



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

Case Number: EC/01/2020

In the matter between:

THE SPECIAL INVESTIGATING UNIT

Plaintiff

vs

RAYMOND MHLABA LOCAL MUNICIPALITY

First Defendant

KWANE CAPITAL (PTY) LTD

Second Defendant

PORT ST. JOHNS LOCAL MUNICIPALITY

Third Defendant

and

In the matter between:

Case Number: EC/03/2020

SPECIAL INVESTIGATING UNIT

Plaintiff

vs

MBASHE LOCAL MUNICIPALITY

First Defendant

KWANE CAPITAL (PTY) LTD

Second Defendant

PORT ST. JOHNS LOCAL MUNICIPALITY

Third Defendant

JUDGMENT

Summary – Three special pleas were adjudicated – firstly, that the Special Tribunal is not a High Court and does not have jurisdiction to entertain the SIU's claims – secondly, judicial review does not constitute civil proceedings as envisaged in subsec 8(2) of the SIU Act – thirdly, the SIU should have brought review proceedings in terms of PAJA – the three special pleas were dismissed.

DAFFUE J:

INTRODUCTION

- [1] In William Shakespeare's play, *Romeo and Juliet*, Juliet tried to convince Romeo, her lover who was from her family's rival home, that it did not matter by stating that 'a rose by any other name would smell as sweet'. Put differently, the names of things do not affect what they really are.

- [2] The Special Investigating Units and Special Tribunals Act 74 of 1996 (the SIU Act) commenced on 20 November 1996. Recently a new trend has developed in terms whereof parties are not only dealing with the merits of the relief claimed against them, but seek to rely on technical issues as I shall explain hereunder.

- [3] The above cases have been consolidated and declared trial-ready nearly two years ago. This trial was due to start on 4 October 2022 with the leading of evidence on the merits. Instead, submissions were entertained in respect of three similar special pleas filed belatedly in both matters. In the main, the Special Tribunal's jurisdiction to adjudicate the Special Investigating Unit's claims is attacked. At this stage we are awaiting a judgment of the Constitutional Court that heard submissions by the parties on 24 May 2022.¹ The same issues that are now raised in the special pleas were raised with the Constitutional Court.²

THE PARTIES

- [4] The plaintiff in both matters is the Special Investigating Unit (the SIU) who issued summons against three defendants. In case number EC/01/2020 the Raymond Mhlaba Local Municipality is the first defendant. In case number EC/03/2020 the first defendant is the Mbashe Local Municipality. The second defendant in both matters is Kwane Capital (Pty) Ltd (Kwane Capital) whilst the

¹ *Ledia Structural Development (Pty) Ltd and Others v Special Investigating Unit* CCT319/21.

² A media statement was issued in this regard by the Constitutional Court on 24 May 2022.

third defendant in both matters is the Port St. Johns Local Municipality. The three municipalities do not oppose the actions and did not play any role in the proceedings thus far.

THE RELIEF SOUGHT BY THE SIU

- [5] Insofar as the adjudication of the matters does not at present warrants a consideration of the pleadings on the merits, save on a limited basis as will become clear later, I shall just briefly summarise the SIU's claims. Both the Raymond Mhlaba and the Mbashe municipalities entered into contracts to procure yellow plant equipment and/or vehicles from Kwane Capital. In order to comply with its contractual obligations, Kwane Capital entered into hire purchase agreements with Zeda Car Leasing (Pty) Ltd t/a Avis Fleet. It is the SIU's case that the agreements between the municipalities and Kwane Capital fall to be set aside in terms of subsec 172(1)(a) of the Constitution insofar as the procurement processes which had preceded the contracts were unlawful, not fair and not transparent as provided for in s 217 of the Constitution. Therefore, it claimed that the agreements between the municipalities and Kwane Capital shall be declared invalid and set aside. Furthermore, Kwane Capital shall be directed to pay to the SIU the sum of R22 343 764.26 in the case of Raymond Mhlaba municipality and R34 857 863.27 in the case of Mbashe municipality, together with costs.

KWANE CAPITAL'S THREE SPECIAL PLEAS

- [6] Crisply put, Kwane Capital in both matters pleads that:
- (a) the Special Tribunal is not a High Court and does not have authority to set aside the agreements between it and the Raymond Mhlaba and Mbashe municipalities as invalid as this should have been done by way of a review to the High Court;
 - (b) the main relief sought by the SIU is in the nature of a judicial review which does not constitute 'civil proceedings' as envisaged in subsec 8(2) of the SIU Act and the regulations promulgated thereunder; and

- (c) the review is not in the form of a self-review and therefore, the SIU should have brought the review proceedings in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

One judgment is issued in respect of both matters insofar as the same three special pleas were belatedly filed in both proceedings.

A HISTORICAL BACKGROUND OF THE LITIGATION THUS FAR

- [7] Summons was issued by the SIU on 5 February 2020 and 1 May 2020 respectively whereupon Kwane Capital pleaded and filed conditional counterclaims. The SIU filed replications in both matters as well as pleas to the conditional counterclaims. Kwane Capital failed to replicate to the SIU's special pleas to its conditional counterclaims and consequently, *litis contestatio* was reached in both matters as pleadings become closed during September 2020.
- [8] The matters were consolidated and were to be heard as long ago as May 2021, but due to the presiding judge's unavailability this did not materialise. Thereafter the matters were set down for hearing from 28 September 2021 to 1 October 2021. Just before the hearing Kwane Capital filed an application for leave to file certain witness statements and subpoena certain witnesses and the matters did not proceed. The consolidated matters were again set down to proceed on trial from 18 to 31 May 2022. On this occasion the trial could not proceed as Kwane Capital complained that the SIU had filed certain witness statements late and that it had to apply for condonation. By agreement I postponed the trial to the week of 4 to 7 October 2022 as well as from 23 to 27 January 2023. At no stage was there any indication from Kwane Capital that it intended to raise special pleas pertaining to jurisdiction, the lack of locus standi and/or the failure to follow PAJA.
- [9] On 16 September 2022 and out of the blue, Kwane Capital filed notices of intention to amend in order to rely on three separate special pleas in both matters. The SIU did not object and consequently the special pleas were filed on 23 September 2022. The SIU filed similar replications to the special pleas in

both matters on 30 September 2022, two court days before the first day of the trial. The parties agreed that the special pleas would be argued separately, the merits to stand over later adjudication if required. Heads of argument were filed by both parties as directed. The parties presented their oral arguments via the Ms Teams virtual platform on 4 October 2022 whereupon judgment was reserved.

EVALUATION OF THE PARTIES' SUBMISSIONS

[10] The present President of the Special Tribunal, Modiba P, has already pronounced on the issues now raised by the second defendant in several judgments, the first being the *Special Investigating Unit and Another v Caledon River Properties (Pty) Ltd t/a Magwa Construction & Another (Caledon River Properties)*³. Also, Mothle J dealt with the jurisdiction of the Special Tribunal and the SIU's powers in *Ledla Structure Development (Pty) Ltd and Others v The SIU (Ledla)*⁴. In order to succeed with the special pleas, Kwano Capital attempted to persuade me that those decisions are wrong and should not be followed. Therefore, it is appropriate to consider the *stare decisis* doctrine before dealing with the parties' submissions.

[11] In *Patmor Explorations (Pty) Ltd v Limpopo Development Tribunal*⁵ the Supreme Court of Appeal (the SCA) emphasised the importance of complying with the *stare decisis* doctrine, stating that the object of the doctrine is to avoid uncertainty and confusion. It serves to lend certainty to the law and the protection of vested rights and legitimate expectations. Also, it upholds the dignity of the court. Consequently, judges in the same division are bound by judgments of that division, unless satisfied that they are clearly wrong. Therefore, the judgments of Modiba P and Mothle J have to be followed by me, unless I am satisfied that they are clearly wrong. I shall now deal with the points raised in the three special pleas.

³ GP 17/2020 a judgment delivered on 26 February 2021 which was not taken on appeal.

⁴ GP 07/2020.

⁵ (1250/2016) [2018] ZASCA 19; 2018 (4) SA 107 (SCA) (16 March 2018) paras 3, 4 & 7.

The jurisdiction of the Special Tribunal

- [12] Kwane Capital did not object to the jurisdiction of the Special Tribunal in its initial pleas. It not only pleaded to the merits of the claims in both matters, but also filed conditional counterclaims. The pleadings have become closed and *litis contestatio* has taken place. In principle, this would mean that Kwane Capital submitted to jurisdiction and cannot now raise a special plea to the effect that the Special Tribunal does not have jurisdiction. This is not an application to consider whether an amendment should be allowed to plead lack of jurisdiction as the SIU has decided not to oppose the notice of intention to amend. Therefore, the amendment has already been effected and the special plea pertaining to the lack of jurisdiction must be entertained.
- [13] I am satisfied that the general rule pertaining to submission to jurisdiction applies to submission to territorial jurisdiction or to monetary jurisdiction of the lower courts, but not to material jurisdiction. Based on the *stare decisis* doctrine I would be bound by the judgment of the Supreme Court of Appeal (the SCA) in *Zwelibanzi Utilities v TP Electrical Contractors*,⁶ unless it can be distinguished based on facts or principle. This judgment and the judgments relied upon deal with territorial jurisdiction.⁷ It is apposite to point out insofar as the SCA referred to *Lubbe v Bosman*, it specifically quoted Van den Heever JP, enunciating the general principle of the common law that 'where a defendant without having excepted to the jurisdiction, joins issue with a plaintiff in a Court which has material jurisdiction, but has no jurisdiction over defendant because he resides outside the jurisdiction of that Court, the defendant is deemed to have waived his objection and so as it were conferred jurisdiction upon the Court.'⁸ In my view, the conclusion of the SCA that jurisdiction was established as an objective fact by the joinder of issue, was thereupon irreversible and that an substantive right was thereby conferred on the plaintiff to pursue his action in the previously incompetent court, must be understood to refer to territorial jurisdiction. If a court does not have material jurisdiction, excluding monetary jurisdiction which

⁶ (160/10) [2011] ZASCA 33 (25 March 2011).

⁷ Ibid paras 6 – 13 in particular as well as para 21.

⁸ Ibid para 9; *Lubbe v Bosman* 1948 (3) SA 909 (O).

parties often agree to, the same principle cannot be followed. One example is sufficient: s 170 of the Constitution prohibits a court of a lower status than the High Court to 'enquire into or rule on the constitutionality of any legislation or any conduct of the President.' If a plaintiff institutes an action in the Magistrate's Court regarding the conduct of the President without the defendant objecting to jurisdiction prior to *litis contestatio*, such defendant would be entitled to do so at any stage thereafter as the Magistrate's Court would not have jurisdiction. The SIU's reliance on *Commercial Union v Waymark*⁹ is without substance as it deals with territorial jurisdiction.

[14] More than two decades ago the SCA dealt with the SIU Act and the Special Tribunal's powers in *Special Investigating Unit v Nadasen*.¹⁰ It stated inter alia:¹¹ '[10] Reverting to the scheme of the Act, a unit must investigate the matter referred to it, collect relevant evidence and may then institute proceedings in the tribunal against the parties concerned for the recovery of what is due to the particular state institution (ss 4(1)(a) and (b); 5(5) and 5(7)). The tribunal consists of a judge and has in general terms the powers of a high court in relation to matters falling within the terms of reference (ss 7,8 and 9). Appeals lie against a judgment of a tribunal to the Full Court or to this Court (s 8(7)).' (Emphasis added.)

[15] The first issue to consider apparent from the judgment in *Caledon River Properties*, is whether the Special Tribunal is a court. In this regard it was held as follows:¹²

'Therefore, Nadasen is not only the prevailing authority for the proposition that the Special Tribunal is a court, it is also authority for the proposition that the Special Tribunal is a court of similar status to the High Court as envisaged in s166(e).'

In *Ledla*, Mothle J was not prepared to go as far as Modiba J insofar as he held that a Special Tribunal 'is unique and sui generis'. He also stated that 'it is not named as such [a court of law] but it performs the functions of a civil court.'¹³ He continued:¹⁴

'Unlike the tribunals and commissions generally, whose decisions are either appealable or reviewable by the High Court presided by a single Judge, in terms of section 8(7) of the Act, a

⁹ 1995 (2) SA 73 (TkGD).

¹⁰ (5/2001) [2001] ZASCA 117; 2002 (1) SA 605 (SCA).

¹¹ Ibid para 10.

¹² *Caledon River Properties loc cit* para 31.

¹³ *Ledla loc cit* para 46.

¹⁴ Ibid para 47.

decision of the Tribunal is appealable to the *full court* on the same basis as a decision of a Division of a single Judge in the High Court. In effect, apart from the fact that it is not named as a court, and does not have appellate jurisdiction from the magistrate court, it would fit the description of a court as contemplated in section 166(e) of the Constitution. Section 166(e) names the various courts in the order of hierarchy, and in sub-(e) provides:

'any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or Magistrate Courts.' (Emphasis added.)

[16] It is relevant to quote s 170 of the Constitution:

'All courts other than those referred to in sections 167 [the Constitutional Court], 168 [the Supreme Court of Appeal] and 169 [the High Court of South Africa] may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.'

Section 34 of the Constitution under the heading 'access to courts', stipulates that:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

Contrary to the heading of the section, it is clear that the legislature differentiates between a court and a tribunal or forum. The same distinction is also found in subsec 5(5) of the SIU Act, authorising the institution of civil proceedings in a Special Tribunal or any court of law. Sub-section 8(2) of the SIU Act must be read therewith which stipulates that a Special Tribunal shall have jurisdiction to adjudicate upon any civil proceedings brought before it by a Special Investigating Unit emanating from the investigation by such Unit, whilst further powers are provided for in subsecs 8(2)(a), (b) and (c). No doubt the SIU has wide ranging powers as is provided for in subsec 2(2) of the SIU Act which must be read with the preamble which reads as follows:

'To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and of instituting and conducting civil proceedings in any court of law or a Special Tribunal in its own name or on behalf of State institutions; ...'

- [17] In *Nadasen*, Harms JA emphasised that the Special Tribunal, like a commission, has to stay within the boundaries set by the SIU Act and its founding proclamation, that it has no inherent jurisdiction and since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly.¹⁵
- [18] In *Special Investigating Unit v Ngcinwana & Another*,¹⁶ the full court remarked *obiter* that the Special Tribunal is not a court of law in the following words:
- ‘The last anomaly I wish to refer to relates to the adjudicative instrument established by the Act, the Special Tribunal. The Special Tribunal is not a court of law with judicial authority in terms of the Constitution. Although it performs judicial functions it is not established as a court (s 2(1)(b) of the Act; ss 165(1) and 166 of the Constitution), nor are its presiding members judicial officers appointed to it in terms of the Constitution (s 7 of the Act; s 174 of the Constitution).’
- Modiba J rejected the views of the full court in *Ngcinwana* and preferred the judgment of Harms JA in *Nadasen*. This court is not bound by the *obiter* remark of the full court.
- [19] I am prepared to accept the reasoning of Modiba J in *Caledon River Properties* and her conclusion that the Special Tribunal falls within the ‘rubric of courts’ referred to in subsec 166(e) of the Constitution. The reference to all courts other than those referred to in ss 167, 168 and 169 must be seen as a reference to ‘other courts’ referred to in subsec 166(e).¹⁷ Consequently, when organs of state contract in a manner that is inconsistent with subsec 217(1) of the Constitution and in the event that a proclamation is issued by the President in terms of the SIU Act, the investigative and adjudicative jurisdiction of the SIU and the Special Tribunal is ignited. Therefore, when exercising its mandate in terms of subsec 2(1)(b) of the SIU Act, the Special Tribunal enjoys constitutional jurisdiction in terms of subsec 172(1) of the Constitution. Consequently, I agree with Modiba J that a contrary interpretation of s 172 ‘does not accord with the literal formulation of this section read with ss 166(e) and 170 of the Constitution, is at odds with the purpose of the Act as set out in its preamble as well as the Special Tribunal’s jurisdiction as set out in s 2 and will strip the Special Tribunal

¹⁵ *Special Investigating Unit v Nadasen* *loc cit* para 5.

¹⁶ 2001 (4) SA 774 (E) at p 77D – E.

¹⁷ *Caledon River Properties* *loc cit* at paras 59 & 60.

of the essence of its jurisdiction, leading to untenable consequences that could not have been intended by the legislature when it enacted the Act.¹⁸

[20] In addition to what was held by Modiba J and Mothle J, I wish to add the following. Although s 34 of the Constitution and the SIU Act distinguish between a tribunal (in s 34) and a court of law, this distinction is not sufficient to come to the conclusion advocated by Kwane Capital. One cannot equate the Special Tribunal with for example, commissions of enquiries such as the Mpati, Nugent and Zondo commissions which were all presided over by judges but did not have the adjudicative powers of the Special Tribunal. The Special Tribunal can also not be equated to the Competition Tribunal established in terms of the Competition Act 89 of 1998. Although the decisions of the Competition Tribunal are appealable only to a specialist Appeal Court comprising three judges,¹⁹ this does not transform that tribunal to a court of law. On the other hand, the Commissioner of Patents is a judge of the High Court designated for that purpose by the Judge President of the Gauteng Division, Pretoria, who generally has the powers of a single judge sitting in a civil action in the High Court.²⁰ Appeals from decisions of the Commissioner of Patents are noted and prosecuted on the same basis as orders or decisions of a single judge. The seat of the Commissioner of Patents is referred to as a court because of the judicial authority bestowed upon the Commissioner. Contrary to the position of the Commissioner of Patents, the Consumer Protection Act 68 of 2008 provides for the establishment, by way of provincial consumer legislation for consumer courts, but these are not established by way of national legislation in accordance with the requirements of subsec 166(e) of the Constitution. Therefore, although these consumer courts are labelled as such, they are not courts falling within the judicial system.

[21] In my view the court should not look at the label given by the legislature, but whether the Special Tribunal has characteristics that fit those of a court as contemplated in subsec 166(e) of the Constitution. This view accords with the

¹⁸ Caledon River Properties *loc cit* para 68.

¹⁹ Section 37 of Competition Act.

²⁰ Sections 8 & 17(1) of the Patents Act 57 of 1978.

finding of Mothle J.²¹ I am satisfied, over and above what I have stated before, that the following indications all point to the status and powers of the Special Tribunal:

- (a) the President of the Special Tribunal must be a judge, including a retired judge of a High Court, appointed by the President after consultation with the Chief Justice;²² and although additional members may be appointed by the President from the ranks of judges, acting judges, magistrates, advocates or attorneys, the fact remains that the Special Tribunal is not thereby losing its authority to adjudicate;
- (b) the Special Tribunal shall be independent and impartial and perform its functions without fear, favour or prejudice²³ and although chapter 9 institutions such as the Human Rights Commission, the Public Protector and the Auditor-General must also be impartial and independent²⁴ these institutions do not have the right to adjudicate civil proceedings;
- (c) the Special Tribunal is clearly a special court functioning on the same basis as a civil court, allowing it to adjudicate upon civil proceedings before it emanating from an investigation by the SIU and in this regard the powers of the SIU set out in s 2 as well as the preamble of the SIU Act is again emphasised;
- (d) sub-section 8(2) also provides that the Special Tribunal's powers include the power to issue suspension orders, interlocutory orders or interdicts and to make any order which it deems appropriate so as to give effect to any ruling or decision given or made by it;
- (e) although *Nadasen* may not be seen as direct authority for the decision arrived at by Modiba J in *Caledon River Properties*, the SCA stated that the Special Tribunal consists of a judge and has in general terms the powers of the High Court in relation to matters falling within its terms of reference, a similar situation as in the case of the Commissioner of Patents;
- (f) any judgment or order of the Special Tribunal is appealable as an appeal against the decision of a single judge of the High Court²⁵ and this process

²¹ Ledla *loc cit* para 47.

²² Section 7(1) of the SIU Act.

²³ Section 8(1) of the SIU Act which reflects s 165(4) of the Constitution.

²⁴ Section 181 of the Constitution.

²⁵ Section 8(7) of the SIU Act.

is also in line with that applicable to appeals against the decisions of the Commissioner of Patents;

- (g) orders and judgments of the Special Tribunal are executed as if they were made by the High Court;²⁶
- (h) it is important to note the difference between the wording of subsecs 166(c) and 166(e): in the first case, the legislature used the words 'by an Act of Parliament', whilst in the second instance (subsec 166(e)), it elected to use the words 'in terms of an Act of Parliament';
- (i) the wording of subsec 166(e) fits the establishment of the Special Tribunal by Presidential Proclamation as this is done in terms of an Act of Parliament and not directly by an Act of Parliament.

[22] As mentioned by Khampepe J in *Chisuse v Director-General, Department of Home Affairs*²⁷ the purposive or contextual interpretation of legislation must remain faithful to the literal wording of the statute. It is now accepted that a unitary approach to interpretation should be followed whereby text, context and purpose should be dealt with, bearing in mind the language used, the purpose and circumstances under which the legislation was promulgated. Having considered this, I am satisfied that the Special Tribunal is in fact a court as provided for in subsec 166(e). To return to Shakespeare's Juliet, 'a rose by any other name would smell as sweet', or put differently, the reference to the Special Tribunal as such does not affect what it really is, to wit a court as provided for in subsec 166(e).

Does judicial review constitute civil proceedings as envisaged in s 8(2) of the Act?

[23] Kwane Capital pleaded in the second special plea that civil proceedings referred to in the SIU Act do not include applications for judicial review. I indicated above that subsec 8(2) of the SIU Act affords the Special Tribunal the jurisdiction to adjudicate on any civil proceedings brought before it by the SIU.

²⁶ Section 9(7) of the SIU Act which gives effect to s 165(5) of the Constitution which states that: 'An order or decision issued by a court binds all persons to whom and organs of state to which it applies.'

²⁷ [2020] ZACC 20; 2020 (6) SA 14 (CC) at para 52.

[24] I am satisfied that the Special Tribunal has jurisdiction to review the award of contracts by organs of State. The jurisdiction of the Special Tribunal flows from subsec 8(2) of the SIU Act which allows it to adjudicate upon any civil proceedings brought before it by the SIU emanating from the investigation by the SIU. Even if I am wrong in concluding that the Special Tribunal is a court, subsec 8(2) of the SIU Act is consistent with s 34 of the Constitution and with PAJA. Both pieces of legislation contemplate that the review function to be performed by the Special Tribunal in this case can be performed by a court or by another independent and impartial tribunal. The whole purpose of the SIU Act is (a) to investigate malpractices and maladministration in connection with the administration of State institutions, States assets and public money as well as any conduct which may seriously harm the interests of the public, (b) the institution of civil proceedings in respect hereof in a court of law or a Special Tribunal and (c) for the adjudication of these civil proceedings by either a court of law or a Special Tribunal. Such malpractices and maladministration would not be capable of being properly adjudicated if review proceedings could not be considered to be civil proceedings. No doubt the purpose of the SIU Act and the processes provided for are designed to allow also the Special Tribunal to remedy these malpractices and maladministration. If the Special Tribunal does not have a review function relied upon by the SIU, the scheme and purpose of the SIU Act would be fruitless. I am satisfied that the second special plea should be dismissed.

Should the review application have been brought in terms of PAJA?

[25] Nothing barred the SIU from instituting proceedings in the High Court. It elected to institute proceedings in the Special Tribunal. It is trite that a government entity that seeks to review its own decision must do so under the principle of legality.²⁸ Kwane Capital submitted, based on the principles enunciated in *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others*²⁹ (*Compcare Wellness*) that insofar as the SIU is seeking to review the decision

²⁸ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* (CCT254/16) [2017] ZACC 40; 2018 (2) SA 23 (CC) (14 November 2017) para 41.

²⁹ (267/2020) [2020] ZASCA 91; 2021 (1) SA 15 (SCA) (17 August 2020) at paras 15 – 20.

of another organ of state, it is in a position akin to that of a private person and should have brought the application for review by way of PAJA and not based on the principle of legality. I do not believe that the authorities are clear and/or indicative that the SIU had no other choice, but to bring an application in accordance with PAJA. As stated in *Compcare Wellness* the two major pathways to review are s 6 of PAJA and the principle of legality. Obviously, if reliance is placed on PAJA, the applicant must show that all internal remedies have been exhausted. Also, when PAJA is utilised, that Act provides for specified time limits and therefore there are some differences insofar as delay in instituting litigation is concerned.

- [26] In *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd*³⁰ the SIU brought its review application to the High Court in accordance with PAJA. The SCA again dealt with the differences between PAJA reviews and the principle of legality. The court stated³¹ that '(i)t seems doubtful that the SIU would be regarded as being in a position akin to that of a private person... This must, indeed, be an indication that only private persons enjoy rights under section 33, and by extension under PAJA.' Consequently, the court accepted that it dealt with a legality review and continued to assess the delay. I have not been convinced that a review application should have been brought under PAJA and therefore, the third special plea should also be dismissed.

CONCLUSION

- [27] Although criticism may be raised in respect of some of the reasons provided by Mothle J and Modiba J in the *Ledla* and *Caledon River Properties* judgments, I am bound to follow the judgments, unless I am convinced that they are clearly wrong. This is not the case. Consequently, all three special pleas must be dismissed in respect of both matters.

³⁰ (216/2020) [2021] ZASCA 90 (25 June 2021).

³¹ *Ibid* para 25.

- [28] Mr Nankan sought a special punitive costs order in his heads of argument, but did not repeat this during oral argument. Although I made it clear during oral argument that I was dissatisfied with the approach adopted by Kwane Capital to wait until the last moment to file their special pleas, I am not convinced that it is really a delaying tactic. It decided to await the decision of the Constitutional Court in *Ledla* on issues that may have a bearing on the legal points now taken. A punitive costs order is not warranted. This judgment should have been delivered sooner than later, but I eventually also decided to await the outcome of the *Ledla* matter. The delay in delivering this judgment should be ascribed to the fact that I did not want to deliver a judgment that might have no practical value.
- [29] Mr Nankan not only unnecessarily filed separate heads of argument in respect of the two cases which have been consolidated earlier, but furthermore drafted three sets of heads of argument pertaining to the three special pleas relied upon. I do not intend to make an order in this regard and leaves the issue to be determined on taxation. Furthermore, the instructions of the SIU are supposed to be forthcoming from the State Attorney, but for an unconvincing reason, the State Attorney is making use of private attorneys as so-called correspondent attorneys. The SIU is entitled to costs, but on a party and party scale only and in respect of the fees and expenses of one set of attorneys only.

ORDER

1. Case number EC/01/2020:
 - 1.1 The second defendant's three special pleas are dismissed with costs, including the fees and expenses of counsel, but limited to the fees and expenses of one set of attorneys.
2. Case number EC/03/2020:
 - 2.1 The second defendant's three special pleas are dismissed with costs, including the fees and expenses of counsel, but limited to the fees and expenses of one set of attorneys.

JUDGE JP DAFFUE

APPEARENCES

Counsel for the plaintiff:	Adv. S Nankan
Attorney for the plaintiff:	State Attorney
	East London
	c/o State Attorney
	Johannesburg
	c/o Viren Naidoo & Ass
	Pietermaritzburg

Counsel for the 2 nd Defendant:	Adv. D Dorfling (SC)
Attorney the 2 nd Defendant:	Thomson Wilks
	Sandton

No appearance for 1st and 3rd Defendants.

Date of hearing: 4 October 2022

Date of judgment: 6 December 2022

Mode of delivery: this judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time of delivery is deemed to be 12h00 on 6 December 2022.