



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF  
THE SPECIAL INVESTIGATIONS UNIT AND  
SPECIAL TRIBUNALS ACT 74 OF 1996**

**(REPUBLIC OF SOUTH AFRICA)**

Case no: **GP15/2020**

In the matter between:

**THE SPECIAL INVESTIGATING UNIT**

**FIRST PLAINTIFF**

**THE MEMBER OF THE EXECUTIVE**

**COUNCIL FOR HEALTH, GAUTENG**

**SECOND PLAINTIFF**

and

**NOSIPHO ZIBANI**

**FIRST DEFENDANT**

**YOLANDE TEBOGO HLATSHWAYO**

**SECOND DEFENDANT**

**PHINDILE ANELE ZIBANI**

**THIRD DEFENDANT**

**NTANDOKAZI TRADING**

**FOURTH DEFENDANT**

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**JUDGMENT**

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***Civil trial*** – damages arising from two fraudulent schemes allegedly master minded by the first defendant, an assistant State Attorney, and perpetrated by all the

defendants against the second plaintiff – the plaintiffs have established on a balance of probabilities that the defendants have perpetrated the fraudulent schemes.

## **MODIBA J:**

### **INTRODUCTION**

[1] The plaintiffs, the Special Investigating Unit (SIU) and the Member of the Executive Council for Health, Gauteng (MEC) claim damages the MEC allegedly suffered pursuant to two fraudulent schemes perpetrated by the first defendant, Nosipho Zibani (Nosipho), the second defendant, Yolande Tebogo Hlatshwayo (Hlatshwayo), the third defendant Phindile Zibani (Phindile) and the fourth defendant Ntandokazi Trading (Ntandokazi Trading).

[2] For convenience, I refer to all the defendants individually by their names and jointly as defendants. Due to their association when allegedly perpetrating the second fraudulent scheme, I refer to Nosipho, Phindile and Ntandokazi Trading jointly as the Zibani defendants. Unless otherwise specified, all references to statutory provisions are to the Special Investigating Units and Special Tribunals Act.<sup>1</sup> Similarly, all references to Rules are to Rules for the Conduct of Proceedings in the Tribunal.<sup>2</sup>

[3] When the plaintiffs' cause of action arose, Nosipho was employed by the State Attorney, Johannesburg as an assistant State attorney. She served in the medical negligence unit. In this capacity, Nosipho was the attorney of record for the MEC in matters in which the MEC is cited as the defendant where various plaintiffs instituted action against the MEC for the alleged negligent conduct of medical health professionals working in public health institutions,

resulting in a child being born with cerebral palsy. Together with the other cited defendants, Nosipho allegedly perpetrated fraudulent schemes that caused the damages the MEC seeks to recover in these proceedings.

[4] This judgment follows the following scheme:

4.1 why the trial proceeded on a default basis;

4.2 the plaintiffs' claims as pleaded;

4.3 the Zibani defendants' defence as pleaded;

4.4 the evidence of the plaintiffs' witnesses, analysis and findings;

4.5 the order.

#### **WHY THE TRIAL PROCEEDED ON A DEFAULT BASIS**

[5] The SIU instituted this action in November 2020. The defendants had to file their notice of intention to defend within 10 days of service of the summons, and their plea within 20 days of filing their notice of intention to defend.

[6] Hlatshwayo did not file a notice of intention to defend. For this reason, she was *effectively* barred from defending these proceedings in terms of Rule 13(3).

[7] The Zibani defendants filed their notice of intention to defend but failed to file their plea. Notwithstanding that they too became effectively barred from defending these proceedings in terms of the same Rule, on 11 May 2021, the plaintiffs served a notice of bar on the defendants, effectively extending a life line to the defendants to defend these proceedings. In terms of that notice, the

defendants would be effectively barred if they failed to file their plea by 18 May 2021.

[8] At the case management meeting held on 18 May 2021, I issued the following Directives in terms of Rule 19 with the parties' agreement:

8.1 in the event that the defendants fail to file their plea by end of business on 18 May 2021, the trial shall proceed on a default basis;

8.2 the plaintiffs shall deliver their discovery affidavit, witness statements and trial bundles by 28 May 2021;

8.3 the application for default judgement would be heard on 10 to 11 June 2021;

8.4 in the event that the defendants file their plea by 18 May 2021, they shall deliver their witness statements, discovery affidavit and trial bundles by 17 June 2021.

8.5 the trial is down for 2 to 13 August 2021 and 1 to 7 September 2021.

[9] The Zibani defendants filed their plea by 18 May 2021. However, they failed to comply with the rest of the Directives.

[10] On 29 July 2021, I issued a further Directive regarding the hearing of the trial.

I directed that the trial will be heard at the seat of the Special Tribunal at the Booyens Magistrates' Court. This Directive elicited no response from the Zibani defendants.

[11] On Friday 30 July 2021, at approximately 17h28, the Zibani defendants' attorney of record filed a notice of withdrawal as attorney of record. He did not cite reasons for his withdrawal.

[12] I issued another Directive calling on the Zibani defendants' attorney of record to file an affidavit setting out reasons for his belated withdrawal. I premised this Directive on the attorney's ethical duty not to withdraw from a matter on the eve of a trial without the Court's leave, particularly where the withdrawal risks prejudicing the commencement of the trial. In compliance with the Directive, the attorney explained that he withdrew from the matter on Nosipho's instructions. She has no funds to settle his legal fees as she is unemployed. The attorney further explained that he has numerous engaged the Zibani defendants regarding his legal fees. They have failed to fulfil their numerous undertakings to settle his legal fees.

[13] In a very unexpected turn of events, the Zibani defendants did not attend court on 2 August 2021. They did not afford the plaintiffs' attorney the courtesy of appraising her of their intentions regarding the trial. They also did not file an application for a postponement.

[14] At the very least, Nosipho as an admitted attorney, should have appeared in person to request a postponement on behalf of the Zibani defendants and to place facts before the Tribunal regarding how the Zibani defendants intend dealing with their purported lack of funds for legal representation.

[15] At all material times since the commencement of these proceedings, the Zibani defendants conducted their defence jointly, having instructed one

attorney. There is no reason to regard them as conducting their defence separately following the withdrawal of their attorney of record.

[16] Under these circumstances, this matter falls within the rubric of those matters where terminating an attorney's mandate on the eve of a trial is a strategy for delaying the commencement of the trial.<sup>3</sup> When regard is had to the Zibani defendants' paltry defence as set out in their plea, their non-compliance with the Tribunal's Directives and in particular, failure to file witness statements and the documentary evidence on which they rely to establish their defence, as well as their unexplained failure to appear at the trial, such an inference is not far-fetched.

[17] A postponement of the trial, particularly in the absence of an application setting out reasons for it will not only be prejudicial to the plaintiffs' attorneys and counsel who have been diligently complying with the Tribunal's Directives and are ready for trial, it will also not be in the public interest. One of the primary objectives of establishing the Tribunal is to ensure that litigation of this nature is disposed of expeditiously. The defendants allege that they are out of funds. They will probably not afford the cost of a postponement. Nor is there any reason to believe that they will afford legal representation if the trial is postponed. It is in the interest of justice that the trial is disposed of without any further delay.

[18] The trial proceeded on 2 to 6 August 2021. I reserved judgment. In the interests of justice, I subsequently issued a Directive calling on the plaintiffs to reopen their case, file an expert report and lead expert evidence in support of the order they seek in respect of the second fraudulent scheme.

[19] This led to the trial being part heard. At the Tribunal's direction, the defendants were served with a notice of set down relating to the continuation of the trial on 24 February 2022. They similarly failed to appear on that date. As a result, the trial continued in their absence.

## **THE PARTIES CLAIMS AND DEFENCES AS PLEADED**

[20] The plaintiffs have dissected their claims into claim A and B.

### ***Claim A***

[21] The plaintiffs allege that in 2016 to 2017, Nosipho, Hlatshwayo and Phindile entered into an oral agreement to defraud the MEC through the scheme described below (the first fraudulent scheme).

[22] Hlatshwayo purportedly issued invoices to the State Attorney in matters assigned to Nosipho as the attorney of record for the MEC when Hlatshwayo did not render such services. The invoices were purportedly in relation to midwifery medico-legal services Hlatshwayo rendered in the relevant matters.

[23] The said invoices Nosipho reflected Hlatshwayo's banking details as the bank account into which the office of the State Attorney should make payment to Hlatshwayo for the said services. The State Attorney duly made payments to Hlatshwayo in respect of the said invoices. On receipt of the payments by the office of the State Attorney, Hlatshwayo made payments into a Capitec bank account held in Phindile's name. On receipt of the payments by Hlatshwayo, Phindile remitted money into an FNB account held in Nosipho's name.

**Claim B**

[24] The *modus operandi* used to perpetrate the losses that constitute Claim B (the second fraudulent scheme) is an alleged oral agreement between Nosipho, Phindile and Ntandokazi Trading in terms of which Nosipho would issue invoices to the State Attorneys in matters in which Nosipho represents the MEC. The invoices would reflect that Ntandokazi Trading rendered assessment services to the State Attorney as a result of which Ntandokazi Trading purportedly prepared an assessment report in each matter. Nosipho caused the State Attorney to remit payment for these invoices into Ntandokazi Trading's bank account. Phindile remitted these payments from Ntandokazi's bank account into her bank account from where she further remitted payments to Nosipho's bank account.

[25] The Zibani defendants allegedly perpetrated the second fraudulent scheme well knowing that Ntandokazi had not rendered any services to the office of the State Attorney and was not entitled to receive any payment from the office of the State Attorney.

[26] The high water mark of the Zibani defendants' defence to these allegations as set out in their plea is that the MEC did not suffer loss as a result of Nosipho's alleged fraudulent conduct. Notwithstanding that no case is made against Ntandokazi Trading under Claim A, the Zibani defendants pleaded that this entity was properly appointed to conduct work on behalf of the State Attorney.

The work was properly approved and accepted by the management of the State Attorney. Ntandokazi Trading's invoices were properly approved after the work was done to the satisfaction of the State Attorney.

[27] Notably, the Zibani defendants did not plead to the allegation regarding the mid-wifery medico-legal work purportedly performed by Hlatshwayo, the approval and payments for such work.

### **THE EVIDENCE OF THE PLAINTIFFS' WITNESSES, ANALYSIS AND FINDINGS**

[28] To establish the above allegations, the plaintiffs relied on witness statements filed on behalf of several witnesses in terms of Rule 19(6)(b)(ii)(B) and (C) read with Rule 20(4). The Tribunal required that all the witnesses on whose witness statements the plaintiffs rely, attend the Tribunal on Friday 6 August 2021, to confirm that they deposed to the respective witness statements and the contents as set out therein. In addition to the above stated purpose, Ishmail Dawood Suleman Varachia (Mr Varachia), was required to clarify certain aspects of his evidence.

[29] The plaintiffs' witnesses are Zanele Nompumelelo Sybil Olive Nhlayisi (Ms Nhlayisi), Washington Nyembe (Mr Nyembe), Mr Varachia and Henry Baden Wiggil (Mr Wiggil).

[30] Ms Nhlayisi is the Deputy State Attorney in the Office of the State Attorney, Johannesburg. When the plaintiffs' cause of action arose, she was the Acting State Attorney in this office. It is the duties she performed as the Acting State

Attorney that enabled her to detect the alleged fraudulent scheme. It was in that capacity that she also received a complaint from Hlatshwayo, which I will detail shortly. Her witness statement deals with the method of operation used by the defendants when they perpetrated the alleged fraud against the MEC.

[31] Mr Nyembe is an investigator appointed in terms of section 3(2). He is stationed at the SIU office in Durban. He investigated the events at the office of the State Attorney that gave rise to the plaintiffs' cause of action.

[32] Mr Varachia is a Chief Forensic Accountant, also appointed in terms of section 3(2). He too is stationed at the SIU office in Durban. Having been briefed by Mr Nyembe on the method of perpetuating the alleged fraud in Claims A and B, and on the basis of bank statements Nyembe furnished him with, he conducted an analysis of payments the office of the State Attorney made to Hlatshwayo and Ntandokazi, payments Hlatshwayo and Ntandokazi Trading made to Phindile and payments Phindile made to Nosipho.

[33] Mr Wiggil is employed by the SIU as a digital forensics practitioner, assigned to the Cyber Forensics Laboratory (CFL). He was tasked with imaging, examining and analysing the hard drive disks (HDD) for the computer the office of the State Attorney assigned to Nosipho, with specific reference to documents with the key words 'Mrs Y Hlatshwayo', to determine who the author of the documents was. He also determined who last modified and/ or saved the documents. He filed a report setting out the methodology used when undertaking these tasks, as well as his findings.

[34] At the Tribunal's direction, Mr Wiggle filed another report relating to a similar task with specific reference to documents with the key words 'Ntandokazi Trading'.

[35] Ms Nhlayisi, Mr Nyembe and Mr Varachia appeared before the Tribunal on 6 August 2021 as directed. They confirmed their evidence and depositions as they appear on their respective witness statements filed in these proceedings.

[36] Mr Wiggle's appearance was initially not secured due to ill-health. This is not fatal to his evidence because he is not a factual witness but an expert witness. His evidence is not foundational to the plaintiffs' case. The basis for his findings and expert opinion is premised on the factual evidence adduced by Ms Nhlayisi and Ms Nyembe. His evidence merely corroborates the factual evidence of these witnesses with reference to objectively verified cyber data.

[37] Rule 19(6)(b)(ii)(B) and (C) read with Rule 20(4) permits the admission of his expert report filed in relation to the first fraudulent scheme. It was properly commissioned before a commissioner of oaths. For the above reasons, the Tribunal admits Mr Wiggle's evidence on the affidavit filed on pages 290 to 314 of the Plaintiffs' trial bundle.

[38] Mr Wiggle appeared before the Tribunal on 24 February 2022 as directed, to give evidence in relation to the further investigation he conducted in respect of the second fraudulent scheme, as well as his findings.

[39] All the above witnesses were not subjected to cross-examination for the reason already stated. Their evidence was admitted unchallenged, having been found to be satisfactory and consistent in material respects.

[40] Ms Nhlayisi testified that when the plaintiffs' cause of action arose, the medical negligence unit was headed by Mr Lekabe (Lekabe) in the position of Deputy State Attorney. Mr Lekabe no longer works for the office of the State Attorney. His position was still vacant when the plaintiffs' cause of action arose. Hence, invoices rendered by service providers in relation to medical negligence litigation conducted by Nosipho were approved by a Deputy State Attorney heading another unit within the office of the State Attorney, Johannesburg.

[41] When authorising payment for these invoices as Acting State Attorney, Ms Nhlayisi noticed the following trend in respect of a series of invoices issued to Nosipho: the amount charged, nature of the service rendered with reference to the distance travelled, telephone calls made and time spent, was the same. Nosipho was the only attorney in the Medical Negligence Unit, who utilized the relevant services.

[42] When Ms Nhlayisi queried the similarity in the distance travelled by the service provider as reflected on the invoices, Nosipho informed Nhlayisi that it was an error by the service provider. She undertook to get the service provider to correct the error.

[43] When she enquired with them, other attorneys in the Medical Negligence Unit informed Ms Nhlayisi that tracing services are hardly necessary in medical

negligence cases as the mortal status of a child in relation to whom a claim for medical negligence is made is confirmed with the Department of Home Affairs at no cost to the office of the State Attorney.

[44] This evidence was not confirmed by these other attorneys. It therefore constitutes hearsay evidence. Nonetheless, the evidence is admitted in the interests of justice in terms of section 3 of the Law of Evidence Act<sup>4</sup> for the reasons that follow.

[45] Ms Nhlayisi's witness statement was served on the Zibani defendants. They have not objected to the admissibility of this evidence.

[46] The probative value of this evidence is low because the evidence is peripheral to the plaintiffs' case. The plaintiffs' case is not premised on whether the services purportedly rendered by Ntandokazi were necessary or not. It is premised on the alleged fraudulent schemes. If anything, the evidence of these other attorneys establishes a motive for the procurement of services from Ntandokazi by Nosipho to perpetuate the alleged second fraudulent scheme. It does not establish that the fraudulent scheme was indeed perpetrated as alleged. Admitting the evidence is unlikely to prejudice the Zibane defendants.

[47] Nhlayisi subsequently received a complaint by email from Hlatshwayo regarding payments made into her account by the office of the State Attorney. Hlatshwayo informed Nhlayisi that Nosipho invited Hlatshwayo, a mid-wife, to work with her in medico-legal maternity cases assigned to Nosipho. Nosipho undertook to assist her to register on the office of the State Attorney's Basic Account System. Hlatshwayo subsequently received an instruction from

Nosipho to compile a medico-legal report in one of the matters in which Nosipho represents the MEC. Due to the short period in which she was required to undertake this task, she could not fulfil the task. She could not, for the same reason, undertake a subsequent task.

[48] As and when payments were made into Hlatshwayo's bank account, Nosipho would give her instructions on how to remit the payments. On Nosipho's instructions, she remitted the payments to bank accounts nominated by Nosipho.

[49] The third request Hlatshwayo received from Nosipho was that her sister Phindile was rendering security services to the Department of Justice. Phindile was experiencing difficulties registering on the supplier database. Nosipho sought Hlatshwayo's permission for payments due to Phindile to be paid into Hlatshwayo's bank account. Hlatshwayo agreed to the request. From time to time, Hlatshwayo continued to receive instructions from Nosipho to remit payments to bank accounts nominated by Nosipho.

[50] Hlatshwayo became suspicious when she received documentation reflecting that the payments related to midwifery services and not security services as represented to her by Nosipho. When she sought clarification from Nosipho, Nosipho informed her that she did everything above board. Nosipho subsequently stopped taking Hlatshwayo's calls and blocked her on all social media platforms.

[51] Investigations Ms Nhlayisi undertook with the State Attorney's accounting department revealed 9 invoices bearing Hlatshwayo's name. Further

investigations by Ms Nhlayisi revealed that Nosipho authorised several invoices by Ntandokazi Trading which reflect an email address by the name Phindile. Invoices paid to this entity, as authorised by Nosipho, amounted to R4,4 million.

[52] These findings prompted the launch of disciplinary proceedings against Nosipho. She resigned from the office of the State Attorney before the disciplinary proceedings commenced.

[53] Ms Nhlayisi reported these findings to SIU investigators in February 2020. She subsequently granted the investigators access to Nosipho's office from which they seized her computer and universal serial bus (USB).

[54] Ms Nhlayisi's conduct in this matter makes her stand out as a rare bulwark of ethics, professionalism, good governance and accountable public service leadership. Corruption and maladministration, which has become endemic in the public service, would be detected early, preventing fiscal drainage, if many leaders in the public service emulated her exemplary leadership.

[55] Mr Nyembe was directly involved with the investigations relating to Claims A and B as informed by Ms Nhlayisi. In the course of the investigation, he interviewed Hlatshwayo, who confirmed that the version she narrated to Ms Nhlayisi when she lodged a complaint against Nosipho.

[56] Further investigations by Mr Nyembe, confirmed in Mr Wiggle's cyber forensic report, establish that Hlatshwayo indeed undertook no work for the office of the State Attorney, Johannesburg. In four of six matters in which Nosipho purportedly instructed Hlatshwayo, the reports were prepared by a certain

Diane du Plessis (Ms du Plessis), a midwife practicing in Bryanston. Hlatshwayo is not the author of these reports. Nosipho altered the reports compiled by du Plessis, to reflect Hlatshwayo as the author of the reports. Nosipho is the last person who modified and saved a sample of these reports. The author of the other two reports could not be identified. However, they were found on Nosipho's computer and were last modified and saved by her.

[57] Mr Wiggle's further investigation found that the words 'Ntandokazi Trading' yielded approximately 51 hits on Nosipho's computer. However, the documents were not available on her computer because she used a USB to access the relevant documents. Phindile did not email the documents to Nosipho as expected from a service provider. Otherwise, the documents would have been automatically downloaded on Nosipho's computer. The path link for some of the documents indicates that the documents were invoices. One of the documents was authored by 'Dian DP'.

[58] On the probabilities, as argued by counsel for the plaintiff:

- 58.1 this is the same person who authored the documents used to perpetrate the first fraudulent scheme;
- 58.2 Zibani was the author of the reports and invoices identified by Mr Wiggle as there is no plausible connection between Ms du Plessis as the original author of the relevant documents, Hlatshwayo, Phindile and Ntandokazi;
- 58.3 the same *modus operandi* was used to perpetrate both fraudulent schemes.

[59] According to Mr Nyembe, notwithstanding that Ntandokazi rendered invoices to the office of the State Attorney, which were duly paid, in some of the files, Ntandokazi did not submit any reports to the office of the State Attorney, Johannesburg in relation to such payments.

[60] Mr Nyembe subpoenaed bank statements for bank accounts held in Nosipho, Phindile, Hlatshwayo and Ntandokazi Trading's name. Mr Varachia's analysis of these statements provides corroboration for Ms Nhlayisi's evidence that, in the 9 invoices purportedly rendered by Hlatshwayo to the office of the State Attorney, Johannesburg, the same amount, being R15,000 was charged in each invoice for 10 hours at R1,500 per hour, per invoice. The invoices are dated August 2017 to August 2018. The invoices were all rendered for medico-legal services in matters assigned to Nosipho. The office of the State Attorney, Johannesburg, paid a total sum of R135,000 to Hlatshwayo's FNB account in respect of these invoices.

[61] Hlatshwayo remitted R100,500 out of this account as follows:

- 61.1 R41,500 to Phindile's bank account held with Capitec between 4 February 2016 and 31 December 2018;
- 61.2 R59,000 referenced P Zibani, Nosipho on 4 August 2017;
- 61.3 cash deposits in the amount of R23,450 referenced Zibani, Pa Zibani and Phindile Zibani, were made into Nosipho's FNB Private Clients Cheque account between November 2016 and January 2017. The cash deposits correlate materially with cash withdrawals from Phindile's Capitec account over the same period.

[62] Ntandokazi FNB account statements for the period January 2015 to April 2019 reflect that during this period, the office of the State Attorney paid R4,452,351.85 to this entity. From this account 33 transactions were made in the amount of R328,909.75 referenced Zibani. 28 of these transactions were paid into an FNB account held in Nosipho's name amounting to R143,320. On 2 March 2017 R32,000 was paid to House and Home referenced 'N Zibani'. R150,000 was paid to Mercedes Benz East Rand referenced N T Zibani.

[63] These transactions reflect a clear financial relationship between Hlatshwayo, Ntandokazi Trading, Phindile and Nosipho to perpetrate a fraudulent scheme against the MEC. They also reflect how Nosipho personally benefited from such a scheme.

[64] According to Nyembe, the total amount defrauded from the office of the State Attorney, Johannesburg under the above scheme is R135,000 in respect of Claim A and R4,452,351,82 in respect of Claim B. In their particulars of claim, the plaintiffs claimed R4,5 million under Claim B. They seek an amendment to reflect the amount proved during the trial, being R4,452,351,82. The amendment stands to be granted.

[65] In the premises, this Tribunal finds that the plaintiffs have established on a balance of probabilities that:

65.1 Nosipho was the master mind to defraud the office of the State Attorneys in two schemes, aided by Hlatshwayo and Phindile in the first

fraudulent scheme under Claim A and the second fraudulent scheme under Claim B. She was aided by Phindile;

65.2 Nosipho fraudulently submitted invoices for services purportedly rendered by Hlatshwayo and Ntandokazi Trading to the office of the State Attorney, Johannesburg, when she knew very well that Hlatshwayo did not render any services and that in some of the matters, Ntandokazi Trading did not render any services.

65.3 Hlatshwayo was complicit in the fraudulent scheme under claim A because she retained R34,500 of the R100,500 the office of the State Attorney paid to her under the first fraudulent scheme.

65.4 the fact that Hlatshwayo blew the whistle on Nosipho does not absolve her from liability. She too had her hand in the cookie jar as established by the SIU as she personally benefited from such payments. She stopped collaborating with the SIU in its investigations after Nyembe interviewed her, failing to make good her undertaking to submit the content of her interview in a sworn statement. She also failed to defend these proceedings where she had an opportunity to account for her conduct in the alleged fraudulent scheme. Her own culpability in retaining part of the funds she received from the office of the State Attorney is probably the reason why she stopped collaborating with the SIU investigators as well as failing to defend this action.

65.5 Phindile was complicit in the second fraudulent scheme under Claim B because she permitted the abuse of the Ntandokazi's corporate entity to perpetrate the fraudulent scheme resulting in a loss of an amount of R 4 452 351,81 to the office of the State Attorney, Johannesburg.

65.6 The plaintiffs have, on a balance of probabilities, proved their claims against Nosipho and Hlatshwayo under claim A and the Zibani defendants under claimed B in the amount set out above.

## **COSTS**

[66] The determination of liability for legal costs is guided by two primary trite principles:

66.1 the award of costs is a matter of the court's discretion;

66.2 the successful party in civil litigation is generally entitled to have his legal costs paid by its opponent.<sup>5</sup>

[67] The plaintiffs have pleaded with the Tribunal to award costs against all the defendants on the punitive scale as between attorney and client, the one paying the other to be absolved, as opposed to the ordinary party and party scale, due to the existence of the following exceptional circumstances:

67.1 fraudulent, dishonest and vexatious conduct on the part of all the defendants;<sup>6</sup>

67.2 as a public official, Nosipho was duty bound to uphold the rule of law, promote, respect and protect constitutional values, uphold a high standard of professional ethics, employ public resources effectively, provide services impartially, fairly and equitably as a state attorney and account on how she has discharged her constitutional duties as a government administrator. Nosipho's conduct fell far below the ethical

standards placed upon persons who are admitted to practice in the legal profession in that she failed to conduct herself with integrity, honour and honesty.<sup>7</sup>

[68] For the reasons advanced by the plaintiffs, I find that awarding punitive costs against all the defendants is appropriate in these circumstances.

### **REFERRAL TO APPROPRIATE AUTHORITIES**

[69] In terms of section 8(2), the Tribunal may make any ruling to give effect to its findings.

[70] The Tribunal will be failing in its duty as an institution tasked with adjudicating civil disputes that emanate from findings of maladministration in the affairs of the state, irregular and unlawful transactions that have an adverse bearing on state property and intentional loss of public money as investigated by the SIU, if it did not refer the papers in this litigation, as well as the judgment, to the relevant authorities to investigate the defendants' conduct and take action against them as appropriate.

[71] In the premises, the following order is appropriate:

### **ORDER**

1. The plaintiffs are granted leave to amend their particulars of claim to reflect the proved amount of R4,452,351,81 as the amount claimed under Claim B.

2. The first defendant Nosipho Zibani (Nosipho), second defendant Yolanda Tebogo Hlatshwayo (Hlatshwayo) and the third defendant Phindile Zibani (Phindile) shall pay to the second plaintiff, the Member of the Executive health, Gauteng (the MEC), an amount of R 135, 000. 00 in respect of Claim A, together with interest on the said amount at the prescribed rate, calculated from the date of judgment to the date of payment. These defendants shall pay the said amount jointly and severally, one paying and the other to be absolved, provided that Hlatshwayo's liability for the said amount shall only be limited to an amount of R 34, 500. 00 and interest on the latter amount.
3. Nosipho, Phindile and Ntandokazi 31 Trading (Pty) Ltd Registration No: 2014/003182/07 (Ntandokazi), (collectively, the Zibani defendants), shall pay to the MEC an amount of R 4 452 351,81 in respect of Claim B, together with interest on the said amount at the prescribed rate, calculated from date of judgment to the date of payment, jointly and severally, one paying and others to be absolved.
4. All the Defendants are jointly and severally ordered to pay the costs of this action on the scale as between attorney and client, including costs of two counsel, one paying and the others to be absolved; provided that Hlatshwayo's liability for costs shall be limited to the costs of the action on an unopposed basis.
5. Nosipho's pension benefits held with the Government Employees Pension Fund (the GEPF) were preserved in terms of the Tribunal's order granted on 10 October 2020, pending this action. The pension benefits are declared forfeited to the MEC to the extent of Nosipho's indebtedness to the MEC in respect of the

judgment debt in terms of paragraph 2 and 3 of this order, and the order in respect of costs in paragraph 4 of this order.

5. The GEPF and its administrators shall pay over to the MEC Nosipho's pension benefits to satisfy the judgment debt in terms of paragraph 2, 3 and 4 of this order.

6. The Registrar of the Tribunal is directed to send a copy of the papers filed in the preservation application, the preservation order, the trial and this judgment to:

6.1 the Legal Practice Council, for its attention and investigation of Nosipho's conduct based on the Tribunal's findings in this judgment;

6.2 the South African Nursing Council for its attention and investigation of Hlatshwayo's conduct based on the Tribunal's findings in this judgment;

6.3 the appropriate law enforcement agency, for criminal investigation and action against all the defendants.

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**JUDGE L. T. MODIBA (Ms.)**  
**MEMBER OF THE SPECIAL TRIBUNAL**

**APPEARANCES**

Counsel for the Plaintiff:

Adv D. V. Mtsweni, assisted by Adv  
N Rasalanavho

Attorney for the Plaintiff: Mr B. Baliso, Mketsu & Associates  
INC Attorneys

For the defendants: no appearance

Date of trial: 2, 6 August 2021, 24 February 2022

Date of judgment: 4 May 2022

***Mode of delivery:*** *this judgment was handed down electronically by email to the parties' legal representatives, loading on Caselines, publishing on the Department of Justice and Constitutional Development's website and releasing to Saflii. The time of delivery is deemed to be 10am.*

<sup>1</sup> Act 74 of 1996.

<sup>2</sup> Published in Government Gazette No. 43647 Vol 662 on 25 August 2020.

<sup>3</sup> *Take & Save Trading CC and Others v The Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at paragraph 10.

<sup>4</sup> 45 of 1998.

<sup>5</sup> *Ferreira v Levin NO and Another* 1996 [2] SA 621 (CC) at 626 B-E

<sup>6</sup> *Public Protector South Africa v South African Reserve Bank* 2019 (6) SA 423 (CC)

<sup>7</sup> *Vassen v Law Society of the Cape* 1992 [4] 534 (SCA) at F38 F-H