IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: 2017/2015

Reportable

In the matter between:

MEC FOR HEALTH, EASTERN CAPE **Applicant**

.

and

KHUMBULELA MELANE **Respondent**

and

SPECIAL INVESTIGATING UNIT **Applicant**

and

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

KHUMBULELA MELANE **2nd Respondent**

JUDGMENT

GOOSEN J:

[1] This judgment deals with two separate applications for leave to appeal. The main application, in respect of which judgment was delivered on 22 March 2022, also concerned two separate but interrelated applications. A single hearing was held and a single judgment was prepared, for reasons of convenience. The same applies in this instance. I shall, however, deal with the two applications for leave, under separate headings.

[2] The parties shall be referred to throughout as follows:

(a) Mrs Melane, who is the plaintiff in the main action, the applicant in the first application for leave to appeal and the respondent in the second application for leave to appeal, shall be referred to as 'the plaintiff'.

(b) The MEC for the Department of Health, who is the defendant in the main action, the respondent in the first application for leave to appeal and a respondent in the second application for leave, shall be referred to as 'the MEC'.

(c) The Special Investigating Unit, which is the applicant in the second application for leave to appeal and is not a party to the main action, shall be referred to as 'the SIU'.

The application for leave to appeal by the Plaintiff

[3] The plaintiff seeks leave to appeal against the whole of the judgment and the order set out in paragraph 1 of the order of this court. Insofar as paragraph 3 is

contingent upon paragraph 1, its fate is determined by the outcome of the appeal against paragraph 1. The effect of the order is to rescind orders granted in favour of the plaintiff and against the MEC in the main action.

[4] The plaintiff opposes the granting of leave to appeal against paragraph 2 of the order at the instance of the SIU. In the first application the plaintiff was represented by Mr *Katz* SC and Mr *Mdeyide*. In the second application, dealt with hereunder, the plaintiff was represented by Mr *Dugmore* SC and Mr *Sambudla*.

[5] The plaintiff's application was premised upon s 17 (1) (a) (i) and (ii) of the **Superior Courts Act**[1]. In relation to the existence of reasonable prospects of success as required by s 17 (1) (a) (i) several grounds are advanced. Upon close examination they may be addressed under the following essential grounds:

a) that the court erred in finding that there existed fatal irregularities in relation either to the affidavit filed in support of the application to strike the defence or procedural irregularities in the process by which the orders, set aside, were sought;
b) that the court erred in its articulation of the principles applicable to rescission of judgments in conflict with those affirmed in ***Zuma v The Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others***[2] (hereafter 'the Zuma' matter) and failed to exercise a discretion in relation to the rescission application of the plaintiff; and

[1] Act 10 of 2013
[2] 2021 (II) BCLR 1263 (CC).

c) that the court erred in *mero motu* rescinding the order imposing liability on the MEC when such rescission was not sought by the MEC and in circumstances in which the MEC conceded liability to the plaintiff.

[6] In relation to the existence of compelling circumstances as envisaged by s 17 (1) (a) (ii) of the **Superior Courts Act**, the plaintiff advanced four bases. Firstly, it was contended that the matter is of considerable importance, not only to the plaintiff but to all users of public health care facilities in the Eastern Cape. It is also of significance inasmuch as it deals with the need for organs of state to comply with the rules of court and court orders.

[7] Secondly, the matter implicates the constitutional imperative that the best interests of the child are paramount. Thirdly, it was contended that the court had failed to exercise any discretion in deciding to rescind the orders. This, overlaps with a ground advanced under the rubric of s 17 (1) (a) (i). Finally, it was contended that the court had failed to consider the need for a just and equitable remedy pursuant to s 172 (1) (b) of the Constitution[3]. The consideration of such remedy was required in the circumstances of the case. The failure to do so means that the interests of justice dictate that leave to appeal be granted.

[8] A key aspect upon which the application hinges concerns the findings in relation to the affidavits and the procedural questions. These are dealt with compositely from paragraphs [85] to [94] of the main judgment. I do not intend to repeat the reasoning there set out. It suffices to note that the procedural irregularities at issue concerned two issues, namely the fact, *ex facie* the papers before the court,

[3] Act No. 108 of 1996.

that the order was granted a day prior to the date reflected in the notice, and that the application to strike out the defence was prematurely enrolled.

[9] In this application for leave to appeal, the plaintiff seeks to suggest that the order dated 28 August 2017, compelling discovery, was not granted on that date but was in fact granted on 29 August 2017. The plaintiff seeks to advance this case solely on the basis of contentions set out in her notice of appeal and in heads of argument. There is no evidence to this effect.

[10] The circumstances in which the MEC raised the procedural and other irregularities are fully canvassed in the main judgment. They were dealt with comprehensively in a supplementary affidavit. The plaintiff did not, however, seek to file any answer to the allegations contained in that supplementary affidavit. The plaintiff could have done so, and could thereby have placed evidence before the court upon which she might have relied. She cannot now seek to do so by way of argument alone.

[11] In any event, the arguments now advanced do not address the findings in relation to the affidavit used in support of the order obtained on 28 August 2017, nor do they address the premature enrolment of the application heard on 12 September 2017.

[12] The main judgment proceeds on the basis that the requirements of Regulation 4 (1) of the Regulations Governing the Administering of an Oath or Affirmation are directory and that a court has a discretion to accept an affidavit on the basis of substantial compliance with the Regulations.

[13] On the face of it, the affidavit does not comply. It was suggested, in argument, that all that is lacking is the place of commissioning. However, the date that is recorded reflects only the year 2014. The declaration itself is blank insofar as 'the manner, place and date' of the deposition is concerned.

[14] The argument now advanced, however, fails to deal with the essence of this court's finding, which is that there is nothing on record to show that the court which considered the application was called upon to determine whether the affidavit substantially complies with the Regulations.

[15] In these circumstances this court's finding as to the existence of substantive and procedural irregularities is not reasonably assailable.

[16] This brings me to the plaintiff's argument premised on the principles enunciated in the ***Zuma*** judgment. The argument was that this court had erred in its statement of the law relating to rescission of judgments and had failed to recognise that a court was vested with a discretion whether or not to rescind a judgment where the requirements are established.

[17] In developing the argument reference was made to the following passage in the judgment[4]:

> "[83] Once the court holds that an order was erroneously sought or granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order; it is not necessary for a party to show good cause for the rule to apply." (footnotes omitted)

[4] Main judgment, para [83].

[18] This passage does not state that there exists no discretion. Nor does it preclude the existence of a discretion. It must be read in the context in which it appears in the judgment. The quoted passage occurs in a paragraph that sets out, broadly, the terms of Rule 42 (1) (a). It does so with reference to well-established authority cited in the footnotes. There is nothing controversial about the broad statement the paragraph contains. It must also be read within the context of the judgment as a whole.

[19] In paragraph [91] of the judgment the following is stated:

> "[91] In light of the procedural irregularities mentioned above, the orders of 28 August 2017 and 12 September 2017 were erroneously sought and erroneously granted within the meaning and contemplation of rule 42 (1)(a). There is also nothing, from the facts of this matter, that precludes the court from exercising its discretion against rescinding the impugned orders."

[20] The passage is supported by a footnote which cites the ***Zuma*** judgment and quotes para [53] of that judgment which reads:

> "[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court "may", not "must", rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."

[21] To suggest, in the light of this, that the court proceeded on the basis of failing to recognise the existence of a discretion or to fail to follow the '***Zuma*** principle' is simply wrong. It is also not correct to suggest that the court failed to exercise a discretion. The quoted passage plainly states that it did.

[22] In the circumstances the argument advanced by the plaintiff on this aspect also fails to establish a reasonable prospect that another court will come to a different conclusion. The third aspect relied upon under the s 17 (1) (a) (i) grounds concerned the decision by the court, *mero motu*, to rescind the order on the merits of the claim dated 22 May 2018.

[23] Mr *Katz*, for the plaintiff, relied upon ***Fischer and Another v Ramahlele and Others***[5] where the court said:

> "[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits which serve the function of both pleadings and evidence, to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the

[5] 2014 (4) SA 614 (SCA) at para [13]- [14].

> parties to identify the dispute and for the court to determine that dispute and that dispute alone.
>
> [14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits."

[24] It was submitted that the order rescinding the order of 22 May 2018 was an instance of the court impermissibly raising an issue which was not on the pleadings and was not at issue between the parties.

[25] I do not agree. First, the circumstances in ***Fischer*** are wholly distinguishable. In that matter the court of first instance had, at a stage when oral evidence was to be led to determine a dispute of fact, raised several legal issues not addressed in the papers before it and required the parties to address these. It then decided the matter

on the issues it had raised and not on the basis of the factual material pleaded by the parties.[6]

[26] In this case there was no disregard of the factual basis upon which the parties prosecuted their respective cases. In ***Member of the Executive Council, Department of Education, Eastern Cape v Komani School & Office Suppliers CC t/a Komani Stationers***[7]the court emphasized, with reference to ***Fischer***, that:

> "[53] One of the enduring tenets of judicial adjudication is that courts are enjoined to decide only the issues placed before them by the litigants. And that it is not open to a court to change the factual issues presented by the parties or introduce new issues."

[27] Secondly, the validity, in law, of the preceding court order, namely the order striking out the MEC's defence was squarely in issue. So too was the consequent order determining the quantum of damages payable to the plaintiff. As a matter of law orders granted consequent upon the order of 12 September 2017 are necessarily impugned by the contested status of the order of 12 September 2017. As a matter of law therefore, the status of the order of 22 May 2018 was a live issue on the papers. This is the logical consequence of the principles enunciated in ***Government of the Republic of South Africa and Others v Von Abo***[8] and in ***Paddock Motors (Pty) Ltd v Igesund***[9]. Neither ***Fischer*** nor ***Komani Stationers*** has qualified or limited the ***Von Abo*** and ***Paddock*** principles.

---

[6] *Fisher* (*supra*) at para [15].
[7] [2022] ZASCA 13 (26 January 2022) at para [53].
[8] [2011] ZASCA 65; 2011 (5) SA 262 (SCA) at para [18].
[9] 1976 (3) SA 16 (A) at 23F.

[28] Thirdly, the MEC's decision, premised upon the evidence available to her, not to contest liability cannot infuse an order which is wrong in law with lawfulness.

[29] Mr Katz argued that the provision, in Rule 42 (1), which confers upon a court the power to *mero motu* rescind or vary an order must be read with subsection (3). The latter subsection precludes a court from rescinding or varying any order unless satisfied that all parties whose interests may be affected have notice of the order proposed. This, he submitted, required that notice of the proposed setting aside of the order of 22 May 2018 be given to the plaintiff.

[30] This is, in my view, not an instance where the court acts *mero motu* outside of the context of an application brought in terms of the Rule. The parties affected by the order were all properly before the court and, as already indicated, the status of the order of 22 May 2018 was, by operation of law, squarely in issue in the application. In the circumstances, the plaintiff's reliance upon ***Fischer*** does not establish a reasonable prospect of success on appeal.

[31] This brings me to the plaintiff's reliance upon s 17 (1) (a) (ii) of the **Superior Courts Act**. As indicated earlier this encompasses a few aspects. There can be little doubt that the plaintiff's claim against the MEC is a matter of considerable importance to her. That, however, is not a basis to grant leave to appeal. The plaintiff will, in any event, be able to pursue her claim. No matter of broad principle, which may guide similarly placed litigants, arises in this matter. Nor is the fact that the interests of a minor child are at issue in the ultimate determination of the claim decisive.

[32] Mr Katz sought to suggest, premised upon the notice of application, that the order referring the further conduct of the trial action to case management, would cause a delay. This, it was suggested, would impinge upon the best interests of the minor. The contention is without substance. It is difficult to conceive of why case management which is directed to facilitate enrolment of an action, would cause delays if the parties themselves approach the matter with due diligence. In any event, an appeal at this stage could hardly not give rise to delay in finalising the case in the interests of the minor child.

[33] The broader argument for the existence of compelling circumstances rested upon this court's failure to exercise a discretion in relation to the rescission and the failure to grant an appropriate remedy in terms of s 172 (1) (b) of the **Constitution**. The argument proceeds from the premise that, in the first instance, grounds exist to rescind the orders and, furthermore, that a constitutional remedy is appropriate. However, contrary to the argument on behalf of the plaintiff, the court did exercise a discretion. It expressly stated this to be so. It held that all of the circumstances of the case do not warrant a refusal to set aside the impugned orders. Having come to this conclusion, the consideration of a remedy under s 172 (1) (b) of the **Constitution** did not arise.

[34] It was argued, on behalf of the MEC, that the discretion exercised in relation to a rescission of judgment is one in the true sense. Accordingly, limited scope exists for a court of appeal to interfere. Whether the discretion is a narrow or wide one, need not be decided. That is so because it cannot reasonably be concluded that this court did not exercise its discretion judicially or at all. In the circumstances, even if the discretion is narrowly construed, which is to be doubted, there is in my view no

reasonable prospect that a court of appeal would, on this ground, interfere with the order made.

[35] At the conclusion of the hearing the parties were given an opportunity to file additional written submissions to canvas issues not fully addressed in oral argument. Both the plaintiff and the MEC filed further submissions. It is necessary to deal with only one aspect. Ms *Goedhart* SC, for the MEC, raised the appealability of an order rescinding a judgment. Since this aspect had not formed the subject of debate at the hearing, the plaintiff was given further opportunity to deal with the issue.

[36] It was submitted, on behalf of the MEC, that the effect of this court's order rescinding the orders of 28 August 2017, 12 September 2017, 22 May 2018 and 11 February 2019, is to place the parties in the position they were in prior to the first order. That means that the plaintiff's claim against the MEC remains to be determined. The setting aside of the orders does not fully determine any of her rights. This court's order is therefore not dispositive of any issue in the main action.

[37] Upon this basis, having regard to the test for appealability set out in ***Zweni v Minister of Law and Orde***r[10] the order of this court is not appealable. Reference was also made to ***Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd***.[11] In that matter a judgment by default was granted against ***Rainbow Farms*** in the Limpopo High Court at a stage when the parties were engaged in settlement negotiations. The fact of these negotiations was not drawn to the attention of the trial judge. The trial judge refused a postponement of the matter and granted judgment against ***Rainbow Farms***. A subsequent rescission application was dismissed on the basis that the trial court's judgment was not a default judgment.

[10] 1993 (1) SA 523 (A).
[11] (529/18) [2019] ZASCA 61 (20 May 2019) at paras 4 and 5.

[38] The matter went on appeal to the full court of the Division. It was held that had the trial court been aware of the settlement negotiations it would not have granted the default judgment. It accordingly set aside the order refusing the rescission application. In a subsequent appeal to the Supreme Court of Appeal, the court reiterated the test set out in ***Zweni*** and held:

> "[5] In this matter the appellant's claim remained intact. Nothing has been decided about it. All that has happened, is that the respondent has been afforded an opportunity of answering it. The Full Court's order is interlocutory and does not cause the appellants any irreparable harm or preclude it from obtaining some relief in the future. It has no direct effect on the final issue relating to the purported termination of the agreement and neither does it dispose of any portion of the appellant's claim. It is accordingly not appealable and the appeal must be dismissed on this ground alone."

[39] The plaintiff argued that the judgment in ***Crockery*** is distinguishable on the facts. In the present matter the MEC's defence had been struck out and this was followed by an order imposing liability and a subsequent order determining the quantum of damages payable, whereas in the ***Crockery*** matter this was not the case.

[40] I am unable to discern the distinction. The effect of the order granted by the Full Court in the ***Crockery*** matter was to place the appellant in a position to prosecute its claim without hindrance. Its rights were not determined. It is this effect of the order, which formed the basis upon which it was decided that the order was not appealable. That is no different, in my view, to the position in this instance. The

effect of this court's order is to place the plaintiff in a position to prosecute her claim without hindrance. Her rights have not been determined.

[41] In the circumstances, I have significant doubts that the order of this court is indeed appealable. I accept that the recent jurisprudence regarding the appealability of orders accords questions of the interests of justice a greater determinative role. For this reason, I shall accept, despite my doubts, that the order is appealable. I do so because, as is apparent from the findings set out above regarding the absence of a basis to grant leave in terms of s 17 (1) (a) (ii) of the **Superior Courts Act**, there are in fact no overriding considerations of the interests of justice which would warrant the granting of leave to appeal.

The application for leave to appeal by the SIU

[42] The SIU seeks to appeal paragraph 2 of this court's order. The effect would be an order consonant with paragraph 1 of this court's order together with an order granting the SIU leave to intervene in the action and to prosecute such defences as it may wish to advance.

[43] The application for leave to appeal is pursued in terms of Rule 49 (1) (*b*). The grounds of appeal, upon which leave is sought, comprises some 21 type written pages. The judgment comprises 31 pages. The notice is divided into 53 paragraphs and subparagraphs. The document concludes by stating that the SIU reserves its rights to supplement the grounds of appeal at the hearing of the matter. Mercifully, it did not act upon such reservation.

[44] Although it is possible, upon a reading of the application, to discern some points which may constitute grounds for seeking leave, the document consists primarily of submissions in critique of this court's failure to uphold the SIU application.

[45] During argument Mr Nankan, who appeared for the SIU, was asked to explain why the application for leave to appeal should not, by reason of established authority in this Division, be dismissed for non-compliance with Rule 49 (1) (*b*). He submitted that it would not be in the interests of justice to do so. This submission was premised on an acceptance that the grounds of the application did not meet the requirements of the Rule.

[46] Rule 49 (1) (*b*) requires a party seeking leave to appeal to file, within 15 days of the order sought to be appealed, its application 'setting out the grounds therefor'.

[47] In ***Songono v Minister of Law and Order***[12] Leach J (as he then was), considered the impact of Rule 49 (1) (*b*). The leaned judge considered the similarly worded Rule 49 (3) which required that the notice of appeal should state whether the whole or part of the judgment is appealed against, specify the findings of fact and/or ruling of law appealed against and the ground of appeal. He came to the conclusion that[13]:

> "It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to

[12] 1996 (4) SA 384 (E).
[13] *Songono* (supra) at 385I-J

> appeal. Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as being peremptory."

[48] This finding was endorsed by a full bench of this Division in ***Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission)***[14]. In that matter the applicant had, instead of a notice setting out the grounds of appeal, filed a lengthy affidavit. The court considered that it was entitled to dismiss the application on that basis. It nevertheless considered the merits of the application and refused leave.

[49] The approach to the requirements of Rule 49 (1) (*b*) has subsequently been followed in several judgments in this Division and other Divisions, in both civil and criminal cases.[15]

[50] In ***Hing and Others v Road Accident Fund***[16] which relied upon ***Songono***[17] Binns-Ward J observed[18]that:

> "The application for leave to appeal had listed 65 grounds on which the judge *a quo* was alleged to have 'erred and misdirected himself'. As the respondent's counsel justifiably observed, a number of those grounds were so vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeals. In any event it should have been apparent to the appellants that the learned acting judge could not possibly have intended his words to be taken literally[19]. The effect of the notice of

[14] [2006] 2 All SA 442 (E) at 446g.
[15] *S v Van Heerden* 2010 (1) SACR 599 (ECP) at para 4; *S v McLaggan* 2013 (1) SACR 267 (E) at para 6-7; *S v McKenzie* 2003 (2) SACR 620 (C) at 621e.
[16] 2014 (3) SA 350 (WCC).
[17] *Hing* (*supra*) at fn 3.
[18] *Hing* (*supra*) at para 4 (353F-H).
[19] This is a reference to the judge *a quo* having granted leave 'on the grounds set out in their notice of appeal'. See *Hing supra* at para 2.

> application for leave to appeal was to suggest that he had misdirected himself at every turn in making any findings adverse to their claims. In the context of his detailed and fully reasoned judgment, it could not reasonably have been assumed by the appellants or their legal representatives that by granting leave to appeal in the terms he did, the judge meant to be understood to be acknowledging that such wide-ranging error and misdirection on his part might reasonably be established on appeal. On the contrary, the manifestly indiscriminate formulation of the grounds on which the application for leave to appeal was brought brings to mind the observation of a US Appeals Court judge that when he sees 'an appellant's brief containing seven to ten points or more, a presumption arises that there is no merit to any of them'."

[51] Ms *Goedhart* drew attention to this 'presumption' in the context of the manifest shortcomings of the SIU's application for leave to appeal.

[52] It is necessary to touch on an amendment to Rule 49 which was effected after the judgments in ***Songono*** and ***Xayimpi*** referred to above. Rule 49 (3) was substituted by GN R472 of 12 July 2013. The sub-rule in its present form came into effect on 16 August 2013. Prior to its amendment and at the time when ***Songono*** and ***Xayimpi*** were decided the sub-rule read as follows:

> "(3) The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against, it shall state which part and shall further specify the finding or fact and/or ruling of law appealed against and the grounds upon which the appeal is found.

[53] It is this sub-rule which was held to be peremptory and, by parity of reasoning, that Rule 49 (1) (*b*) is peremptory. Sub-rule (4), prior to the amendment, provided that:

> "A notice of cross-appeal shall be delivered within ten days after delivery of the notice of appeal or within such longer period as may upon good cause shown be permitted and the provisions of these Rules will regard to appeals shall *mutatis mutandis* apply to cross-appeals."

[54] It will immediately be observed that sub-rule (3) in its present substituted form is identical in every respect to the erstwhile sub-rule (4). The present sub-rule (4) reads:

> "Every notice of appeal and cross-appeal shall state:
>
> (a) what part of the order is appealed against; and
>
> (b) the particular respect in which the variation of the judgment or order is sought."

[55] The effect of the amendment therefore was to deal with the subject matter of the erstwhile sub-rule (3) in the new sub-rule (4). The judgments in ***Songono*** and ***Xayimpi*** must accordingly be read in this light. The basis upon which ***Songono*** held that the erstwhile sub-rule (3) was peremptory is to be found in the following passage of the judgment.[20]

> "Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law

[20] *Songono supra* at 385G.

> appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet - see, for example, *Harvey v Brown* 1964 (3) SA 381 (E) at 383; *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808 (A) at 815 and Erasmus *Superior Court Practice* B1-356-357 and the various authorities there cited."

[56] This rationale applies, with equal force, to the proper interpretation of sub-rule (4). Accordingly, the subsequent amendment of Rule 49 has not altered the law regarding compliance with its provisions. The effect is that where a party fails to comply with the peremptory requirements of Rule 49 (1) (*b*) inasmuch as they do not set out the grounds of appeal in clear, unambiguous and succinct terms, the court hearing the application may, on that basis, dismiss the application.

[57] I have already indicated that the grounds set out in the SIU application are excessively lengthy. That is, however, not the only respect in which they do not meet the requirements. The 'grounds' consist, in large measure, of argument and submissions which impugn the court's reasoning. No attempt is made to identify the factual findings which the SIU seeks to challenge on appeal nor the findings of law. At points the 'grounds' are incomprehensible.

[58] One example will suffice to illustrate the point. The following passage appears at page 6 of the notice:

> "e) It was the MEC's initial failure and election not to rescind the judgment granted on the issue of liability and its failure to raise the public health care defence on the issue of quantum in its application as a *bona fide*

defence that had necessitated SIU's application. The Honourable Court had erred and ignored this fact in its judgment. Notwithstanding the plethora of evidence that has been put forth by the SIU in its application, ***the MEC did not at any stage indicate that it would be raising the public health care defence on the issue of quantum in the SIU's application or even its own application***. Hence, the finding that the MEC may raise the public health care defence in the trial action as referred to at paragraph 103 of the judgment, is speculative. Accordingly, the above Honourable Court had erred in finding that the MEC may raise the public healthcare defence and hence, the intervention of the SIU was not necessary at this stage;

f) Paragraph 30 of the judgment of the Honourable Court sets out that the MEC's defence to the trial action on the issue of quantum, wherein the MEC alleges that the amounts of quantum consist of ***duplications, inaccuracies and incongruities, so much so that the default judgment ought to have been refused.*** In addition, the MEC contended in the MEC's application that the ***startling amounts awarded for future medical expenses is not justifiable with due regard to previous comparative awards*** and in these circumstances, Mr. Bastile on behalf of the MEC, had raised this as the only *bona fide* defence to the issue of quantum warranting the MEC application to rescind the order striking out its defence and the order granted on quantum. Hence, no evidence was placed before the Court by the MEC via Mr. Chronis either in the MEC's application or in the SIU's application, confirming that the public health care defence would be raised in the trial action on the issue of quantum by the MEC, even after the SIU instituted its application declaring its desire to

raise the public health care defence, as a *bona fide* defence in the trial action on the issue of quantum. Consequently, the above Honourable Court erred in utilising this as a basis to deny the Applicant the right to intervene as a party in the trial action in terms of Rule 12 of the Rules, in order to pursue the public health care defence on the issue of quantum, as found at paragraphs 103 and 112 of its judgment;

g) Resultantly, there is no evidence put up by the MEC even after the MEC was in receipt of the SIU's comprehensive application papers setting out and/or alleging that the judgment on liability would also be rescinded as there is a *bona fide* defence and further that the public health care defence would be raised, indicating that it would raise such defences. Accordingly, the finding by the above Honourable Court at paragraph 112 of its judgment that the SIU has not met the requisite threshold for joinder and intervention constitutes a material misdirection as it is clear from the affidavits exchanged between the parties that the MEC is ***not*** intent on disputing the issue of liability and raising the public health care defence. Resultantly and in the circumstances, the failure by the MEC to raise the aforesaid two (2) defences, would constitute maladministration, improper and irregular conduct which as defined by section 2 (2) of the SIU Act, which as read with the relevant Proclamations and section 4 (1) (c) (i) and (iii) as well as section 5 (5) of the SIU Act, would clothe the SIU with the necessary *locus standi* to intervene in the trial action and raise the aforesaid defences. Accordingly, the above Honourable Court had erred in failing to find that the SIU has the necessary *locus standi* to

intervene in the trial action as referred to at paragraphs 104, 105 and 106, of its judgment in the SIU's application."

[59] Paragraph 103 of the judgment contains no finding regarding the MEC raising a 'public health-care defence'. That paragraph of the judgment describes the effect of the rescission of the order. It says so in so many words, and allows that such defences, if any, that the MEC may wish to raise she will be free to raise. It equally states that inasmuch as the MEC chooses not to raise a defence on liability she will be free to do so.

[60] The assertion by the SIU that the court erred in failing to find that the SIU does not have the *locus standi* to intervene is, it should be said, an assertion so vague as to be entirely unhelpful. Not only is it not stated in what respect or upon what basis the Court erred, the assertion itself is simply wrong.

[61] What paragraph 104 of the judgment records is that several judgments in the Division have already pronounced upon the SIU's lack of *locus standi* in circumstances such as the present. It is then stated that no pronouncement need be made on the correctness or otherwise of those judgments since the determination of the SIU's application is made upon another basis. Nowhere in its application for leave to appeal does the SIU come to grips with the true basis upon which its application was dismissed.

[62] It is not for a court to trawl through a notice of appeal to discern possible grounds of appeal. In this instance, this is what Mr Nankan's plaintive appeal to the interests of justice required. The Rule exists not for the purpose of frustrating a would-be appellant. It exists to ensure that the appellate process is purpose directed

– to identify errors or misdirections where they occur and to marshal the judicial resources of a higher court to correct them. In the first instance, this requires careful and considered analysis by the party seeking to determine whether the judgment or order is tainted by any errors or misdirections. Secondly, once those errors or misdirections have been identified and succinctly stated in the notice, the Rule serves to afford the respondent an opportunity to consider whether to abandon or defend the judgment.

[63] None of these purposes are achieved in the event that an applicant fails to comply with its obligations. No reason has been offered to explain why this was not done. A general appeal to the interests of justice does not avail the SIU. To grant leave to appeal means that the court is satisfied that there is a reasonable prospect that a court of appeal would come to a different conclusion. Having considered the grounds such as they are, none exists. Nor is there any discernible compelling reason to grant the SIU such leave.

[64] As indicated earlier a court is entitled, on the basis of non-compliance with Rule 49 (1) (*b*) to dismiss the application. It need not consider the 'merits' of the application such as may be discernible. In this instance, I have indeed considered the merits. The application falls to be dismissed on both accounts.

[65] In the main application, the MEC adopted the stance that the costs of the application to rescind should be costs in the cause. Insofar as the SIU application was concerned, the MEC abided. The SIU was ordered to pay the plaintiff's costs of opposition. The applications for leave stand upon a different footing. The MEC successfully opposed the plaintiff's application. Similarly, both the plaintiff and the

MEC successfully opposed the SIU application. There is no reason why the costs in in these applications should not follow the result.

Order

[66] In the result, I make the following orders:

1. *The plaintiff's application for leave to appeal against the judgment of this court given under case number 2017/2015 on 22 March 2022 is dismissed with costs.*

2. *The application by the Special Investigating Unit for leave to appeal against paragraph 2 of this court's order under case number 2017/2015 on 22 March 2022 is dismissed with costs, such costs to include the costs of two counsel where employed.*

_____

G G GOOSEN

JUDGE OF THE HIGH COURT

MBENENGE JP,

I agree.

_____

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

NORMAN J,

I agree.

_____

T V NORMAN

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the MEC	:	G-*M Goedhart SC*
Instructed by:		Norton Rose Fulbright SA Sandton C/o Smith Tabata Attorneys Mthatha
Counsel for the Applicant	:	*A Katz SC* (with him, *A Mdeyide*)
Instructed by:		Sakhela Inc. Mthatha
Counsel for the SIU	:	*S Nankan* (with him, *S Zimema*)
Instructed by:		Bhisho State Attorney East London C/o W T Mnqandi & Associates Mthatha

Counsel for the Respondent	:	*A G Dugmore SC* (with him, *L Sambudla*)
Instructed by:		Sakhela Inc. Mthatha
Heard	:	23 May 2022
Delivered	:	14 June 2022