IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **A90/2024**

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

12/02/26 [redacted]
Date Signature

In the matter between: -

THABISO HAMILTON NDLOVU	**FIRST APPELLANT**
HAMILTON HOLDINGS (PTY) LTD	**SECOND APPELLANT**
HAMILTON PROJECTS CC	**THIRD APPELLANT**
FELIHAM (PTY) LTD	**FOURTH APPELLANT**

And

SPECIAL INVESTIGATING UNIT (SIU)	**FIRST RESPONDENT**
NATIONAL HEALTH LABORATORY SERVICES (NHLS)	**SECOND RESPONDENT**

ZAISAN KAIHATSU (PTY) LTD	**THIRD RESPONDENT**
REGISTRAR OF DEEDS, PRETORIA	**FOURTH RESPONDENT**
BUGATTI SECURITY SERVICES AND PROJECTS (PTY) LTD	**FIVETH RESPONDENT**
VICTOR NKHWASHU ATTORNEYS INC	**SIXTH RESPONDENT**
ZAHERR CASSIM NO	**SEVENTH RESPONDENT**
COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICES	**EIGHT RESPONDENT**
AKANNI TRADING AND PROJECTS (PTY) LTD	**NINTH RESPONDENT**
MOK PLUS ONE (PTY) LTD	**TENTH RESPONDENT**
ABOMPETHA (PTY) LTD	**ELEVENTH RESPONDENT**
JORITANS LOGISTICS (PTY) LTD	**TWELFTH RESPONDENT**
PERSTO (PTY) LTD	**THIRTEENTH RESPONDENT**
KGODUMO MOKONE TRADING ENTERPRISE (PTY) LTD	**FOURTEENTH RESPONDENT**

JUDGMENT

CORAM: BAQWA J et LESO AJ

BAQWA J

Introduction

[1] This is an appeal against the order and the judgment handed down on 7 June 2022 by Modiba J in the Special Tribunal in terms of which the decisions of National Health Laboratory Service ('the NHLS') to award various contracts to the appellants were reviewed and set aside and the appellants were directed to make repayment of R158 850 921.13, including interest at the prescribed rate calculated from the date the NHLS made payment pursuant the impugned contracts.

[2] The appeal to the full court follows the automatic right of appeal in terms of section 8(7) of the Special Investigating Unit and Special Tribunals Act 74 of 1996.

[3] The appeal however, subsequently lapsed because it was filed and was not prosecuted on time. The appellants brought an application for condonation of the late filing of the appeal and its reinstatement.

[4] The first and second respondents opposed both applications.

[5] For convenience, the first appellant, Thabiso Hamilton Ndlovu, the second respondent, Hamilton Holdings (Pty) Ltd, the third respondent, Hamilton Projects CC and Feliham (Pty) Ltd will be jointly referred to as the appellants. The name of the first appellant will be used interchangeably where required, and the acronym 'SIU' to refer to the Special Investigating Unit and the acronym NHLS to refer to the National Health Laboratory Service.

The Review Judgment

[6] In order to outline the background, I propose to make a brief reference to the judgment of the Special Tribunal.

Summary of the Special Tribunal Judgment

6.1. The NHLS entered into nineteen contracts for the purchase of PPE's between March and April 2021 with eight companies which were under the control of the first appellant (the Fronting Companies) which were declared invalid and set aside as unlawful (the impugned transactions).

6.2. The emergency procedures applied by the NHLS to procure the PPEs were fraudulently exploited by the first appellant and the Fronting Companies, resulting in the impugned transaction being reviewed due to non-compliance with the prescribed procurement procedures by NHLS officials and fraud on the part of the first appellant and the fronting companies.

6.3. The first appellant was found to control the following companies: Bugatti Security Services and Projects (Pty) Ltd, Hamilton Holdings (Pty) Ltd, Hamilton Projects CC, and Feliham (Pty) Ltd, and to have channeled funds through them for his benefit and that of his family members.

6.4. It was established that the NHLS had paid R172 742 175.00 to the company fronting in respect of the impugned transactions, with only R13 891 253.87 being found to have been used for the purchase of PPEs to supply to the NHLS. The balance of the funds were found to have been diverted for the first appellant's personal use. First appellant was held liable, jointly and severally with all except one of the fronting companies, for the repayment of the amount R172, 742, 175.00, less the cost of sourcing the PPEs, namely (R13 891 253.87), and less certain amounts retained by Abompeta, Mok Plus One, Persto, and Kgodumo, which they tendered to repay the NHLS.

6.5. The total repayment by the first appellant was R158 850 921.13.

[7] Notably, in his answering affidavit in the review application by the SIU and NHLS, the first appellant avoided dealing with the direct incriminating allegations against him.

7.1. By way of illustration, the SIU and NHLS alleged that the fronting companies were controlled by the first appellant, who was the direct or indirect beneficiary of the funds (approximately, R172 million) paid to them by the NHLS and that instead of operating at arms length and in competition with each other to supply the PPE's to the NHLS at the best available prices the companies operated as a front through which first appellant could obtain multiple contracts from the NHLS at excessive prices without revealing his involvement with each of them. This allegation was not dealt with in his answering affidavit.

7.2. In paragraph 27 of the review application by the SIU and NHLS it is stated that the fronting companies had fraudulently violated the provisions of section 217 of the Constitution. There was no response thereto by the first appellant.

7.3. The SIU and NHLS further presented evidence to the effect that the contract that was awarded to Kgodumo (the fourteenth respondent, one of the fronting companies), without any quotation from suppliers being sourced and compared. Resultantly, the contract was procured at a grossly inflated price. The unit price of the coats provided by Kgodumo for the four sizes are R320.00, R343.00, R370.00 and R390.00. The unit price of a lab coat provided by Pinnacle PPE in respect of a similar transaction with NHLS is R17.50. When dealing with this issue, the first appellant simply side-stepped it by passing the blame to the employees of NHLS for the excessive pricing as if the corrupt and unlawful scheme was being condoned by the said employees and not an act perpetrated through the fronting companies.

7.4. The first appellant responded as follows in his answering affidavit

"15. The Respondent, and/or any other bidding party, cannot be blamed for the propriety or impropriety of the decisions of the NHLS in this regard. It was entirely up to the NHLS to decide the time period to be allowed for bidding on their own requirements. 16. Second, insofar as the appellants allege that they agreed to excessive prices, I submit that the respondents submitted quotations (in the sense of an offer) which was subject to the Second Applicant's approval or rejection. 17. To the extent that the Second Appellant accepted the offer, notwithstanding that the prices were excessive (as the founding affidavit alleges), the Respondents submit that the proprietary or impropriety of such a decision rests squarely with NHLS and cannot be attributed to the Respondents."

7.5. Notably, and along with the strategy of blaming the NHLS, it is a matter of record that the first appellant conceded in the Notice of Appeal as follows in this regard: "The information presented to the Respondents, in the present day circumstances, objectively establish illegality". In this regard, therefore, the notice of appeal does not seek to revisit the finding of the Special Tribunal that the impugned transactions were unlawful.

[8] It is worth noting that the Heads of Arguments presented in this appeal and the argument in support thereof seek to challenge the very concessions made by the first appellant in the notice of appeal. In this regard the argued appeal seems to bear no resemblance to the grounds of appeal in the notice of appeal. There is neither an explanation nor an application for an amendment in this regard.

The lapse of the appeal

[9] After the dismissal of the initial application for leave to appeal on 7 September 2022, the first appellant, Hamilton N Holdings, Hamilton Projects and Feliham delivered their Notice of Appeal to the full court. In terms of Rule 49(6) the applicants had 60 days to deliver the record and apply for a hearing date, that is during January 2023.

[10] On 19 June 2023 when a copy of the record was delivered by Makhaye Inc Attorneys, it was brought to their attention by the NHLS and SIU Attorneys that the appeal had lapsed.

[11] No further action was taken in this regard until 18 June 2024 when the applicants, then represented by ENS filed a notice of intention to amend their grounds of appeal in terms of Rule 28 of the Uniform Rules of Court. That notice intended to

amend the notice of appeal of 5 October 2022 by deleting the existing grounds of appeal and replacing them with new ones. These were among others that the Tribunal impermissibly relied on hearsay evidence, made findings of fraud where the alleged fraud was not proved, that the prescribed procurement procedures were fully complied with, that the evidence of the NHLS employees was "suppressed" which would have shown that the contracts were awarded to suppliers which dropped off business cards at the NHLS reception, that pricing was not excessive and that PPE was delivered at the agreed prices.

[12] The SIU and NHLS objected to the proposed amendment on the basis that the notice purported to amend a notice of appeal that had lapsed. That notice to amend was not pursued any further.

[13] However, irrespective of the fact that the grounds of appeal were not amended as a result of the objection, the appellants have proceeded to argue the appeal as if the proposed amended grounds were the actual grounds of appeal in the notice of appeal. This appears to be a fundamental error by the appellants. There has been no explanation why this was done, why it was justified or why it should be permitted.

<u>The application for reinstatement</u>

[14] The application for reinstatement was launched on 17 July 2024, eighteen months past the lapsing of the appeal and the replying affidavit in the reinstatement application was filed on 27 September 2024. The appellants took steps to file the heads of arguments and apply for a date of hearing in March and April 2025. The further delay was not explained by way of evidence on affidavit. An attempt was

made through submissions in the heads of arguments concerning the reasons for this part of the delay which has no evidentiary value. Consequently, the delay remains unexplained.

Condonation

[15] It is trite that the standard for considering an application for condonation is the interests of justice and that an application for condonation must give a full explanation for the delay. It is equally trite that the explanation must cover the entire period of the delay and that the explanation must be reasonable. *Van Wyk v Unitas Hospital.*[1]

Explanation for delay partial and superficial

[16] The explanation for the delay, so the respondents argue, is not only superficial and partial but also dishonest. The explanation by the first appellant is that:

16.1. "Pursuant to the granting of the SARS order and the subsequent placing of the Appellant, including myself, under curatorship, ran out of money to prosecute the appeal".

16.2. Makhaye Inc, which had assisted with the appeal withdrew in August 2023 due to the lack of funds.

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[1] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) [22]*

16.3. In December 2023, the Appellants engaged the services of Mr Molepo of ENS on the basis of a contingency fee "arrangement".

16.4. Mr Molepo started dealing with the appeal and other proceedings in mid-January 2024.

16.5. Mr Molepo started preparing the application for condonation in February 2024 but then "discovered that" the appellants were all deregistered by CIPC in January 2024.

16.6. The companies were reinstated on 16 April 2024.

16.7. It is then said "pursuant thereto, Mr Molepo commenced with this application and took steps to procure a copy of the appeal record from Makhaye Inc.

16.8. On July 2024 the application for re-instatement was instituted.

<u>The explanation</u>

[17]The first leg of the explanation is that they ran out of money to brief attorneys and counsel and to prosecute the appeal. This challenge, they say, was only solved when Mr Molepo agreed to assist "on a contingency arrangement".

*[18]*The second leg is that after the work began on the condonation it was discovered that the appellant companies had been deregistered. This is said to have brought the preparation to a halt until the reinstatement of the companies in April 2024.

The explanation peters out. There is no explanation regarding what happened during the three-month period from 16 April until the launch of the condonation application on 17 July 2024. I agree, as the respondents submit, that this omission is fatal to the application as it is also trite that an appellant must apply for condonation without delay subsequent to the discovery of the lapse and give a full account for the reasons of the delay which explain the whole period of delay. *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd.*[2]

[19] No reason is tendered for downing tools after the discovery of the deregistration of the fronting companies. An application for condonation could have been prepared whilst preparing to re-instate them. Moreover, the first appellant who is the principal appellant, is not a company and he was unaffected by the deregistration.

[20] The only logical conclusion is that deregistration is nothing but a lame excuse which fails to justify why it took some seven months to launch the condonation application after Molepo had come to the applicant's rescue.

<u>Dishonesty in the "contingency arrangement"</u>

[21] The respondents submit that the logical import of the allegation that a contingency fee arrangement was entered into is that such arrangement was in terms of the Contingency Fees Act 66 of 1997, which requires that such an agreement be in writing.

[2] *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd 2017 (6) SA 90 SCA [26]*.

[22] It is common cause that the word "arrangement" was used by first appellant in his affidavit and not "agreement". A notice in terms of Rule 35(12) asking for a copy of the agreement was served on the applicant's attorneys and it was responded to by the applicants saying "No document is referred to at paragraphs 44, 46 and 50 and accordingly the request is declined".

[23] In his replying affidavit Mr Hamilton Ndlovu provides the following explanation for the financial arrangement between him and Mr Molepo:

"53. I did not conclude any contingency fee agreement with ENS, neither did the appellants conclude such an agreement,

54. When I met with Mr Molepo, I raised the issue of the contingency fee arrangement, to which he indicated that he would not be in a position to assist myself and the appellant on the basis of a contingency arrangement.

55. Mr Molepo however understood to accept the mandate without a deposit or available funds until such time as myself and the appellants were able to obtain the funds to pay him. My mandate and that of the Appellants was accepted by Mr Molepo on that basis".

[24] Notably however there was no confirmatory affidavit by Mr Molepo and on 12 November 2024 ENS withdrew as applicant's attorneys.

[25] There is however no getting away, so the respondents argue, from the impression created that a contingency fee agreement had been entered into to explain how he was able to afford top-shelf legal representation despite his pleas of poverty.

[26] They submit further that the lack of candour detracts from his credibility and in the absence of confirmation from ENS, the story in his replying affidavit that ENS

agreed to act for fees that would be paid when Hamilton Ndlovu obtained funds and to brief counsel without a deposit is palpably improbable.

[27] The respondents further submit that the lack of candour regarding the contingency fee arrangement and Ndlovu's assertions (unsupported by any evidence) that he did not have access to funds to prosecute the appeal ought to be taken with a pinch of salt. They ought to be viewed from the background of the SIU and NHLS having adduced evidence disputing the allegation and showing that the applicants were well able to source funds for litigation which was preceded with when it suited them during the relevant period in the present matter. At the same time Hamilton Ndlovu was able to fund lavish trips to and purchases in Paris which were not denied.

[28] In his replying affidavit he stated that his brother-in-law paid for the defence of the criminal proceedings; he was the "plus one" of his brother on a free trip to Paris paid for by the House of Givenchy, an assertion which the respondents submit is uncreditworthy. There is no list of assets and liabilities or any evidence as to the financial position of the applicants. They merely repeat the same excuse that they ran out of money without any supporting evidence as to their financial position and/or ability to obtain finance.

Prospects of success

[29] Another critical consideration in deciding the issue of condonation and re-instatement of the appeal is the prospects of success of the appeal.

[30]I consider it apposite in this regard to make reference to excerpts from the judgment of the Special Tribunal. At paragraphs 8 and 9 thereof the following was said:

"[8] All the opposing respondents accept the applicant's version that when the NHLS officials ordered PPE's supplies from the fronting companies, they failed to comply with the applicable procurement procedures. Although Hamilton Ndlovu. And the companies he represents takes issue with what they allege is a delay in instituting the review application ultimately, they take no issue with the impugned transactions being reviewed and set aside for lack of compliance with the applicable prescripts. Although Hamilton Ndlovu did not answer to the allegations of fraud against him and the companies, he represents ad seriatim, he largely denies the allegations. He also disputes as alleged by the applicants, that the impugned transactions were without cause because no PPEs were delivered to the NHLS. He asserts the right to recover all the costs he and the companies he represents incurred when they supplied PPEs to the NHLS in accordance with the no profit no loss in All Pay.

[9] The rest of the fronting companies have tendered repayment of the amounts retained or Hamilton paid them from funds deriving from the impugned payments. They plead that they should not be held liable to the NHLS for the full amount the applicants seek to recover in these proceedings jointly and severally with Hamilton Ndlovu and the companies he represents".

[31]At paragraph 30 to 35 of the judgment the following was said:

"[30] Hamilton Ndlovu was the director of Hamilton Holdings, and his wife was the director of Feliham. He used the fronting companies to procure PPE supplies

to the NHLS. Although he barely denies making false representations to any NHLS officials regarding his involvement in the fronting companies, on his own version and on the version of the fronting companies, they were dormant. He actively marketed them. None of the fronting companies were in the business of or had any track record in PPE supplies. NHLS officials bent the rules to favour the fronting companies. According to the NHLS officials who offered explanations regarding how these unqualified companies came to supply PPEs to NHLS, in each of the cases of the opposing respondents, an unidentified person was said to have dropped off a business card on an unspecified date, and on the basis of this introduction was invited to quote, and an order was placed with the fronting companies. There is no evidence anywhere on the record that the NHLS officials invited quotations or granted contracts to any other supplier on the basis of them simply dropping off a business card."

[31] On the version of the Bugatti, Mok Plus One, Persto and Kgodumo, none of them submitted quotations to the NHLS or were in any way invited in the procurement of PPE supplies to the NHLS. Hamilton promised to procure tenders on their behalf. It was for that reason that they gave him control of their companies. Therefore, the directors of the companies allowed Hamilton to use their companies as a front to do business with the NHLS. He submitted quotations on behalf of the companies. When orders were placed, he supplied PPEs on their behalf. Since he was not a director or employee of the fronting companies, he concealed his involvement in the companies. It is under these circumstances that NHLS approved the quotations submitted by these companies and issued them with purchase orders. He emptied the bank accounts of the fronting companies as soon

as NHLS made the impugned payments to these companies. He has not disputed this version.

[32] Hamilton N Holdings was ostensibly invited to quote telephonically instead of by email. Its quotation was approved prior to the closing date. The impugned transactions with Joritans and Kgodumo were effected without any other bidders being invited to quote. PPEs were procured from Feliham while on the restricted supply list.

[33] On Hamilton Ndlovu's version, his company, Hamilton Holdings, sourced PPEs and was the onward selling entity to the other opposing respondents. Therefore, Hamilton Ndlovu traded PPEs between the fronting companies as a result of which they supplied PPEs to the NHLS at excessive prices when the same goods were available from other suppliers at a much lower price.

[34*] Kgodumo supplied to the NHLS gloves bought from Mok Plus One for R5.10. The same gloves were available from other suppliers at R0.95. Other bidders had not been invited to quote. There was no instruction to buyers to procure the latex gloves from Abompetha for R4.99. The gloves were available from another supplier at R0.70c. Gloves were purchased from Bugatti for R4.95 without comparative quotations when they were available from another supplier for R0.70c.*

[35] On the authority in Swifambo, these inexplicable actions by NHLS officials to benefit Hamilton Ndlovu through Hamilton and the fronting companies justify an interference of corruption. This interference is further supported by the fact that almost 90% of the funds acquired through the impugned payments made its way to the accounts held and controlled by Hamilton Ndlovu or members of his family

and the bulk of the funds was spent on acquiring assets and on luxurious consumption. The SIU investigation revealed that in just a few months, Hamilton Ndlovu spent tens of millions of Rands of the funds deriving from the impugned payments on cars (R18 million), houses (R38 million), furniture and fittings for the houses (R5,8 million). He placed approximately R50m in investment accounts. He withdrew approximately R16 million as cash."

Turpitude

[32] The above quotations from the judgment of the Special Tribunal demonstrate in the clearest terms the extent of the irregularities and turpitude in which the applicants were involved and the basis on which the tribunal made its order. More importantly, they underline the unequivocal manner of the concession made by the principal appellant leading to the granting of the order. The facts underlying the concessions were made under oath in evidence tendered by way of affidavits before the tribunal. There was therefore no misdirection on the part of the tribunal when it made findings and conclusion on the basis thereof.

[33] What is also clear is that:

33.1. The majority of the fronting companies were empty shells incapable of and not qualified to supply PPEs which pretended to be independent entities conducting legitimate business in competition with each other when they were in fact a mere front for Hamilton Holdings and Hamilton Ndlovu.

33.2. There was no bona fide intention to supply PPEs to meet NHLS requirements. As the flow of funds report demonstrated 90 per cent of the funds paid by NHLS went to Hamilton Ndlovu or companies controlled by him.

33.3. The record shows that none of these companies adduced evidence establishing that PPE was delivered to the NHLS in quantities specified in the purchase orders and none alleged that they were in the business or had any track record in supplying PPEs.

33.4. It is patently clear that the impugned transactions were procured in flagrant breach of the principle of legality and the constitutional principles of transparency, competitiveness and cost-effectiveness as provided for in section 217. Consequently, the procurement decisions were made sine causa and were invalid.

33.5. Evidently Hamilton Ndlovu was the controlling mind of the fronting companies which clearly did not function as independent entities but as his alter ego. He was the author of the fraudulent scheme to defraud NHLS, the strategy of which was as follows:

Firstly, he identified NHLS as the potential target due to the fact that they, as a service provider, were prepared to settle invoices within 30 days. Secondly, he set about establishing a business relationship by marketing the fronting companies to NHLS by inter alia, dropping business cards whilst carefully concealing that he was their controlling mind and that whatever was paid by NHLS would ultimately be transferred into his bank accounts. He virtually assumed the status of a sole supplier without making the required disclosures to the NHLS. He thereby fraudulently avoided compliance with the requisite prescripts.

[34] It can therefore not be credibly submitted or argued that there are any prospects of success of an appeal against the judgment and order of the Special Tribunal.

Submissions by applicants to this Court

[35] As alluded to above, on 10 October 2022, the applicants delivered a notice of appeal to the Full Court, and on 18 June 2024, they filed a Notice of Intention to amend the grounds of appeal in terms of Rule 28 of the Uniform Rules of Court. The notice intended to delete the existing grounds of appeal and to replace them with new ones.

[36] The new grounds were, inter alia, that the Tribunal impermissibly relied on hearsay evidence, made findings of fraud where fraud was not proved, that the procurement procedures were fully complied with, that the evidence of the NHLS was "suppressed" that would have shown that contracts were awarded to suppliers which dropped off business cards at the NHLS reception, that pricing was not excessive and that, that issue ought to have been dealt with by the Competition Commission.

[37] The proposed amendment was objected to by the SIU and the NHLS as it purported to amend a notice which had lapsed. The applicants took no further steps regarding that notice to amend.

[38] Despite the fact that the grounds of appeal were not amended due to the objection, the applicants have proceeded to argue the appeal as if the proposed amended grounds were indeed the grounds of appeal in the notice of appeal, which is not the case. No attempt was made to explain why this was justified or permissible. In

S v Baloyi,[3] it was held that a notice of appeal is not just an informal document which could be disregarded at will. It forms the very basis upon which an appeal must stand or fall.

Case to be argued as per the case record

[39] It is trite that, unless this court has ordered otherwise, the applicants were expected to argue their application on the basis of the case presented before the Special Tribunal. The proposed amended grounds refer to matters that were not argued before the Special Tribunal and arise out of an application which was not granted by this court. In my view, it is not appropriate to sidestep that issue by simply referring to the new grounds as an explanation or extension of the original grounds of appeal. The appellants committed an irregularity of simply attempting to introduce new grounds of appeal via heads of argument.

New defence on appeal

[40] The issue of a new defence on appeal was dealt with in *Homi Lifestyle (Pty) Ltd and Another v Unemployment Insurance Fund and Another.*[4]

[41] I can do no better than by referring to the that judgment and to illustrate the point. I refer to paragraph 18:

" [18] Leave to raise a new defence on appeal is not for the asking. It is given only in certain circumstances. The reason for this is obvious: An appeal court

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[3] S v Baloyi 1991 (1) SACR 265 (B) at 267 C-1

[4] *(Appeal) (13443/2023 [2025] ZAGPPHC 630 (17 June 2025).*

considers and must pronounce on the cogency of the judgment of the court a quo. Logically, it must, as a rule, do so in light of the case presented to that court. To consider a different case than that turns the appeal into a rehearing of the matter rather than an assessment of the court a quo."

Conclusion

[42] The omissions committed by the appellants in the condonation application and, in particular, the failure to provide a full explanation regarding the period which led to the lapsing of the appeal, lead me to one conclusion, namely, that condonation ought not to be granted.

[43] The appellants made an application to amend the grounds of appeal contained in their notice of appeal through a notice to amend, and upon objection by the respondents to the amendment application on the basis that the Notice to Appeal had lapsed, that application was never followed up on. Instead, the applicant using the new grounds contained in the notice of amendment have utilised those grounds to make their submissions despite the fact that the amendment was never granted by this court. No explanation was proffered for this approach by the appellants, nor was it explained whether to do so was permitted.

[44] What is even more puzzling is that in their new grounds, an attempt is made to introduce matters which were never raised before the Special Tribunal. It is puzzling because the concessions made by the appellants regarding the review and setting aside of the impugned transactions were clear and unequivocal as set out in the judgment itself. The appellants were legally represented.

[45] I am therefore not persuaded that there was any misdirection on the part of the Special Tribunal on any matter when it made its order, be it in regard to the application of the law or the facts.

[46] I do not consider the findings made at the hearing by the Tribunal to be wrong in law as suggested by the appellants in their submissions. Their reference to *Matatiele Municipality v The President of the Republic of South Africa*[5] is misplaced. It does not assist them in the appeal.

[47] Further, their argument, for example, that matters regarding excessive pricing ought to have been referred to the Competition Commission is equally misplaced. Instead, it demonstrates a misunderstanding of how that issue came to be raised by the SIU before the tribunal. It was raised to demonstrate the extent of the fraud committed by the appellants in order to effect maximum gains in extracting as much money as possible from the NHLS. The suggestion, therefore, that the matter ought to have been dealt with in terms of section 8 of the Competition Act[6] 89 of 1998 is a new matter which was not raised by the Special Tribunal. It cannot, therefore, together with the other grounds be raised on appeal. For this court to accept the submissions by the appellants would be to commit the very mischief warned against in the Homi Lifestyle decision.

[48] In light of the above, I am of the view that the submissions by the appellants demonstrate the absence of prospects of success instead of assisting them in this

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[5] *Matatiele Municipality v The President of South Africa 2006 (5) SA 47 (CC).*

[6] *Competition Act 89 of 1998.*

J.T LESO

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 11 September 2025

Date of Judgment: 12 February 2026

APPEARANCES:

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[48] In light of the above, I am of the view that the submissions by the appellants demonstrate the absence of prospects of success instead of assisting them in this

[5] *Matatiele Municipality v The President of South Africa 2006 (5) SA 47 (CC).*

[6] *Competition Act 89 of 1998.*

appeal. That is one of the key considerations in an application for condonation and re-instatement.

Order

In the result I propose that the following order be made.

48.1. The application for condonation for the late filing of the appeal and re-instatement is dismissed.

48.2. The applicants are ordered to pay the costs of the appeal jointly and severally, the one paying, the other to be absolved, on an attorney and client scale which shall include the costs of two counsel.

[redacted]

SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree

[redacted]

J.T LESO

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 11 September 2025

Date of Judgment: 12 February 2026

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