants. The eighty-seventh respondent, the Personal Injury Professional Lawyers Association (PIPLA) were granted leave to join as a respondent. Chance at Life and the Medical Malpractice Lawyers Association were admitted as *amici curiae*.

[3] The application was brought in two parts. At this stage only part A of the application is before us for determination. In it the applicants sought to interdict various respondents (the plaintiff respondents) who have obtained judgment against the MEC for Health for delictual damages, arising from the negligence of their employees, from executing, save to the extent set out later, against any immovable or movable property, whether corporeal or incorporeal, of the Eastern Cape Department of Health (the ECDOH). They further sought to interdict the attorneys (the attorney respondents), who had acted for the plaintiff respondents in the underlying litigation, from recovering

fees in excess of R125 000,00 from their clients. The relief in part A was in the form of an interim interdict, pending the finalization of part B, and the applicants said that they sought the relief in terms of the common law and s 173 of the Constitution<sup>2</sup>, alternatively, in terms of rule 45A of the Uniform Rules of Court (the rules).

[4] The purpose of the interim interdict, they said, was to enable them to vary the terms of the final orders made in favour of the plaintiff respondents. Thus, they sought an order that the MEC for Health and the HOD for Health "be directed" to endeavor to conclude agreements with the plaintiff respondents to pay the judgment debts in instalments and, failing such agreement, to bring an application for the variation of the court orders to permit instalment payments in a manner that does not disrupt or materially impede the delivery of medical and emergency services at public health facilities in the Eastern Cape. They said that they would seek a further suspension of all execution proceedings pending the final determination of such applications for variations.

[5] It is necessary to transverse briefly the history of the application. The relief sought has morphed over time. At first, the applicants tendered to permit each plaintiff respondent to attach R500 000,00 of its Paymaster General account (PMG account)<sup>3</sup>, of which no more than R125 000,00 was to be paid to the attorney respondents in respect of legal fees, to which they were contractually entitled, and suggested that the remaining R375 000,00 would be sufficient to pay for any urgent medical attention required by them, or by persons on behalf of whom actions had been instituted (the

<sup>2</sup> The Constitution of the Republic of South Africa, 1996

<sup>3</sup> The function of the PMG account is set out in para [28] and [29] of the judgment.

injured parties). They tendered that any further urgent medical services required by such persons, over and above those services which are paid for by the R375 000,00, must be delivered by the applicants' facilities, failing which respondents may, on five days' notice, approach the high court for relief.

[6] As I have said, the application was postponed from time to time and, in November 2021, the applicants amended their notice of motion to include, as the main relief, a declaratory order that any attachment of the ECDOH's PMG account, in execution was unlawful.<sup>4</sup> The declaratory relief is final, both in form and effect, and involves the interpretation of statutory provisions. Accordingly, the interim relief adumbrated earlier, was sought in the alternative to the declarator.

[7] During the course of the argument of the application, Ms *Bawa*, on behalf of the applicants, advised that they would no longer seek the relief set out in the notice of motion but, in its stead, she proposed three alternative draft orders. The first would apply to the declaratory relief, to which I revert. Annexed to the second draft order was a table that recorded the judgment debts due to each of the plaintiff respondents and a schedule of proposed annual instalments, which the applicants intended to pay in order to settle the judgment debts. The number of instalments varied from two annual payments to ten, depending on the magnitude of the award. The applicants said that the relief claimed in the second draft would be interim, pending the determination of part B of the application<sup>5</sup>. In it they sought to interdict the respondents from issuing writs or attaching the ECDOH's provincial revenue fund or the PMG

<sup>4</sup> The declaratory relief sought is set out in para [27] of the judgment.

<sup>5</sup> The relief sought in part B is described in para [10] of the judgment.

account, or issuing writs and attaching and removing, or continuing with the attachment and removal of any immovable or movable property in possession of the HOD for Health or the Premier of the Eastern Cape.<sup>6</sup> In addition they sought the following further relief:

- \*3. The ... Applicants, are directed ... to make further endeavours to conclude agreements with the (plaintiff respondents) to pay their damages or awards in instalments in terms of section 3(10) of the State Liability Act ... within 60 days of this order, failing such agreement to bring an application for variation of such awards to permit instalment payments, and to take all other necessary steps to address the payments of such awards in a manner that does not prevent, nor have the consequence, directly or indirectly of impeding the delivery of medical and emergency services at Fourth Applicant's health facilities and which also does not impede the treatment required for the Plaintiff, or any person on whose behalf the Plaintiff had instituted the action;
4. The First Applicant is directed to report to Court in 60 days and every 60 days thereafter in relation to any agreements concluded with plaintiffs in relation to the orders and writs already in existence, or in the absence of any such agreements being concluded, any variation applications instituted in respect of such orders as granted;
5. ... that any urgent medical services required by the (plaintiff respondents) or persons on whose behalf they had instituted the medico-legal claim, arising from such claims, over and above those services which are paid for by the amounts listed in the columns headed '*Current year*' and '*Plus 1*' in Annexure "A", must be delivered by the Fourth Applicant's facilities, failing which, such Respondent/s may, on 5 days' notice, or on any other lesser notice, as is necessary, depending upon the urgency of the situation,

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<sup>6</sup> The schedule was prepared in 2021 reflecting an initial payment in 2021 (the current year) and a second payment in 2022 (plus one). The interim interdict contained in the second draft order is subject to the payment of these two annual instalments before 31 May 2022.

on notice to the Second and Third applicant, and service at the office of the Premier Building, ... approach this Court for further relief."

[8] In the third alternative draft order the applicants said that they would seek a final order that, subject to the payment of an initial amount by 31 May 2022, the execution of the judgments in favour of the plaintiff respondents be stayed for a period of one year and they made a similar tender in respect of the urgent medical treatment required by the plaintiff respondents, or injured parties.

[9] As I have said, the application was argued almost nine months after it had been launched. In the interim the applicants have tried to negotiate with the plaintiff respondents to pay their debt in instalments. Those who are inclined to do so have concluded agreements with the applicants, which have been made orders of court. The remainder have rejected the applicants' approaches. There can be no purpose for an order now directing the applicants to endeavor to conclude agreements with the remaining plaintiff respondents. In any event, the applicants do not require an order of court to negotiate with them. Such a prayer can accordingly not be sustained.

[10] The relief which the applicants ultimately sought in part A relates only to final orders already granted in favour of the plaintiff respondents and writs already issued. By contrast, in part B the applicants seek relief only in respect of "any further orders" that a court may grant in future in favour of a plaintiff. Usually the purpose of an interim interdict is to preserve or restore the status quo, pending the final determination of the rights of the parties. Whereas part B relates only to future, or incomplete litigation, the suggestion of an interim interdict, pending the resolution of part B is curious. What the applicants really sought, as is evident from the papers and the argument before us, is

an interim interdict pending an application to vary the final orders granted against them. I shall approach the application thus.

### Background

[11] The applicants said that they had brought the application in their own interest and in the interests of all persons requiring health services in the Eastern Cape. They explained that medical negligence claims, particularly claims arising from birth injuries, and consequent cerebral palsy, have rapidly increased in recent years and they continue to escalate. These claims, by their nature, are generally large claims and judgment debts arising from these claims, which are not budgeted for, have had a devastating effect upon the already parlous state of the ECDOH's finances. The ECDOH has an annual budget of R26.43 billion, however, in her budget speech for 2022, the MEC for Health explained that, if one considers the projected over expenditure on cost of employment for 2022 and the accruals and payables from 2020/2021, the available budget for the ECDOH for 2021/2022 financial year becomes R21.3 billion, of which R17.9 billion, or 84%, is for the cost of employment. In the result, the ECDOH has approximately R3.4 billion to render public health care services to the Eastern Cape.

[12] They said that they were constitutionally bound to respect, promote, protect and fulfil the rights in the Bill of Rights<sup>7</sup> and to take reasonable legislative and other measures, within their available resources, to achieve the realization of the right to access to health services.<sup>8</sup> They explained that they are not permitted to refuse

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<sup>7</sup> Section 7(2) of the Constitution

<sup>8</sup> Section 27(1)(a) and s 27(2) of the Constitution

anyone emergency medical treatment<sup>9</sup> and they are bound to ensure every child's right to basic health care services.<sup>10</sup>

[13] During the financial year 2020/2021 writs in execution pursuant to judgment debts arising from medico-legal claims amounted to more than R921 million. These writs were issued against, and paid from, the PMG account. When the application was argued before us an amount of R397 million was due to the plaintiff respondents in respect of judgment debts, which had accumulated from judgments delivered over a period from 2019 to mid-2022, and the department estimated that a contingent liability of R38.67 billion existed in respect of unresolved claims.

[14] The head of the Eastern Cape Department of Provincial Treasury (HOD for treasury) explained that due to the country's precarious financial position no further financial assistance, beside the Eastern Cape's ever diminishing equitable share of the national revenue, will be forthcoming from national treasury. The applicants, accordingly, contended that payment of the existing judgment debts may lead to the total collapse of health services in the Eastern Cape.<sup>11</sup> The collapse of health services, they said, threaten the Constitutional rights of all persons that have existing or potential claims, suffer illnesses or injuries and receive health care in the Eastern Cape.

<sup>9</sup> Section 27(3) of the Constitution

<sup>10</sup> Section 28(1)(c) of the Constitution

<sup>11</sup> In respect of the contingent liabilities the applicants have instructed their legal representatives to raise a public health defence in respect of future medical expenses and to seek orders developing the common law to provide for payments in instalments in respect of such claims. They will be dealt with in the individual trials as and when they arise.

[15] The financial constraints imposed on the ECDOH are real and the potential impact thereof is cause for concern. Excessive medical malpractice litigation against the State may, indeed, potentially undermine its ability to provide public health care.<sup>12</sup> However, the symbol of justice is a pair of scales, which requires the particular circumstances of each plaintiff respondent to be weighed.

[16] The plaintiff respondents are primarily indigent, rural citizens of the Eastern Cape and the vast majority of claims arise from cerebral palsy inflicted upon children through birth injuries, by the negligence of employees of the ECDOH. The issue of “excessive litigation” does not arise in respect of the relief sought in part A of the application. The applicants accept that the litigation in each case was justified, the finding of their negligence is not disputed and the validity and binding effect of the judgments is not challenged. I shall revert to the plight of the injured parties.

#### The Statutory Regime

[17] It is instructive, before I proceed to consider the predicament of the applicants, to explore the statutory context which finds application to the financial issues in this case. Section 27 of the Constitution provides for everyone to have a right to access to health care services, including reproductive health care. It imposes an obligation on the State to take reasonable legislative, and other measures within its available resources, to achieve the progressive realisation of such rights. Health services is a functional area of concurrent national and provincial legislative competence.<sup>13</sup>

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<sup>12</sup> AB Wessels: *“The Expansion of the State’s Liability for Harm Arising from Medical Malpractice: Underlying Reasons, Deleterious Consequences and Potential Reform”* (2019) 1 TSAR 1 at 15, referred to by the Constitutional Court in *MEC for Health, Gauteng v PN* [2021] ZACC 6; 2021 (6) BCLR 584 (CC)

<sup>13</sup> Schedule 4 to the Constitution

Pursuant to the obligation conferred in s 27(2) of the Constitution, parliament passed the National Health Act (the Health Act),<sup>14</sup> which confers the responsibility for the delivery of health services on the provincial health departments.<sup>15</sup>

[18] In order to fulfill its obligations and to deliver services to the people of the Eastern Cape, the Eastern Cape Government is funded, partly by its equitable share and allocation of revenue from national government,<sup>16</sup> and partly from funds it raises.<sup>17</sup> All money received by a provincial government must be paid into the Provincial Revenue Fund (PRF).<sup>18</sup> The PRF is controlled by the Provincial Treasury<sup>19</sup> (treasury) and money may only be withdrawn from the PRF in terms of an appropriation by a provincial act (or as a direct charge against the fund in circumscribed circumstances).<sup>20</sup>

[19] The equitable share received from national government is determined each year by a Division of Revenue Act (DORA). Once it is received, the first applicant (MEC for Finance) is required to present a budget to the provincial legislature which must pass legislation to appropriate the funds to various departments in order to provide for the needs of the province.<sup>21</sup> The budget must meet certain minimum requirements.<sup>22</sup> It must contain, *inter alia*, proposals for the financing of any anticipated deficit for the particular year and provide an indication as to how the

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<sup>14</sup> Act 61 of 2003

<sup>15</sup> Section 25 of the Health Act

<sup>16</sup> Section 214 of the Constitution

<sup>17</sup> Section 228 as read with s 227(2) of the Constitution

<sup>18</sup> Section 226(1) of the Constitution, s 22 of the Public Finance Management Act, 1 of 1999 (PFMA)

<sup>19</sup> Section 21(1) of the PFMA

<sup>20</sup> Section 226(2) of the Constitution and s 21(1)(b) of the PFMA

<sup>21</sup> Section 26 and 27(2) of the PFMA

<sup>22</sup> Section 27(2) and (3) of the PFMA

province intends to deal with any public liability that will increase public debt during that financial year and future financial years.<sup>23</sup> As adumbrated earlier, once an appropriation has been made money may only be withdrawn from the PRF in accordance with the appropriation. In respect of the ECDOH, money appropriated to it is transferred into its PMG account to which it then has access.

[20] The finances of the ECDOH resort under the control of the accounting officer, the HOD for Health<sup>24</sup>. He or she is obliged to take into account all relevant considerations, including issues of propriety, when proposals affecting his responsibilities are considered and, when necessary, to bring those considerations to the attention of the responsible executive authority.<sup>25</sup> His general responsibilities are set out in s 38 of the Public Finance Management Act (PFMA) and include:

- (i) The duty to ensure that the department has and maintains an effective, efficient and transparent system of financial and risk management and internal control<sup>26</sup>;
- (ii) The management of the liabilities of the department<sup>27</sup>; and
- (iii) The payment of all money owing within the prescribed or agreed period.<sup>28</sup>

[21] In the context of judgment debts the system of financial and risk management,<sup>29</sup> and the prescribed or agreed periods for payment,<sup>30</sup> emerge from the State Liability Act, as amended (the SLA),<sup>31</sup> to which I revert hereafter.

<sup>23</sup> Section 27(3)(g) and (h), as read with s 18(1)(c) of the PFMA

<sup>24</sup> In terms of s 36(1) of the PFMA every department must have an accounting officer and s 36(2) provides that it would usually be the head of the department.

<sup>25</sup> Section 38(1)(i)

<sup>26</sup> Section 38(1)(a)(i)

<sup>27</sup> Section 38(1)(d)

<sup>28</sup> Section 38(1)(f)

<sup>29</sup> As envisaged in s 38(1)(a)(i) of the PFMA

<sup>30</sup> As envisaged in s 38(1)(f) of the PFMA

<sup>31</sup> Amended by Act 14 of 2011

[22] In addition to his general responsibilities the accounting officer is required to ensure that effective and appropriate steps are taken to prevent unauthorised expenditure<sup>32</sup> and, to this end, he must report any impending shortfalls in budgeted revenue to the executive authority and the relevant treasury.<sup>33</sup> He is guilty of financial misconduct if he willfully or negligently fails to comply with sections 38 or 39 or permits unauthorised expenditure.<sup>34</sup> Where such financial misconduct is willful or grossly negligent it is an offence punishable with imprisonment of up to five years.<sup>35</sup>

[23] As previously indicated, this case is concerned with the execution of judgments in favour of the plaintiff respondents. The judgments are common cause and the applicants said that they recognize the validity and binding effect of the judgments. None have been rescinded or appealed and many arise from settlement agreements concluded by the MEC for Health. The judgments have not been satisfied and a number of plaintiff respondents have issued writs of execution, notably for the attachment of the MEC for Health and the HOD for Health's rights, title and interest in the PMG account.

[24] Execution of judgment debts against the state is governed by the SLA.<sup>36</sup> It lays out the structural scheme created to ensure satisfaction of a judgment debt against the state.<sup>37</sup> Where a judgment is entered against a department, as in each instance

<sup>32</sup> Section 39(1)(b) of the PFMA

<sup>33</sup> Section 39(2)(b)(ii) of the PFMA

<sup>34</sup> Section 81(1) of the PFMA

<sup>35</sup> Section 86(1) of the PFMA

<sup>36</sup> Act 20 of 1957, as amended from time to time

<sup>37</sup> The heading to Act 14 of 2011 (The State Liability Amendment Act) records: "To amend the State Liability Act ..., so as to regulate the manner in which a final court order sounding in money against the State must be satisfied".

in this case, the accounting officer is obliged to pay the judgment debt from the appropriated budget, within 30 days of the final judgment, unless a different period is agreed with the judgment creditor.<sup>38</sup> If the accounting officer fails to pay, whether in dereliction of his duty or as a result of insufficient funds in the appropriated budget, the judgment creditor may bring the judgment to the attention of the executive authority, the state attorney and treasury.<sup>39</sup> Treasury is then obliged to pay the debt within 14 days of receipt of the judgment, in the prescribed manner, unless, in the event of the insufficient funds, he has made an acceptable arrangement with the judgment creditor.<sup>40</sup> In order to do so, he is mandated by s 18(2)(i) of the PFMA to do anything that is necessary to fulfill his responsibilities. If treasury satisfies the judgment debt it must record this fact and debit the amount thereof against the appropriated budget of the department concerned.<sup>41</sup> In the event that there are insufficient funds available in the appropriated budget of the department for the current year, treasury is empowered to debit the payment to the appropriated budget for future years.<sup>42</sup>

[25] The accounting officer is obliged to put in place appropriate budgeting procedures, in accordance with instructions issued by the relevant treasury,<sup>43</sup> in order to ensure the timeous satisfaction of final court orders.<sup>44</sup> These budgeting procedures must include measures for the appropriate identification and recording of potential contingent liabilities which may arise as a result of claims which have been instituted

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<sup>38</sup> Section 3(3)(a) and (b) of the SLA and s 38(1)(f) of the PFMA

<sup>39</sup> Section 3(4) of the SLA

<sup>40</sup> Section 3(5) of the SLA

<sup>41</sup> Section 3(11) of the SLA

<sup>42</sup> Section 3(12) of the SLA

<sup>43</sup> Section 18(2)(a) of the PFMA empowers treasury to issue instructions which are not inconsistent with the PFMA

<sup>44</sup> Section 3(15)(a) of the SLA

against the department.<sup>45</sup> An accounting officer who fails to comply with this duty is guilty of financial misconduct,<sup>46</sup> and the satisfaction of the judgment debt by treasury does not absolve him of liability for his misconduct.<sup>47</sup>

[26] If both the accounting officer and the relevant treasury fail to satisfy the judgment debt, the judgment creditor may proceed, in the prescribed manner, to execution of the judgment against movable property owned by the state and used by the department concerned.<sup>48</sup> Unless agreement can be reached in respect of the movable property which may not be attached and sold,<sup>49</sup> the SLA permits the attachment of "any movable property". The plaintiff respondents in this case have judgments outstanding and unpaid, which have accumulated over several years starting in 2019. As I have said, some of the judgment creditors have attached the applicants' PMG account, which self-evidently, has serious implications that may impact upon the ability of the MEC for Health and the ECDOH to deliver services in the execution of their Constitutional mandate. Hence the application.

#### Declaratory Relief

[27] I turn to the declaratory relief sought, which, as adumbrated earlier, is a purely legal issue. The applicants seek the following orders:

- "2. Declaring that the State Liability Act 20 of 1957 does not permit writs to be issued against the Third and Fourth Applicant's right, interest and title in its

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<sup>45</sup> Section 3(15)(b) of the SLA

<sup>46</sup> Section 3(16) of the SLA

<sup>47</sup> Section 3(13)(b) of the SLA

<sup>48</sup> Section 3(5)-3(9) of the SLA

<sup>49</sup> Section 3(7)(b) and (c) of the SLA

Pay Master General Bank Account ... held at the Third Respondent (ABSA Bank);

3. Declaring that all current and future writs issued against the PMG account are unlawful and invalid;
4. Setting aside the writs issued by or on behalf of the Tenth to Sixteenth, Eighteenth to Twenty-Fourth, Twenty-Sixth to Twenty-Ninth, Thirty-Second to Thirty-Fourth, Thirty-Sixth to Thirty-Seventh, Thirty-Ninth to Seventy-Second, Seventy-Fourth to Eighty-Sixth Respondents and by any other plaintiffs who have obtained writs (which remain unsatisfied) against the PMG account;
5. Interdicting the Sixth to Ninth Respondents and any other Sheriff of the Court from issuing or executing writs against the<sup>50</sup> PMG account."

The relief sought in paragraphs 4 and 5, they said, would flow from the declarators in paragraphs 2 and 3. As this relief is final, both in form and in substance, and is purely a matter of law, it is convenient to consider these prayers before proceeding to the main relief which has bearing also on the movable property used by the department.

[28] The issue was first raised in the replying papers where it was sought to categorise the PMG account as a subsidiary account of the PRF and it was therefore contended that withdrawals from the PMG account could only occur in accordance with s 226 of the Constitution and s 22 of the PFMA. Neither the Constitution nor the PFMA makes reference to a PMG account. On the applicants own averments, however, the argument cannot be sustained. In its founding papers the second applicant, who attested to the founding affidavit on behalf of all the applicants,

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<sup>50</sup> The sixth to ninth respondents are sheriffs who have made attachments on the PMG accounts.

articulated the harm which the ECDOH would suffer if writs of attachment were issued against the PMG account. He identified the harm as follows:

- "1. ... the ECDOH will effectively lose control of its bank account;
2. the ECDOH will not be able to pay its suppliers and service providers and as a result, services and suppliers will be impeded, and ultimately halted;
3. ABSA will potentially place a stop on payments to suppliers, where writs are issued; and
4. ... the removal of such funds from the ECDOH's bank account will wreak havoc on the ECDOH placing it in a position where it will be unable to execute its constitutional obligations ...."

(Emphasis supplied)

[29] In the replying affidavit he explained that treasury has an exchequer account,<sup>51</sup> which has sub-accounts known as PMG accounts. Each department's allocation is deposited into its own PMG account for the requirements of the respective departments. The ineluctable conclusion is that the monies allocated to the various departments, in terms of the Provincial Appropriation Act, are withdrawn from the PRF and paid over to the account of the department concerned, as envisaged in s 226(2)(a) of the Constitution and s 21(1)(b) of the PFMA. The PMG account, is accordingly, not an account protected under s 226 of the Constitution.

[30] In *Ikamva*<sup>52</sup> a full court of this division was called upon to consider the issues raised in support of the declaratory relief, in particular whether the MEC for Health's

<sup>51</sup> The account envisaged in s 21(2) of the PFMA

<sup>52</sup> *The MEC for the Department of Public Works and Others v Ikamva Architects and Others*, a judgment of the full court of this division delivered on 17 March 2022 (case number 235/2021) [2022] ZAECHC 6

right, title and interest in the PMG account was susceptible to attachment in execution. The core argument for the applicants was that, on a proper construction of the SLA, it permitted attachment only of corporeal movable assets. The full court embarked upon a detailed analysis of the relevant provisions of the SLA. It found that, as a matter of interpretation, there was nothing in s 3 that points to a conclusion that "movable property" must be limited to corporeal movables.<sup>53</sup> It proceeded to conclude:

"The attachment of a judgement debtor's right to monies in a banking account is authorised by Uniform Rule 45(8). It provides that an attachment of an incorporeal right is only complete when the sheriff has given notice of the attachment to all the interested parties, and has taken possession of the writing or document that evidences the judgement debtor's ownership of the right. The requirements for a complete and effective attachment of the right in a banking account are not inconsistent with the process of execution prescribed by section 3 of the Act in that they:

- (a) allow the sheriff not to remove the attached property immediately;
- (b) enable the sheriff and the relevant state or provincial department to instead agree on the property to be attached, removed and sold in execution;
- (c) do not immediately deprive the relevant department of its use of the property, avoiding the potential for the disruption of service delivery obligations; and
- (d) provide for the sale of the right of the judgement debtor at a sale in execution to the highest bidder as envisaged in section 3 of the Act.

Provided that the monies standing to the credit of a state or provincial department are capable of being identified as monies which are being 'used' by the department concerned, in that it had been appropriated to the vote of that department, an attachment, as envisaged in Uniform Rule 45(8) accordingly does not appear to conflict with the framework provided by s 3 of the Act."<sup>54</sup>

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<sup>53</sup> At para [41]

<sup>54</sup> At para [46]

[31] The finding of the full court is decisive of the relief sought in these paragraphs and binding on this court, a full court of the same division, unless I am persuaded that it is clearly wrong. Ms *Bawa*, for the applicants, urged me to conclude that it was. Two contentions for this conclusion were advanced. First, that adopting the accepted approach to the interpretation of statutes, and viewing the provisions of the SLA in their context, they clearly provide for the attachment of corporeal movables only. Secondly, it was contended that the full court had erred in having regard to the provisions of rule 45(8) in seeking to interpret the provisions of the SLA.

[32] The full court correctly recognized the approach to the interpretation of statutes set out in *Endumeni*,<sup>55</sup> where the SCA stated:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.”<sup>56</sup>

[33] It is convenient to consider first the material known to parliament at the time of the promulgation of the amendment to the SLA. In common law, incorporeal property

<sup>55</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

<sup>56</sup> *Endumeni* at para [18]

has, since time immemorial, been susceptible to attachment in execution.<sup>57</sup> Thus, in *Snow*<sup>58</sup> the SCA remarked:

"Some trite observations may be necessary to introduce a discussion of the subject. Rights in relation to the (contractual) performance (*obligatio*) of another have since time immemorial been classified as incorporeal. The obligation of the debtor is not property; it is the right (often referred to as the 'action') of the creditor. Obligations can therefore not be attached because they do not form part of the patrimony of the creditor, whereas rights can be attached and do form an asset in the estate of the creditor."

[34] Incorporeal property was, in common law, classified as movable or immovable. In *Ex Parte Master of the Supreme Court*<sup>59</sup> Innes CJ, reliant on *Voet*,<sup>60</sup> held that incorporeal rights should, wherever possible, be divided into movable or immovables.<sup>61</sup> The necessity for such a classification derives from the fact that Roman-Dutch law adopted the Roman classification of corporeals and incorporeals, as well as the Germanic distinction between movable and immovable property.<sup>62</sup> The practical importance of the distinction between movable and immovable incorporeal property in South African law includes the fact that on attachment in execution, a judgment debtor's movable property is attached first and, only if it is insufficient to satisfy the judgment debt, can execution be levied against his or her immovable

<sup>57</sup> *Voet* 42.1.42

<sup>58</sup> *MV Snow Delta: Serva Ship Limited v Discount Tonnage Limited* 2000 (4) SA 746 (SCA) at 753E-F

<sup>59</sup> 1906 TS 563 at 566

<sup>60</sup> 1.8.18

<sup>61</sup> The decision has been criticized on the ground that Innes CJ failed to have regard to other portions of the writings of *Voet*, in particular, 1.8.29. However, the decision has remained uncontradicted for more than hundred years.

<sup>62</sup> *CG van der Merwe: Sakereg* (2<sup>nd</sup> ed) at 41; *Wille's Principles of South African Law* (9<sup>th</sup> ed) at 421 and *The Law of South Africa* (2<sup>nd</sup> ed) volume 27 para [46]

property.<sup>63</sup> The right title and interest in a credit balance in a bank account is an incorporeal movable asset, susceptible to attachment.<sup>64</sup> The legislature must accordingly be deemed to have known, when the SLA was adopted that movable assets, generally, include incorporeal movable assets, for purposes of execution.

[35] The apparent purpose of the provisions in s 3(5), (6) and (7) emerges from the circumstances giving rise to the amendment of the SLA and the incorporation of the amended s 3, in its current form, in 2011. Prior to the amendment of the SLA, it provided that no execution, attachment or like process was permitted against property of the state. In *Nyathi*<sup>65</sup> the Constitutional Court held the provisions of the SLA (in its unamended form) did not treat judgment creditors as equal before the law. It emphasized that the effect of sections 8, 34 and 165 of the Constitution, in particular s 165 (5), was that an order issued by a court is binding on all persons to whom, and organs of state to which, it applies. These provisions of the Constitution do not treat state litigants differently from private litigants. It held, accordingly, that s 3 of the SLA was unconstitutional because it effectively prevented private litigants from executing effectively on a judgment legitimately obtained against the state. The apparent purpose of the amended s 3 is, accordingly, as the heading of the section suggests, to ensure the satisfaction of final court orders against the state, sounding in money.

[36] The structure of the SLA, and the context in which s 3(6), (7) and (8) appear, has been set out earlier. The SLA prescribes that a judgment debt must be paid from the appropriated budget of the relevant department, which, as I have said, is held in

<sup>63</sup> *Wille's Principles* at 424; *Sakereg* at 46-47 and *LAW/SA* at para [46]

<sup>64</sup> *Bobroff and Another v National Director of Public Prosecutions* 2021 (2) SACR 53 (SCA) at para [10]

<sup>65</sup> *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Another* [2008] ZACC 8

the PMG account of the ECDOH. Where both the accounting officer of the ECDOH and treasury have failed to comply with their obligations in terms of the SLA, s 3(6) to (9) provides for the attachment and sale in execution of movable property. Failing agreement on the movable property which may not be attached the sheriff is authorised to attach "any movable property". Adopting the approach to the interpretation of statutes set out in *Endumeni*, and viewing these provisions against the backdrop of *Nyathi*, and in the context in which they appear in the SLA, it would be inimical to the structure of the SLA to exclude the single asset, which has been specifically identified in the SLA as the source from which the debt is to be paid, from the movable property that is available for attachment. For these reasons I am unpersuaded that the full court was "clearly wrong" in *Ikamva*. On the contrary, I consider that they were correct.

[37] I do not understand the judgment in *Ikamva* to mean that the full court had recourse to rule 45(8) to interpret the provisions of the SLA. Rather, having ascertained the meaning of the SLA, it noted that s 3(9) provided for the application of the rules of court and that rule 45(8) permits the attachment of money held in a bank account. Even if I err in my understanding of the judgment, for the reasons set out earlier, I am not persuaded that the conclusion reached in *Ikamva* is wrong. The declaratory relief sought can therefore not be sustained.

#### Cause of Financial predicament

[38] I revert to the applicants' financial embarrassment. As adumbrated earlier, they ascribe their financial woes to medico-legal claims, which undeniably have escalated dramatically, not only in the Eastern Cape, but throughout the country. It is indeed

cause for concern and, as I shall show later, the Constitutional Court has foreshadowed the possible development of our law to ameliorate the effect thereof on the fiscus and public health care.

[39] The applicants acknowledge that the difficulty should preferably be resolved by legislation, but they contend that they cannot be expected to wait for government to legislate given their prevailing predicament. They attribute their current embarrassment to numerous factors, including: the “excessive” litigation against the ECDOH; unscrupulous and dishonest attorneys; the incompetent and under resourced state attorney, particularly in the Mthatha office, who is unable to provide effective legal advice or representation; awards which have over-compensated plaintiffs in medico-legal matters; and the national government, which has failed to heed their call for legislative measures.

[40] The respondents, on the other hand, have attributed the ECDOH’s financial embarrassment to corruption, “state capture” and mismanagement.

[41] The state attorney is not a party before us and it is not appropriate for me to make findings in respect of their conduct when they have not had the opportunity to be heard. The election to legislate, or not to legislate, is a matter for parliament, not the courts. As I have said, neither the fairness of the awards to the plaintiff respondents, nor the conduct of their attorneys, are in issue in the application. The applicants accept the validity of all the judgments, and most resulted from settlement agreements. There is no attack on the judgments. There is also no evidence in the

papers to justify the sweeping suggestions of corruption or state capture and I do not intend to address these issues any further.

[42] Whilst the applicants firmly denied any suggestions of mismanagement, on their own version, the fiscal management of the ECDOH, and, indeed of treasury, is cause for grave concern.

[43] The HOD for treasury explained that the ECDOH is allocated a budget annually for its various programs. However, the ECDOH has instead, been spending an ever increasing portion of its allocated annual budget on the settlement of medico-legal claims, which has had the result of funds being shifted from other service delivery budget items in order to pay these claims, that are unbudgeted and unfunded. He proceeded to contend that the ECDOH is not permitted to budget for these payments as they are not categorised as health service delivery related items (in terms of s 27 of the Constitution) and they need to be legitimised by the SCOPA processes. He said that the ECDOH does not budget for medico-legal claims on the instructions of treasury. They preferred a consequence management approach.

[44] As a direct result of the conscious decision not to budget for these claims, any payment of a judgment debt constitutes an unauthorised expenditure in terms of the PFMA.<sup>66</sup> In his consolidated general report on national and provincial outcomes: PFMA 2019/2020, the Auditor-General reported:

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<sup>66</sup> Section 1 of the PFMA defines "unauthorised expenditure" to mean, *inter alia*, "expenditure not in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division".

"The poor internal control environment negatively affected the outcomes at the key service delivery departments of Health, Transport and Education, and transgressions of legislation at these departments had an adverse impact on how they spent the money allocated to them. At R1.59 billion, the unauthorised expenditure of the Eastern Cape is the highest of all the provinces. The Eastern Cape Department of Health made payments of R763 million relating to medical claims that were not budgeted for, which resulted in unauthorised expenditure. By year-end, the Department still had R36.75 billion in unpaid medical claims – the highest of all national and provincial auditees."<sup>67</sup>

[45] The HOD for treasury has explained that the R36.75 billion is a reference to contingent liability which has not yet arisen. The Auditor-General proceeded to express concern about the financial state of health in the provinces. He reported:

"Departments usually do not budget for claims. Especially in the health sector, not budgeting for medical negligence claims means that all successful claims will be paid from funds earmarked for the delivery of services, resulting in these departments using more than what had been allocated to them. The provincial health and education departments alone incurred R2.37 billion (79%) in unauthorised expenditure."<sup>68</sup>

[46] The suggestion of the HOD for treasury that the ECDOH is not permitted to budget for judgment debts is unfounded. Section 27 of the Constitution contains no line items. It provides for everyone to have a right to access to health care and obliges the state to take reasonable measures, within its available resources, to achieve the progressive realization of each of the rights set out in the section. The available resources are the difference between the income flow of the department and its liabilities. There is nothing in s 27 of the Constitution which prevents the ECDOH from

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<sup>67</sup> At p 16 of the report

<sup>68</sup> At p 61 of the report

budgeting for known liabilities and contingent liabilities. The PFMA<sup>69</sup> requires the HOD for Health to advise the MEC for Finance and the MEC for Health on policy proposals affecting his responsibilities. The preparation of the budget is central to his responsibilities. Where the payment of known debts, as outstanding judgment debts are, and contingent liabilities give rise to an anticipated deficit in the financial year, the MEC for Finance is obliged to set out proposals in his budget to meet these liabilities.<sup>70</sup> Where they would result in an increase in public liability during that financial year the MEC for Finance is obliged, in his budget, to provide an indication of his intentions regarding such liability.<sup>71</sup> The applicants are silent on the budget tabled by the MEC, but where they openly declared that they have taken a conscious decision not to budget for judgment debts it may be accepted that no provision was made in the budget for these liabilities, as required by the PFMA.

[47] As I have said, the finances of the ECDOH resort under the control of the accounting officer. He is obliged to budget for these liabilities.<sup>72</sup> His failure to do so constitutes financial mismanagement.<sup>73</sup> One of the central obligations of the HOD for Health is to prevent "unauthorised expenditure"<sup>74</sup> and a willful failure to do so constitutes an offence punishable by imprisonment of up to five years.<sup>75</sup>

[48] I have explained earlier that the treasury is entitled to issue instructions, provided that they are not inconsistent with the PFMA.<sup>76</sup> It is not empowered to issue

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<sup>69</sup> Section 38(1)(l)

<sup>70</sup> Section 27(3)(g) of the PFMA

<sup>71</sup> Section 27(3)(h) of the PFMA

<sup>72</sup> Section 3(15) of the SLA

<sup>73</sup> Section 3(16) and 3(13)(b) of the SLA

<sup>74</sup> Section 39(1) of the PFMA

<sup>75</sup> Section 86(1) of the PFMA

<sup>76</sup> Section 18(2)(a) of the PFMA

directives in conflict with the provisions of the PFMA. As adumbrated earlier, it is the failure to budget for judgment debts, as prescribed by the SLA, which results directly in unauthorised expenditure. An instruction not to budget for these known debts,<sup>77</sup> and for contingent debts, is an unlawful instruction.

[49] The conclusion is inescapable that the management of the finances of the Eastern Cape Government, and in particular the Eastern Cape Department of Health, falls far short of the standard demanded by the PFMA. The unlawfulness of the *modus operandi* was drawn to their attention by the Auditor-General as long ago as 2020. He concluded then, that the transgressions of legislation had an adverse impact on how the ECDOH spent the money allocated to them. The flagrant disregard for legislation designed to ensure proper financial planning of the fiscus is ominous. In the circumstances it is appropriate to refer this judgment to the National Director of Public Prosecutions to consider whether to institute a prosecution in terms of s 86 of the PFMA.

[50] Notwithstanding the disturbing financial mismanagement of ECDOH, the HOD of treasury said that even if the expenses had been budgeted for it would simply mean that less would be available from the inception to be allocated to the ECDOH's programs unless further funding was available. It is, of course, true of any enterprise that the payment of its debts will result in it having less money available for the implementation of its business. The current position has, at the very least been exacerbated by the continued failure to comply with the legislation. However, it is undeniably so that state coffers, including those of the Eastern Cape Government and

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<sup>77</sup> Judgments delivered in preceding years

the ECDOH, are under significant pressure. Whilst the applicants have clearly demonstrated the severe fiscal constraints imposed on the ECDOH, I do not think that its imminent collapse is reasonably anticipated. The SLA provides for the payment of judgment debts by the treasury, if the ECDOH fails or is unable to pay, and in the final analysis, health is a joint competency of national and provincial government. The obligation imposed by s 27 of the Constitution binds the national government as much as it does the applicants. Moreover, the Eastern Cape government has it within its power to raise revenue of its own.<sup>78</sup>

#### Application to vary orders of court

[51] As adumbrated earlier, the applicants, in part A of their notice of motion, sought an Interim interdict pending the finalisation of part B of the application. I have explained earlier that the relief now sought relates only to the orders already obtained by the plaintiff respondents and can therefore only be interim to the determination of the applications for variation.

[52] In its founding papers the applicants gave no indication of the nature of the variation that they would seek. When challenged that they had no plan for the payment of instalments, the respondents, in reply, produced a schedule, currently annexed to the second draft order, which attributes to each plaintiff respondent an initial payment, as adumbrated earlier, and thereafter equal payments, in some cases extending over ten years. The schedule made no provision for the payment of interest that has already accrued, or that will accrue in future, on the outstanding balance. It gave no indication of the manner in which these amounts were calculated, made no mention

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<sup>78</sup> Section 227 and 228 of the Constitution

of the circumstances or needs of the individual plaintiff respondents and injured parties, and the applicants contended that the amounts have been arrived at solely on the basis of their affordability. They gave no indication of where these funds would be sourced from, given that they have not been budgeted for, nor have they shown that the MEC for Finance has put forward any proposals to meet these liabilities in the annual budget.<sup>79</sup>

[53] The circumstances of the plaintiff respondents differ from case to case. The vast majority of claims, as I have observed before, are cerebral palsy related claims. These judgments often include an award to provide for private caregivers; alterations to the primary residence so as to provide for the need for specialised access for wheelchairs, specialised bathing facilities, specialised sleeping facilities, onsite residence for caregivers and the storage of medical equipment. Where the plaintiffs are resident in remote rural areas the award may often provide for the acquisition and adaptation of specialised transport to bring the child to a centre where specialised medical or educational needs may be met. In extreme cases, the applicants acknowledge, provision is sometimes made for a second apartment or home in the city where such services are available. These constitute very considerable expenses which may be required immediately and, if an order were made to pay the judgment debt in instalments, would require quantification in order to determine the extent of the first instalment. The need may change as the child reaches school going age, and evidence would be required to determine what the extent of the need might be at that particular time. These expenses do not relate directly to the provision of the

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<sup>79</sup> Section 27(3)(g) and (h) of the PFMA

emergency medical care that the applicants have tendered and no consideration has been given to it.

[54] There were, initially, forty plaintiff respondents, of which fourteen had obtained orders for interim payments, in terms of rule 34A, to provide for their immediate needs, pending the final quantification of their claims. The remainder had obtained final judgment in respect of the underlying litigation and the majority of them were orders granted by consent. Some of the orders stipulate the date for payment<sup>80</sup>.

[55] A significant feature of rule 34A is that a court is not empowered to make an interim order unless it appears to the court that the defendant is insured in respect of the plaintiff's claim, or that he has the means at his disposal to enable him to make such payment.<sup>81</sup> Where the defendant (the MEC for Health) consented to a judgment to make payment, in terms of rule 34A, at a particular time, it seems to me that the settlement included at least a tacit warranty that he is able to pay. Where the court delivered a reasoned judgment, a factual finding in this regard had to be made and the judgments are not attacked.

[56] Many of the final judgments, too, were taken by agreement between the parties and stipulated the date for payment. They provided for interest to be paid where the defendant (the MEC for Health), is in default of payment.

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<sup>80</sup> The time for payment is stipulated in the SLA referred to earlier. Some of the interim orders stipulated a time for payment at variance with the statutory provision and in one instance (the 86<sup>th</sup> respondent) an agreement was concluded (on 20 July 2021) for the payment in two separate instalments to be paid on 31 August 2021 and 20 August 2023, respectively, and an order was made accordingly. The applicants sought to vary these orders on the ground that they are unable to pay.

<sup>81</sup> Rule 34A(5)

[57] Rule 42 provides for the variation or rescission of judgments. It is purely a procedural mechanism designed to correct an obviously wrong judgment and it must be read against the common law background. It is common cause that the judgments in issue are not wrong and it has not been suggested that they were erroneously sought or erroneously granted. The failure by a party to seek relief to which it was entitled is not covered by the rule. The variation that the applicants intend to seek is to the date of payment, to provide for various amounts to fall due as set out in the schedule of instalments proposed. The effect of the intended variation is to change the substance of the order.

[58] Ordinarily, in the case of an award for delictual damages, the judgment debt will bear interest from the date on which the judgment debt is payable, unless the judgment provides otherwise.<sup>82</sup> Some of the judgments in issue do stipulate the date from which interest will run, but others do not.<sup>83</sup> A variation of the date for payment would, in these cases, bring about a reduction in the compensation which the plaintiff's would receive, because interest on the sum awarded would only commence to run in respect of each payment when it falls due.

[59] Moreover, where an award is made in respect of obligations which will be incurred, or benefits which would arise in future, it is ordinarily expressed by calculating the present value thereof, having regard to interest which would be

<sup>82</sup> Section 2 of the Prescribed Rate of Interest Act, 55 of 1975

<sup>83</sup> For example, the order in respect of the sixteenth respondent directs the defendant to compensate the plaintiff and her minor son in the amount of R16 500 000, within 30 days of the order. It is silent in respect of interest. Similarly, the order in respect of the twenty-first respondent is silent. In the case of the twenty-third respondent the court ordered that the awarded damages were to be paid within 14 days from the date of the order and that it would attract interest "in terms of section 2 of the Prescribed Rate of Interest Act". The order in respect of the thirty-seventh respondent provided that, in the event that the defendant fails to make payment, it was "to pay interest at the legal rate from the date of default to the date of payment".

received on the award.<sup>84</sup> A variation in the date for payment may, depending on the damages awarded, affect the substance of the award. It is not merely procedural.

[60] At common law the court has no power to set aside or alter its own final order, as opposed to an interim order or an interlocutory order. In *Zondi*<sup>85</sup> the Constitutional Court explained the foundation for the rule thus:

"The rationale for this principle is two-fold (*sic*). In the first place a Judge who has given a final order is *functus officio*. Once a Judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of Court has been made, it is final and they can arrange their affairs in accordance with that order."<sup>86</sup>

[61] There were certain exceptions to the rule where obvious errors have been made. These are supplementary, accessory or consequential matters such as cost orders or interest on judgment debts; clarification of a judgment or order so as to give effect to the court's true intention; correcting clerical and arithmetical or other errors in its judgment or orders; and altering an order for costs where it was made without hearing the parties.<sup>87</sup>

[62] The variations, which the applicants contend for, are considerably more substantive and far-reaching, as I have demonstrated earlier. The applicants contend that they are entitled to the variation by the development of the common law in respect

<sup>84</sup> Compare *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W), where an interest rate of 3.5% was used; and *New India Assurance Co, Ltd v Naidoo* 1949 (2) PH J15, confirmed on appeal 1950 (1) PH J4 (AD), where an interest rate of 4% was employed in the calculation of the future loss of earnings.

<sup>85</sup> *Zondi v MEC Traditional and Local Government Affairs and Others* 2006 (3) SA 1 (CC) at para [28]

<sup>86</sup> See also *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA) at para [16]

<sup>87</sup> *Firestone South Africa (Pty) Ltd v Gentiluro AG* 1977 (4) SA 298 (A) at 306F-G

of the “once and for all” rule to permit for the payment of the judgment debt in instalments.

[63] The “once and for all” rule was explained by Corbett JA in *Evins*<sup>88</sup> as follows:

“This rule appears to have been introduced into our practice from English law ... Its introduction and the manner of its application by our Courts have been subjected to criticism ..., but it is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.

Closely allied to the 'once and for all' rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions ... The claimant must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment, that is the end of the matter.”<sup>89</sup>

[64] In *DZ*<sup>90</sup> the Constitutional Court explained that the corollary of the “once and for all” rule is that a court is obliged to award these damages in a lump sum. They proceeded to examine the application of the “once and for all” rule and concluded at para [54]:

<sup>88</sup> *Evins v Shield Insurance Co. Ltd* 1980 (2) SA 814 (A)

<sup>89</sup> *Evins* at 835D-H

<sup>90</sup> *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC)

"Although the 'once and for all' rule, with its bias towards individualism and the free market, cannot be said to be in conflict with our constitutional value system, it can also not be said that the periodic payment or rent system is out of sync with the high value the Constitution ascribes to socio-economic rights."

[65] They opined that there was no obvious choice at the highest level of justification between the two. With this, the Constitutional Court opened the door for the development of the common law so as to provide for payment by instalments.

[66] In *PN*<sup>91</sup> the issue again arose before the same court. They recognized the increasing prevalence of medico-legal claims and that they result in a large portion of the health care budget being allocated to medico-legal liabilities. They expressed their concern at the impact which it has on the delivery of health care services to "everyone" and "every child".<sup>92</sup>

[67] The Constitutional Court declined, in *PN*, to make any finding on the development of the common law and commented:

"Considering the significant implications of the development of the common law rules at issue, which – in the context of a matter of this nature – may entail the leading of extensive evidentiary material and the presentation of legal arguments of some magnitude, it is simply not in the interests of justice for this court to depart from the general principle."

<sup>91</sup> *Member of the Executive Council for Health, Gauteng Provincial Government v PN* [2021] ZACC 6; 2021 (6) BCLR 584 (CC)

<sup>92</sup> *PN* at para [28] and [29]. See also *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* 2020 (2) SA 567 (GJ); [2020] 2 All SA 177 (GJ).

[68] I accept, for purposes of this judgment, that *DZ* and *PN* have given a clear indication of the likely development of the common law in this field, but they emphasised that "this does not mean that the individual interest of [a plaintiff] and similarly placed individuals must be relegated to insignificance. Each must be afforded an appropriate remedy and compensated fairly for the loss suffered".<sup>93</sup>

[69] The prayer for periodic payments constitutes a special defence to the "once and for all" rule, which must be properly pleaded. Evidence must be led to substantiate the defence and the court must, after consideration of all the relevant evidence craft an appropriate remedy for the individual plaintiff. This will require an assessment of medical evidence as to the nature and condition of the injured party, the extent of the immediate need, which would vary from one victim to another, the time of the likely future need and the extent and time of the relevant instalments. Each individual case must be considered on the basis of the particular circumstances pertaining to it.

[70] The immediate difficulty which the applicants encounter is that the defence which they now seek to raise was not raised at the trial. As a direct result thereof, and flowing from the settlement agreements, medical evidence required to determine the extent of the initial instalment and the time and extent of subsequent instalments has not been heard or considered. It would require the reopening of the trial in each case, which, in turn, would have a detrimental impact on the plaintiff respondents, mostly poor people who have been victims of the ECDOH's negligence, and have already litigated their matters to finality. All the evidence that is now raised in the application,

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<sup>93</sup> *PN* para [29]

and that may arise in the application for variation, was always available to the applicants at the trial and they chose not to raise the issue or to tender the evidence.

[71] For these reasons, the development of the common law contended for, is a matter for trial. It cannot be raised after the issues have been finally decided, simply because the applicants feel the financial pinch.

### Interim interdict

[72] I have canvassed earlier the periodic evolution of the relief sought. The main relief currently sought is for an interim interdict pending the finalisation of part B. As I have demonstrated earlier,<sup>94</sup> the relief currently sought relates only to the judgments granted in favour of the plaintiff respondents and the writs issued pursuant thereto. Those judgments have no bearing on the relief sought in part B, which relates exclusively to further orders which may be made in favour of a plaintiff. For that reason alone, the interim interdict, as currently framed, could not succeed. However, I have approached part A of the matter, as I think the papers do and as the argument did, as an interim interdict pending the finalisation of the application for variation.

[73] The well-established requirements for the granting of an interim interdict are:

- (a) *A prima facie* right, although open to some doubt;
- (b) a well-grounded apprehension of irreparable harm if the interim interdict is not granted and the ultimate relief is eventually granted;
- (c) a balance of convenience in favour of the granting of an interdict; and
- (d) the absence of any other satisfactory remedy.

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<sup>94</sup> in the second draft order referred to in para [7]

[74] On behalf of the applicants it was contended that the *prima facie* right which the applicants seek to protect is the right of all its inhabitants to be afforded access to health care services and to prevent the collapse of health care services. The argument cannot be sustained. Of its own, the applicants have no right as against the plaintiff respondents. The ECDOH, through its employees, as the wrongdoer, has inflicted a lifetime of suffering upon the injured parties through its negligence. They have had to issue summons to obtain redress and have litigated their matters to finality. The ECDOH, through the HOD for Health, and subsequently treasury, are in breach of their statutory obligations set out in the SLA and in the PFMA. They have no *prima facie* right.

[75] As I have said, they also approached the court in the interests of all persons requiring health services in the Eastern Cape. Section 38 of the Constitution provides, *inter alia*, for anyone acting as a member of or in the interests of a group or class of persons to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened. Section 27 of the Constitution is contained in the Bill of Rights. Persons requiring health services in the Eastern Cape have an undeniable right, as against the applicants, to demand the delivery of health care services as contemplated in s 27 of the Constitution. But the applicants cannot assert the right of the general public to demand services from themselves to the detriment of other health care users who have suffered harm in consequence of the conduct of the ECDOH. These are predominantly indigent, rural citizens of the Eastern Cape.

[76] The applicants have not, in my view, demonstrated a threatened infringement of a right in the Bill of Rights, as envisaged in s 38 of the Constitution. The right in issue is contained in s 27 of the Constitution to which I have referred. It is a progressive right, which must be pursued within the available resources of the state. I have recognised earlier that payment of judgment debts will, as the payment of any other liability would, reduce the available resources, but that is not an infringement of the provisions of s 27. Ms *Bawa* candidly admitted in her heads of argument, that the health demands in the Eastern Cape far exceed what is available in monetary terms. Whatever the outcome of these proceedings, there will always be a shortfall, as measured against the ideal, because the available resources are limited.

[77] The third requisite for the grant of an interim interdict is that the balance of convenience must favour the granting of the order. In resolving this consideration the court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice which the respondent will suffer if it is.<sup>95</sup> The exercise of this discretion usually resolves itself into a consideration of the prospects of success and the balance of convenience; the stronger the prospects of success, the less the need for such balance to favour the applicant; the weaker the prospects of success the greater the need for it to favour him.<sup>96</sup> For the reasons set out earlier the prospects of success in an application for the variation of final orders already granted, are slim, if they exist at all.

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<sup>95</sup> *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* [1969] 1 All SA 430 (C); 969 (2) SA 256 (C) at 267.

<sup>96</sup> *LAWSA* (2<sup>nd</sup> ed) vol 11 para [406]

[78] The prejudice which arises for the applicants, is a reduction in the standard of health care services that they are able to provide. The reduction flows, however, at least in part, from its own making. As I have said, the ECDOH is the wrongdoer and is the cause of the liability that it has incurred. As against the prejudice to them is the suffering of injured parties and the hardship of the plaintiff respondents. Ms *Bawa* was constrained to concede, during argument, that some of the injured parties may even die as a consequence of the delay in payment of the judgment debts.

[79] For these reasons I conclude that the applicants have no *prima facie* right to the relief sought nor does the balance of convenience favour them.

[80] There is a further and more compelling reason why the relief sought cannot be granted. I have referred earlier to *Nyathi* where the Constitutional Court declared s 3, prior to the amendment in 2011, to be unconstitutional, *inter alia*, because it treated state litigants differently from private litigants. The stance which the applicants currently adopt is that the plaintiff respondents are not entitled to attach any of its moveable assets, whether corporeal or incorporeal. It says that no execution may be levied against any of its property. The effect is a reversion to the position, which the Constitutional Court declared to be unconstitutional in *Nyathi*.<sup>97</sup> Section 9(1) of the Constitution provides for everyone to be equal before the law and to have equal rights to the protection and benefit of the law. What the applicants seek is to prevent execution, in terms of the SLA, by judgment creditors in medico-legal claims against the Eastern Cape government, but those who have obtained judgment in similar cases against private health care providers, or public health authorities in other provinces,

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<sup>97</sup> See also *Moodley v Kenmont School and Others* 2020 (1) SA 410 (CC) paras [17] to [22]

would be treated differently. They asserted that only approximately 10% of the population in the Eastern Cape, the wealthier sector, have access to private health care. Thus, the relief which they sought would also discriminate against the poorer majority who have been compelled to rely on public health care.

[81] In addition, they seek to interdict only those who have judgments arising from medico-legal claims against them, but not creditors who obtain judgments for contractual debts. The discrimination is not constitutionally defensible.

#### Suspension of writs in execution

[82] I turn to the stay of execution sought in the third draft order.<sup>98</sup> Execution is a means of enforcing a judgment, or order of court, and is incidental to the judicial process.<sup>99</sup> The court has the inherent power to regulate its procedures in the interests of proper administration of justice, and s 173 of the Constitution reaffirms this power.<sup>100</sup> Regulating the process of execution is purely procedural, not substantive. The inherent jurisdiction of the high court does not, however, include the right to tamper with the principle of finality of judgments other than in the specific circumstances, which do not arise in this case.<sup>101</sup>

<sup>98</sup> Referred to in para [8] above.

<sup>99</sup> *Chief Lesapo v The North West Agricultural Bank and Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420, [1999] ZACC 16 para [13]; *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tkh) at 453C-D; and *Road Accident Fund v The Legal Practice Council and Others* 2021 (6) SA 230 (GP) at 244 para [28]

<sup>100</sup> *Universal City Studios Incorporated and Others v Network Video (Pty) Ltd* [1986] ZASCA 3; [1986] 2 All SA 192 (A); and *Road Accident Fund* at para [30]

<sup>101</sup> *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* 2017 (5) SA 508 (SCA) para [12]; and *JN v NN* (unreported)(Eastern Cape Division, Makhanda)(case no. 2283/2021) at para [22]

[83] The power to suspend execution will not be exercised as a matter of course and should be used sparingly to come to the assistance of an applicant outside of the provisions of the rules of court, when the court is satisfied that the interests of justice require it to do so and that justice cannot be properly done unless relief is granted to the applicant<sup>102</sup>. The discretion of the court must be judicially exercised, but it cannot be otherwise limited.<sup>103</sup>

[84] Rule 45A of the Uniform Rules of Court does no more than to restate the common law and it is not necessary to consider the provisions of the rule any further for purposes of this application.

[85] In the third draft order the applicants sought a stay of execution for a period of one year. The prayer is curious as no case has been made that the applicants will be in a position to meet their commitments in one year. On the contrary, in the founding affidavit<sup>104</sup> the HOD for treasury declared that they need at least six months to a year to come up with a funding solution. The application, as previously observed, was heard nine months later, when the third draft was presented.

[86] Applicants relied heavily on *Road Accident Fund*,<sup>105</sup> where a full court in Gauteng, Pretoria, gave an order suspending all writs of execution and attachments against the Road Accident Fund (RAF) in respect of court orders already granted or settlements already reached, in terms of the Road Accident Fund Act, 56 of 1996, for

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<sup>102</sup> *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 462H-463B; and *Whitfield v Van Aarde* 1993 (1) SA 332 (E) at 337E-G

<sup>103</sup> *Whitfield* at 337F-G

<sup>104</sup> Attested to on 14 July 2021

<sup>105</sup> Referred to in fn 99

a period of six months. On behalf of the applicants it is argued that the present application is on all fours with the *Road Accident Fund*.

[87] In my view there are material differences between *Road Accident Fund* and the present application. First, the RAF is a statutory body established to compensate victims of motor vehicle accidents in South Africa. They are not a wrongdoer in respect of any of the motor accidents and they compensate victims who suffer harm as a result of the negligence of others. They have no control over the number of motor vehicle accidents or the injuries inflicted. By contrast the plaintiff respondents have obtained judgments to recover damages that arose as a result of the wrongdoing of the ECDOH.

[88] Second, the RAF has no control over the extent of its finances. It is predetermined by the volume of fuel sold. By contrast, as I have shown, the applicants are funded partly by national government, in respect of a competency which they share with national government, and they have it within their means to raise further revenue of their own by passing legislation and raising taxes.

[89] Third, the RAF approached the court for a suspension of execution in order to enable them to pay the judgment debts for which they were liable. In particular, they did not seek an order for a stay of payments or payment of interest. By contrast the applicants have come to court to stay the execution of judgments in order to afford them time to vary the judgments. For the reasons set out earlier it seems to me that is not merely procedural, but the proposed variation would change the substance of what the plaintiff respondents would receive. After a final judgment resulting from a settlement has been given a court does not, at common law, have the jurisdiction to

vary the order, save in limited circumstances, such as fraud, or perhaps *iustus error*.<sup>106</sup>

Neither can arise in this case.

[90] Fourth, the RAF has at its disposal an "offer to pay defence".<sup>107</sup> Years of experience in our courts have shown that the RAF invariably invokes the provisions of s 17(4) of the RAF Act. No suspension of the undertakings given was sought in *Road Accident Fund* and victims of road accidents who had obtained judgment against the RAF were therefore at liberty to obtain all services covered by s 17(4) of the RAF Act including, home care, adaptation of homes and motor vehicles and the like. By contrast, the applicants require the plaintiff respondents to utilise the initial payment tendered for medical expenses and tendered further treatment at the applicants' facilities, failing which, the said plaintiff respondents may apply to court for further relief. There are two fundamental difficulties which flow from the tender. First there is no attempt in the papers to establish that the particular treatment, required by the plaintiff respondents or the injured parties, is available at a health care institution at a centre where they may be resident. Second, it requires of indigent parties to litigate again in order to obtain treatment, where such treatment is not available close to their residence, when an award in respect thereof has already been made. I can conceive no justification to subject successful litigants to this hardship.

<sup>106</sup> *Moraitis* para [112] and [15]; and *Childerley Estate Stores v Standard Bank of South Africa* 1924 OPD 163

<sup>107</sup> Section 17(4) of the Road Accident Fund Act, 56 of 1996 (the RAF Act) provides:

"(4) Where a claim for compensation under subsection (1)-

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate-

(i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or

(ii) the provider of such service or treatment directly, notwithstanding section 19(c) and (d)."

[91] In addition, the constitutional issue flowing from s 9 of the Constitution referred to earlier finds equal application to relief sought in the third draft. For these reasons I am unable to find that justice demands the relief sought. The application was ill-advised and cannot succeed.

#### Costs

[92] The historic development of the relief sought, from time to time, is set out earlier. Initially the applicant sought to interdict attorneys who had acted on behalf of plaintiff respondents from exercising their contractual rights against their clients, by interdicting them from recovering more than R125 000,00 of their legitimate charges. This understandably, prompted the attorney respondents and PIPLA to enter the fray.

[93] To add insult to injury, the applicants made a thinly veiled charge against personal injury attorneys, generally, and the attorney respondents, of excessive litigation, raising unscrupulous charges, and even of dishonesty. The applicants clearly have no *prima facie* right to interfere with a contract to which they were not party and, wisely, the relief was abandoned midway through argument of the application. Mr Willis, on behalf of PIPLA, and the attorney respondents, accordingly, sought costs on a punitive scale against the applicants. On a careful consideration of the application I think that the relief sought against the attorney respondents and the unjustified allegations made in respect of their conduct was clearly an abuse of the court process. The request for a punitive costs order is therefore justified.

[94] For the reasons set out earlier, and adopting the usual rule that costs follow the result, the plaintiff respondents are entitled to their costs in the application. Only the 37<sup>th</sup> respondent had given notice of his intention to seek such an order on a scale as between attorney and client. At the hearing, however, Mr *Dugmore*, representing a number of plaintiff respondents sought an order of punitive costs in favour of his clients. The remaining plaintiff respondents followed suit.

[95] I have already held that the application was ill-conceived and it had no prospect of success. I am not, however, persuaded that it was *mala fide*. Whilst much criticism was levelled at the ECDOH for the manner in which the underlying litigation, and this application, had been conducted, I am not persuaded that it justifies an order of costs on a punitive scale.

[96] The sheriff respondents did not enter an appearance to defend and the South African Medical Malpractice Lawyers Association, as an *amicus curiae*, did not seek an order for costs. I am indebted to Ms *Pillay* and her junior colleagues, who acted on behalf of the South African Medical Malpractice Lawyers Association, for their very helpful submissions, which have assisted the court substantially.

[97] The second *amicus curiae*, Chance at Life, did seek an order for costs, they said because of the manner in which the litigation had been conducted. I do not consider that it is generally appropriate to make a costs order in favour of an *amicus curiae* in proceedings of this nature, because they are not a party to the litigation in the ordinary sense. Whilst the plaintiff attorneys may have cause to complain about

the manner in which the litigation has been conducted, it has little or no impact on the *amicus curiae*. I am disinclined to make a costs order in favour of the *amicus*.

[98] Finally, there is a matter of reserved costs. The matter was initially enrolled on 17 August 2021, when it was postponed to 11 November 2021. On 11 November 2021, leave was granted to PIPLA to join as a party and the matter was postponed for argument on 18 to 21 January 2022. In preparing the roll for the first term of 2022 the Judge President resolved that the matter should be heard by a full court and he allocated 11 to 14 April 2022 for argument. This led to the inevitable postponement of 18 January. On each occasion to costs occasioned by the postponement were reserved.

[99] The respondents urged me to include the costs occasioned by these postponements in the costs orders referred to earlier. The applicants contended that the costs occasioned by the postponement in January 2022 should be excluded from any order for costs as the postponement occurred at the instance of the Judge President. Whilst I accept that these costs were occasioned by the decision of the Judge President, I think that they are best considered to be costs in the cause and should follow the result.

[100] The costs order set out below will exclude the costs of those respondents who have settled with the applicants after the issue of the application.

[101] In the result:

1. Part A of the application is dismissed.
2. The applicants are ordered to pay the costs of all the respondents who have entered an appearance to defend, including the Personal Injury Professional Lawyers Association, and such costs are to include the costs of two counsel, where so employed in each instance, and the costs reserved on 17 August 2021, 11 November 2021 and 18 January 2022.
3. The costs, as set out in paragraph 2 above, incurred by the Personal Injury Professional Lawyers Association and the attorney respondents are to be paid on a scale as between attorney and client.
4. The registrar of this court is directed to deliver a copy of this judgment to the National Director of Public Prosecutions to consider a possible prosecution in terms of s 86 of the Public Financial Management Act.



**J.W. EKSTEEN**

**JUDGE OF THE HIGH COURT**

BESHE J:

I agree.

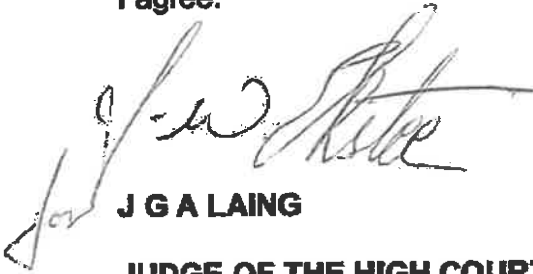
A handwritten signature in black ink, appearing to be 'N G Beshe', with a long horizontal flourish extending to the right.

**N G BESHE**

**JUDGE OF THE HIGH COURT**

LAING J:

I agree.

A handwritten signature in black ink, appearing to be 'J G A Laing', with a long horizontal flourish extending to the right.

**J G A LAING**

**JUDGE OF THE HIGH COURT**

**Appearances:*****Amicus Curiae for the South African Medical Malpractice Lawyers Association***

Adv K Pillay SC and Adv Z Cornelissen instructed by Joseph's Attorneys c/o Huxtable Attorneys, Makhanda

***Amicus Curiae for Chance at Life***

Mr M Ndabeni instructed by Ndabeni Inc, c/o Netteltons, Makhanda

**Applicants:** Adv N Bawa SC, Adv M O'Sullivan, Adv N Redpath-Molony instructed by The State Attorney, East London c/o N N Dullabh & Co., Makhanda

10<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 24<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 34<sup>th</sup>, 42<sup>nd</sup>, 46<sup>th</sup>, 49<sup>th</sup>, 50<sup>th</sup>, 51<sup>st</sup>, 56<sup>th</sup>, 57<sup>th</sup>, 70<sup>th</sup>, 72<sup>nd</sup>, 77<sup>th</sup>, 79<sup>th</sup>, 83<sup>rd</sup>, 84<sup>th</sup>, 85<sup>th</sup>

**Respondents:** Adv A G Dugmore SC instructed by Enzo Meyers Attorneys, East London

**29<sup>th</sup> Respondent:** Adv A D Schoeman SC instructed by Dayimani Inc, Mthatha

**36<sup>th</sup> Respondent:** Adv A D Schoeman SC and Adv H Ayerst instructed by Mjulelwa Inc, Mthatha

**37<sup>th</sup> Respondent:** Adv A G Dugmore SC and Adv T S Miller Mjulelwa Inc, Mthatha

**39<sup>th</sup> Respondent:** Adv A D Schoeman SC and Adv H Ayerst instructed by Mpambaniso Attorneys, Queenstown

**41<sup>st</sup> Respondent:** Adv D du Plessis SC instructed by Mlonyeni & Lesele Inc, King Williams Town

**45<sup>th</sup> Respondent:** Adv A D Schoeman SC instructed by W T Mngqandi & Associates, Mthatha

**52<sup>nd</sup> Respondent:** Adv D du Plessis SC instructed by Mlonyeni & Lesele Inc, King Williams Town

**54<sup>th</sup> Respondent:** Adv A D Schoeman SC and Adv H Ayerst instructed by Mjulelwa Inc, Mthatha

**59<sup>th</sup> Respondent:** Adv A D Schoeman SC instructed by Dayimani Inc, Mthatha

**64<sup>th</sup> Respondent:** Adv A D Schoeman SC and Adv H Ayerst instructed by Mpambaniso Attorneys, Queenstown

**68<sup>th</sup> Respondent:** Adv A D Schoeman SC and Adv H Ayerst instructed by WT Mngandi & Associates, Mthatha

**82<sup>nd</sup> Respondent:** Adv D du Plessis SC instructed by Dudula Attorneys, Johannesburg

**86<sup>th</sup> Respondent:** Adv A D Schoeman SC instructed by Mjulelwa Inc, Mthatha

**87<sup>th</sup> Respondent:** Adv R S Willis and Adv G Badela instructed by De Broglio Attorneys c/o Huxtable Attorneys, Makhanda