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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2016/41493

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|-----|---|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. YES |

31 October 2017

.....
SIGNATURE

In the matter between:

THE PREMIER OF GAUTENG PROVINCE

First Applicant

**THE MEMBER OF THE EXECUTIVE COUNCIL
SOCIAL DEVELOPMENT (GAUTENG PROVINCE)**

Second Applicant

**LIFE RECOVERY CENTRE (RANDFONTEIN)
WITPOORT TREATMENT CENTRE (NGO)**

Third Applicant

LIFE ESIDIMENI (PTY) LTD

Fourth Applicant

and

A RE AGENG SOCIAL SERVICES (NGO)

First Respondent

**ABSA BANK LTD
(Registration No: 1986/004794/069)**

Second Respondent

**THE BRANCH MANAGER
MRS MARTIE MOSTERT
(ABSA BANK - RANDFONTEIN BRANCH)**

Third Respondent

KISH GAS (PTY) LTD

Intervening Party/Fourth Respondent/

And

CASE NO: 2016/44645

In the matter between:

THE PREMIER OF GAUTENG PROVINCE

First Applicant

**THE MEMBER OF THE EXECUTIVE COUNCIL
SOCIAL DEVELOPMENT (GAUTENG PROVINCE)**

Second Applicant

**LIFE RECOVERY CENTRE (RANDFONTEIN)
WITPOORT TREATMENT CENTRE (NGO)**

Third Applicant

LIFE ESIDIMENI (PTY) LTD

Fourth Applicant

and

A RE AGENG SOCIAL SERVICES (NGO)

First Respondent

FIRST NATIONAL BANK LTD

(a Division of FIRSTRAND BANK LTD)

Second Respondent

KISH GAS (PTY) LTD

Intervening Party/Third Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL
FINANCE (GAUTENG PROVINCE)**

Intervening Party/Fourth Respondent

JUDGMENT

SPILG, J

INTRODUCTION

1. The case commenced with an urgent *ex parte* application to recover an amount of R10 181 070 which it was alleged the first respondent, A Re Ageng Social Services ("*ARA*"), had fraudulently appropriated out of its bank account. Unless otherwise necessary the amount will simply be rounded off to R10.18 million.
2. The applicants were identified as the Premier of Gauteng, the Member of the Executive Council for Social Development; Gauteng Province, Life Recovery Centre Randfontein (Witpoort Treatment Centre) NGO and Life Esidimeni (Pty) Ltd. They were cited respectively as the first to fourth applicants.

All the applicants were represented by the State Attorney. This includes Life Recovery and Life Esidimeni. The founding affidavit did not contain a supporting affidavit or a resolution filed by either Life Recovery or Life Esidimeni. This was subsequently cured after ARA took issue with the State Attorney's entitlement to represent private parties.¹

The first two applicants will be referred to individually as *the Premier* and the *MEC; Social Development* or collectively either as "*Social Development*" or "*the department*". The other applicants will be referred to as "*Life Recovery*" and "*Life Esidimeni*".

Aside from ARA, the applicants also cited Absa Bank Ltd ("*Absa*") and its branch manager at Randfontein as the second and third respondents.

3. ARA is a registered not for profit organisation ("*NPO*"). It provides shelters for abused women and children as well as adult diversion programs and runs victim empowerment centres from a number of police stations.
4. The applicants contended that ARA had agreed to act as a conduit for monies which Social Development was paying out to Life Recovery in respect of a service level agreement. They alleged that ARA refused to pay the R10.18 million

¹ The State Attorney produced the relevant section entitling it to do so

it had received in its Absa bank account to Life Recovery or its administrator being Life Esidimeni but unlawfully appropriated the amount for itself.

The applicants also relied on an acceptance letter by ARA dated 22 June 2016 which Social Development contended was the underlying agreement pursuant to which its officials transferred the amount into ARA's account some four months later. This was relied on as a legal basis for recovering from ARA the full amount that had been appropriated even if a portion was no longer traceable into a bank account.

5. ARA's main defence is that it never claimed an entitlement to the money and was willing to pay the amount over but because of its concerns regarding the possible irregular utilisation of its account had requested Social Development to provide both proof of source and proof that the funds had been properly authorised to be paid over to the intended service provider. ARA also contended that the acceptance letter of 22 June was unrelated to what it claims was an undisclosed transfer of the R10.18 million into its bank account on 18 October 2016.

Furthermore ARA averred that after requiring such proof from Social Development's officials, but before the original *ex parte* application was brought, R5 million was transferred out of its Absa account. It claimed that the bank account was hacked or otherwise compromised by unauthorised persons.

Social Development has continued to rely on its original cause of action based on theft and a breach of the alleged agreement in terms of which ARA was to act as a conduit. It also contended that the *condictio indebiti* applied in that ARA was unjustifiably enriched as a result of the payment it made under the mistaken belief that ARA would transfer the amount to the intended beneficiary².

6. Since the grant of the original order and the disclosure of ARA's defences, this case has spawned numerous orders pursuant to applications and counterapplications brought by a number of parties, including those not initially

² Founding affidavit to the first *ex parte* Application, para 11 p34

cited. The court file now consists of some 1200 pages and the several hearings resulted in the presentation of over 180 pages of heads of argument.

7. In part this may be attributed to an attempt by one or other party to follow the money trail in the expectation that the R5 million transferred out of ARA's account may be recovered and may reveal whether or not ARA can be linked to the recipients. Furthermore the parties considered it necessary to address the serious allegations and counter allegations made by one or the other of fraud, money laundering, breaches of the Public Finance Management Act, 1 of 1999(the "*PFMA*") and alleged unlawful threats by officials of the department against ARA which impact directly on the provision of basic social services to the most vulnerable in our society.
8. Of the R10.18 million which was transferred into ARA's account an amount of R5 137 244.08 remains unaccounted for³. Social Development contends that it is entitled to obtain a final order on the papers alternatively that the matter should await the outcome of a trial action to be instituted. ARA submits that the application should be dismissed or referred to trial. Each party contends that, even if the matter is to be resolved by way of trial, it is entitled to a special costs order. Throughout the proceedings the parties have sought costs orders on the attorney and own client scale.
9. It is best to start with an overview of the more relevant applications and counterapplications brought by the parties who were originally cited and those who have since intervened.

A. Urgent *ex parte* application of 23 November 2016

³ As will appear later this amount is made up of the R4 998 550.36 transferred by ARA out of its bank account to be held in trust by the State Attorney and the amount of R45 275.56 which was all that remained of the R5 million that ARA alleged had been unlawfully hacked out of its account and which, as appears later, had found its way into the account of an entity known as Kish Gas .

10. On 23 November 2016 the applicants obtained an urgent interim order without notice (*ex parte*) under case no 41493/2016 freezing monies standing to the credit of ARA at Absa Bank in the total sum of R10 181 070. The order was returnable on 31 January 2017.

11. The applicants alleged that Social Development had transferred the amount in question to ARA on 18 October 2016 under an agreement which, it contended, required ARA to act as a conduit and immediately pay over the sum received to Life Recovery and Life Esidimeni.

It was averred that Life Esidimeni was “*responsible to attend to the administration and management*” of Life Recovery.⁴

12. In order to freeze ARA’s account and have monies still standing to the credit of its account with Absa paid back to the Premier and the MEC: Social Development the applicants relied on what may be loosely described as the theft of monies by appropriation.⁵

I have already mentioned that the applicants also relied on a breach of contract, being the alleged breach of the 22 June 2016 acceptance letter, and the *condictio indebiti*. This was in order to support a claim for the recovery of any shortfall either by way of a final order or by way of a separate action to be instituted within 30 days.⁶

It was contended that the applicants had received information from an anonymous source that “*the Directors of the First Respondent (i.e. ARA) authorised that an amount of R5 million be transferred out of the said account ... in order to settle outstanding debts of the First Respondent due to Absa...*” and that this amounted to common law theft.

⁴ Premier’s Founding affidavit para 6 p 32

⁵ Ibid para 23 p 41

⁶ First *ex parte* application p27 prayer 1 to Part B. This was changed to 60 days in the second application

It is evident that the applicants relied on the real right to “*follow*” their alleged funds and recover them from any bank account to where it might be traced. This explains why they also pursued claims based on personal rights flowing from an alleged agreement.⁷

13. The application came before Tsoka J who granted a rule returnable on 31 January 2017 in terms of which ARA and Absa were to show cause why the amount in issue, or any lesser amount standing to the credit of ARA’s account with Absa, should not be repaid and why they should not be liable for the costs on an attorney and own client scale.

B. Urgent Application of 14 December 2016

14. After Absa produced ARA’s bank statements the applicants were able to ascertain that two large amounts had been transferred out of ARA’s account. The first amount, for R670 000, was transferred on 19 October 2016 to an account held at First National Bank (“FNB”). The other for R5 million was transferred on 10 November 2016 into a different account held at FNB.
15. This led to the Applicants launching a second urgent *ex parte* application similar to the original one save that it was now directed at freezing the monies that had been traced to the two FNB accounts. Part B of the notice of motion was for final relief in terms of which the applicants sought repayment of these amounts from ARA, Absa and the ultimate recipient into whose account the amounts might be traceable, alternatively that the applicants be directed to institute action proceedings within 60 days.⁸
16. On 14 December 2016 Wepener J granted a rule returnable on 31 January 2017 which required ARA, FNB or the relevant FNB account holders to show cause why the two amounts should not form part of the monies that had been

⁷ See *S v Graham* 1975 (3) SA 569 (A) at 574H. See generally *S v Grayston Technology Investment (Pty) Ltd and another* [2016] 4 All SA 908(GJ)

⁸ Second *ex parte* application p6 prayer 1 of Part B

transferred into ARA's account and why they should not be paid back to the Premier and the MEC; Social Development.

C. ARA's Rule 6(12)(c) urgent application of 29 December 2016

17. Although the previous orders had been served on Absa, ARA was only served on 23 December. Since the applications had been launched *ex parte* ARA elected to bring an application under rule 6(12) (c). It asked the court to reconsider the initial applications and sought revised orders;

- a. Directing that the amount held in ARA's Absa account be transferred to the trust account of the State Attorney until the determination of the case on 31 January 2017;
- b. Declaring that the other amount, of R670 000, held at FNB belonged to ARA.

18. After hearing argument it was evident that the amount of R670 000 was not traceable back to, and therefore did not form part of, the R10.18 million originally transferred by Social Development into ARA's account on 18 October 2016. Accordingly ARA was entitled to the declarator regarding that amount.

Pursuant to an agreement between the parties the balance of the R10 181 070 which remained in ARA's Absa account, namely the sum of R4 998 530.30, was transferred to the trust account of the State Attorney. FNB was also required to respond fully to the subpoena *duces tecum* which had been issued on 14 December 2016. This was in order to ascertain the identity of the holder of the account into which the R5 million had been transferred and to determine if any subsequent transfers could be traceable back to this amount.

19. Essentially the case made out by the applicants remained that ARA had fraudulently transferred the amount into this as yet unidentified account held at FNB, whereas ARA contended that the amount had been transferred by unknown persons who had hacked into its account. At this stage the issue appeared to be limited to one of costs which I reserved for argument on 13 January 2017. The date selected would afford the parties sufficient time to consider the bank statements that FNB were subpoenaed to provide.

20. For sake of completeness I set out the order made on 30 December:

- 1 *Paragraph 2 of the Order granted on 14 December 2016 under case number 2016/44645 is hereby deleted and the hold placed on account number [...] at First National Bank Ltd is hereby lifted immediately.*
- 2 *It is declared that the funds presently held in account number [...] at First National Bank belong to A re Ageng Social Services (NGO).*
- 3 *Paragraph 2 of the Order granted on 23 November 2016 under case number 2016/41493 is hereby deleted and the hold placed on account number [...] held at Absa Bank is hereby lifted immediately.*
- 4 *The sum currently in that account, in the sum of R4 998 550.36, is to be transferred to the trust account of the State Attorney, the details of which are the following:*

Standard Bank Egoli Branch

Account Number [...]

Branch Code: 001805
- 5 *First National Bank is ordered to respond fully to the subpoena duces tecum issued under case no. 44645/2016 on 15 December 2016 on or before 13 January 2017.*
- 6 *The question of costs is reserved for argument on 13 January 2017.*

21. At the hearing of 13 January 2017 the holder of the FNB account into which the amount of R 5 million had been transferred from ARA's account was identified as Kish Gas (Pty) Ltd. The *rule nisi* was extended to 31 January 2017 and then again to 28 February 2017 in order to enable the parties to file further affidavits. I also directed that the rule be served on FNB, Kish Gas, Mr Kishan Jawaharal of Kish Gas and Kish Gas' attorneys⁹.

Kish Gas was also ordered to file such affidavits as it wished on the merits of the application by no later than 13 February 2017.¹⁰

⁹ Although the attorneys had not attended on the return date they had contacted my registrar directly.

¹⁰ The order of 31 January reads:

1. *The rule nisi is extended to 28 February 2017.*
2. *The parties in this order will be referred to as cited under case number 41493/2016 although the order and the documents to be served relate to both that case number and case number 44645/2016.*
3. *The first and second applicants must file their replying affidavits by no later than 13 February 2017.*
4. *The third and fourth applicants must file any confirmatory and/or other affidavits concerning the merits of this matter by no later than 13 February 2017.*
5. *This rule nisi, together with the whole application, must be served on the following:-*
 - 5.1. *FNB Bank;*
 - 5.2. *Kish Gas (Pty) Ltd, being the holder of the FNB bank account number [...] at its business address situate at 271 Johan Rissik Street, Waterkloof Ridge, Pretoria, Gauteng, as supplied by the FICA documentation discovered by FNB Bank;*
 - 5.3. *Mr Kishan Jawaharlal, at his business- and residential address, situate at 271 Johan Rissik Street, Waterkloof Ridge, Pretoria, Gauteng, as supplied by the FICA documentation discovered by FNB Bank;*
 - 5.4. *Kish Gas (Pty) Ltd's attorneys, Forbay Attorneys, situate at 44 Hilda Street, Pretoria, 0083.*
 - 5.5. *AND ONLY in the event of an acceptable form of proof of the State Attorney's authority to act in these proceedings on behalf of each of the third and fourth applicants not being produced in response to the first respondent's Rule 7 notices by no later than Friday 3 February 2017 then service must also be effected on;*
 - 5.5.1. *Life Recovery Centre, Randfontein (Witpoort Treatment Centre) at No 28 Maugham Road, Randfontein;*
 - 5.5.2. *Life Esidimeni (Pty) Ltd at Oxford Manor, 21 Chaplin Road, Illovo, Sandton*
6. *Should Kish Gas (Pty) Ltd, FNB Bank, and in the event of para 5.5 of this order becoming operative, Life Recovery Centre, Randfontein (Witpoort Treatment Centre) or Life Esidimeni (Pty) Ltd elect to file any affidavits on the merits of the application, they are ordered to do so by no later than 13 February 2017.*
7. *The first and second Applicants are responsible for serving forthwith all the papers referred to in the preamble to para 5 on the persons identified in paras 5.1 to 5.4 inclusive.*
8. *In the event of para 5.5 of this order becoming operative then the first respondent is responsible for serving forthwith on the expiry of the time limit therein, all the papers referred to in the preamble to para 5 on the persons identified in para 5.5.1 and/or 5.5.2 as the case may be.*
9. *The costs of the application set down on 31 January 2017 are reserved.*

22. Kish Gas filed an affidavit explaining how it came to receive the R 5 million. The bank statement attached to the affidavit revealed how all but R 45 275.56 was disposed of within a matter of 24 hours through some 26 individual transfers to ostensibly separate recipients, although it is evident that one of the payments went to a firm of attorneys¹¹. Kish Gas tendered the amount that remained into the State Attorney's trust account pending the final determination of the action that the applicants intended to bring for recovery of the balance of the amount that had initially been transferred into ARA's account on 18 October 2016.

The rule in the main application was then extended from 28 February to 14 March.

D. Application by Kish Gas on 28 February 2017

23. Aside from delivering an answering affidavit explaining how it dealt with the R5 million that came into its account Kish Gas also brought an application to have its FNB account unfrozen.

24. The applicants had no difficulty in doing so once the amount of R45 275.56 had been tendered into the State Attorney's trust account.

E. Ageng's counter-application of 7 March 2017 for payment

25. In the meanwhile ARA brought an urgent counter-application for hearing on 14 March in order to coincide with the return day of the main application and of the rule 6(12) (c) application.

26. The counter-application was for payment of subsidies totalling R 979 981 which ARA contended had become due and payable during January 2017. Social Development refused to pay the amount on the ground that ARA was guilty of

¹¹ Presumably the purpose of this sudden payment, of R620 000, out of the proceeds of an unexpected transaction, can be readily established from the attorneys concerned as can the originating source of, and paper trail for, all of the fuel that was allegedly supplied.

defrauding it and claimed that it was diverting ARA's subsidies to other organisations which it had since appointed to deliver the services which had been provided by ARA.

27. On 8 March 2017 the Premier and the MEC gave notice under rule 30(b) to remove causes of complaint relating to the counter-application.

28. It was however of concern that the original amount of R10 181 070 may have been drawn from Treasury pursuant to a fraudulent or irregular transaction, as appeared from the allegations made by ARA and from a concession that had been made during earlier argument by Social Development that the procurement of funds was irregular¹². If that was the case then the proceeds which were recovered and now held by the State Attorney, of just under R5.45 million, belonged to Treasury and not to the Premier or MEC; Social Development.

29. It appeared that National Treasury was ultimately responsible and had an interest in the outcome of the litigation¹³. It was therefore necessary to allow it and the parties a reasonable time to file papers. In view of this the original rule was extended to 13 April 2017.

30. ARA however argued that its counterapplication could not wait until then as the plight of its employees and the consequences for the individual beneficiaries were dire if it did not receive the amount withheld by the Department before 31 March.

For this reason it was inappropriate to hear the application and counter-application together.

¹² It must be recorded that subsequently Adv Joubert said that the Department was withdrawing the concession and tendered an explanation for why it had been made.

¹³ See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at paras 27 and 71.

Without deciding urgency or any other preliminary point the counterapplication was separated. Social Development was then afforded time to file its answering affidavit.

31.I accordingly made the following order which dealt both with the possible intervention of Treasury at the hearing of the main application to be heard on 13 April and with disposing of the counterapplication prior to that on 27 March:

1. *The rule nisi is extended to 13 April 2017.*
2. *The parties in this order will be referred to as cited under case number 41493/2016 although the order and the documents to be served relate to both that case number and case number 44645/2016.*
3. *The first and second respondents must file any supplementary affidavits by no later than Wednesday 29 March 2017.*
4. *This rule nisi, together with the whole application, must be served on National Treasury.*
5. *Should National Treasury elect to file any affidavits on the merits of the application they must do so by 04 April 2017.*
6. *The first and second Applicants are responsible for serving forthwith all the papers referred to in para 2 on National Treasury. Furthermore and without being prescriptive;*
 - a. *National Treasury may wish to be joined as a party;*
 - b. *The issue of whether the monies currently held by the State Attorney, which constitute the remaining proceeds of a payment made of R10 181 070 on 18 October 2016 under reference TREAS/IBS to A re Ageng Social Services (NGO), were lawfully paid pursuant to a service level agreement concluded between the Department of Social Development, Gauteng Provincial Government and Life Recovery Centre Randfontein (Witpoort Treatment Centre), and whose funds according to the Department were administered and managed by Life Esidimeni Pty (Ltd). A copy of the underlying agreement relied on is attached marked "A".*

National Treasury's attention is furthermore drawn to;

- i. *The apparent discrepancy in how the breakdown of the total amount payable under the agreement is arrived at, as set out in clause 4.2 thereof;*
 - ii. *The admission by the Department that the payment to A Re Ageng did not follow the Public Finance Management Act 1 of 1999 as payment was made to a party other than the contracted service provider and that payments had been made in similar fashion on two previous occasions, one in June 2016 under the same agreement of R13 million and an amount of R 14 million to SANCO in April 2016 (see paragraph 40 of the applicants' second replying affidavit).*
- c. *Whether National Treasury or Provincial Treasury claims any entitlement to the remaining proceeds currently held by the State Attorney by reason of the regularity or lawfulness of the transaction pursuant to which the payment of R10 181 070 was authorised or made.*
7. *In the event of Kish Gas Pty (Ltd) being referred to in any papers filed by National Treasury then National Treasury must also serve on Kish Gas Pty (Ltd) at the address of its attorneys of record, Forbay Attorneys care of AJ Ndhlovu Attorneys 51 Main Street, Marshalltown, Johannesburg, reference BJS003 (email: info@forbayattorneys.co.za).*
8. *In regard to the counter-application brought by A re Ageng Social Services (NGO) against the first and second Applicants;*
- a. *By no later than 13h00 on Friday 17 March 2017 the first Respondent must provide the first and second Applicants with the documents, for the period January to March 2017 inclusive referred to in paras 8 and 9a of the letter dated 12 January 2017 from the Department to the first Respondent and that the original invoices must be made available for inspection to the department on 15 March 2017 between 10h00 to 16h00 at the first respondent's premises.*
 - b. *The first and second applicants must file their answering affidavits by no later than 22 March 2017*
 - c. *The first respondent must file any replying affidavit by no later than 24 March 2017*
 - d. *A rule nisi is hereby issued calling on ABSA Bank Ltd, the second respondent, to show cause before this court at 10 am on 27 March 2017 why any amount that may be payable by the first or second applicants to the first respondent arising out of the counter-application should not be paid into ABSA Bank Randfontein Bank account number [...] and that*

such amount may only be transferred out of such account into First National Bank account number [...] held in the name of the first respondent;

9. *The counter-application is postponed for hearing at 10h00 on 27 March 2017.*

10. *The costs of the counter-application set down on 14 March 2017 are reserved.*

32. I heard argument, considered the matter to be urgent and on 30 March 2017 granted ARA the main relief it sought. The reasons for doing so are contained in a separate judgment. The order reads:

1. *The matter is urgent and condonation is granted to the first respondent.*
2. *The first and second applicants are ordered to pay the sum of R979 981 together with interest at the prescribed rate as from 16 January 2017 into the account of A Re Ageng held at Absa Bank Ltd by no later than 7 April 2017.*
3. *In the event of any portion of this amount not having been utilised on or before 31 March 2017 for the purpose for which allocated then;*
 - a. *The first respondent is to;*
 - i. *submit, by no later than 18 April 2017 a deviation request asking permission to retain the funds and use them for some other service-delivery related purposes; or*
 - ii. *make arrangements with the Department of Social Development , Gauteng Province ("the Department") by no later than 18 April 2017 for the unspent funds;*
 - b. *Failing the foregoing, the Department may;*
 - i. *deduct the unspent funds from any subsidy allocation of the following financial year, if applicable; subject to the first respondent's right to challenge such decision*
 - iii. *institute proceedings for recovery of such amounts as it contends have been overpaid.*
4. *Costs are reserved for determination at the hearing of the main application.*

33. The MEC for Finance (Gauteng Province), (*“MEC Finance”*) sought leave to intervene by reason of her responsibilities and role in the management and control of the Gauteng Provincial Revenue Fund. After hearing the parties and pursuant to agreement an order was made on 14 April granting the MEC; Finance leave and directing that the R 5 043 825.92 held by the State Attorney was to be transferred or deposited immediately into the Gauteng Provincial Revenue Fund PMG bank account, the account number provided at the hearing by the MEC for Finance being the account from which the original R10.18 million had emanated.

The amount was made up of the R 4 998 550,36 received by the State Attorney from ARA’s Absa account and the R 45 275, 56 it had received from Kish Gas’ FNB account.

34. During the course of argument *Adv Steyn* for the MEC; Finance confirmed that Provincial Treasury took the allegations of unlawfulness seriously and had launched an investigation into the payments under s 18(2) of the PFMA. This appears from the contents of the affidavit of the MEC; Finance, Ms B Creecy¹⁴. In the same affidavit the MEC; Finance was scathing of ARA and said: *“Ageng attempts to style itself as a custodian of public funds and as a self-appointed guardian of the province’s payment systems.”*¹⁵ The MEC; Finance drew this conclusion from the statement made by ARA that Social Development had repeatedly refused to provide proof of the basis on which the funds had been lawfully transferred into its account on 18 October.

The affidavit later goes on to repeat in almost exact terms as before, that: *“Ageng has styled itself as a custodian of public funds and as a self-appointed guardian of the province’s payment systems. That is improper. The Gauteng Provincial Treasury is the true custodian of these funds and has a duty under the PFMA to monitor and enforce compliance with the PFMA within the province”*¹⁶

¹⁴ At para 38 p944

¹⁵ At para 20.4 p938

¹⁶ At para 42 p945

35. Counsel submitted on behalf of the MEC; Finance that it was inexplicable how ARA could dispute the entitlement of the Premier or the MEC; Social Development to repayment of the R10.18 million even if the original payment to it was unlawful and in breach of Social Development's systems and protocols. It was submitted that this constituted "*a further ruse (i.e. by ARA) for refusing to return the funds*" and that "*questions relating to the legal validity of the arrangement and underlying agreement, and conduit payments in general, are immaterial to a determination of this application*"¹⁷.

36. The submission that the legal status of the conduit arrangement and the underlying agreement between the parties to the litigation was irrelevant was a constant theme as was the assurance that the matter was being investigated internally. At this stage it suffices to state that what was omitted was the recognition that on its version ARA was a whistle blower which had attempted, without success, to escalate its concerns of an unlawful transfer of funds to the MEC; Social Development prior to the latter bringing the present application against ARA.

Counsel however conceded in argument that if regard is had to the size of Social Development's budget it is unlikely that an audit would have picked up the irregularity; the auditors would only have seen ARA as the recipient of the funds, not Life Recovery, let alone Social Development's actual designated recipient, Life Esidimeni.

37. I should add that this matter continued to be adjourned at the request of the parties in order to pursue the paper trail in the expectation of securing a resolution on motion of the main outstanding issue; namely whether ARA was party to a fraud on Social Development or whether it was inadvertently sucked into what it termed a money laundering operation in which one or more officials within Social Development were complicit.

¹⁷ Heads of argument at para 34

Both parties submitted that there was a real possibility of securing evidence which could finally resolve the matter on paper and thereby avoid the institution of action proceedings. This course of action appeared desirable having regard to Social Development's decision to terminate the provision of funding to ARA, the impact that the closure of ARA's facilities and the termination of its services, (which had been provided for over 12 years) would have on the individuals who depended on it and also because of the broader public interest.

F. ARA's application against the MEC Finance and the Department of Social Development

38. The Premier and MEC; Social Development had failed to pay the amount of R979 981 in terms of the court order of 30 March. This prompted ARA to bring an urgent application requiring the MEC; Finance to pay this amount to it. The application also sought to hold the Premier and the MEC; Social Development in contempt of the earlier court order.

39. Social Development responded by contending that the payment was being processed and that there were administrative delays in what appeared to be a belated loading of the request for payment into the financial system. While the communications from the Department may have been equivocal, which justified the launching of the application, it was evident that there was no wilfulness or *mala fides* on the part of Social Development. It was also evident that when argument was heard the amount was being transferred albeit that it was not yet reflected in ARA's bank statements.

G. Introduction of further evidence- application of 17 May 2017

40. ARA sought to introduce the affidavit of an IT expert in support of its contention that the Absa account had been hacked. ARA also contended that Absa had failed to make a proper disclosure to the court of relevant information at its disposal in regard to the transfer of the R5 million out of ARA's account and the utilisation of ARA's online banking profile.

41. On 25 May an order was formulated to address the further documents that Absa was alleged to have in its possession. It read:

1. *ABSA BANK LIMITED ("ABSA") is afforded an opportunity to reply by no later than 11 June 2017 to the Supplementary Affidavit of A RE AGENG SOCIAL SERVICES (NGO), which affidavit is to be served together with this Order,;*
2. *By no later than 11 June 2017 ABSA BANK LIMITED is to produce, by delivery to both the APPLICANTS and A RE AGENG SOCIAL SERVICES (NGO), copies of the following documents, or to state under oath in an affidavit to be delivered by that date either why it refuses to, or is unable to, produce any of the said documents:*
 - 2.1 *The SWIFT report in respect of the payments made by the Department of Social Development into the account of A RE AGENG on or about 29 June 2016 and 18 October 2016;*
 - 2.2 *All records kept in terms of Section 22 of the Financial Intelligence Centre Act ("FICA") in respect of the Account held in A RE AGENG's name with ABSA as from 1 January 2016 until the closure of the account in April 2017;*
 - 2.3 *All reports made to the Financial Intelligence Centre in terms of Section 28 of FICA including but not limited to payments made by the DEPARTMENT OF SOCIAL DEVELOPMENT ("the Department") into the account of A Re Ageng on 29 June 2016 and 18 October 2016, and the disputed payment made from A RE AGENG's account to the Account of KISH GAS ("Kish") on or about 10 November 2016 ("the disputed payment");*
 - 2.4 *The audit records of the disputed payment;*
 - 2.5 *Documents evidencing the occasions when A Re Ageng utilised its Internet Banking Facility;*
 - 2.6 *Documents evidencing that the Notify Me SMS was sent and received in relation to the disputed transaction;*
 - 2.7 *Documents evidencing how the beneficiary added on 9 November 2016 were so added;*
 - 2.8 *Documents evidencing that the beneficiary referred to in 2.4 above was properly authorised using a One Time Pin or other method of dual-form authentication;*

- 2.9 Documents evidencing how the payment limit on the account was increased and that dual-form authentication was utilised and/or when the payment limit was increased;
- 2.10 Documents evidencing how the disputed payment was made, and whether dual-form authentication was utilised and/or required;
- 2.11 The Anti Money Laundering Report which was compiled by ABSA under FICA pertaining to A RE AGENG's account;
- 2.12 Any and all reports or correspondence made by ABSA to any other party, or any other bank, regarding the account of A RE AGENG or any suspicious activity in respect of that account;
- 2.13 The records, whether extracted from its electronic database or otherwise, detailing all changes made, whether electronically or otherwise, to A RE AGENG's account, from 1 June 2016 to date, reflecting the dates and nature thereof, and including but not limited to:
 - 2.13.1 Beneficiaries loaded and deleted;
 - 2.13.2 Payment limit increases;
 - 2.13.3 Notify Me detail changes;
 - 2.13.4 Flags raised on the account.
- 2.14 The records, whether extracted from its electronic database or otherwise, providing full details of:
 - 2.14.1. the identities of all ABSA employees who accessed the account from 1 June 2016 to date, and the purpose for which they accessed the account;
 - 2.14.2. all mobile and land telephone numbers linked to the account, and dates when such numbers were loaded and/or removed;
 - 2.14.3. the identity of the user who authorised the deactivation of the internet profile for User no 4 on the account on 14 November 2016 as well as details of the I.P address of the person or entity who deactivated said user;
 - 2.14.4. the date when User Number 0004 was created on the system;
 - 2.14.5. the identity of the User that authorised the increase of the limit from R300 000, 00 to R6 million, including the IP address which was used to increase the limit;
- 2.15 Documents recording the fraudulent activity on the account of A RE AGENG on or about 31 October 2016 and the steps taken by ABSA in response to this activity;
- 2.16 Documents setting out and/or recording the reasons why A RE AGENG was advised to change its PIN on 1 November 2016 by ABSA's fraud division;

2.17 *The records, whether extracted from its electronic database or otherwise, providing full details of the User and the IP address used to access the account on 2 November 2016; and*

2.18 *The Report by ABSA's internal investigators;*

The terms "document/s" and "record/s" are used interchangeably and refer to documents, including electronic data stored on a computer or server which is capable of being retrieved and is accessible in a manner usable for subsequent reference

3. *The Provincial Treasury and/or the APPLICANTS may provide this documentation to the South African Police Services.*
4. *The APPLICANTS may file a supplementary affidavit by no later than 18 July 2017;*
5. *A RE AGENG may file a supplementary affidavit, by no later than 8 August 2017;*
6. *All supplementary affidavits are to be served upon Provincial Treasury and ABSA.*
7. *This matter is postponed to Monday 14 August 2017 at which hearing any issue relating to the order for the production of documents by ABSA will also be dealt with.*

42. In-house legal counsel at Absa deposed to an affidavit which effectively repeated that it was not possible to hack into the system as contended for by ARA. The affidavit also claimed that ARA's account transfer limit was increased from R300 000 to R6 million on 10 November 2016 by IP_address 105.229.222.185, User 4 on account [...].

However the actual transaction sheet that was attached revealed that the significant change to the transfer limit in fact occurred on 31 October at 21h25 from another IP address (105.5.124.199) albeit by User 4. The transaction sheet also reflected that on 9 November the same User utilised IP_address no 105.229.222.185 to add Kish Gas' account as an authorised payee. This was at 15h20 and the same User later then used the same IP_address to effect the transfer the R5 million to Kish Gas.

43. I should point out that in an earlier affidavit Absa's in-house counsel contended that Absa's investigation department was of the view that the payment of the R5 million was a normal banking transaction conducted via ARA's internet banking facility in the ordinary course and that this was substantiated by the "Sure Check" sms sent and delivered to a certain Mafu's cellphone.

44. ARA did not file a further affidavit by its expert after receipt of the ASA documentation. It was however contended that ex-facie the documents supplied by Absa both pursuant to the court order of 25 May and earlier;

- a. Of the initial amount that had been deposited on 30 June 2016 an amount of R13 034 958 was physically transferred out of ARA's account to an FNB account (which would have been that of Life Esidimeni) by an Absa teller at its Randfontein branch.
- b. On 18 October 2016 an amount of R10.18 million was transferred into ARA's account and recorded on the bank statement as "*NPF CREDIT*" and then "*TREAS/IBS*" followed by an EFT reference number.

It is not disputed that on the same day Absa was requested by ARA to find the source of the transfer and was advised that the reference number was electronically generated but that it did not resemble any official reference, thereby making it difficult to trace the source. This is what prompted ARA to transfer R670 00 out of its Absa account to its FNB account. This represented the balance of the amount standing to its credit excluding the R10.18 million. The amount was transferred by way of an ATM transfer using a debit card on 19 October. Accordingly only the questioned amount of R10.18 million was left in the account.

On another attempt at locating the source, an Absa official advised that the amount appeared to have been deposited from an FNB Forex department.

- c. On 31 October Absa detected suspicious activity on ARA's account whereby three new beneficiaries were loaded onto its banking profile. Absa contacted ARA which confirmed that these beneficiaries had been fraudulently loaded. Absa therefore suspended ARA's internet banking facility and directed that it physically reinstates the internet facility by

attending at its branch. This reveals that Absa recognised that the security of ARA's banking platform had been compromised.

- d. On 1 November Ms Mafu who is the financial administrator of ARA, attended at Absa's Randfontein branch to re-instate the internet banking facility and selected new personal PINs to access ARA's internet banking platform. It is in dispute whether she also changed the passwords.
- e. Absa acknowledged that on 7 November Mafu had completed an Absa loss form reporting an unauthorised withdrawal by an unknown person on 4 November and again on 5 November. An amount of R1 000 had been withdrawn on each occasion from a SASWITCH ATM.
- f. The R5 million was transferred out of ARA's account by way of an internet banking transaction. The transaction could only be effected by a person who had all the log-in details. This would include PINs, passwords and account details pertaining to ARA's internet banking platform.
- g. There was no evidence of the internet facility being used to transfer ARA's funds prior to that. ARA claims that it had not done so because, when the internet facility had been created at Absa's request (due to the number of transactions going through the account), the profile was not set up properly with the consequence that it was never possible to log-in.
- h. Although the amount that could be withdrawn was increased on 31 October to R6 million ABSA did not produce among the documents it was ordered to, any proof that a "*Sure Check* " was accepted in regard to this change.¹⁸

¹⁸ A Sure Check is the process whereby an automated SMS is sent to a cellphone number designated for this purpose by the account holder requesting a particular required response if a sensitive banking procedure is being initiated on the internet banking site (such as adding a beneficiary or changing the withdrawal ceiling). Without a positive reply from the designated cellphone number (whether it be a digit or possibly the repeat of a one-time PIN number) the bank will decline to process the request.

THE ISSUES

45. The main issue is whether the Premier and the MEC; Social Development are entitled on motion to the relief sought in their applications. They sought together with Life Recovery and Life Esidimeni orders under case numbers 41493 /2016 and 44645/2016;

- a. Declaring that an amount of R10 181 070 paid by the Premier and the MEC on 18 October 2016 into ARA's account with Absa, or any lesser sum standing to the credit of that account, does not form part of its monies and is to be repaid;
- b. Declaring that the amount of R670 000 paid by ARA out of its Absa account into an FNB account does not form part of the monies in the latter's bank account and is to be paid back to the Premier and MEC;
- c. Declaring that the R5 million paid by ARA out of its Absa account into an FNB account similarly does not form part of the monies in the latter's account and is to be paid back;
- d. Alternatively to the declaratory and restitution orders, an interdict freezing these monies in their respective accounts pending the finalisation of an action to be instituted within 60 days against ARA or Absa, or the holders of the accounts into which the monies were later transferred, for payment of such amounts.
- e. Costs on an attorney and own client scale against ARA.¹⁹

¹⁹ In the initial application costs were sought against ARA and Absa jointly and severally.

- f. Part B of the order took the matter no further. In effect on the return date the applicants sought to extend the interdict until the outcome of an action to be instituted.

46. It will be recalled that Tsoka J's initial order was based on the matter being finally determined on the return date. It also appears that the applicants hoped that the full amount of R10.18 million would be traceable and recovered. By the time the second *ex parte* application was launched it became evident that this was unlikely to be the case in respect of the outstanding R5 million that had been disposed of out of Kish Gas' account.

47. It is evident that in the first application the Premier and MEC were not granted relief in a form which would allow them to sue for any portion of the R10.18 million that was no longer traceable. The second order granted *ex parte* can be construed in conformity with the grant of an interdict pending the outcome of an action for recovery of the R5 million that was transferred into Kish Gas' account.

48. *Adv Joubert* contends that the applicants were successful in that all but some R5 million has been repaid, effectively by ARA, and that on paper it is evident that this amount could only have been transferred out of ARA's account by one of its authorised employees. In this regard reliance is placed on Absa's contention that it would not have been possible for an outsider to hack into ARA's internet banking platform.

49. I do not share *Adv Joubert's* optimism with regard to making a finding on the papers. Firstly the court must apply *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). In short the applicants can only obtain final relief if the respondent admits the facts set out by the applicant and if its own facts support the grant of the relief, unless of course the respondent's denials do not raise a real, genuine or bona fide dispute of fact.²⁰

²⁰ At 634H-635C

In the present case the affidavit of Mr Pienaar, the IT expert, which was filed on behalf of ARA supports its contention that the account had been hacked: Among other things, that Absa did not mention at the meeting on 1 November that the transfer limit had been increased on 31 October. It is also contended that the transaction of R5 million should have been flagged and held in escrow. Furthermore, Absa's in-house counsel claimed in an affidavit that the increase in the amount that could be transferred had only been effected after the meeting- but this statement, which I consider material, has proven to be incorrect.

50. There was also an unauthorised and unexplained change in the profile information on 2 November which relates to Mafu where her name was listed twice, first as User 0001 and then as User 0004, that User 1 was deleted and User 4 added and identified as "*Mrs Mafu*". It is common cause that Mafu is unmarried. Moreover User 003 was also deactivated, yet she is an employee of ARA and remains an authorised signatory on the account. These issues were not addressed in Absa's affidavit.²¹

The upshot is that, on motion proceedings, the possibility of an outside hacking cannot be ruled out. It is therefore unnecessary to consider whether in law a case of vicarious liability has been made out by the applicants as the assumption cannot be made that the only person who could be involved in the withdrawal of the R5 million was a member of ARA's personnel.²²

51. Similarly the applicant's reliance on a breach of the alleged agreement fails to take into account the denial that the letter was intended to cover more than the first tranche payment. There certainly was no evidence presented to support the applicant's contentions. On the contrary one would have expected that after the lapse of over three months since the authorisation letter of 22 June 2016 an

²¹ The allegation was made in ARA's supplementary affidavit at paras 23-25 p1021. The response at para 28 p1063 does not address these issues or the accusations levelled against Absa.

²² If regard is had to the number of attempts to unlawfully access ARA's account which were picked up by Absa and confirmed by ARA prior to the change of the transfer limit and the actual transfer of the R5 million to an entirely new beneficiary, it may not be remiss to express a degree of surprise that the bank's risk profiling algorithms which one imagines would be in place did not red flag the significant increase of the withdrawal limit by twentyfold despite Absa admitting that on the very same day it had detected a suspicious loading of three new beneficiaries which ARA had immediately confirmed were fraudulent.

official of Social Development or someone from Life Recovery or Life Esidimeni would have contacted ARA to pre-cognise it to expect a deposit of R10.18 million into its account.

52. Nor do any of the applicants explain why it would have taken so long to regularise the registration of Life Recovery on Social Development's systems considering that the service level agreement had been concluded more than three months earlier.

Presumably they would have had difficulty explaining certain of the provisions of that agreement which included an acknowledgement that payments would be subject to Treasury Regulation 8.4.2 and that the funds must be transferred to a banking account described as "*the legitimate bank account*" and specifically identified in the service level agreement as FNB acc no 625933600285.²³

53. On the other hand *Adv Ben-Zeev* argues that ARA had been substantially successful in that the claim by the applicants for payment of the R670 000 was unsuccessful and that the initial case made out had failed to make material disclosures; more particularly, that ARA had informed officials of Social Development prior to the first application being launched that it accepted that it was not entitled to the money but needed assurance that the funds could be lawfully given to Life Recovery (or for that matter Life Esidimeni) or even be given back to Social Development by reference to the paper trail leading up to the payment to the ultimate intended recipient.

54. The applicant in an *ex parte* application is obliged to disclose all facts that might influence the court in coming to a decision and that a failure to do so may result in the order being set aside and rescinded even if the non-disclosure is not wilful or *mala fide*. See *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-350B and *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981(2) SA 412 (W)

²³ Service level agreement clauses 4.3 and 7.16 at pp 52 and 58 of the court file. In particular Clause 7.16 provides that:
"Funds will be transferred into the legitimate bank account of the Service Provider"

at 414D-E; see also *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at para 21.

55. Margo J in *Cometal-Mometal* at 414H pointed out that among the factors to be considered in deciding whether or not to subsequently set aside the *ex parte* order where there has been a non-disclosure are;

“the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the Court might have been influenced by proper disclosure in the ex parte application, the consequences, from the point of doing justice between the parties, of denying relief to the applicant on the ex parte order, and the interests of innocent third parties”.

56. This was echoed by the following statement in *Phillips and others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at para 29 where Howie P said the following:

“It is trite that an ex parte applicant must disclose all material facts that might influence the Court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that discretion the later Court will have regard to the extent of the non-disclosure; the question whether the first Court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside.”

The underlying requirement where an applicant seeks interim relief without notice remains its duty to display *uberrima fides* towards the court: *Cometal-Mometal* at 414H.

See also *Berrange v Hassan and another* 2009 (2) SA 339 (N) at 354A-G (confirmed on appeal in *Hassan and another v Berrange NO* 2012 (6) SA 329 (SCA)).

57. On analysis the case made out by Social Development relies on three causes of action.

- a. Theft of monies out of a bank account;
- b. An unjust enrichment claim under the *condictio indebiti*;
- c. A breach of the 22 June acceptance letter.

58. It is necessary to point out that while Life Recovery and Life Esidimeni may have been cited as co-applicants they do not purport to make any claim against ARA or seek recovery of any monies from it. Only Social Development through the Premier and its MEC does.

APPLICANTS' CAUSES OF ACTION

59. A claim by Social Development under the *condictio indebiti* cannot get out of the starting blocks for a number of reasons.

In order to succeed Social Development would have to show that ARA was enriched in an amount representing the unrecovered portion of the R10.18 million.

It is common cause that this is the amount which was transferred to Kish Gas. Kish Gas confirms that it has no association with ARA and the paper trail ends there. Accordingly the applicants cannot show any enrichment by ARA

60. Moreover Social Development relies on an agreement in terms of which ARA received the amount on behalf of Life Recovery. The letter of 22 June deals in

clear terms with the receiving of money and I did not understand the applicants to argue otherwise.

The salient portion of the letter for present purposes reads:

“I, Mrs ... Lenyehelo ..., the director of A Re Ageng Social Services accept to hold the first quarter funding on behalf of Life Recovery Centre Randfontein as to be transferred by the Department of Social Development.”

The letter is signed on behalf of ARA by both Lenyehelo as director and Ms Kunene as deputy director.

61. Two things follow from ARA receipting the money as agent for Life Recovery.

Firstly, it precludes Social Development from arguing that payment was made pursuant to an error that may be construed as reasonable or excusable in the circumstances²⁴. It is clear that the payment was not made in error, and if it was then the error cannot be construed on any basis to have been reasonable or excusable: the responsible officials of Social Development acted deliberately and with full knowledge of the implications of using ARA as a conduit.

Secondly, as our law stands, a payment made to an agent on behalf of a disclosed principal does not satisfy an essential requirement of the *condictio*, even if it can be shown that only the agent was enriched. Only the principal can be sued under the *condictio indebiti*.²⁵ Presumably it is for the principal to in turn recover the amount from the agent. I should add that there was no cession of any

²⁴ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) at 223H-224G

²⁵ *Phillips v Hughes; Hughes v Maphumulo* 1979 (1) SA 225 (N) at 229C-F and *Minister van Justisie v Jaffer* 1995 (1) SA 273 (A) at 280E-G

right of action by Life Recovery in favour of the Premier or the MEC; Social Development.

62. The claim based on the appropriation of monies in ARA's account that were earmarked for Life Esidimeni is also problematic. Assuming that the money could be recovered by Social Development despite it entering the account as the money which now "*belonged*" to Life Recovery under the purported agreement in terms of which ARA held it as the latter's agent, then the undisputed statements by ARA to officials of Social Development at a meeting on 8 November and its actions (which will be dealt with in more detail later) cannot amount to acts of appropriation.

Accordingly, at best, Social Development will have to show that ARA appropriated the monies by transferring them out of the Absa account on 10 November. Since the overt actions of ARA are inconsistent with it knowingly appropriating the money Social Development would also have to show grounds for attributing vicarious liability to ARA for the unauthorised actions of any of its employees who may have been complicit in hacking the Absa account.

63. It is therefore evident that Social Development cannot succeed on motion with a claim based on the *condictio indebiti*. The issue that must still be considered is whether this aspect of the applicants' case should be referred to trial or await the outcome of action proceedings.

64. Finally Social Development appears to rely on the terms of the 22 June 2016 acceptance letter.

65. In its terms the letter is limited to ARA agreeing to hold "*the first quarter funding*"

Although the terms of the funding for Life Recovery under its service level agreement with Social Development were not known to ARA, the agreement was attached to the applicants' *ex parte* application. The first tranche is recorded in

that agreement to be the amount which was in fact transferred into ARA's account at the end of June 2016. The agreement is dated 22 June 2016 which is the same date that ARA signed the acceptance letter as requested by Mrs Maluleke of Social Development.²⁶

I add that it is somewhat surprising that each page of the service level agreement between Social Development and Life Recovery is marked "*Confidential*"; unlike all the service level agreements that were produced to this court between Social Development and ARA.²⁷

66. Returning to the basis on which Social Development alleges that ARA received the R10.18 million; at best for it there is a dispute as to whether the letter was intended to cover only what it admits was in fact the first tranche payment under its service level agreement with Life Recovery (which was made at the end of June) or whether it also covered the October payment

67. I believe that the applicants would also have evidential difficulties as the document is in the form of a unilateral undertaking and, as mentioned earlier, there was never a follow up communication by any of the applicants to pre-cognise ARA that it was to expect a transfer of R10.18 million and immediately forward it onto the ultimate recipient.²⁸

²⁶ The possibility that the service level agreement was back-dated therefore cannot be ruled out if Lenyehelo is correct that Maluleke claimed not to have known the amount of the first tranche at the time the letter was written: The actual amount was stipulated in the agreement.

²⁷ There are four separate service level agreements between the department and ARA. They are marked SLA1.1 to SLA1.4 at pp 548-644.

One would expect enquiries to be made as to who decided that the Life Recovery agreement should be treated differently, to whom its existence was restricted, from whom was its existence being withheld and why. I mention this also because the contents of Social Development's second replying affidavit reveal that in April 2016 it had also used SANCA as a conduit to pay an amount of R14 million over to Life Recovery (see para 40 of the affidavit). An explanation is given that this was for ad hoc services that had been provided. That may well be, but it is then surprising that the money remained idle in the account.

On Social Development's own version in the present case a total of more than R37 million was paid or was to be paid into Life Esidimeni's account as the administrators of Life Recovery within the space of six months.

²⁸ This is all the more surprising if regard is had to the period of time that was needed, according to Social Development in the contempt proceedings, to process and effect a payment on its systems.

68. It is evident that the applicants cannot succeed on motion with a cause of action based on the letter of acceptance. Once again the question arises whether the application should be referred to trial in one way or another.

69. I have already dealt with case law on the failure to disclose material information in *ex parte* applications and the effect it may have on the outcome of the application itself.

70. Earlier I also mentioned that two weeks prior to launching the first *ex parte* application on 23 November 2016 a meeting was held on 8 November between ARA and officials from Social Development.

I must cover this meeting in some detail before weighing up whether the application should be referred to evidence or await the outcome of an action. It is necessary to do so in order to determine whether the discussions which took place at the meeting, and which were recorded in subsequent letters, should have been disclosed in the *ex parte* applications of 23 November and 14 December; and what consequences ought to follow if they were not.

MEETING OF 8 NOVEMBER AND RECORDAL OF EVENTS BY ARA IN LETTERS TO SOCIAL DEVELOPMENT

71. In contending that Social Development had failed to disclose material facts, ARA claimed in the rule 6(12)(c) application of 27 December 2016 that;

- a. Lenyehelo together with other of its board members repeatedly asked Social Development officials for bank-generated proof of payment of the R10, 18 million and for confirmation that the transmission of funds to Life

Recovery and Life Esidimeni was lawful and legitimate but that neither was forthcoming;

- b. Social Development had untruthfully claimed that ARA's staff had avoided meeting with its officials. ARA referred to two meetings, one on 8 November and the other on 15 November, as well as "*countless telephonic conversations*". ARA claimed that Lenyehelo had already informed Social Development on 15 November that R5 million had been unlawfully transferred out of its Absa account without authorisation and forwarded its bank statement as proof. This is disputed by the applicants and I will accordingly ignore the allegation.

72. In amplification of the discussions that were held with the officials on 8 November ARA attached two letters recording what it claimed had transpired at these meetings. It is significant that none of the letters was responded to, particularly bearing in mind that they were not dealt with at all in the applicants' founding papers.

73. The first letter, dated 10 November 2016, was addressed to Ms Tsakane Maluleke. The other was addressed to Ms Nandi Mayathula-Khoza the MEC; Social Development but was only given by hand on 15 November 2016.²⁹ The main difference between the two letters is that in the one to the MEC; Social Security Lenyehelo gave an overview of the events, lodged a complaint and sought the MEC's intervention to investigate and "*take the appropriate action against officials who abuse our trust and faith*".

²⁹ See Annexures RC1 and RC2.

Both letters recorded what transpired at the meeting of 8 November, although the one to Maluleke was in greater detail.

74. The contents of both Lenyehelo's affidavit and the letter to Maluleke claimed that Maluleke had contacted her to advise that she would be attending ARA's offices at 9 am on 8 November in order to escort Lenyehelo to the bank. When Lenyehelo replied that members of ARA's board would have to be present the meeting was then changed to 11 am on the same day.

75. At the meeting Maluleke requested that ARA release the R10.18 million into the account of Life Recovery at Rand Merchant Corporate Bank³⁰ as had been done in June in relation to the R13 million odd. It was then resolved that this would be done *"once the department... provides us with a bank generated proof of payment indicating the source of the deposit which would be taken to our bank since the bank cannot trace where the money is from since is reference no. is the same as the R13 087 578, 44 deposited in June but completely different from those coming directly from DSD to A re Ageng for the past 13 years."*

76. It was also contended that the reason for insisting on establishing the source of the money was outlined to Maluleke at the meeting and reiterated in the letter; namely that ARA was *"being put in a precarious position of transferring monies to bank accounts that have absolutely nothing to do with the relationship between itself and DSD as based upon obligations accruing from the signed service level agreement between our organisation and the DSD."*

³⁰ This cannot be the *"legitimate"* bank account stipulated in the service level agreement as that is identified as an FNB held account (see earlier footnote)

77. Lenyehelo claimed that Social Development had failed to supply the information and continued to make telephonic demands *“in an attempt of dragging us as management to our bank to make the transfer irrespective”*.

78. In the letter Lenyehelo claimed that at the meeting Social Development agreed to supply ARA on the following day (i.e. 9 November) with;

a. a formal letter from Social Development confirming that an NPO could hold monies on behalf of others who are not on the system since this was common practice. In the letter of 10 November it was contended that Maluleke had made this statement at the meeting.

b. feedback as to whether the money came through foreign exchange (*“Forex”*) and if so a copy was requested of the application that was made to the South African Reserve Bank allowing the money to enter ARA’s account.

79. The letter of 10 November to Maluleke traced the history of the attempts made by ARA to establish the source of the deposit. It also set out events which ARA claimed had occurred since the meeting of 8 November. These are set out in the following paragraphs.

80. ARA’s financial advisor attempted to locate the source of the money that had entered ARA’s account and advised it to contact the person from Absa’s division who had picked up that ARA’s account had been hacked on 31 October in the hope that this could be traced. In the letter Lenyehelo expressly stated that this

had been brought to Maluleke's attention but she had dismissed it in another telephone conversation.

81. The letter of 10 November then mentions the name of Mr Themba Msimang. By reason of its significance the entire passage is repeated;

“what is also of concern to us... is the audacity of Mr Themba Msimang to contact our bank without our consent after Ms Maluleke wanted us to give her the name and contact no of our financial advisor which we correctly refused, to contact our bank regardless and bully his way into determining who is responsible for our account and to rudely instruct her to make that transfer leaves much to be desired.”

Lenyehelo also complained that this was indicative of the way in which Msimang had addressed them since the outset and although his conduct had been raised with Maluleke and Gumani he continued to act in this manner at the bank.

82. Despite Social Development's agreement to supply the information by 9 November, not only did it fail to do so but according to the letter of 10 November there continued to be;

“sheer intimidation and harassment from Mr Themba Msimang and Mr Gumani, informing us that the transfer must be made immediately so that the “head office” should not freeze our account which would have severe consequences to our programme and staff complement.”

83. The letter then mentioned that Lenyehelo had never experienced such abuse and disrespect and took exception to the treatment she was receiving from the

department. She added that *“threatening me to do as you wish or else you will stop funding... those who really need it, is really taking this to another level”*.

Lenyehelo set out that ARA had 30 full time staff members and 32 volunteers who receive stipends and that it runs two shelters in Bekkersdal and Simunye catering for 20 abused women and their children in the one shelter and 16 in the other. She added that ARA also runs adult diversion programmes and has victim empowerment centres in six police stations serving the West Rand. Lenyehelo then said that she would *“continue to protect and empower those who are in need for as long as I live and no one will stop me...”*

84. The letter of 10 November referred to what Lenyehelo contended comprised *“criminal activity levelled against us and in particular me relating to this money which is currently under police investigation.”* This was then outlined as follows;

- a. In the early hours of Monday 31 October ARA’s bank account was hacked and beneficiaries were loaded in an attempt to transfer funds out of its account. ARA was notified about the attempt by Absa’s fraud division and was advised that the incident was under investigation;
- b. On about Friday 4 November Lenyehelo’s cellphone number was unlawfully ported to MTN. It was contended that this enabled the hackers to obtain a one-time pin number for internet transfers. It was pointed out that her cellphone number was one of the official numbers linked to the account.

- c. During the period when Lenyehelo was unaware that her cellphone number had been ported, which meant that she would not receive bank notifications, R2000 was successfully withdrawn from her account in an apparent trial run.
- d. On 7 November Lenyehelo was contacted by Vodacom who advised that her number had been illegally ported to MTN. This explained the successful SASWITCH ATM withdrawal. She stated in the letter that Absa was contacted as soon as she became aware of the unauthorised withdrawals, that she had informed the police, and that another case was opened which was being investigated by SASWITCH's Fraud Unit.
- e. After Maluleke and Gumani left ARA's offices on 8 November Lenyehelo realised that she was being watched by occupants of a vehicle that was parked opposite ARA's offices. The vehicle then followed Lenyehelo when she left the office. Because of her fears she went to the police station and as she turned in there the vehicle sped off. This incident was also reported to the police and is also now under investigation.

Lenyehelo then called Maluleke and related the incident *"in order to alert her that this money situation of hers is putting my life at risk moreover monies that are not mine and do not have control over."* Lenyehelo identified the registration number as DJ65KP GP and provided it to warrant office Mosiapo of SAPS.

- f. Maluleke had been contacting ARA's administration staff requesting details of the other board members who were present at the meeting of 8

November. In the letter Maluleke was requested to direct all such queries to Lenyehelo personally.

85. It should be noted that these incidences occurred prior to Maluleke instructing Lenyehelo on the morning of 9 November that she would be arriving with officials from Social Development's head office to escort her to the bank in order to have the money released.

Lenyehelo claimed that she had refused to do so and reminded Maluleke of the agreement that her department would *"provide us with the necessary documentation"* pursuant to which ARA's board would give permission to transfer the monies.

86. The letter of 10 November to Maluleke reiterated that *"nobody is refusing to transfer the money back but in light of what has transpired things will be done correctly this time around"* (emphasis added). This is a key passage in the letter.

87. The letter concluded with Lenyehelo regretting that she had agreed to the request of transferring the R13 million odd at the end of June 2016 and that as Management they had trusted the representations made by Maluleke at the time and *"will not commit that mistake yet again. Money will be transferred once all the correct procedures have been made and ARA is comfortable that it is not opening itself to be used in this way again."*

88. A second letter was addressed to the MEC; Social Development, Ms Mayathula-Khoza. It was hand delivered on the morning of 11 November at the Birchwood Hotel to Mr Mbwanya who is the spokesperson for the MEC. This was pursuant to

Lenyehelo bringing the matters that had been raised with Maluleke to his attention on 10 November and Mbwanya advising, later that day, that she should set it out in writing.

89. By reason of her not retaining a copy of the letter Lenyehelo then prepared a typed one, virtually identical to the earlier one but which included certain subsequent events. She handed it over at the meeting held on 15 November 2016 at which she claimed to have told them that R5 million had been hacked out of ARA's account. The letter is dated 10 November and aside from repeating the substance of the email to Maluleke of 10 November;

- a. requested the MEC's formal and urgent intervention concerning what she claimed to be harassment, intimidation and threatening conduct levelled against her, her staff and *"above all the continued services I am rendering to the public under the auspices of A re Ageng."*
- b. Most significantly Lenyehelo urged the MEC to look into the conduct of the officials with regard to the source of the funding and procedures followed in respect of these transactions. She then specifically named these officials and their positions;
 - i. Mr Themba Msimang, the Director Partnership and Province
 - ii. Ms Tsakane Maluleke, the Deputy Director Social Work West Rand Region
 - iii. Mr Gumani, the Director of Finance West Rand Region

- c. Lenyehelo then set out ARA's complaints and informed the MEC that on 22 June 2016 she had received a call from Maluleke who requested her to hold funds on behalf of Life Recovery. It was claimed in the letter that Maluleke had explained that the money could not be transferred directly into Life Recovery's bank account because the department was experiencing delays in finalising the organisation's registration and that Life Recovery needed to be launched on 26 June.

By reason of the good relationship spanning some 13 years which ARA had with Social Development and understanding the difficulties in raising funds for projects Lenyehelo said that she had not been concerned about Maluleke's request. Under the impression that ARA would be helping out Lenyehelo in good faith had asked her deputy to write a mandate acceptance letter.

- d. Lenyehelo added that Maluleke was contacted to provide the amount so that it could be inserted in the acceptance letter. Maluleke told her that she was not certain and that it could be between R10 million to R13 million. As explained in the letter to the MEC, it was for this reason that the acceptance letter did not refer to an amount but instead stipulated that ARA was accepting on behalf of Life Recovery an amount representing the first quarter payment.

Bearing in mind that the MEC is cited as the second applicant I consider this passage also relevant as it demonstrates that ARA's allegations in this regard were known to the second applicant prior to the launch of both *ex parte* applications.

- e. When the money was cleared through ARA's bank account Lenyehelo contacted Maluleke who said that she would provide the account number for Life Recovery once she received it. When these details were provided on about 8 July ARA transferred the amount save for R50 0000 which, in the letter, the MEC was informed was used "*strictly to the benefit of the organisation and not the benefit of any of our staff members.*"
- f. Lenyehelo wrote that she had also alerted Absa to ensure that ARA would not be liable to SARS and this was evidenced in a communication to the bank advising that it was solely an intermediary³¹. The communication was attached to the letter.
- g. The letter alleged that ARA did not realise that the bank details provided by Maluleke were not those of Life Recovery but of Life Esidimeni and that on enquiring Maluleke stated that they "*were managed by the same people and therefore it was acceptable*".

It was then pointed out in the letter to the MEC that Maluleke and Gumani informed Lenyehelo that it was common practice for the department to request established organisations to hold monies for transfer to NPOs waiting finalisation of registration on Social Development's data base.

- h. The MEC was also informed that Maluleke had been asked at the meeting of 8 November why Life Esidimeni's account was not used from the start to transfer the full R23 million since it had been in existence for far longer than ARA. Maluleke had replied that, while Life Esidimeni had been in

³¹ There is no suggestion in the communication that receipt of any other monies was anticipated.

existence for long a time, it had been registered on the Department of Health's database but not on that of Social Development. She claimed that Life Esidimeni was regarded as a new organisation and its details were similarly waiting to be fully loaded on the department's database.

- i. Maluleke also mentioned that *"since the Department of Health withdrew funding from Life Esidimeni, Department of Social Development saw an opportunity to go in and fund it."* (emphasis added) The fact that this was pertinently mentioned in the letter, its relevance and the red flags it raises will be addressed later.

90. In addition to repeating key aspects covered in the letter to Maluleke, Lenyehelo in her letter to the MEC added the following;

- a. On 18 October 2016 ARA's bank had been approached to find out the source of the funds. The bank advised that this was difficult to trace as the electronically generated reference number did not resemble any official reference and, at the time of writing the letter to the MEC, Absa was unable to trace the reference with any certainty to find out who had transferred the funds into the account.

When an Absa consultant was again approached he indicated that the money appeared to have been deposited at an FNB Forex department. ARA therefore made enquiries from possible overseas funders. In the letter to the MEC Lenyehelo expressly said that because Absa was unable to recognise the reference number *"we were even of the opinion that the*

money could have been deposited incorrectly and didn't want any part of illegal monies."

- b. Since foreign exchange could have been involved ARA considered requesting Absa to contact the Reserve Bank to establish whether they had approved the remittance of the money into the country by international funders and whether ARA's profile or supporting documents were used in the transaction.

Because of the concern regarding the legitimacy of these funds ARA advised the MEC that to avoid any attempt to freeze its account if the monies had been illegally obtained it had transferred all funds, other than the R10.18 million, that were standing to the credit of its Absa account into an FNB account.

Once again this part of the letter is significant for reasons that will be addressed shortly.

- c. Lenyehelo also recorded in the letter that she had raised the concerns regarding the Reserve Bank with Gumani at the meeting of 8 November. He said that *"because of the huge amount the only explanation would be that the money was transferred from the DSD to the Reserve Bank via FNB Forex and back into A re Ageng"*.

She also mentioned that at the meeting Gumani claimed that the difference in reference numbers could be attributable to the huge sums involved since ARA had never been funded millions by the department.

It will be recalled that Gumani was a Director of Finance and one would expect ARA to accept his explanations as reliable.

91. The letter to the MEC then dealt with the attempted hacking of ARA's Absa account on 31 October. This is found under the headings "*Beginning of Harassment*" and "*Beginning of Illegal Activity*". Further incidents were dealt with under "*Increased Scale of Illegality*".

Under the heading "*Continued demand to escort us to the bank*" Lenyehelo informed the MEC that on 9 November Maluleke had instructed that she would attend at ARA's offices with Msimang and stressed that they were contemplating freezing ARA's account. This despite Absa having advised that the spreadsheet supplied by the department did not assist in determining the source of the funds. The spreadsheet was attached to the letter

It was pointed out that freezing ARA's account would affect its programmes and the livelihood of staff.

92. The letter also informed the MEC that immediately after the discussion with Maluleke and without ARA's permission Msimang had contacted the bank and instructed it to transfer the monies over to Life Recovery.³²

The MEC was expressly requested to intervene particularly as Lenyehelo was concerned that they were charting dangerous territories. Lenyehelo said that her

³² According to ARA, at this stage Maluleke and Msimang were still insisting that payment be made over to Life Recovery.

conscience *“did not allow her to take the easy way out by transferring the money over”* and that:

“The people that I have issues with are holding high positions and are using the department’s resources to railroad people like us. As directors they have fiduciary responsibilities which they choose to overlook in order to gain whatever their agendas are. They should however not bring the reputation and good that the DSD stands for down.”

The letter to the MEC concluded:

“I have faith in you and appreciate all that you do in assisting us to help others, that is why you were the only person I could bring this to in order to investigate, and take the appropriate action against officials that abuse our trust and faith.

Hoping to hear from you at your earliest convenience.”

93. It is to be noted that the meetings of 8 and 9 November described in these letters took place immediately *prior to* the transfer of the R5 million out of ARA’s account at Absa. The transfer was effected at 15h58 on 10 November³³. This appears to have occurred later on the same day as Maluleke received the letter from ARA and after Lenyehelo had escalated the complaint to the MEC’s office.

³³ Absa’s Electronic Funds System Payment Details – record p93

THE DISTRIBUTION OF THE R5 MILLION

94. It will be recalled that once the monies found their way into Kish Gas' bank account they were dispersed within twenty four hours to twenty-nine separate accounts, some of which appear to be related entities. There is nothing alleged by Social Development to suggest that ARA had the capability to disperse money so quickly. It appears beyond dispute that the process adopted could only have been implemented at such short notice and with such speed by someone who already had the capability of doing so.

95. The conduct of Lenyehelo and her actions in notifying the bank and the police prior to the R5 million being moved out of ARA's Absa account on 10 November would be suicidal if she was involved in its transfer to Kish Gas. In particular she would have no reason to believe that Absa and the authorities would not monitor the account after the earlier reports she had made and the concern she had raised that the monies might be tainted.

96. It is therefore apparent that at least the controlling mind of ARA could not have initiated the fraud in such a systematic manner, bearing in mind also that ARA's experience seems limited to effecting simple transfers in and out of its account, generally for a few thousand Rand. By contrast the distribution of the R5 million, the transaction contended for by Krish Gas involving the alleged overnight purchase of fuel and the speed with which the R5 million

was dispersed into numerous accounts, if true, indicates a more sophisticated operation directed by someone outside ARA³⁴.

REFERAL TO TRIAL

³⁴ Kish Gas' version was that on 8 November Kishan Jawaharlal ("Kish") received a call from a Mr Morney Williams ("Morney") wanting to purchase fuel. They met on 9 November. Morney was accompanied by a person whose name Kish no longer recalled. Morney wanted to purchase R10 million worth of fuel. Kish required an EFT payment. Although Morney wanted a once-off transaction, Kish advised that it was prudent to split the purchase into two deals of R5million each. On 10 November at 18;05 Kish received an email from "Tim Tim" attaching an Absa on line proof of payment notification of the transfer of R5 million into Kish Gas' FNB account. On 11 November at 10;04 Morney indicated that they would proceed with taking delivery of ½ million litres of "Diesel PPM500 for export to Zambia" and that delivery would commence that afternoon. The email was written on behalf of Zengereri Fuels LLC, Julius Nyerere Drive, Lusaka. Kish Gas provided a tax invoice which reflects a total unit price of R10.73. The fuel was loaded onto 12 tankers with 40 000l capacity each. On 14 November Morney contacted him again. This was after Kish Gas' bankers had informed Kish that the R5 million might be part of a fraudulent transaction. Curiously Kish told Morney that "*Kish Gas will not entertain an electronic fund transfer however I requested that he make a cash deposit at a branch of FNB. I requested him to do this because the branches of FNB have cameras and as such will be able to identify the perpetrator.*" Morney did not proceed with the balance of the transaction." Curious because Kish does not claim to have alerted the authorities to his plan, let alone to have promptly informed them of how Kish Gas came to receive the amount and that another transaction was in the offing. On 11 November of the R5 million all but R164 000 had been transferred out of Kish Gas' account. By 12 November the entire balance had been transferred out.

It is evident that if Kish Gas is to be believed, already by 8 November a plan was in place to transfer monies into Kish Gas' account for onward distribution. This was on the same day when ARA met with department officials and required proof that the monies had not been illegally transferred to it.

Since no times are reflected as to when the amounts were transferred out it cannot be said that they were effected prior to ordinary business hours which obviously would raise further suspicion. What however requires an explanation is;

- a. how the fuel could have been procured so quickly as Kish Gas admits that it is an intermediary between the producers and suppliers;
- b. why a foreign company would be prepared to pay a reasonably high price for local fuel which price included duties when:
 - i. fuel for export must be transported in Removal of Goods (ROG) tankers;
 - ii. the Zambian company would not be able to recover duties paid when the tankers crossed the border and the fuel would be subject to additional duties imposed by the Zambian authorities when entering that country.

If there was fuel supplied then ARA could never have gained from the transaction since the money went directly out of ARA into Kish Gas' account and the amount paid for the fuel was high. If there was little or no fuel supplied then Kish Gas becomes a suspect and one would expect that it would be relatively easy for the authorities to follow a paper trail not only in respect of where the money ended up and proof of the *causa*, but also in respect of proof of receipt of fuel from a producer, when it was ordered and delivered, where such a large quantity could have been stored for pumping into the 12 tankers, where the tankers came from and whether there was any hiring charges, whether they crossed the border and if so what was cleared through customs. If suspicion falls on Kish Gas then it should be relatively easy to establish if there are links between it or the ultimate beneficiaries and any person or official employed by or otherwise involved with any of the parties.

97. Nonetheless, since the applicants seek a referral to trial in some form or other, when exercising a discretion I should consider whether or not these inferences may be displaced by oral evidence or some other relevant consideration.

98. The first difficulty is that the claim will be against ARA. While it may be that someone within ARA was complicit in hacking the account, ARA's conduct from 31 October was consistent with bringing to the attention of Absa and the authorities its concerns that its account had been compromised. As indicated earlier, ARA could not have assumed that Absa would have ignored any suspicious looking transaction. I now turn to the effect that this has on the case.

99. The three passages from the letters of 10 November which I emphasised earlier were never brought to the court's attention in either of the two *ex parte* applications. The letter of 10 November to Maluleke was available and in my view should have been attached to the application. The letter which was directed to the MEC; Social Development, albeit only received on the 15th of November, should also have been brought to that court's attention; particularly bearing in mind that the MEC as the second applicant is a direct party to the proceedings.

In my view the decisions of *Schlesinger* and *Cometal-Mometal* are directly in point.

100. There is a further factor to be considered. The Premier and the MEC; Social Development have threatened action proceedings against ARA. Their applications indicated that such proceedings would be brought within 60 days. It is also apparent that they should by now have enough information at their disposal to pursue an action against ARA or Kish Gas, or both. Yet they have not done so despite the lapse of some 11 months since the first application was brought and some 8 months since Kish Gas' identity and details of the twenty-nine accounts into which it had transferred the R5million became known.

101. There are also concerns as to whether ARA will be the only party cited. If it is, then ARA has already indicated that it will seek to join Absa and Kish Gas. Insofar as Kish Gas is concerned, the explanation provided as to how the R5 million came into its account is not convincing, is riddled with commercial improbabilities and the lack of documentation to support the source of the fuel, let alone the dissipation of all but R45 000 of the R5 million that entered its account, is also of concern.

102. For these reasons it is my view that there should be finality to the application and that if Social Development is minded to bring an action, then it must do so. The disposal of this application should not wait if regard is also had to the material failure to disclose the contents of the 10 November letters which, if revealed, would have required explanation by the applicants in their founding affidavits. This is particularly so bearing in mind their reliance on the anonymous source, when the MEC; Social Development had

already been notified per ARA's letter of 10 November of the reason for transferring all but the R10.18 million out of its bank account.

103. There is a further issue that arises. It concerns the anomalies regarding the way Social Development transferred the full R23 million to ARA. While the R13 million transferred in late June 2016 was pursuant to discussions with ARA, which accepted that the amount was being held as a conduit for Life Recovery, the underlying justification for doing so appears to offend relevant legislation³⁵ and no adequate explanation has been offered as to why Social Development should take over facilities, which chronologically appear to have been at the last minute, and without any tender process, from the Department of Health in circumstances where the latter considered the facilities too expensive and where neither the ultimate recipient, nor its "*administrator*", being respectively Life Recovery and Life Esidimeni, sought recovery of the monies.³⁶ I have also mentioned that the effect of this explanation is to bring into question the manner in which Social Development dealt in its books with the earlier but similarly structured payment of R14 million it claims to have made in April 2016 to Life Recovery using

³⁵ See the PFMA and the requirements in terms of Treasury Regulations under the Finance Intelligence Centre Act 38 of 2001 ("*FICA*"). By way of illustration Reg 17.1.1 provides that all transactions must be supported "*by authentic and verifiable source documents, clearly indicating the approved accounting allocation*".

³⁶ The "*confidential*" agreement produced indicated, at face value at least, that the money was well overdue, yet neither Life Recovery nor Life Esidimeni sought payment directly into either of their accounts. Life Esidimeni's role has yet to be fully explained and neither it nor Life Recovery deposed to any founding affidavits setting out why they did not require direct payment considering that it would have been common cause between them and Social Development that ARA was holding any monies as agent for them and not for Social Development.

A further concern is that the papers indicate that the R13 million odd was paid into Life Recovery's bank account at Rand Merchant Corporate Bank during July 2016, yet the service level agreement stipulated that the only legitimate bank account into which money could be deposited was into one held with FNB. (see paras 52 and 75 *supra*)

SANCA as the conduit and what agreement or other transaction was used to support the payment.

104. The papers indicate that Social Development provides funding and oversees its utilisation by organisations which provide social services to those in need. They may be small organisations which do not have the capacity to administer budgets themselves or are unable to access adequate funding from the communities they serve. They are therefore dependent for their survival, and for being able to provide services for the vulnerable and abused, on the subsidies allocated by the Department. If the contents of Lenyehelo's letters to Maluleke and the MEC Social Development of 10 November are correct, then certain officials within the department appear to have made it their personal fiefdom. The course this case took has exposed certain officials who believe they can wield autocratic powers with impunity, as there seemingly is no adequate accountability. They have the power to switch funding on and off with scant regard for the wellbeing of the individuals in need of care (who in this case are generally indigent women and children who are victims of abuse).

105. As I understand the documents and service level agreements supplied, Social Development provides a resource intended to fill a desperate need within historically disadvantaged communities which do not have access to established welfare organisations. The department is mandated to provide funding for the benefit of those identified to be in need of specific care. It is not intended that the department provides the services directly to those in

need, nor can it. It requires a delivery vehicle and presumably looks at the projects submitted by suitably qualified persons or organisations (which would result in their being registered on the system as a registered service provider) that can most efficiently, competently and economically provide for an identified social assistance need whether on its own or with the assistance of intermediaries performing demonstrable and essential added value services.

106. If ARA's allegations are correct, then the threatened closure by officials, if ARA did not conform to their bidding and whose actions appear to be procedurally irregular, suggests that the department has been compromised. The MEC's failure to mention ARA's letter in the *ex parte* applications, raises concerns regarding the oversight of senior officials and their accountability.

107. Kish Gas' explanation of how it came to the R5 million through some transaction with an unknown foreigner who wished to export fuel at a price which includes local duties without any paperwork to speak of for customs or in regard to its procurement, in my respectful view, cries out for investigation. More so, if regard is had to the fact that the twenty-nine or so transferee's of the R5 million should be readily identified. Yet the court has not been informed of the outcome of any of the investigations mentioned in the papers even though they were initiated some time ago either by complaints laid by ARA with the police, or which were alluded to by the MEC: Finance or pursuant to Absa's own investigations.

108. There is a confirmed breach of the PFMA. The structures and systems in place appear to have been deliberately compromised by officials within Social Development. While this may be as a result of poor administration in registering service providers, the potential for the system being abused is self-evident³⁷.

109. In this context it would be remiss not to refer again to the contents of the affidavit in which the MEC; Finance contended that the allegations made by ARA were not matters of relevance to the court but were matters to be dealt with internally.

Firstly the allegations of ARA were essential to the defence it raised. Secondly ARA pertinently relied on being in the position of a whistle blower entitled to receive statutory protection. Far from being an officious bystander ARA was entitled to be concerned about the legality of the monies entering its account and had brought the matter to the attention of both the official it was dealing with in the department and to the MEC; Social Development.

The subsequent events do not provide comfort particularly when there is no explanation regarding the conduct of senior personnel within the Department

³⁷ There has yet to be any internal documentation produced by Social Development to indicate that the R10.18 million was to be received by Life Esidimeni on behalf of Life Recovery and not that the internal audit trail would end with ARA as recipient. That in essence was the documentation requested by ARA as far back as the meeting of 8 November because, on its version, it was concerned about being an unwitting party to money laundering. The subsequent provision of a service level agreement marked "*confidential*" in the *ex parte* application does little to allay these concerns.

in relation to matters which for reasons I have already set out, at this stage indicate *prima facie* a contravention of the PMFA.³⁸

110. In the present case, officials within Social Development have seen fit to terminate any further funding to ARA. These are allegations made in the last set of papers filed. If this is maintained then it has a direct impact on those in need of care and counselling and who have come to ARA for assistance. It is reasonable to anticipate that the best outcomes are achieved where care and counselling are provided by persons with whom the individual has built up a relationship of respect and trust.

111. The uncontested evidence presented when ARA brought its counter claim for payment of amounts that were outstanding and in the contempt application is that department officials did not ensure that those treated by ARA at the time when Social Development purported to close it down were provided with any alternate NPO which could be considered, suitable or adequate in the circumstances.

³⁸ Looming large are the acts of certain senior officials within Social Development who are in breach of legislation concerned with financial regularity. So too the curious situation where one department of the Provincial Government finds a service provider too expensive, which itself is strange as any remuneration would be pursuant to a costing evaluation process, yet another department will effectively conclude in haste an agreement with the very same service provider without any apparent tender or cost analysis. Perhaps the most cause for concern is that neither Life Esidimeni nor Life Recovery sought payment despite ostensibly having provided the services and the amount falling due. These unresolved issues raise concerns about the genuineness of the transactions, what or for whom the payments were in fact intended and what services were in fact rendered. The involvement of Life Esidimeni in the Department of Health scandal where at the time of this judgment there remains no proper explanation for the removal of patients in haste to unregistered NPO also raises red flags. Although there is no need to make such a finding for the purposes of the case (and therefore I confine it to a footnote), Lenyehelo's concern of ARA being used to launder money was reasonable in the circumstances.

112. This brings into question whether the officials within Social Development appreciate that they are custodians of funds which are required to be distributed to competent service providers for the benefit of those most in need of care. Their actions as contended for by ARA indicate that certain officials are not beyond utilising coercive measures which fall well outside their mandate or powers.³⁹

REFERRAL

113. The MEC claimed in a brief replying affidavit deposed to by the department's director of legal services that the allegations made by ARA were not matters of relevance to the court and that they would be considered internally.

114. I am afraid that this gives little comfort when no explanation has been given regarding the conduct of senior personnel within the department in relation to matters which for reasons I have already set out at this stage *prima facie* indicate a contravention of the PFMA.

115. The court's role cannot be as a passive onlooker when matters come before it which involve the possible misappropriation of public funds allocated in the national budget for alleviating the plight of the most vulnerable and needy in our communities and impact on the NGO's who provide much needed services and

³⁹ Once again: According to ARA in its letters of 10 November, Maluleke and Msimang were still requiring the R10.18 million to be transferred into an account which, if regard is had to the purported service level agreement between the department and Life Recovery, would have been unlawful as payment could only be made into the FNB account identified in the agreement.

care. By their nature, few NGOs are likely to have the resources, resilience or the *locus* to ensure that a proper investigation takes place.

Moreover the consequences in the present case have been that those in authority within the department have seen fit to terminate any further funding to ARA. This naturally has a direct impact on the latter's ability to provide the necessary care for the abused women and children who have come to depend on it. The conduct of the department in removing ARA as a recipient of social welfare funding, prior to any investigation leaves one with a sense of unease about the commitment of the department to undertake a thorough and fair investigation.

116. There is another element to this case which is of grave concern. It affects the rights of the individual to be protected from unlawful acts of intimidation, surveillance, financial sabotage, interception of data and other unlawful acts utilising clandestine resources accessible by reason of positions of power or authority which are then used to invade the economic and privacy rights of members of the community.

117. In *South African Association of Personal Injury Lawyers v Heath and others* 2001 (1) BCLR 77 (CC) at para 4 the Constitutional Court said the following;

"Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution.

If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."

In *Gama v Transnet Limited* 2010 JDR 0059 (GSJ)⁴⁰, at para 28 of the judgment I accepted that this passage was said in the context of the Special Investigating Units and Special Tribunals Act, but considered that the purpose of the PFMA Act is similarly to hold accountable the Board and officers of both State-owned corporations and government controlled entities. I also referred to ss 195(1) and (2) (b) of the Constitution which require public administration to be accountable and to meet high standards of professional ethics.

118. S 195(3) of the Constitution provides that:

'National legislation must ensure the promotion of the values and principles listed in subsection (1).'

The PFMA is one of the pieces of legislation born of this provision.

119. It is not unusual for a court to refer conduct which at face value appears to contravene legislation or disciplinary codes for consideration to the appropriate authorities or to a professional body.

120. In the present case the concerns which this court has are sufficiently serious for it to refer to the responsible authorities the possible contravention of PFMA in relation to financial misconduct (i.e.; unauthorised or irregular expenditure) as contemplated in s 81 of the PFMA or if the cheques were authorised by provincial

⁴⁰ *Gama* at para 27

treasury in a manner constituting financial misconduct as contemplated by s 82 of the PFMA.

Under the PFMA the appropriate authority is National Treasury by reason of the powers and duties conferred upon it by, among others, ss 6(1)(f), 6(2)(b), (c), (e), (f) and (g) of the Act bearing in mind the resources that were brought to bear on Lenyehelo and, if her allegations are correct, suggest that the use of an unsuspecting and legitimate NGO as a conduit to effect the improper transfer of funds might not be isolated.

121. By reason of the provincial department's audit requirements provided for in ss 19 and 41(1) (c) (i) it also appears that the Auditor-General should receive a copy of this judgment for consideration.

122. Finally the nature of the transfers through an ostensible intermediate party's hands to a party that is not the actual service provider for use by another without any proof of the department's paper trail or proof of the manner in which it was actually accounting for it in its books raises concern about the breach of FICA and POCA⁴¹. The clandestine porting of Mrs Lenyehelo's cellphone, the transfer of R2000 and then the alleged hacking of her account to transfer R5million into another account appear to be within the ambit of the Special Investigating Units and Special Tribunals Act 74 of 1996 (*"SIU Act"*). This Act is concerned with investigating serious malpractices or maladministration in connection with the

⁴¹ Finance Intelligence Centre Act 38 of 2001 and Prevention of Organised Crime Act 121 of 1998

administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public.⁴²

It seems that an appropriate route, bearing in mind that aside from the PFMA there may also be contraventions of FICA or POCA, is to refer the papers and the contents of this judgment to the Director of Public Prosecutions who may be in the best position to consider how the complaint is to be pursued and whether or not other charges should be considered and if so which investigative arm of SAPS should be involved.⁴³

COSTS

123. In *Schlesinger* and *Cometa-Mometal* the courts considered making a special order for costs where relevant information was withheld in *ex parte* proceedings. While I cannot speak for the presiding judges who heard the *ex parte* applications, I for one formed a strong *prima facie* view of serious malfeasance by ARA upon reading the applicant's papers, which I did first.

124. I am satisfied that if the letters of 10 November had been revealed in the *ex parte* applications then the court would have had difficulty in taking a *prima facie* view that ARA intended to dissipate the monies. Moreover the applicants would have been compelled to draw their papers differently in order to deal with the letter of 10 November to the MEC.

⁴² See Preamble to the SIU Act

⁴³ See e.g. the request made to the DPP by Bertelsmann J in *Blue Cell (Pty) Ltd v Blue Financial Services Ltd and other* (unreported) case no 14192/2010(NGHC) in the judgment delivered on 19 April 2012

This is because the letters contained an explanation as to why monies that formed no part of the R10.18 million were transferred out of ARA's account, contained a statement that ARA recognised that the money was not due to it, that it would pay the amount over provided there was sufficient proof as to the legitimacy of the payment and its source and that even Absa considered the documentation provided by the department on the spreadsheet to be inadequate. Furthermore the letter alleged that despite the failure to produce such proof as undertaken the department's officials resorted to bullying tactics, that ARA was concerned about attempts to hack its account and had approached the bank with its concerns.

In essence the letters provided explanations and perhaps equally significantly had named senior officials within the department and asked the MEC to intervene on the very issue of ensuring that the money ARA had received could be lawfully dealt with by it.⁴⁴

125. In short the letter would have alerted the court to treat with circumspection the claim in the founding papers that the money had been stolen by ARA to pay Absa. It also would have revealed that ARA was alive to the threatened freezing of its account well before the application was heard which would have removed the argument justifying a court to dispense with notice.

⁴⁴ It will be recalled that initially the officials required the money to be paid over to Life Recovery.

126. The court takes a very serious view of the failure to place ARA's two letters before the court, having regard to the circumstance of this case and the fact that the letters were not only in the possession of senior officials of Social Development but ought to have been in the possession of the MEC prior to her bringing the application as the second respondent. A punitive costs order is therefore appropriate

ORDER

127. For all these reasons I make the following order:

1. *Save the extent that there have been orders made by consent the applications brought under case number 41493/2016 and 44645/2016, are dismissed.*
2. *The first and second applicants are to pay jointly and severally two thirds of the first respondent's costs incurred under the above two case numbers, which shall include two thirds of all the reserved cost orders, on the attorney and client scale the one paying the other to be absolved;*
3. *The Registrar is directed to forward a copy of this judgment to the responsible senior official or head of the secretariat of:*
 - a. *National Treasury;*

b. the Auditor-General;

c. the Director of Public Prosecutions;

d. Former Deputy Chief Justice Moseneke in his capacity as the arbitrator in the Life Esidimeni Alternative Dispute Resolution proceedings being held at Emoyeni Conference Centre, 15 Jubilee Road, Parktown, Johannesburg

To the extent that any of the recipients may request access to the contents of the court files same shall be made available for perusal and copying.

DATES OF HEARING:

29 December 2016

30 December 2016

13 January 2017

31 January 2017

01 February 2017

28 February 2017

14 March 2017

27 March 2017

30 March 2017

13 April 2017

22 May 2017

25 May 2017

14 August 2017

DATE OF JUDGMENT: 31 October 2017

FOR APPLICANT: Adv. D Joubert SC
Adv. VR Fouche

FOR FIRST RESPONDENT: Adv. O Ben-Zeev
Tracy Lomax Attorneys

FOR SECOND
RESPONDENT: Tim Du Toit & Co Inc.

FOR MEC FOR FINANCE: Adv. A Stein
Adv. A Msimang
Bowman Gilfillan Inc.

FOR KISH GAS: Adv. M Louw
Forbay Attorneys