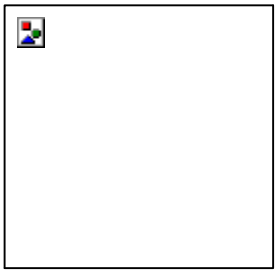

Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case number.: 1999/2016
Date heard: 15/03/2021
Date delivered: 20/01/2023

In the matter between:

LUKE BERNARD SAFFY N.O 1st Appellant

DONOVAN THEODORE MAJIEDT N.O 2nd Appellant

SHAVONNE BADENHORST ST CLAIR COOPER N.O
[IN THEIR CAPACITY AS APPOINTED LIQUIDATORS OF
VISTA PARK DEVELOPMENT (PTY) LTD] 3rd Appellant

And

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THE MEC: NORTHERN CAPE PROVINCIAL GOVERNMENT: DEPARTMENT OF ROADS AND PUBLIC WORKS 1st Respondent (2nd respondent *a quo*)

THE HOD: NORTHERN CAPE PROVINCIAL GOVERNMENT: DEPARTMENT OF ROADS AND PUBLIC WORKS 2nd Respondent (3rd Respondent *a quo)*

CORAM: WILLIAMS J *et* **MAMOSEBO J** *et* **LEVER J**

JUDGMENT

WILLIAMS J:

1. The appellants, in their capacity as the liquidators of Vista Park Development (Pty) Ltd (Vista), brought an application to enforce the terms of a settlement agreement entered into between the liquidators and the first, second and third respondents *a quo* during the course of litigation between the parties. The first respondent in the court *a quo* was the Minister of Public Works and the fourth respondent was Joh-Arch Investments (Pty) Ltd (Joh-Arch).

2. The first to third respondents in response to the above-mentioned application, launched a counter-application in which they sought *inter alia;* the reviewing and setting aside of the decision to settle the claim of Vista and Joh-Arch as a Joint Venture (JV); setting aside as unlawful and invalid the ensuing settlement agreement; and claiming from the appellants and

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the fourth respondent payment of the amount of R10 million paid to them in terms of the settlement agreement.

3. The matter served before Pakati J, who on 30 August 2019 made the following orders in relation to the counter-application::

> "1. The decision taken on 12 September 2017 at Port Nolloth to settle the dispute between the applicants and the Department in Case Number 2072 is hereby reviewed and set aside.
>
> 2. The settlement agreement (Annexure "AS 5") is declared null and void ab initio.
>
> 3. The applicants and the third party/fourth respondent are to pay jointly and severally the one paying the other to be absolved:
>
> 3.1 The amount of R10 million paid on 01 December 2017 into the account of Mr Vertue with interest at the mora rate from 01 December 2018 to date of payment;
>
> 3.2 The applicants and the third party/fourth respondent are to pay the costs of this application including the wasted costs of 23 November 2018 as well as costs of two counsel jointly and severally, the one paying the other to be absolved."

4. This appeal is against the findings made in the counter-application.

5. The background to this matter can be summarised as follows:

5.1 The JV was the successful tenderer for the construction of a psychiatric hospital in Kimberley.

5.2 After a considerable amount of construction had been completed, the Head of Department: Northern Cape Provincial Government: Department of Roads and Public Works (the third respondent in the application, and the second respondent in the appeal), hereinafter

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referred to as the HOD, cancelled the construction contract during December 2009.

5.3 During June 2010 Vista was placed in liquidation.

5.4 During December 2012, the appellants as liquidators of Vista and its JV partner Joh-Arch instituted action under case no 2072/2012 against the HOD for damages in the amount of R57 million based on the alleged wrongful unilateral cancellation of the construction contract.

5.5 The HOD defended the action and in his plea raised certain special pleas relating to non-compliance with the provisions of the Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002 ("the Act") in that six months prior notice of the claim had not been given as required by the Act and further that in terms of s2 of the State Liability Act, 20 of 1967, in any action instituted against the State, the executive authority of the department concerned must be cited as nominal defendant, which the HOD was not.

5.6 During April 2014 the JV brought an application for condonation for failure to give prior notice in terms of the Act wherein it cited as respondents the Minister of Public Works (first respondent in the court *a quo*) and the MEC: Northern Cape Provincial Government: Department of Public Works (the second respondent in the court *a quo*) and the HOD.

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5.7 The application for condonation was opposed in part on the basis that the JV could never have a claim against the HOD and that any claim against the Minister or MEC had become prescribed.

5.8 The application for condonation was not pursued to its finality and in the meantime a certain Mr Scholtz, who represented the JV during the tender process, and the deponent to the respondents' papers in the court *a quo*, embarked on a quest to obtain payment from the Department by making repeated calls to the HOD for payment of the alleged damages suffered, contacting the Premier and certain other senior officials within the provincial government in this regard as well as the respondents attorney of record and local newspapers.

5.9 The HOD, who describes himself as being at his *"tether's end"* with Mr Scholtz and his demands, arranged for a meeting to be held with certain provincial government executives and senior officials while they were on a road show in Port Nolloth to decide upon an approach to be adopted with Mr Scholtz and his insistence on payment despite pending legal action.

5.10 Mr F Borman, who was the Department's in-house legal advisor at the time, was approached to prepare a presentation for the meeting which was to be held on 12 September 2017.

5.11 Present at this meeting were the Premier, the MEC for Finance, Economic Development and Tourism, the first respondent MEC, the HOD, the Director-General in the office of the Premier, the Chief of Staff in the office of the Premier and the Chief Director of Public Works and Property Management.

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5.12 The minutes of the meeting compiled by Mr Borman and approved by the HOD, were attached to the respondent's answering affidavit. In short, the contents of the minutes reveal that:

5.12.1 The HOD explained that he required *"approval and guidance in regard to the litigation matter which has been dragging on for four years now and is costing the Department in legal costs and fees to attorneys."*

5.12.2 The Chief Director: Public Works appears to have explained briefly the reason for the termination of the construction contract with the JV.

5.12.3 Mr Borman gave an overview of the litigation which ensued, focussing on the JV's contractual claim. Mr Borman explained that the JV's claim of about R57 million was made up of about R37 million as per clause 28 of the construction contract which made provision for payment of 10% of the contract price upon the unilateral termination by the Department of the contract; R4.7 million for work done without payment and R10 million retention money.

5.12.4 The meeting considered the risks involved in going to trial to prove a breach of contract due to non-performance by the JV, which would entitle the Department to terminate the contract, the costs of litigation *etcetera*.

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5.12.5 I do not intend to traverse the entire content of the minutes save to say that the meeting ultimately agreed and resolved that:

> "1. The proposal of R36 million be made to the plaintiff as full and final settlement of litigation with no interest and each party to pay its own legal costs;
>
> 2. The amount of the settlement to be paid in increments and not a lump sum amount;
>
> 3. Mr Borman to handle the negotiations with the assistance of the Chief State Law Advisor Adv. G Botha from the Office of the Premier to be present at the negotiations as well."

5.13 Settlement negotiations ensued whereafter Mr Scholtz for Vista and the HOD signed a settlement agreement on 27 September 2017 and a Mr Libisi for Joh-Arch signed on 19 February 2018.

5.14 The terms of the settlement agreement accord in the main with the discussion at the meeting of 12 September 2017 and the resolution passed in that *inter alia* the JV agreed to accept R36. 8 million in settlement of 10% of the contract amount, to be paid in four tranches; that an amount of R443 113.03 in payment of legal costs under case no 2106/2009 be set off against the final payment; and that the settlement agreement be subject to the approval of the liquidators of Vista.

5.15 Significantly and although there was no formal joinder of the Minister of Public Works and the MEC of Public Works, these parties are cited in the settlement agreement as 1st and 2nd defendants respectively, with the HOD as 3rd defendant.

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5.16 Subsequent to the settlement agreement the Department only made one payment in the amount of R10 million on 1 December 2017 and failed to make any further payments in terms of the agreement.

5.17 This situation led to the institution of the application by the liquidators (the appellants) for payment of the outstanding balance in terms of the settlement agreement and the counter-application for the review and setting aside of the decision of 12 September 2017, the repayment of the R10 million paid in terms of the agreement and payment of the costs under case no 1522/2010.

6. The counter-application for the review and setting aside of the decision of 12 September 2017 was based on the application of the doctrine of legality and premised on the following grounds:

6.1 That the decision was arrived at without considering the merits of the action and specifically the special pleas raised by the Department;

6.2 Had all the relevant information served before the meeting, the decision to settle the litigation between the parties would not have been taken; and

6.3 The decision to enter into a settlement was not in accordance with the Constitution and public policy and would result in fruitless and wasteful expenditure by the Department.

7. In opposing the counter-application for review the appellants raised issues such as the delay in bringing the review, the manner in which it was

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brought, the fact that it was an executive action relating to settlement of pending litigation as opposed to an administrative action, whether irrationality could be a ground for the review and whether irrationality had been shown to exist.

8. The court *a quo* found it unnecessary to deal with most of the issues raised by the parties as alluded to in paragraphs 6 and 7 above in light of the view held that no settlement agreement had come into being absent the fulfilment of the condition contained in the agreement that the liquidators approve of the settlement reached. On this basis, it would appear from a reading of the judgment, the payment of R10 million (in fact the total settlement amount of R37 million) was found to be wasteful and fruitless expenditure, contrary to the Constitution and public policy, hence the order made.

9. It would appear that the court *a quo* was derailed by an unmeritorious side-issue which was found to be dispositive of the matter. The long and short of the matter is that the liquidators had in any event ratified the agreement and there can be no clearer evidence thereof than the fact the liquidators had brought the application for performance in terms of the settlement agreement.

10. Be that as it may. On appeal before us, the main issues between the parties crystallised as follows:

10.1 The delay in bringing the review application;
10.2 Irrationality as a ground of review; and
10.3 Whether irrationality had been shown to exist.

DELAY

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11. The review application was brought more than a year after the decision to settle was made and the settlement agreement entered into. The appellants complain that no explanation had been given for the delay and that there was therefore no basis laid for the court *a quo* to overlook the delay.

12. In their papers before the court *a quo* the Department did not specifically deal with this delay, but addressed the late filing of the opposing affidavit – which the court *a quo* condoned.

13. The explanation given by the Department for the delay in filing its opposing affidavit (counter-application) does however, on a reading of the papers, also explain the delay in bringing the review application. In its opposing papers the Department explained that upon receiving the main application, it had instructed new attorneys. In order to draft the opposing papers, the new attorneys had to acquaint themselves with the preceding litigation between the parties. The court files relating to that litigation proved difficult to trace. However, upon obtaining the pleadings relating to the main action between the parties, the new attorneys alerted the Department to the fact that the decision of 12 September 2017 was problematic. This fact then prompted the filing of the counter-application. It is therefore not correct to state that no explanation was given for the delay in bringing the review application.

14. The other issue raised by the appellants in their heads of argument was the consequences of the delay, which they asserted that the court *a quo* failed to properly consider. The consequences and prejudice caused by the delay were contended to be the fact that the liquidation and distribution account had already been approved by the Master – confirming the settlement and the R10 million already received. The argument was that

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the confirmation of the liquidation and distribution account had elevated it to the status of a court order which had to be set aside before the court *a quo* could make the order that it did.

15. This ground of appeal relating to the liquidation and distribution account was however abandoned by the appellants' counsel at the hearing of the appeal. In the circumstances, there is no reason to interfere with the discretion exercised by the court *a quo* to overlook the delay in bringing the review application.

IRRATIONALITY / UNREASONABLENESS AS A GROUND OF REVIEW

16. The contention in this regard is that the Court must decide whether the decision amounted to administrative action or executive action since unreasonableness or irrationality is a ground of review under the Prevention of Administrative Justice Act[1] (PAJA), which concerns administrative action and not executive action.

17. The argument was made rather half-heartedly since Mr Grobler SC for the appellants conceded that irrationality can "*notionally"* be a ground of review for executive action. He argued however, that in this type of what he termed *"quasi-executive action"* where the decision was to settle pending litigation, unreasonableness or irrationality does not have much bearing since a party cannot resile from an agreement simply because he discovered that he has made a bad deal.

18. In support of this argument Mr Grobler referred in his written arguments to the matters of **Eke v Parsons**[2] and **Provincial Government North West Province and another v Tsoga Developers CC and others**[3].

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1 Act 3 of 2000
2 2016 (3) SA 37 (CC)
3 2015 (5) BCLR 687 (CC)

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19. Both these judgments concerned allegedly questionable settlement agreements which had been made orders of court. The settlement agreement in *casu* had not. In **Eke** the settlement agreement had been entered into by two private individuals and what the Constitutional Court clarified is what a court should ascertain before making a settlement agreement an order of court. In the **Tsoga** matter the Constitutional Court held that even if there were grounds upon which the settlement agreement could be set aside on review, the fact that the agreement had been made an order of court would present an obstacle in that the order would only be susceptible to being set aside if on the face of it it was a nullity, failing which the normal processes such as rescission should be followed.

20. I accept that what Mr Grobler was attempting to distil from the abovementioned matters was the latitude afforded to litigating parties in terms of settlements or compromises reached during the course of litigation, except where it is not competent or proper or contrary to the Constitution and the law. There is however authority more apposite to the matter in *casu.*

21. In **PM on behalf of TM v Road Accident Fund**[4], the trial court refused to make a settlement agreement an order of court when it appeared from the court papers and after being addressed by counsel for the RAF, that there was no indication that the insured driver was negligent at all and that the main reason for the agreement was the lack of preparation of counsel. On appeal the Supreme Court of Appeal[5] held:

> "[34] The RAF is an organ of state, established in terms of s 2 of the Road Accident Fund Act 56 of 1996 (the Act). It is thus bound to adhere to the basic values and principles governing the public administration under our Constitution. Section 195(1) requires, inter alia, that '(a) high standard of professional ethics must be promoted and maintained'; and that (e)fficient, economic and effective use of resources must be promoted

4 2019 (5) SA 407 (SCA)
5At para 34 and 35 of the judgment

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[35] In cases involving the disbursement of public funds, judicial scrutiny may be essential. A judge is enjoined to act in terms of s173 of the Constitution to ensure that there is no abuse of process."

22. In **Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited**[6] the Constitutional Court dealt with a review application launched by the Municipality relating to a building contract awarded to Asla which was invalid due to non-compliance with the provisions of s 217 of the Constitution in that no competitive procurement processes were followed. There were issues with delay by the Municipality which were condoned by the High Court and the contract was declared invalid. On appeal to the Supreme Court of Appeal Asla was successful and the Supreme Court of Appeal found, without making definitive findings with regard to the legality of the contract, that a proper case for condonation had not been made out by the Municipality. The Municipality then approached the Constitutional Court with an application for leave to appeal the Supreme Court of Appeal's judgment. After argument in the application for leave to appeal the Municipality sought to withdraw the application and to have a settlement agreement with Asla made an order of court. The Constitutional Court refused to make the settlement agreement an order of court or to accede to the request to withdraw the application on the basis *inter alia:* that a court should not be mechanical in its approach to making a settlement agreement an order of court (para 25); there was no explanation in the withdrawal application as to how the settlement agreement cured the defects in the contract (para 30); and the parties had not explained why the settlement agreement was in accordance with the law and the Constitution (para 31).

23. The judgments in the matters referred to in paragraphs 21 and 22 above serve to dispel any notion that the court's hands are tied when it comes to

6 2019 (6) BCLR 661 (CC)

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settlement agreements between litigating parties, especially those which involve the disposal of state funds.

HAS IRRATIONALITY BEEN SHOWN TO EXIST

24. The question as to whether irrationality has been proven has been dealt with in argument by the appellants on two bases. Firstly, whether enough information has been placed before the court in order to make such a determination and secondly, whether in fact the defences raised by the respondent are as watertight as contended.

25. The contention on behalf of the appelants is that the respondents failed to make a full and frank disclosure of any or all of the relevant documents or facts necessary for a proper determination of the review application. In support of the argument reference was made to the matter of **Airports Company South Africa v Tswelokgotso Trading Enterprises CC**[7] where Unterhalter J restated that to make out a case on the basis of mistake of fact, an applicant must show that the decision was initiated by error as to a material fact that is uncontentious and objectively verifiable. In that matter the applicant had failed to provide the supporting documentation referred to in its papers and on which it based its averments of mistake of fact, nor was any explanation given for the mistake. These issues being contentious, it was held that the applicant had failed to make a case for review on facts that were uncontentious and verifiable.

26. The facts *in casu* differ from those in the **ACSA** matter. The explanation was given by the HOD in the respondent's answering affidavit / founding affidavit in the counter-application, of the events leading up to the meeting of 12 September 2017; the presentation by the legal advisors as to the validity of the points raised by Mr Scholtz regarding payment in terms of

7 2019 (1) SA 204 (GJ)

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the procurement agreement, despite the pending legal action between the parties; the discussion at the meeting as supported by the minutes and the HOD's explanation that the bulk of the litigation between the parties was conducted before his appointment and although he keeps track of the litigation which involves the Department, he was not familiar with every detail of the several cases in which the Department was involved.

27. None of the above allegations by the respondents were disputed by the appellants, neither could it be gainsaid. The high water mark of any "disagreement" with the respondents explanation about the circumstances in which the decision was made was that it was inconceivable that no one at the meeting was aware of the defences raised by the respondents in their special pleas or that a thorough investigation of the status of the litigation was not made prior to the decision to enter into a settlement agreement.

28. There is no indication whatsoever on the papers that the respondents (the HOD and the MEC) had been aware of the defences prior to the decision being taken. There is nothing before us on which to find that the respondents had failed to make a full and frank disclosure of all the facts.

29. I now turn to the argument that the defences raised are in any event not watertight. The argument, as I understand it, is that it is not a clear cut fact that, if the action had gone to trial or should proceed to trial, that an amendment to substitute the HOD with the MEC as respondent, or the joinder of the MEC as a respondent, would not be granted or that condonation would not be granted for the non-compliance with the provisions of the Act. Therefore the MEC's lack of knowledge of the defences raised did not necessarily translate to irrationality of the decision to settle the action.

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30. We therefore need to take a closer look at the defences which have been raised by the respondents.

31. Section 2 of the State Liability Act[8] reads as follows:

> **Section 2 - Proceedings to be taken against executive authority of department concerned**
>
> (1) In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent.
>
> (2) The plaintiff or applicant, as the case may be, or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney.
>
> (own underlining)

32. On 30 August 2011, some 15 months prior to the summons being issued in the main action, s 2(1) of the State Liability Act was amended to replace the previous “may” with “must”, thus making it imperative that the executive authority i.e. either the Minister or the MEC of a department be cited in proceedings against it.

33. The HOD in one of the special pleas dated 2 July 2013 alerted Vista and Joh-Arch (the plaintiffs in the main action) to the fact that the wrong defendant had been cited. At that stage there were still some eight months left before a claim against the MEC would have prescribed. During that time however, the plaintiffs failed to amend the summons to substitute the MEC for the HOD or to bring an application for the joinder of the MEC or to withdraw the summons and issue a new summons, citing the MEC. In fact, by the time of the decision in September 2017 none of the above measures to cite the correct defendant had even been attempted. By then it would have been too late to join the MEC or reissue the summons with the correct defendant cited since the claim against the MEC would have

8 Act 20 of 1957

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prescribed. Any amendment sought could also have been successfully opposed as it would resuscitate a prescribed claim. Mr Du Toit SC, who appeared for the respondents with Mr Merabe, referred to the matter of **Dumasi v Commissioner, Venda Police**[9] wherein a similar situation unfolded where the plaintiff in that matter had cited the Commissioner of Police as defendant instead of the Minister as required by the State Liability Act. The plaintiff filed a notice of intention to amend the summons to join as a second defendant the State President after a special plea was raised. After hearing argument on the proposed amendment and the special plea, the applications for amendment and joinder were dismissed and the special plea upheld.

34. The Court stated the following[10]:

> "2. The applications for amendment and joinder.
>
> Applications for the amendment of pleadings are usually granted unless they are not made *bona fide* or will cause prejudice which cannot be cured by a postponement or an order for costs. (*MacDuff & Co (in Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1923 TPD 309; *Rosenberg v Bitcom* 1935 WLD 115 at 117.)
>
> Where an amendment is granted or effected without opposition, the pleading concerned must be taken to be amended from its original date. This follows from the fact that one of the grounds on which a proposed amendment can be successfully opposed is that it would resuscitate a prescribed claim or defeat a statutory limitation as to time. (*Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279; *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T).)
>
> It also seems to me that a so-called application for an amendment introducing a new party to the proceedings, where it appears that the action against the existing party is a nullity, in order to obtain the benefit of the *nunc pro tunc* rule, is not a *bona fide* attempt at placing the true case before Court, but simply a device to circumvent s 36 of the Police Act. The existing abortive action is simply used as a vehicle to institute a fresh action against the Minister concerned in contravention of the limitation as to time contained in the Act. (See also *Greef v Janet en 'n Ander* 1986 (1) SA 647 (T)**.)**

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9 1990 (1) SA 1068 (VSC)
10 At p 1071 B-H

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> In terms of the section referred to (s 36 of Act 4 of 1985) an action had to be instituted *against the State* within six months after the cause of action had arisen, after giving at least one month's prior written notice to the Commissioner. This was not done and on any view of the facts the plaintiff is now hopelessly out of time and, with a single exception, there is no possibility of extending these periods. They are 'expiry periods', not periods of extinctive prescription which can in certain circumstances be extended. (See *Hartmann v Minister van Polisie* 1983 (2) SA 489 (A) at 499.) The sole exception appears to be where it was objectively impossible for a claimant to comply with these requirements, based on the maxim *lex non cogit ad impossibilia* (see *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A)**).**
>
> The desperate last-ditch attempt to join the State President by application places the applicant in an even worse position: it is common cause that a mere joinder amounts to the institution of a new action against the party that is joined and not even a suggestion of retrospectivity arises (see *Greef v Janet (supra* at 654 – 6)). This application could, therefore, not save the plaintiff from her present dilemma."

35. I agree with the reasoning in the above extract of the judgment. Of further significance *in casu* is that the appellants and Joh-Arch appeared to have abandoned their application for condonation for non-compliance with the provisions of the Act (the subject of the other special plea), having realised, in all probability, that in the absence of the MEC having been joined in time, the application for condonation would not succeed.

36. To put it lightly, the appellants' prospects of success in the main action would, in the light of the above, have been minimal. Had the meeting of 12 September 2017 and more specifically the MEC, been informed of the defences, the decision to settle the litigation between the parties to the tune of R37 million would in all probability not have been taken.

37. In **Pharmaceutical Manufacturers Association of South Africa and Another: In re *Ex Parte* President of South Africa and Others**[11] the Constitutional Court stated the following:

> "[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions

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11 2000 (2) SA 674 (CC) at paras 85, 89, 90

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must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[89] The President's decision to bring the Act into operation in such circumstances cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the Executive and other functionaries be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do.

[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision. This is such a case. Indeed, no rational basis for the decision was suggested. On the contrary, the President himself approached the Court urgently, with the support of the Minister of Health and the professional associations most directly affected by the Act, contending that a fundamental error had been made and that the entire regulatory structure relating to medicines and the control of medicines had as a result been rendered unworkable. In such circumstances, it would be strange indeed if a Court did not have the power to set aside a decision that is so clearly irrational."

38. Having made the decision in ignorance of the true facts and taking into account irrelevant considerations it cannot be said that the MEC exercised the public power vested in him in an objectively rational manner. The order of the court *a quo* should therefore stand for the reasons mentioned herein.

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ORDER

The following order is made:

The appeal is dismissed with costs.

_____

CC WILLIAMS

JUDGE

I concur:

_____

MC MAMOSEBO

JUDGE

I concur:

_____

LG LEVER

JUDGE

For appellants: Adv S Grobler SC
Gouws Vertue & Associates Inc
c/o Engelsman Magabane Inc

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For respondents : Adv J du Toit SC with Adv Merabe
Mjila & Partners