Part 1 (2023)

Commercial Law Reports

CONTENTS

MA-AFRIKA HOTELS (PTY) LTD v CAPE PENINSULA UNIVERSITY OF TECHNOLOGY (WCC) 1
Tender for contract and irrational action in terms of the Promotion of Administrative Justice Act (no 3 of 2000)
ERIKSSON v HOLLARD INSURANCE CO LTD
in re HOLLARD INSURANCE CO LTD v CILLIERS (GDJ) ...34
Authority to institute action on behalf of a client proved by means of a mandate agreement
ENFORCED INVESTMENTS (PTY) LTD v VERIFIKA INC (SCA) 53
Duty on a creditor to notify its debtor that it intends to call up its security as one of the options available to it.
SNOWY OWL PROPERTIES 284 (PTY) LTD v MZIKI SHARE BLOCK LTD (SCA) 63
Confirmation of arbitrator's award not constituting endorsement of unlawful act

In this issue …

Arbitration - award made order of court Arbitration award - unlawfulness Contract - award by tender - competing contracts for tender Credit Transactions - default, notice of Insurance - authority to act for insured Mandate - proof of Tender - competing contractors - contract award

MA-AFRIKA HOTELS (PTY) LTD v CAPE PENINSULA UNIVERSITY OF TECHNOLOGY

When a successful tender for a contract made by one of two competing parties fails, the decision to call for new tenders rather than award the contract to the other party does not amount to irrational action in terms of the Promotion of Administrative Justice Act (no 3 of 2000).

Judgment given in the Western Cape Division, Cape Town, on 19 January 2023 by Binns-Ward J

The Cape Peninsular University of Technology (CPUT) advertised a request for proposals in respect of the future administration of its property. This was for the continued operation of the premises for student accommodation. Ma-Afrika Hotels (Pty) Ltd was one of the parties that submitted a proposal in response to the request. It and two other parties which had also responded, one of which was Baobab Hospitality (Pty) Ltd, were shortlisted to submit tenders to operate the property for student accommodation and hotel purposes for a 10-year period. Only Ma-Afrika and Baobab submitted tenders.

Ma-Afrika's application was unsuccessful. After learning that Baobab had been awarded the tender, it came to the attention of CPUT that Baobab was unable to perform the operation of the student accommodation. Baobab failed to respond to various enquiries directed to it, and then the CPUT decided to abort the process of concluding a contract with Baobab and rescinded its award of the tender to that company. Ma-Afrika took the view that as the only properly qualifying tenderer it was entitled to be awarded the tender contract. CPUT decided, however, to put out a fresh tender invitation. Ma-Afrika submitted a tender in response to the fresh tender invitation. When doing so it made it clear, however, that its submission was without prejudice to what it maintained were its rights in the purportedly cancelled earlier process.

Ma-Afrika brought an application in terms of section 6 of the Promotion of Administrative Justice Act (no 3 of 2000) ('PAJA'). reviewing and setting aside the decision to cancel the tender process, and reviewing and setting aside the decision not to award the tender to it as the student accommodation and hotel building operator of the premises after CPUT rescinded the award of the tender to Baobab, and substituting that decision with a decision awarding the tender to it.

Held—

CPUT's decision to procure a service-provider for the provision of student accommodation by way of a public tender process was conduct vitally

connected to its governmental function of providing public access to further education. It represented a means of implementing its constitutional and statutory role, and the consequent tender process was therefore administrative in nature. These are strong pointers towards its decisions in respect of the tender.

Section 5 of PAJA gives any person whose rights have been materially and adversely affected by administrative action to request the administrator concerned to furnish written reasons for the action. It was clearly appreciated by the lawgiver that knowledge of the administrator's reasons for making a decision would be necessary in many cases for the subject to be able to establish that its right to administrative justice had been infringed and how to appropriately formulate a challenge.

This was such a case. Ma-Afrika, however, did not have a right to be awarded the contract when the award to Baobab was rescinded. The mere fact that its tender was the only acceptable one out of the two that were submitted did not, by itself, establish that the CPUT's election to choose one of the contractually reserved options to cancel the tender rather than awarding the contract Ma-Afrika was irrational. Provided that it acted reasonably in the circumstances, CPUT was entitled rather to cancel the tender and proceed with the intended procurement in terms of a fresh procedure. If its decision was one that an administrator in its position could reasonably have made, it would not be susceptible to being set aside on review. In order for the court to be able to make an assessment whether the decision was reasonable it would need to know the CPUT's reasons for choosing the course it did.

Ma-Afrika's failure to adduce any evidence concerning the CPUT's reasons for making the decisions it did meant that it had not established a case on its ground of review.

The application was dismissed.

Advocate G. Elliot SC instructed by Thomson Wilks Inc, Cape Town, appeared for the appellant
Advocate S. Magardie instructed by Norton Rose Fulbright Attorneys, Cape Town, appeared for the respondent

Binns-Ward J:

[1] In 2013, the applicant, Ma-Afrika Hotels (Pty) Ltd, sold a property in the District Six area of Cape Town to the respondent, the Cape Peninsula University of Technology ('the CPUT'). The applicant had conducted a hotel business there. After the sale the applicant continued to administer the property, mainly as a residence for students enrolled at the CPUT but also as a hotel. The property

consists of a number of apartments. The majority of them are used for student accommodation for 10 months of the year and the rest for hotel purposes. The apartments ordinarily used for student residential purposes are made available to supplement the hotel's accommodation during the time that they are not required for housing the students. The contractual framework for those arrangements was a lease in terms of which the applicant rented the premises from the CPUT and an agreement in terms of which the CPUT compensated the applicant for providing and administering the accommodation for its students there.

[2] When the time approached for the applicant's lease to expire through effluxion of time, the CPUT advertised a request for proposals in respect of the future administration of the property. The CPUT's primary interest in this regard was the continued operation of the premises for student accommodation. The applicant was one of the parties that submitted a proposal in response to the request. It and two other parties which had also responded, one of which was @ Baobab Hospitality (Pty) Ltd ('Baobab'), were shortlisted to submit tenders to operate the property for student accommodation and hotel purposes for the ensuing 10-year period. The tender in question was labelled as tender no. PUR 5500/9. In the event, only the applicant and Baobab submitted tenders.

[3] The applicant was informed during September 2021 that its tender had been unsuccessful. After learning that Baobab had been awarded the tender, the applicant investigated the possibility of concluding a business partnership with that company. Its investigations turned up that Baobab did not appear to have met the qualifying criteria for the tender contract as it did not have the required experience or a binding contractual relationship with an established hotel group. Baobab's representation to the CPUT that it had such a contractual relationship had been the basis upon which it had been considered as qualified to undertake the tender contract.

[4] The CPUT came to appreciate the difficulty with Baobab's tender only when the applicant drew the facts to its attention during December 2021. At that stage the CPUT had yet to conclude the contemplated contract with Baobab. The applicant then instituted proceedings under case no. 20599/21 in which it sought an order interdicting the CPUT from concluding a contract with Baobab pending the final determination of proceedings to be instituted by the

applicant to impugn the award. The applicant indicated that such proceedings would be instituted after it had received information that it had formally requested in terms of the Promotion of Access to Information Act 2 of 2000 from the CPUT and the latter's agent, Purchasing Consortium Southern Africa NPC. Sher J made an order on 14 December 2021 setting that application set down for hearing on an expedited basis on 24 March 2022. The order provided that, pending the adjudication of the application, the CPUT would not conclude or implement a written agreement with Baobab pursuant to the award to it of the tender and that the applicant would remain as the lessee of the property on the same terms and conditions then in place until 30 June 2022 or such later date as the parties might agree, or the court might order.

[5] On 7 March 2022, after Baobab had failed to respond to various enquiries directed to it by the respondent, the CPUT decided to abort the process of concluding a contract with Baobab and rescinded its award of the tender to that company. The applicant had by that time taken the view that as the only properly qualifying tenderer it was entitled to be awarded the tender contract. CPUT decided, however, to put out a fresh tender invitation. It is accepted by the applicant that this evinced a purported cancellation by the CPUT of the tender process in tender no. PUR 5500/9. The applicant submitted a tender in response to the fresh tender invitation. When doing so it made it clear, however, that its submission was without prejudice to what it maintained were its rights in the purportedly cancelled process in tender no. PUR 5500/9.

[6] The application pending under case no. 20599/21 was overtaken by these developments, and the application was consequently postponed *sine die* by Hlophe JP in chambers without a hearing. The applicant in the meantime instituted a fresh application in case no. 4517/2022. The notice of motion in the latter matter was divided into two parts. Under Part A the applicant sought interim relief pending the determination of the relief sought by under Part B.

[7] It sought orders in the following terms in Part B (as amended):

> Reviewing and setting aside the decision of the respondent on or after 7 March 2022 to cancel the tender process under tender number PUR 5500/9.
>
> 5A Reviewing and setting aside the decision of the respondent on or after 7 March 2022 not to award the

tender to the applicant as the student accommodation and hotel building operator of the premises under tender number PUR 5500/9 ("*the decision*") after the respondent rescinded the award of the tender to @Baobab Hospitality (Pty) Ltd on 7 March 2022.

5. Substituting the decision of the respondent with a decision awarding the tender under tender number PUR 5500/9 to the applicant.
6. Directing the respondent to pay the costs of this application and the costs of the application under case number 20599/21, such costs to include the costs of two counsel where so incurred.
7. Further and/or alternative relief.

The relief sought in terms of paragraph 5 was inserted into the notice of motion by an amendment effected during the hearing on 16 November 2022 (with the originally numbered paragraph 5 thereupon becoming 5A). (The central object of the application is apparent from the following statement in the applicant's replying affidavit, deposed to on 17 May 2022: '[t]*he failure by CPUT to award the tender to Ma-Afrika after the rescission of the award to Baobab on 7 March 2022 is the decision that Ma-Afrika seeks this Honourable Court to review, set aside and substitute it with a decision awarding the tender to Ma-Afrika*'.)

[8] On 15 June 2022, by agreement between the parties, an order was taken postponing the application for hearing before me on 16 November 2022 and fixing a timetable for the filing of the record of decision in terms of Uniform Rule 53 and the exchange of papers. The order also provided that the applicant would remain as the lessee of the property '*on the same terms and conditions currently in place between the Applicant and the Respondent with effect from the date of* [the] *order until 31 March 2023*'.

[9] This judgment is therefore concerned with the substantive relief sought in terms of Part B of the notice of motion and the costs of the undetermined, and otherwise redundant, application in case no. 20599/21. The CPUT's answering affidavit in case no. 4517/2022 enjoined the court to also have regard to the content of its answering papers in case no. 20599/21 to appreciate its defence in case no. 4517/22.

[10] The review application has been brought in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The applicant relied on the following grounds in support of its application:

1. That the CPUT had failed to make a decision to award the tender to Ma-Afrika after rescinding the award to Baobab. The applicant indicated that its application was founded on s 6(2)(g) of PAJA in this regard.
2. That the CPUT had failed to comply with Regulation 13 of the Preferential Procurement Regulations, 2017. The applicant contended that in the context of the applicant having made an acceptable tender the CPUT had not been entitled to cancel the tender and, upon a proper construction of the regulation, had been obliged to award it to Ma-Afrika as the only compliant tenderer. The applicant indicated that its application was founded on s 6(2)(b) of PAJA in this regard.
3. That the decision of the CPUT not to award the tender to Ma-Afrika after it rescinded the award to Baobab was not rationally related to the information before it as Ma-Afrika's tender satisfied all the mandatary requirements in the tender invitation. In this regard, the applicant relied on s 6(2)(f)(ii)(cc) of PAJA.

[11] PAJA is the legislation enacted to give effect to the right entrenched in s 33 of the Bill of Rights giving everyone the right to administrative action that is lawful, reasonable and procedurally fair. An application for judicial review in terms of PAJA is tenable only if the impugned decision (or failure to make a decision) constituted 'administrative action'. The import of the term 'administrative action' is determined by the statutory definition contained in s 1 of the Act:

> '"**administrative action**" means any decision taken, or any failure to take a decision, by-
>
> (a) an organ of state, when-
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing

a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect,

but does not include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4 (1).'

The definition has been described as cumbersome[1] and unwieldy[2], justifiably so.

[12] It is well-recognised that distinguishing what falls within the ambit of 'administrative action' from what does not can often be a difficult undertaking. It has been remarked more than once that there can be no all-embracing test,[3] and the question is one that the courts have to decide on a case-by-case basis.[4]

---

[1] *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43 (13 May 2005); [2005] 3 All SA 33 (SCA); 2005 (6) SA 313, at para 21.

[2] *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18 (10 June 2014); 2014 (8) BCLR 930 (CC); 2014 (5) SA 69, at para 33.

[3] Cf. e.g. *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* [2010] ZASCA 94 (19 July 2010); 2010 5 SA 457 (SCA); [2010] 4 All SA 561 at para 40 and the observations of Lord Nicholls of Birkenhead in *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank & Anor* [2003] UKHL 37 (26 June 2003); [2003] 3 All ER 1213 (HL); [2004] 1 AC 546 (a matter in which it was accepted that a distinction might be drawn between a 'core public authority' and a 'hybrid public authority', the latter exercising both public and non-public functions). Lord Nicholls said, in para 12, that there could not be a single test for determining whether a function was a public one. He proceeded: '*There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.'*.

[4] See, for example, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11 (10 September 1999); 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 at para 143 and *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18 (10 June 2014); 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) at para 113. In *President, RSA v SARFU* loc. cit. it was held that '*the boundaries ... will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration*'.

[13] In *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18 (10 June 2014); 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) in para 33, the Constitutional Court closely analysed the defined meaning of 'administrative action' by an organ of state when exercising a public power or performing a public function in terms of any empowering legislation[5] and determined[6] that it was characterised by the concurrent incidence of all of the following seven elements: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the exclusions listed in the definition.

[14] The CPUT disputed that its decisions in relation to the procurement of a new service provider for the provision and administration of student accommodation at the property constituted administrative action within the meaning of the term in PAJA. It also denied that it was an 'organ of state' as defined in PAJA or for the purposes of s 217(1) of the Constitution, which provides that '[w]*hen an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective*'.

[15] The CPUT argued that its contentions found support in this court's judgment in *Eden Security Services CC and Others v Cape Peninsula University of Technology and Others* [2014] ZAWCHC 148 (8 September 2014). That matter concerned an application by the unsuccessful bidders for a tender contract to provide security services to various campuses of the CPUT to review and set aside the decision of the CPUT to award the contract work to the successful tenderers. The application was heard by Dlodlo J who held (at para 49) that the business of ensuring the safety of CPUT's staff, students and property

[5] See para (a)(ii) of the definition of '*administrative action*' in PAJA (quoted in para [11] above).

[6] Adopting Langa CJ's analysis in *Chirwa v Transnet Limited and Others* [2007] ZACC 23 (28 November 2007); 2008 (4) SA 367 (CC); 2008 (3) BCLR 251; [2008] 2 BLLR 97; (2008) 29 ILJ 73, at para 181.

was 'domestic' (as distinct from public or governmental) in nature. The learned judge expressed the view that because the CPUT had not been acting in terms of any express provision of the Higher Education Act 101 of 1997 ('HEA') when it invited tenders for security services at its various campuses,[7] its decision to appoint the successful tenderers had not been a public function and consequently was not administrative action susceptible to judicial review under PAJA. Consistently with that conclusion, Dlodlo J also held (at para 52) that s 217 of the Constitution was not applicable to the procurement because in transacting its domestic business the CPUT did not function as an organ of state (as defined in para (b)(ii) of s 239 of the Constitution[8]) and it was in any event not an '*institution identified in national legislation*' within the meaning of s 217(1).

[16] The applicant argued, however, that the judgment in *Eden Security Services* was clearly wrong in its conclusions and should not be followed. It relied on the finding to that effect by Chetty J in *Mzanzi Fire and Security (Pty) Ltd v Durban University of Technology and Others* [2022] ZAKZDHC 12 (3 March 2022); [2022] 2 All SA 475 (KZD); 2022 (5) SA 510. *Mzanzi* likewise involved an application by an unsuccessful tenderer for the review and setting aside of a decision by the Durban University of Technology ('DUT'), also an institution of higher learning under the aegis of the HEA, to award a tender contract for the provision of security guarding services at its various campuses. In that matter the court held that the procurement of security services by an institution of higher education heavily funded by the state was integral to the facility's functioning as a public educational institution contemplated in terms of s 29 of the Constitution. Guided by the 'pointers' identified in *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] ZACC 3 (21 February 2017)

[7] The CPUT was brought into being by virtue of a decision in terms of s 23(1) of the HEA by the then Minister of Education in November 2003 to merge the Cape Technikon and Peninsula Technikon into a single public higher education institution with effect from 1 January 2005.

[8] '*any other functionary or institution –*
(i) ...
(ii) *exercising a public power or performing a public function in terms of any legislation.*'

2017 (3) SA 242 (CC); 2017 (6) BCLR 700; [2017] 7 BLLR 641 at para 74 for ascertaining whether any conduct entailed the exercise of public power,[9] Chetty J concluded that the procurement of security services by the DUT was of a public, not a domestic, character. In finding the DUT's decision to procure security services to be 'administrative action' within the meaning of PAJA, the learned judge had reference to the broad constitutional and legislative framework within which the institution was established and operated. Differing from Dlodlo J, he did not consider the absence of an express empowering provision to contract for the services to be significant.

[17] I am not aware that the judgment in *Eden Security Services* has been followed in any later case. The judgment has, however, attracted some criticism from the academic commentators that, with respect, I think is well-founded.

[18] In *JQR Administrative Law* 2014 (3), Professor Danie Brand and Melanie Murcott of the Department of Public Law at the University of Pretoria expressed the opinion that the court's reasoning in *Eden Security Services* in relation to the 'domestic nature' of CPUT's decision-making was '*somewhat superficial*'. In their view, '*the court ought to have taken its own advice and considered in more depth whether the procurement at issue was* [of] *the kind that "entailed accountability"*.'. By that, I think they had in mind the cumulative

[9] The non-exclusive list of pointers given at para 74 of *AMCU* is:

(a) the source of the power;
(b) the nature of the power;
(c) its subject matter; and
(d) whether it involves the exercise of a public duty.

The *AMCU* judgment proceeded, in para 75, to endorse the following remarks of Langa CJ in *Chirwa* supra, in para 186:

'*Determining whether a power or function is 'public' is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.*'

effect of the CPUT's character as a public institution of higher education under the aegis of the HEA, the extent to which it was dependent on public funding and the integral character of the procurement of guarding services to the protection of the assets used by the institution to discharge its essential functions.

[19] In similar vein, Professor Geo Quinot of the Department of Public Law at Stellenbosch University wrote in *JQR Public Procurement* 2014 (3) that '*it is not entirely clear on what basis, apart from the absence of a legislative source for the action, the court reached the conclusion that the procurement of security services was "domestic in nature".*'. Quinot proceeded '*In dealing with this type of inquiry, the key issue is always one of causality. That is, how does one define the relationship between the goods or services procured and the entity's obvious general public function in reaching a conclusion that the particular procurement does not fall under the entity's general public functions, or in the words of the court in* [***Eden Security Services***] *... is "domestic in nature*". In **Transnet Ltd v Goodman Brothers (Pty) Ltd**,[10] *a case that the present court also relied on, the SCA held that the purchase of gold watches to present as long service awards to employees was sufficiently closely linked to Transnet's public function of providing transport services to qualify as the exercise of public power.*'.

[20] As noted, it appears that Dlodlo J's conclusion in *Eden Security Services* that the procurement of security services was a 'domestic' function of the institution, not a public one, was heavily influenced by the fact that the CPUT's conduct in that regard was not expressly provided for in the HEA or any other statute by which its affairs were regulated. The learned judge appears also to have been guided to a notable degree by the outcome in *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [2010] ZASCA 94 (19 July 2010); 2010 (5) SA 457 (SCA); [2010] 4 All SA 561. With respect, I incline to the view that his approach in that regard was mistaken on both counts.

[21] As to the first point, the Constitutional Court's judgment in *Motau* supra[11] illustrates that the absence of an express provision in the applicable governing statute concerning given action by the body

[10] [2000] ZASCA 62 (9 November 2000); 2001 (1) SA 853 (SCA).

[11] In para 112.

concerned is not, of itself, determinative whether it is administrative or executive in character. A proper assessment requires a consideration of the action in issue against the import of the statute examined in its entirety. Because it is a componential element of the exercise, the same considerations apply in determining the question whether any function by an organ of state or any other natural or juristic person is a public or domestic one. I concur in this regard in the view expressed by Quinot (*op. cit.*) with reference to 'causality'. In contrast, Dlodlo J's approach seems to me to have applied the type of bright-line delineation that the relevant higher court jurisprudence, including some of the cases cited in his judgment, has repeatedly described as out of place in the characterisation exercise.

[22] As to the second point, the outcome of the case in *Calibre Clinical Consultants* was, as such cases always are, very much dependent on its peculiar facts. The nature and context of the impugned decision in *Eden Security Services* differed *toto caelo* from those of the decision in issue in *Calibre Clinical Consultants*.

[23] In the latter case a bargaining council, established in terms of s 27 of the Labour Relations Act 66 of 1995, sought proposals from interested parties for the purpose of appointing a service provider to run a wellness programme set up by the council. The programme was funded by contributions by employees in the sector represented by the council and their employers, *not* by the fiscus. The service that was required encompassed the co-ordination of an anti-retroviral management programme, the provision of education and training, the provision of a counselling service, the procurement of pharmaceuticals, and the establishment of a drug distribution service. In a subsequent judicial review challenge to the council's decision to select a bidder for the role, the question arose whether the pertinent decisions of the council constituted 'administrative action'.

[24] The judgment reviewed a range of jurisprudence that served to illustrate that it was the *governmental* character of decisions by institutions, whether public or private, that made them susceptible to judicial review. At para. 41- 42, Nugent JA, writing for a unanimous court, concluded that a bargaining council, like a trade union and an employers' association, is a voluntary association that is created by agreement, to perform functions in the interests and for the benefit of its members and that it was difficult to see how it could be said to be publicly accountable for the procurement of services for a project that

it implemented for the benefit of its members rather than the public. The learned judge was unable to find in the implementation of the project any of the governmental features identified in the case law to signify that it should be subject to judicial review. He proceeded that '[w]*hen implementing such a project a bargaining council is not performing a function that is "woven into a system of governmental control" or "integrated into a system of statutory regulation". Government does not "regulate, supervise and inspect the performance of the function", the task is not one for which "the public has assumed responsibility", it is not "linked to the functions and powers of government", it is not "a privatisation of the business of government itself", there is not "potentially a governmental interest in the decision-making power in question", the council is not "taking the place of central government or local authorities", and most important, it involves no public money.*'.

[25] It must be allowed, however, that one of the other considerations influencing the conclusion reached in *Eden Security Services* was that the fact that the CPUT's procurement decisions are not regulated in terms of s 217 of the Constitution because it does not fall within the limited range of organs of state mentioned in subsection (1) of that provision. That was indeed also one of the considerations to which the court in *Calibre Clinical Consultants* had regard.[12] But, as the authorities show, determining whether a juristic or natural person exercises a public function or power generally requires consideration of a gamut of factors, none of them by itself determinative, and the weight to be given to each is dependent upon the peculiar features of the given case. In contrast, the judgment in *Mzansi*, however, incorrectly, in my respectful opinion, appeared to conclude that the DUT was an organ of state or institution identified in national legislation within the meaning of s 217(1). *Mzansi* was incorrect in this respect because universities of technology are not '*department*[s] *of state or administration in the national provincial or local sphere of government*' and none of them is an institution identified for the purpose of s 217 of the Constitution in national legislation.

[26] The CPUT's counsel submitted that this court was bound in the current matter by the decision in *Eden Security Services*. Mr *Magardie* argued that to permissibly depart from that judgment it was

[12] In para 44-45.

not sufficient for this court merely to have some doubt about its correctness; it had to be able to hold that the earlier judgment was clearly wrong – a higher threshold.[13] The argument was correct in principle, but it failed to take into account the material factual differences between *Eden Security Services* and the current matter.

[27] The function of procuring a service provider in respect of the operation of the CPUT's student accommodation is materially distinguishable from the procurement of security guarding services. It does not necessarily follow because the latter function has been characterised as 'domestic' that the characterisation holds good for the former. The pertinent jurisprudence makes it abundantly clear that the questions that arose in *Eden Security Services* and arise in this matter must be determined on a case-by-case basis. The differences between the current case and *Eden Security Services* are such that any contention that the conclusions reached in the latter matter bind the court in the current one is misplaced.

[28] That the provision of higher education is a matter of national interest of a governmental nature is confirmed by the provisions of s 29 of the Constitution and the HEA. The Act provides for the establishment of both public and private institutions of higher education. The CPUT is a public institution. The financial management of public institutions of higher education is addressed in Chapter 5 of the HEA. It makes provision for the funding of public higher education by the state in terms of a policy to be determined by the Minister after consulting the Council for Higher Education and with the concurrence of the Minister of Finance.

[29] One only has to look at the schedules to the annually adopted Appropriation Acts to see that the CPUT is the recipient of very substantial funding from the National Revenue Fund by way of University Subsidies and 'block grants and other grant allocations'.[14]

---

[13] Cf. *Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51 (31 December 2021); 2022 (4) BCLR 410 (CC); 2022 (3) SA 250 (CC) at para 46.

[14] The Schedule to the Appropriation Act 7 of 2022 indicates that the CPUT was allocated R10 984 000 in 'university subsidies' for 'academic clinical training grants', R1 383 331 000 in respect of 'block grant allocations', R31 564 000 for 'capacity development, R49 168 000 as 'foundation

The appropriations are made by Parliament by virtue of the requirement in s 26 of the Public Finance Management Act 1 of 1999 that it must appropriate money for each financial year for the requirements of the state. The CPUT's Institutional Statute[15] appears to acknowledge that the institution has four streams of income viz. state subsidy, student fees, donations and what is referred to in the Statute as 'Third Stream Income'.

[30] That the provision of student accommodation and matters closely related thereto fall within the public sphere finds confirmation in a number of sources. Section 40(1) of the HEA details the componential makeup of the funding of public higher education institutions. One of the sources expressly provided for is '*money received from students ... of the institution for accommodation*'.[16] Unlike the bargaining council in *Calibre Clinical Consultants supra*, the CPUT is accountable to the state for the use of its funding. In terms of s 41(2) of the Act, a public institution of higher learning is required to report to the Minister as prescribed in the regulations. The relevant regulations are the Regulations for Reporting by Public Higher Education Institutions[17] These require institutions such as the CPUT to prepare Strategic Plans and related Annual Performance Plans, the latter to be submitted to the Department of Higher Education annually. The Annual Performance Plan must, in terms of reg. 5(2)(h)(ii), '*show separately income and budgeted expenditure for student housing*'. The Minister for Higher Education may, in terms of s 42 of the HEA, intervene in the affairs of an institution of higher learning by issuing a directive to its council if he has reasonable grounds to believe that the institution is involved in 'financial impropriety' or 'is being otherwise mismanaged'. This demonstrates the CPUT is accountable in law to the national government in regard to the financial and logistical aspects of its provision of student accommodation.

---

provision', and R55 000 000 by way of a 'university infrastructure and efficiency grant',

[15] GG 46382 dated 20 May 2022. The Institutional Statute is published in terms of s 33 of the HEA after approval by the Minister.

[16] Section 40(1)(h).

[17] GNR 464 published in GG 37726 of 9 June 2014.

[31] When searching for the latest allocations made to the CPUT from the National Revenue Fund, I came across a memorandum of agreement between the Ministers of Higher Education and Training, Public Works and Rural Development and Land Reform and the Vice-Chancellor of the CPUT committing to '*the transfer of land to enable the rapid development of District Six and the Cape Peninsula University of Technology*' published in the Government Gazette on 20 September 2019.[18] As already mentioned, the CPUT campus and the property in issue in the current matter are situate in the District Six area, which has historical significance and is a focal point for post-apartheid land restitution. It is significant that the acquisition of properties in the area '*suitable for university owned student housing*' was one of the matters addressed in the agreement, and obviously of particular interest to the Minister for Higher Education and the Vice Chancellor of the CPUT. In my view, this serves as a further illustration that the provision of university owned student accommodation is a matter of public or governmental concern and involvement.

[32] The CPUT is an institution that performs the public function of providing higher education. It was created for that purpose by the national government and its operation is substantially subsidised from the National Revenue Fund. The State's relationship with the institution is founded in s 29 of the Constitution and regulated by the HEA. The constitutional and statutory context leaves no room to doubt that the CPUT is an organ of state as defined in paragraph (b) of the definition of the term in s 239 of the Constitution. The only question is whether contracting for the provision of student accommodation falls within its public functioning.

[33] In my judgment it does. The object of the establishment of institutions such as the CPUT is to provide higher education and thereby to fulfil the constitutional objective that access to further education be made available by the state to everyone. The resources required to establish and operate an institution of higher learning are obviously much greater than those needed to operate schools. It would therefore be impracticable for there to be a university within reasonable proximity of every local community as there are schools. For similar reasons, not every university is able to offer courses in

[18] GG 42720, dated 20 September 2019.

every learning speciality that a student might wish to pursue. A student might live close to one university but need to enrol at another one far away to pursue a particular desired course of study. Institutions of higher learning tend to be situated in the larger towns and cities in the country and students from outside those centres require to be accommodated when they are away from their homes to attend university during termtime. It is to address those obviously incidental requirements for the adequate fulfilment of their intended purpose of providing higher education that student halls of residence are a universally encountered feature of establishments for higher learning. The provision of such accommodation is integral to the central purpose of universities and other institutions of higher learning. Student residences provide not only necessary material assistance for students in need of accommodation, they also provide a measure of moral support by nurturing a sense of community. That student support services are an aspect of higher education in which the Minister has some governmental interest finds confirmation in s 5 of the HEA.[19] The provision of student accommodation is so closely bound up with the central mission of public institutions of higher learning that it would be contrived to distinguish it from their public functions.

[34] For all the foregoing reasons I am satisfied that the CPUT's decision to procure a service-provider for the provision of student accommodation in issue in this matter by way of a public tender process was conduct vitally connected to its governmental function of providing public access to further education. It represented a means of implementing its constitutional and statutory role, and the consequent tender process was therefore administrative in nature. These are strong pointers towards its decisions in respect of the tender process being 'administrative action' within the meaning of PAJA.

[35] The CPUT contends, however, that its cancellation of the tender process when it rescinded the award to Baobab was executive action, not administrative action. It relies on the judgments in *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty)* [2015] ZASCA 167 (26 November 2015); [2016] 1 All SA 332 (SCA); 2016 (2) SA 494 (SCA) and *SAAB Grintek*

[19] See s 5(2)(g), which identifies '*student support services*' as one of the aspects of higher education on which the Council for Higher Education may be requested to advise the Minister.

Defence (Pty) Ltd v South African Police Service and Others [2016] ZASCA 104 (5 July 2016); [2016] 3 All SA 669 (SCA) in support of its argument. The CPUT also relied on various terms of the invitation to tender in which it reserved to itself the right not to accept the lowest or any tender submission and, in the event that it did not conclude a contract with the successful tenderer, the right to award the tender to another tenderer or to issue a fresh invitation to tender. Similar terms featured in the invitation to tender in *Nambiti* and appear to have been regarded by the appeal court in that case to be of some significance in limiting the susceptibility of the decision to cancel the tender to challenge on review by an aggrieved tenderer.

[36] Nambiti Technologies (Pty) Ltd was contracted to the City of Tshwane Metropolitan Municipality ('the City'), to provide computer technology support services ('SAP support services') for a three-year period ending in December 2012. As the contract approached its expiry date, the City advertised an invitation to tender for the continued provision of the services. Nambiti was one of the entities that responded to the invitation. In mid-December 2012, two months after the issue of the invitation to tender, and after the submitted tenders had been opened, the tenderers were informed that the tender was being cancelled and that a fresh invitation to tender would be issued.

[37] The cancellation of the tender occurred in the following circumstances. In early November 2012, a new chief information officer ('CIO') was appointed by the City. Pursuant to recommendations that he made to the City's procurement committee, the CIO was instructed to consider the use of other SAP support services providers used by different organs of state and to appoint them in line with reg. 32 of the municipal supply chain management regulations made in terms of Act 56 of 2003,[20] alternatively to fast-track and finalise the extant tender. The CIO initially favoured fast-tracking the finalisation of the extant tender process but, after reviewing whether that would best serve the City's interests, he ultimately concluded that the better course would be to cancel the

[20] Published under GNR 868 in GG 27636 of 30 May 2005, as amended in GNR 31 in GG 40553 of 20 January 2017. Regulation 32 permits a municipality, subject to certain stipulated conditions, to procure services or goods under a contract already secured by another organ of state.

tender and advertise a fresh tender with suitably altered contract specifications. In the meantime, presumably in terms of reg. 32, the City appointed EOH Mthombo Limited ('EOH'), which was already the equivalent service provider to the City of Johannesburg, to take over the rendering of the services from Nambiti with effect from 20 December 2012.

[38] Nambiti thereafter instituted review proceedings in March 2013, in which it claimed orders (i) reviewing and setting aside the City's decision to appoint EOH to render the services, (ii) reviewing and setting aside the City's decision to cancel the tender and (iii) directing the City without delay to invite new tenders in respect of the provision of on- and off-site SAP support services. The judgment of the court of first instance in effect resuscitated the cancelled tender and compelled the City to adjudicate and award the tender within two months of the order. Tenderers were permitted to adjust their tariffs upwards or to withdraw their tenders, but otherwise the process was to continue as if the tender had never been cancelled.[21] By the time the matter was ripe for hearing on appeal the tender contract period was on the verge of expiry, and it was evident that the issue had consequently become moot for practical purposes. The appeal court nevertheless entertained the appeal in the exercise of its discretion because it considered that the matter raised questions of general importance.

[39] The appeal court interrogated whether the cancellation of a tender before its adjudication constituted administrative action. It reasoned on the facts that the City's desire to procure the SAP support services had been '*always provisional. That follow*[ed] *from the terms of the advertisement of the tenders, which contained the caveat that "the lowest or any tender will not necessarily be accepted'". ... the standard conditions of tender ... provided even more explicitly that the City "may cancel the tender process and reject all tender offers at any time before the formation of a contract'*". It held that in cancelling the tender '*the City was doing no more than exercising a right it had reserved to itself not to proceed to procure those particular services on the footing set out in that tender*'.[22]

[21] *Nambiti* (SCA) at para 4.

[22] Id. para 25.

[40] In *Nambiti* (SCA), the court also held that a decision not to procure services does not have any direct, external legal effect because no rights are infringed thereby. Wallis JA remarked in that connection '*Disappointment may be the sentiment of a tenderer, optimistic that their bid would be the successful one, but their rights are not affected. There can be no legal right to a contract and counsel did not suggest that there was.*' The learned judge responded to Nambiti's counsel's submission that Nambiti nevertheless had a reasonable expectation that its tender would be considered by stating '*But that expectation was dependent on there being an ongoing tender process, where principles of just administrative action are of full application. Once the entire tender was cancelled any expectation that the tenders submitted by tenderers would be adjudicated ... fell away*.'.[23]

[41] Central to the appeal court's decision in *Nambiti* was its characterisation of the decision to cancel the tender before its adjudication as executive, not administrative, action. The court's view in this regard was summarised as follows (in para 43):

> '*A decision as to the procurement of goods and services by an organ of State is one that lies within the heartland of the exercise of executive authority by that organ of State. We live in a country of finite resources at every level of government. Decisions by organs of State on how their limited resources will be spent inevitably involve painful compromises. A decision to spend money on support systems for computer technology will divert those resources from other projects such as the construction of roads or the provision of rubbish collection in residential areas. The Constitution entrusts these decisions to elected bodies at all three tiers of government. In turn the elected representatives at every tier select the executive that is required to carry out the chosen programme of government. It is an extremely serious matter for a court to intervene in such decisions. But for it to do so by compelling the organ of State to enter into contracts and acquire goods and services that it has determined not to acquire, or at least not to acquire on the terms of a specific tender, is something that, if open to a court to do at all, should only be done in extreme circumstances. These issues are among those*

[23] Id. para 32.

comprehended by the broad doctrine of the separation of powers.'

[42] The appeal court's judgment in *Nambiti* has attracted academic criticism in certain respects,[24] notably its restrictive approach to the adverse effect on rights component of the definition of administrative action. Cora Hoexter and Glenn Penfold, *Administrative Law in South Africa* 3ed. [25] note that the approach adopted in *Nambiti* (SCA) does not fit well with that articulated by Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43 (13 May 2005); [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA) at para 23 and subsequently endorsed more than once by the Constitutional Court[26]:

'*While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect*

[24] See in this regard Helena van Coller, *2016 Annual Survey* s.v. 'Administrative Law' at pp. 58-64 and Geo Quinot, JQR Public Procurement 2015 (4) and JQR Public Procurement 2016 (3);

[25] At p. 314.

[26] See *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28 (29 November 2012); 2013 (3) BCLR 251 (CC), para 30, *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21 (23 November 2010); 2011 (1) SA 327 (CC) ; 2011 (2) BCLR 207 (CC) para 37, and compare also *JDJ Properties CC and Another v Umngeni Local Municipality and Another* [2012] ZASCA 186 (29 November 2012); [2013] 1 All SA 306 (SCA); 2013 (2) SA 395 (SCA) para 15-20.

> *legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.*' (Footnotes omitted.)[27]

[43] The essence of the decision in *Nambiti* appears to me to have been that a determination by an organ of state not to acquire goods or services for which it had invited tenders but no longer required, either at all or in the manner originally contemplated, involves a change of policy rather than the implementation of policy. Policy-making decisions are generally characterised as 'executive' in nature, whereas decisions made in the implementation of policy are readily susceptible to characterisation as 'administrative' in nature.

[44] *Saab Grintek* also concerned an application to review and set aside the cancellation of a tender. In that case the State Information Technology Agency, acting on behalf of the South African Police Service ('SAPS'), invited tenders for the provision of 'an integrated mobile vehicle data command and control solution'. After tenders had been submitted, but before their adjudication, the tender was cancelled on the instruction of SAPS. SAPS indicated that SAPS's 'business requirements' had changed during the repeatedly extended period of time (well over a year) taken up by the tender process and the specifications in the invitation to tender were consequently no longer appropriate to SAPS's requirements. Because of the correspondence between the factual basis of the case and that of *Nambiti*, the appeal court invited the parties to make submissions why the court's decision in *Nambiti* should not be dispositive of the appeal from the court of first instance's refusal of the application (on unrelated grounds).

[45] In *Saab Grintek* the appeal court rejected an argument that *Nambiti* had been wrongly decided and that its determination that the cancellation of the tender was not administrative action was in conflict with well-established authority exemplified in the court's decision in *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135 (18 October 2002); [2003] 1 All SA 424 (SCA); 2003 (2) SA 460

[27] Hoexter & Penfold id. loc.cit. describe the omission in *Nambiti* of any reference to the passage in *Greys Marine* as 'surprising'. They note, in fn. 716, that in *Saab Grintek* supra, at para 21, the SCA 'held that it was unnecessary to consider the contention, grounded in *Greys Marine*, that *Nambiti* had been erroneously decided'.

(SCA).[28] The court distinguished *Logbro*, saying (at para 18), '*The distinction between **Logbro** and **Nambiti** is this: In **Logbro** there was a tender process that had progressed to the stage where a decision had to be made whether to award the tender. In **Nambiti** there was a decision that the services reflected in the tender were no longer required and the tender process was terminated. A decision as to procurement of goods and services by an organ of State, this court said in **Nambiti**, is one that lies within the heartland of the exercise of executive authority by that organ of State. It observed further that "it is always open to a public authority, as it would be to a private person, to decide that it no longer wishes to procure the goods or services that are the subject of the tender, either at all or on the terms of that particular tender".*'

[46] Mr *Elliot* SC, who appeared for the applicant, drew attention, however, to apparently contrary authority in the unanimous decision of the appeal court in *Head of Department, Mpumalanga Department of Education v Valozone 268 CC and Others* [2017] ZASCA 30 (29 March 2017). In that case the cancellation of a tender by the Department of Education for the management and implementation of a school feeding programme was characterised as administrative action. The facts were as follows. The award of the tender contact to some of the tenderers was successfully challenged on judicial review by some of the unsuccessful tenderers. The court ordered the department to consider its decision afresh. On reconsideration, the bid allocation committee recommended to the head of department that the tender be re-advertised to avoid further litigation. The originally unsuccessful tenderers challenged the head of department's decision to act on the committee's recommendation. They did so on three main grounds, namely:

> (i) that the order of the court in the first review application obliged the head of department to adjudicate and award the tender and did not permit the re-advertising thereof;
> (ii) that the decision was invalid for non-compliance with reg. 8(4) of the 2011 PPFA regulations (the equivalent of reg. 13 of 2017 version of the regulations on which the applicant relies in the current case); and
> (iii) that the decision was irrational.

[28] *Saab Grintek* para 15-18.

The court of first instance upheld the challenge on all three grounds.
[47] The appeal court rejected the applicants' contentions in the first review ground concerning the import of the order. It held the order did no more than place an obligation on the appellant to reconsider the tender with due regard to the judgment, and that it did not purport to exclude any legitimate options available to the head of department upon such reconsideration. Without mentioning the earlier decisions in *Nambiti* and *Saab Grintek*, in which an opposing interpretation of the regulation was given, the court in *Valozone* upheld the unsuccessful tenderers' contention that the department's power to cancel the tender was limited to the circumstances stipulated in reg. 8(4) of the procurement regulations, viz. (a) where, due to changed circumstances, there is no longer a need for the services, works or goods requested; or (b) funds are no longer available to cover the total envisaged expenditure; or (c) no acceptable tenders are received, and that the purported cancellation was in breach of those restraints. It also held that the decision to cancel the tender because of a concern about irregularities in a small number of the tender submissions received when there many acceptable tenders was irrational in the circumstances, especially the pressing need for the feeding programme to be implemented. It therefore upheld the court of first instance's decision on the second and third grounds of review.
[48] A subsequent argument about the apparent conflict between the judgment in *Valozone* and those in *Nambiti* and *Saab Grintek* was addressed in the following terms in *Madibeng Local Municipality v DDP Valuers and Another* [2020] ZASCA 70 (19 June 2020) (in para 17): '*... the Municipality argued that divergent views had been expressed by this court, on the one hand, in ...* ***Valozone*** *... and on the other, in ...* ***Nambiti*** *... and* ***SAAB Grintek*** *... . This is not correct. The question cannot be determined in the abstract. In* ***Nambiti*** *and* ***SAAB*** *this court held that the cancellation of a tender by an organ of state prior to its adjudication does not constitute administrative action under PAJA. The ratio common to these judgments was that in such circumstances, the cancellation of the tender constitutes the exercise of executive authority. The court reasoned that the decision of an organ of state to procure goods or services is an executive act and the reversal of that decision, without more, is of the same nature. ... Both these judgments recognised, however, that the position would be different when a public tender is cancelled during the tender process,*

as would be the case on the Municipality's version. On its case, the Municipality cancelled the tender after the award thereof had been set aside and it was ordered to reconsider the matter. This was also the factual position in ***Valozone****. In such a case "principles of just administrative action are of full application" ... or, put differently, principles of administrative justice continue to govern the relationship between the organ of state and the tenderers ... Thus, a decision of an organ of state to cancel a tender after it was awarded, would generally be reviewable under PAJA.*'.

[49] Hoexter & Penfold *op. cit. supra*, at p.261, comment on the jurisprudence just reviewed as follows: '*It seems to us that the diagnoses of administrative action in* ***Valazone*** *and* [an unreported Eastern Cape Division judgment] *were correct, and that the categorisation of the cancellation of a tender as executive action is best confined to the sort of scenario that arose in* ***Nambiti*** *and* ***Saab Grintek****, namely, where the cancellation of the tender flows from a policy decision that the goods or services that form the subject of the tender or no longer required or no longer meet the needs of the organ of state. This distinction is, in our view, more palatable than the distinction drawn in* ***DPP Valuers*** *between a tender that has not yet been adjudicated and one that has (or between a tender that has been awarded and one that has not).*'. The learned authors' observations seem to me, with respect, well-made. They accord with my own analysis of the judgment in *Nambiti* (SCA).[29]

[50] The current case is distinguishable on its facts from *Nambiti* and *Saab Grintek*. In the current matter the cancellation in issue was made after the adjudication of the tender. It is also evident from the content of the freshly issued invitation to tender which, apart from a reduction of the contemplated tender contract term from one of 10 years to nine years, was in substantially the same terms as the original invitation to tender, that the decision to cancel was not informed by any determination by the CPUT that it no longer wished to procure the services in question, or on substantially the same basis as originally contemplated. If it is important to find a comparable earlier case, I think that the facts in *Logbro* supra, afford a better example - although I acknowledge that a distinguishing feature is that the procurement in issue in *Logbro*, being by an organ of state in the provincial sphere of

[29] See para [43] above.

government, was governed by s 217 of the Constitution whereas procurement by the CPUT is not. I do not think that is material, however, as it is clear that the procurement in the current matter did not fall within 'the sort of scenario that arose in *Nambiti* and *Saab Grintek*'.

[51] For the reasons discussed earlier in this judgment, and after consideration of the body of authority referred to and discussed in Hoexter & Penfold *op. cit.*, at 258-262, I have concluded that the CPUT's decision to cancel the tender was indeed 'administrative action' within the meaning of PAJA, and accordingly susceptible to being impugned in terms of s 6 of the Act.

[52] It becomes necessary then to consider the grounds upon which the applicant has brought its challenge under PAJA. Before doing so, however, something should be said about the CPUT's reliance on various provisions in the 'Request for Proposal' that it contends gave it the contractual right to cancel the tender. The provisions in question went as follows:

> '*2.13 ACCEPTANCE OF TENDERS*
> *CPUT does not bind itself to accept either the lowest or any other tender and reserves the right to accept the tender which it deems to be in the best interest of CPUT. CPUT the right to accept the offer in full or in part or not at all.*
> *2.14 NO RIGHTS OR CLAIMS*
> *2.14.1 Receipt of the invitation to tender does not for any right on any party in respect of the Services or in respect of or against CPUT. CPUT Reserves the right, in its sole discretion, two withdraw by notice to tenderers any services or combination of services from the tender process, to terminate any parties participation in the tender process, or two accept or reject any response to this invitation to tender unnoticed to the tenderers without liability to any party. Accordingly, parties have no rights, expressed or implied, with respect to any of the services as a result of their participation in the tender process.*
> *2.18 RESERVATION OF RIGHTS*
> *Without limitation to any other rights of CPUT (otherwise reserved this invitation to tender or under law), CPUT expressly reserves the right to:*

> *2.18.2 Reject all responses submitted by tenderers and to embark on a new tender process.*
> *2.18.3 The tender awarded will be conditional and subject to successful negotiations and signing of a written contract, failing which CPUT reserves the right to withdraw the tender in to award the same to another bidder without the need to repeat the tender process.*
> *2.24 ACKNOWLEDGEMENTS AND DISCLAIMERS*
> *2.24.1 This RFP and any Proposals or not legally binding on CPUT. None of CPUT (sic), nor any person purporting to act on behalf of CPUT, or ... makes any representations or provide (sic) any undertakings to tenderers other than to invite tenderers to submit proposals. CPUT intend to use the RFP/Proposal framework as the basis for negotiations with tenders. CPUT reserves the right to alter that framework at its discretion at any point prior to or during the RFP/Proposal process. CPUT reserves the right, exercisable at its indiscretion, to engage other tenderers for provision of student accommodation services.*'

[53] In *Logbro*, the appeal court held that even assuming provisions such as those quoted in the preceding paragraph were of contractual force between the participants in the tender process, they did not exhaust the organ of state's constitutional duties towards the tenderers. The party that issued the tender invitation in that matter was the Province of KwaZulu-Natal. The court held '[p]*rinciples of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights – such as the entitlement to give no reasons – would necessarily yield before its public duties under the Constitution and any applicable legislation. This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights*

it derived from the contract.'[30] (Footnotes omitted.) The effect of that statement was explained later in the judgment as follows: '*The significance of this analysis is that even if the terms the province stipulated for the tender process entitled it to withdraw the Richards Bay property, it could exercise that power only with due regard to the principles of administrative justice. It could not withdraw the property capriciously or for an improper or unjustified reason*'.[31]

[54] Where the tender is subject to reg. 8 of the 2001 Preferential Procurement Regulations, reg. 10 of the 2011 regulations or reg. 13 of the 2017 regulations, it can be cancelled only within the circumstances permitted in terms of the regulations; see *Valozone* supra, at para 16 and compare *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 (26 June 2015); 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 68-69.[32] Contractual provisions such as those relied upon by the CPUT would be of no effect to the extent of their inconsistency with the regulations where those applied.

[55] It will be recalled that the applicant's first ground for challenging the CPUT's conduct was grounded in s 6(2)(g) of PAJA, which provides that a court has the power to review an administrative action if the action concerned consists of a failure to take a decision. I do not think a case has been made out on this basis. The CPUT did make a decision. When it rescinded the award to Baobab, it decided to advertise a fresh tender. This was one of the options open to it in terms of the 'Request for Proposal'. Implicit in its decision to advertise a fresh tender were decisions (i) not to make a substitute award under the original tender and (ii) to cancel that process. Whether its decision could bear scrutiny in a review under PAJA would depend on its reasons for making it. But any suggestion that the CPUT had failed to make a decision is misplaced on the facts.

[56] The applicant's second ground of review, based on s 6(2)(b) of PAJA, which provides that a court has the power to review an administrative action if a mandatory and material procedure or

[30] In para 7-8.

[31] In para 14.

[32] For criticism of the contrary view expressed in *Nambiti* at para 28-30, see Quinot, *JQR Public Procurement* 2015 (4).

condition prescribed by an empowering provision was not complied with, is predicated on the CPUT's alleged non-compliance with Regulation 13 of the Preferential Procurement Regulations, 2017.

[57] Regulation 13, which was in force at the relevant time, provided:

> '*13* ***Cancellation of tender***
>
> *(1) An organ of state may, before the award of a tender, cancel a tender invitation if-*
>
> *(a) due to changed circumstances, there is no longer a need for the goods or services specified in the invitation;*
>
> *(b) funds are no longer available to cover the total envisaged expenditure;*
>
> *(c) no acceptable tender is received; or*
>
> *(d) there is a material irregularity in the tender process.*
>
> *(2) The decision to cancel a tender invitation in terms of subregulation (1) must be published in the same manner in which the original tender invitation was advertised.*
>
> *(3) An organ of state may only with the prior approval of the relevant treasury cancel a tender invitation for the second time.*'

[58] The implication in this part of the applicant's case was that the CPUT had not been entitled to cancel the tender as none of the circumstances identified in paragraphs (a) to (d) to subregulation (1) had been present and that it had instead been obliged to award the contract to the applicant as the only party left standing that had made an acceptable tender. If the Preferential Procurement Policy Framework Act 5 of 2000 ('the PPPFA') had been applicable, that would indeed appear to be the effect of s 2(1)(f) of the Act.

[59] The PPPFA is, according to its long title, legislation '[t]*o give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in s 217(2) of the Constitution, and to provide for matters connected therewith*'. Section 217(2) provides that the provisions of s 217(1) do not prevent '*the organ of state or institutions referred to in that subsection*' from implementing a preferential procurement policy. The 'organs of state' referred to in s 217(1) are organs of state '*in the national, provincial or local sphere of government*' and the 'institutions' are '*any other institution identified in national*

legislation'. The CPUT is not an organ of state referred to in s 217, nor is it one of those listed in paragraphs (a) – (e) of the definition of the term in s 1 of the PPPFA. Paragraph (f) extends the definition to '*any other institution or category of institutions included in the definition of 'organ of state' in section 239 of the Constitution and recognised by the Minister by notice in the Government Gazette as an institution to which this Act applies*'. The '*other institutions or categories of institutions*' recognised by the Minister for the purposes of the PPPFA and those identified in national legislation for the purpose of s 217(1) of the Constitution are the public entities listed in Schedule 2 and Parts A and B of Schedule 3 of the Public Finance Management Act 1 of 1999.[33] The CPUT is not one of the entities listed in those schedules. The PPPFA and the preferential procurement regulations made in terms of s 5 of the Act are accordingly not applicable to the CPUT.

[60] The applicant has pointed out that the CPUT's procurement policy provides that '*CPUT will apply the provisions as well as the spirit of the PPPFA and its regulations*'. A policy generally amounts to a set of criteria by which decision-making will be guided, rather than dictated. If asked, the CPUT might be expected to provide cogent reasons for any deviation from its policy in its decision to cancel the tender, and it might be held accountable in terms of s 6 of PAJA if the explanation provided showed that it had breached its constitutional duty to have acted reasonably and procedurally fairly, but the fact remains that the PPPFA regulations do not apply to the CPUT as a matter of law. They therefore did not impose on the CPUT mandatory and material procedures or conditions prescribed by an empowering provision within the meaning of s 6(2)(b) of PAJA. The applicant has therefore failed to make out a case on the second ground of its application.

[61] The third ground upon which the applicant brought its application was founded was the alleged irrationality of the CPUT's failure to award the tender to Ma-Afrika. It relied in this regard on s 6(2)(f)(ii)(cc) of PAJA, which provides that the court may review and set aside an administrative decision if the action was not rationally connected to the information before the administrator. The decision

[33] See GNR 501 in GG 34350 dated 8 June 2011 and GN 571 in GG 40919 dated 15 June 2017.

in question in the current case is the decision of the CPUT not to award the tender to Ma-Afrika after it rescinded the award to Baobab. The information before it was an acceptable tender by Ma-Afrika.

[62] The difficulty with this part of the case is that the applicant did not request the CPUT to furnish its reasons for the decision not to award the tender to Ma-Afrika. The CPUT did not furnish any reasons for its decision in the answering papers. As it bore no onus, it was not required to. In its supplementary answering affidavit in case no. 4517/22, the CPUT listed a number of considerations that it would possibly have to take into account were the court to set aside the institution's cancellation of the tender and remit the matter to it for consideration afresh. It did so, however, not to indicate that any of those considerations had weighed with it when it made the decision to cancel, but only to demonstrate that it would be inappropriate for the court to grant the substitutionary relief prayed for by the applicant.

[63] As described earlier, the CPUT emphasised that various provisions in the tender invitation gave it the right to cancel the tender and also the right not to make an award to any tenderer. Capricious, arbitrary or unreasonable resort to those provisions would, offend against the CPUT's obligations to act reasonably and with procedural fairness. Testing whether its election to exercise any of those options was rational or not cannot be done, however, without insight into its reasons for acting in that way. It is for that very purpose that s 5 of PAJA gives any person whose rights have been materially and adversely affected by administrative action to request the administrator concerned to furnish written reasons for the action. It was clearly appreciated by the lawgiver that knowledge of the administrator's reasons for making a decision would be necessary in many cases for the subject to be able to establish that its right to administrative justice had been infringed and how to appropriately formulate a challenge.[34]

[34] Cf. *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* [2002] ZACC 2 (21 February 2002); 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 159 and *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T) at 630F-J, where Southwood J remarked '*The importance of reasons cannot be over-emphasised. They show how the administrative body functioned when it took the decision and in particular show whether that body acted reasonably or unreasonably, lawfully or unlawfully and / or rationally or arbitrarily.*'.

[64] In my view, this is such a case. The applicant did not have a right to be awarded the contract when the award to Baobab was rescinded. The mere fact that the applicant's tender was the only acceptable one out of the two that were submitted does not, by itself, establish that the CPUT's election to choose one of the contractually reserved options to cancel the tender rather than awarding the contract to the applicant was irrational. Provided that it acted reasonably in the circumstances, CPUT was entitled rather to cancel the tender and proceed with the intended procurement in terms of a fresh procedure. If its decision was one that an administrator in its position could reasonably have made, it would not be susceptible to being set aside on review. In order for the court to be able to make an assessment whether the decision was reasonable it would need to know the CPUT's reasons for choosing the course it did.

[65] The applicant's failure to adduce any evidence concerning the CPUT's reasons for making the decisions it did means that it has not established a case on its third ground of review. The averments in respect of the applicant's apprehension of bias or hostility on the part of the CPUT were speculative and did not compensate for the identified lacuna in its case.

[66] In the result, the application will be dismissed. In view of the essentially commercial basis for the proceedings, there is no reason why the costs should not follow the result.

[67] As to the undetermined costs in case no. 20599/21, it ordinarily happens that the costs in proceedings in which interim relief is granted *pendente lite* are held over for determination when the outcome of the principal proceedings has been decided; and that they then follow the result in the principal case. I see no reason why that approach should not apply in the current matter.

[68] An order will issue in the following terms:

1. The application in case no. 4517/22 is dismissed with costs, such costs to include the costs incurred in respect of the relief sought in Part A of the notice of motion.
2. The applicant in case no. 20599/21 is ordered to pay the first respondent's costs of suit.

ERIKSSON v HOLLARD INSURANCE CO LTD
in re HOLLARD INSURANCE CO LTD v CILLIERS

Authority to institute action on behalf of a client proved by means of a mandate agreement

Judgment given in the Gauteng Local Division, Johannesburg on 24 January 2023 by Strydom J

Hollard Insurance Co Ltd and six other plaintiffs instituted action against Eriksson and seven others for damages allegedly suffered pursuant to the terms of section 424(1) of the 1973 Companies Act. The eight defendants were directors of Insure Group Managers Limited ("IGML").

Eriksson, the sixth defendant, filed a rule 7(1) notice, in terms of which he disputed the authority of Edward S Classen & Kaka Attorneys ("ECKA") to act on behalf of the plaintiffs in this action. Notice was further given that unless ECKA complied with the notice, it could no longer act in the matter unless it satisfied the court that it was authorised so to act. No basis or grounds for the challenge to authority was provided nor was any such grounds stated in correspondence leading up to the notice.

Attached to a letter dated 25 January 2022, ECKA sent to the applicant's attorney, Brian Khan Inc ("BKI"), a mandate agreement, which, according to the letter, authorised ECKA to institute the action on behalf of the plaintiffs. ("the mandate agreement" or "mandate").

On 2 February 2022, ECKA formally responded to the rule 7(1) notice by presenting for filing, letters, resolutions and delegations of authority taken by the board of directors of each separate plaintiff. Seven documents were attached, including one on behalf of Guardrisk Insurance Company Limited and one on behalf of Guardrisk Life Limited. The latter was not a party to the action. Eriksson remained dissatisfied as to the authority of ECKA to act for the insurance companies as plaintiffs.

Eriksson contended that ECKA had failed to demonstrate that it had the necessary authority to act on behalf of the plaintiffs, in both the action proceedings as well as the present interlocutory proceedings, and that the documents provided by ECKA to date, ostensibly in support of its purported authority, raised more questions than it answered.

Eriksson applied for an order inter alia that the institution of the action be declared a nullity, alternatively that all further proceedings be stayed until such time as Edward S Classen & Kaka Attorneys had satisfied the court that they had the authority to institute the proceedings on behalf of the first to sixth plaintiffs in the action.

Held—

The mandate agreement did not provide authority to ECKA, provided by the plaintiffs in their capacity as creditors of IGML, to institute proceedings

against Eriksson. It served a different purpose at a stage when IGML was still in business. At that stage, the aim was to institute a claim on behalf of IGML against its former directors. Once the moneys were obtained, the creditors could have been paid. Consequently, the mandate agreement did not provide authority to ECKA to institute action on behalf of the plaintiffs against the directors of IGML. The creditors could have instituted action against the directors either before or after liquidation but the mandate envisaged a claim by IGML in its capacity as the client of ECKA. Thus, the mandate agreement failed to provide proof of authority to institute the current proceedings. For purposes of this application this fact adds to the factual matrix when the company resolutions and other evidence are considered. The mandate purportedly providing authority to ECKA to institute action on behalf of the creditor/shareholding companies. What it does show, on the face of the mandates, is that the current plaintiffs authorized ECKA to act on behalf of the same shareholders who became creditors of the defendants, including the sixth applicant, pursuant to the terms of section 424 of the 1973 Companies Act.

The authority of ECKA had been established and that the plaintiffs in the action against Eriksson authorized the institution of the action.

The application failed.

Advocate A. Subel and Advocate E. Larney appeared for the applicant
Advocate C.D.A. Loxton, Advocate P.F. Louw SC and Advocate N. Ndlovu appeared for the respondents

Judgment:

[1] This is a certified commercial matter in which the applicant has brought an interlocutory rule 7(1) application disputing the authority of the attorney acting for the plaintiffs.

[2] The six plaintiffs instituted action against the eight defendants for damages allegedly suffered pursuant to the terms of section 424(1) of the 1973 Companies Act. The eight defendants were directors of Insure Group Managers Limited ("IGML").

[3] The sixth defendant is the applicant in this matter (hereinafter referred to as "the applicant"). The applicant filed a rule 7(1) notice on 4 December 2021, in terms of which he disputed the authority of Edward S Classen & Kaka Attorneys ("ECKA") to act on behalf of the plaintiffs in this action. Notice was further given that unless ECKA complies with the notice, it may no longer act in this matter unless it satisfies the court that it is authorised so to act. No basis or grounds

for the challenge to authority was provided nor was any such grounds stated in correspondence leading up to the notice.

[4] ECKA was placed on terms to reply to the notice but they responded by pointing out that the rule 7(1) notice was filed out of time. The lateness of the notice was initially disputed but later accepted by the applicant. The plaintiffs were asked to condone the lateness of the applicant's notice, but such request was refused.

[5] Attached to a letter dated 25 January 2022, ECKA sent to the applicant's attorney, Brian Khan Inc ("BKI"), a mandate agreement, which, according to the letter, authorised ECKA to institute the action on behalf of the plaintiffs. ("the mandate agreement" or "mandate").

[6] On 26 January 2022, BKI replied as follows:

> 'The document that you have tendered as constituting your mandate – and which you presumably expect me to be satisfied with – is a document prepared by you, signed in counter-part and raises a myriad of questions – more than it answers – and so we intend to take whatever steps are necessary to procure that the rule 7(1) notice is actually given effect to and that you will need to establish your authority to the satisfaction of the Court.'

[7] ECKA, on 2 February 2022, formally responded to the rule 7(1) notice by presenting for filing, letters, resolutions and delegations of authority taken by the board of directors of each separate plaintiff. Seven documents were attached, including one on behalf of Guardrisk Insurance Company Limited and one on behalf of Guardrisk Life Limited. The latter is not a party to this action. This still left the applicant dissatisfied as to the authority of ECKA to act for the insurance companies as plaintiffs.

[8] This led to the current application, in which the applicant contends that ECKA has failed to demonstrate that it has the necessary authority to act on behalf of the plaintiffs, in both the action proceedings as well as these interlocutory proceedings, and that the documents provided by ECKA to date, ostensibly in support of its purported authority, raised more questions than it answered.

[9] It should be noted that the applicant also brought a joinder application in terms of which it seeks the joinder of ECKA as a seventh respondent to this rule 7 application. This application was not opposed but ECKA maintained that there was no need for its joinder.

[10] In this interlocutory application, the applicant has sought relief in the following terms:

> '1. joining the seventh respondent to the above action but only insofar as this application is concerned, alternatively to this application;
> 2.declaring that the Rule 7(1) notice has been validly delivered in accordance with the provisions of Rule 7(1) of the Uniform Rules of Court, alternatively that the late filing of the notice filed pursuant to the provisions of Rule 7(1) of the Uniform Rules of Court is condoned, further alternatively leave is granted to file the notice after the expiry of the 10 (ten) day period specified in Rule 7(1);
> 3.that the Notice of Bar filed on behalf of the Plaintiffs in the action on 25 January 2022 is set aside insofar as may be necessary;
> 4.that the institution of the action is declared a nullity, alternatively that all further proceedings be stayed until such time as Edward S Classen & Kaka Attorneys have satisfied the above Honourable Court that they have the authority to institute the proceedings on behalf of the first to sixth plaintiffs in the action;
> 5.that the respondents pay the costs of this application, jointly and severally, the one paying, the others to be absolved; and
> 6.further and/or alternative relief.'

[11] Rule 7(1) of the rules of this court provides as follows:

> '1. Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

[12] First issue for decision is what the effect of filing a rule 7 notice is, after the prescribed 10 day period, without leave of the court. In my view, this section should be interpreted to mean that a notice in terms of this rule, which is served out of time, will not prevent an attorney

from acting for a party from date of the late filing of this notice. Such sanction will only become effective after a court has given the objector leave to dispute the authority of anyone acting on behalf of a party. If leave is granted by court in relation to a notice already filed the sanction will operate from date of leave, alternatively, if a notice has not been previously filed form date of filing the notice after leave was granted.

[13] The use of the word '*whereafter*' makes it clear that in this case, ECKA was entitled to act and still is entitled to act on behalf of the plaintiffs until the court grants the applicant leave, on good cause shown, to dispute the authority of ECKA.

[14] Subsequent to the filing of the rule 7 notice, the applicant, in an email dated 17 January 2022, requested a reply to its notice by not later than 2 February 2022. On 19 January 2022, ECKA responded to this email and stated that the notice was served out of time and that the applicant was not able to challenge the authority of ECKA to act. BKI was not aware of the lateness but after it was pointed out to be the case by ECKA, it accepted that the notice was late and asked for ECKA to condone the lateness. ECKA was not prepared to do so but without assuming any duty or obligation and subject to a reservation of rights, ECKA made available a mandate agreement signed on behalf of the plaintiffs and on behalf of ECKA. Correspondence followed about whether the mandate authorized ECKA to act in this matter. BKI persisted that there was no mandate and stated that it will bring an application for an order that ECKA was not mandated by the plaintiffs to file the current action.

[15] On 2 February 2022, ECKA addressed a formal process/response to the rule 7(1) notice. Attached to the response were documents referred to as authority documents. BKI was not satisfied that these documents authorized ECKA to act on behalf of the plaintiffs.

[16] The situation which presented itself at that stage was that ECKA had not condoned the lateness of the rule 7(1) notice but now formally replied thereto by filing documents including resolutions. Previously, the mandate agreement was provided, which was not again referred to in the formal reply. The applicant then launched this application, inter alia, seeking condonation for the late filing of the rule 7(1) notice.

[17] A consequence of the late filing of the rule 7(1) notice is however that it did not prevent ECKA from acting on behalf of the plaintiffs and all acts performed as at date of this judgment remain valid. Only

after this court finds, if it is so inclined, that the authority of ECKA to act has not, to this court's satisfaction, been shown, then and thereafter would ECKA not be entitled to act further on behalf of the plaintiffs until such time that the court is satisfied with the authority of ECKA to act in the matter.

[18] It was argued on behalf of the plaintiffs that the application is incompetent in fact and in law and should be dismissed. This submission is underpinned by a general analysis of rule 7(1). It was argued that a consequence of the lateness of a rule 7(1) notice is that the only order which the court could make in terms of this rule, in response to an application for condonation, is to grant the challenger the opportunity to issue the notice.

[19] It was further argued that a specific feature and quirk of rule 7(1) is that it does not imply any interlocutory application to be made if it is properly applied. If due notice is given, the challenged attorney must approach the court and demonstrate his or her mandate to the court. The attorney is not a party to the principal proceedings and he or she does not approach the court as a party in adversarial proceedings. Instead, so the argument went, the attorney approaches the court for the court to consider the attorney's mandate. This process is of an inquisitorial nature and not adversarial.

[20] I do not agree with this interpretation. Rule 7(1) does not lay down the entire procedure to be followed by the party challenging the authority of a person acting for a party. When a party decides to challenge the authority and serve a rule 7(1) notice, a process is initiated. If the notice was timeously given, then the person whose authority was challenged will no longer be able to act in the matter. The challenged attorney will have to satisfy the court that he or she has the authority to represent the clients. This will ordinarily be done by filing a signed mandate agreement and other authority documents. If, after the filing of the authority documents, the dispute is not resolved, then the court will have to make a determination. How the court will get involved to make a determination is not procedurally set out in the rule. In an action, which is not on trial yet, a judge would not even be aware of the challenge.

[21] The route to follow in resolving this disputed authority can differ, depending on the circumstances. If an attorney can no longer act, then that attorney can, by way of notice or otherwise, for instance orally during a trial, ask that the court makes its determination. In a case

where the authority continues to be in place as a result of a late notice for instance, the objector can apply to court to make a determination. The court will, only at this stage, become involved. If the application is not opposed, a court will then consider the application on an unopposed basis and make an order, either that the court is satisfied with what was produced by the attorney to prove his or her authority to act for a party, or not. If opposed, then the court will have to make its ruling after a consideration of the opposed interlocutory application and after hearing the matter. The parties can argue the matter to persuade the court whether it should be satisfied that the attorney has shown that he or she has authority to act on behalf of clients. Consequently, depending on the process followed, the process can become adversarial.

[22] Further, I am not in agreement with the submission made on behalf of ECKA and the plaintiffs, that the only order which the court could make in terms of rule 7(1) in response to an application for condonation, is to grant the challenger the opportunity to issue the notice. Such an approach would just lead to an escalation of costs. Where I do agree with the submissions on behalf of the plaintiffs is that the prayer to nullify the institution of the action, should the court find that ECKA has not been mandated, is not an outcome contemplated under rule7(1).

[23] Rule 7(1) does not set out what evidential material should be placed before court by an attorney to satisfy the court that he or she has been mandated to represent clients, in this instance, the plaintiffs. It was argued on behalf of the plaintiffs that *'satisfies'* does not imply a burden of proof. In my view, a court will reasonably determine whether it is satisfied with the material placed before it to rule whether a mandate has been shown. The court will act subjectively, but as a reasonable judge which brings into the equation an objective yardstick. One of the reasons for a challenge to the authority of an attorney is not to be faced with a situation where an unsuccessful plaintiff, faced with a cost order, denies the authority of the attorney who instituted the proceedings. In my view, a court will consider the documents filed as proof of authority and consider whether, on a balance of probabilities, the attorney was mandated or not.

[24] In a case where an attorney represents a corporate entity, a court would ordinarily require a signed mandate from an authorized representative of the entity in which document, an attorney is

mandated to institute legal proceedings against a defendant. To establish the authority to provide a mandate, a court will require the resolution of the entity, which can either provide the representative with a general authority or a specific authority to appoint attorneys to institute proceedings against a defendant or defendants. An example of a specific authority would be where an entity has resolved to appoint a specific attorney to institute legal proceedings against a mentioned defendant. A party can challenge the mandate and/or the resolution. A court may, considering all facts and circumstances, be satisfied that authority has been shown even in a case of imperfect documentation being presented.

[25] The rule 7(1) notice in this matter, on the face of it, followed the wording of the rule and did not provide any reasons or grounds for disputing the authority. Further, there was no distinction drawn between mandates and resolutions of legal entities authorizing persons to provide mandates. In my view, it can now be accepted that a challenge to authority in terms of this rule will include a challenge to the authority of the person acting on behalf of a legal entity or trust. What the applicant challenged in this application are the mandates provided to ECKA as well as the purported company resolutions. I am in agreement with the finding in *ANC Umvoti Council Caucus and Others v Umvoti Municipality*[1] that the resolution type cases should also be dealt with in terms of rule 7(1) for the simple reason that a mandate given by unauthorized representatives should not stand scrutiny, unless there are other compelling reasons why the mandate satisfies a court that authority does exist. In this regard, a court will look at the evidence before it and consider probabilities holistically to come to its conclusion.

[26] It was argued that a prior dispute should have arisen between the respective parties concerning a mandate and a resolution, before rule 7(1) could be invoked. This argument, advanced by Mr Louw, appearing for the plaintiffs, is underpinned by the reference to *'be disputed'* in this rule. It was argued that the verb '*dispute'* connotes the need for an *a priori* position on the side of the applicant. On a plain reading of the rule, it is my view that the authority to act can be disputed without a prior dispute having arisen. When a party wants to dispute authority to act, the only requirement is to file the notice. The

[1] 2010 (3) SA 31 (KZP) par 28.

rule makes no mention whatsoever of a pre-existing dispute. If, at a later stage, during the consideration of the challenge, a court finds that the challenge was frivolous or mala fide, then an appropriate cost order can be made against a party or even against an attorney who was responsible for filing the notice. A further remedy, in a case where condonation is sought for filing the notice outside the 10 day period, would be not to grant such condonation.

[27] The rule does not require that the grounds for the notice be mentioned in the notice. In my view, it is nothing more than a challenge to the authority, which may even be based on a suspicion of some kind that the attorney does not have the necessary mandate to act or that the company never resolved that action must be taken against a party. Some of the grounds for disputing these issues may only become known to the challenger after proof is provided. This is the situation in this matter and the court must now decide whether it is satisfied that the authority to act has been shown by the attorney. In coming to this conclusion, the court kept in mind that pre-1987, a mandate to act by an attorney had to be filed in every action. This would mean that regardless of a dispute, the mandate was required. Now it can be requested, in my view, without a prior dispute which presented itself. If this is not the situation, it can lead to an anomaly. If a party has no reason to dispute authority but continues to do so by filing a rule 7(1) notice, and subsequently, it turns out that the attorney is not in a position to satisfy the court that he or she has authority to act, can a challenged party then argue that the notice was not valid as no prior dispute manifested itself? It would lead to an absurdity.

[28] The procedure envisaged in rule 7(1) is a quick one which, in normal cause, should be raised within 10 days after a party becomes aware of an attorney acting for a party. At such stage, no dispute might have arisen. There is no time for the exchange of correspondence. Similarly, proof of authority should be readily available to be produced. The rule does not refer to prior disputes but merely provides that authority for anyone acting *'may. . . be disputed'* . The rule does not provide that authority can only be disputed under certain circumstances.

[29] On behalf of the applicant, it was argued that when the authority or agency of a person is challenged, it is not for the agent to simply proclaim that he or she is authorised to act, but for proof to be produced that the principal has so authorised the agent. I agree with

this submission. Proverbially, you cannot pull yourself up by your own bootstraps.

[30] ECKA provided a mandate agreement and further authority documents. The latter, in response to the rule 7(1) notice and the former as an attachment to a letter. The parties referred to these documents and the applicant launched an attack against all the documents. The court will consider all the documents holistically, together with other evidence, to determine whether it is satisfied that ECKA has the authority to act on behalf of the plaintiffs.

[31] The first document the court will consider is the mandate agreement. On the face of, it is a bilateral agreement signed by parties to the agreement. On behalf of applicant, it was described as a piece of paper which purports to be a mandate being provided, purportedly signed by or on behalf of the principal that provided the mandate. The question arises whether the signatories to this mandate were authorized to bind their principals. To ascertain this, so it was argued, a further requirement needed to be met, i.e. the resolutions authorising the persons who signed the mandates from which it could be deducted that these representatives were properly authorised by the principal. I agree with this submission, which was formulated in *Glofinco v Absa Bank Ltd t/a United Bank*[2] as follows:

> '[13] A representation, it was emphasised in both the NBS cases, supra, must be rooted in the words or conduct of the principal himself and not merely in that of his agent (NBS Limited v Cape Produce Co (Pty) Ltd, supra at 411 H-I).'

[32] It was submitted that the documents and evidence placed before the court by ECKA amounted to no more than a '*mere assurance'* by ECKA itself that it has the authority to act. It was submitted that these documents should not satisfy this court that ECKA had authority to act in this matter. I am not in total agreement with this argument as the mandate is a bilateral agreement with signatures which purport to be signature of representative of the plaintiffs.

[33] The applicant averred that the mandate agreement was defective and remained as such and/or unexplained to date of the application for the following reasons:

[2] 2002 (6) SA 470 (SCA) para 13.

33.1It contains illegible signatures by unidentified signatories purportedly on behalf of the plaintiffs;

33.2The signatories' position within the relevant plaintiffs' companies are not identified or reflected;

33.3It does not confirm on what basis and pursuant to what enabling resolutions or other enabling documents the signatories were authorised to represent their principals;

33.4There is no proof of confirmation that a number of important conditions precedent, which were required to be met to give the mandate agreement effect, had been fulfilled;

33.5It refers to a company called IGML as the '*client*' of ECKA, and not any of the plaintiffs cited in the action proceedings. IGML was liquidated on 21 June 2021 and the liquidator of IGML is not a party to the action proceedings;

33.6It refers to a report produced by the curator of IGML styled *'reportable irregularities dated 7 September 2020'*, without attaching the report, which, according to the applicant, results in there being no rational connection between the report and the action proceedings having been instituted.

[34] On 2 February 2022, ECKA provided the applicant with authority documents. These authority documents comprised of various purported (as was referred to by the applicant) resolutions and ancillary documents, including Delegation of Authority (DoA) ostensibly given to a number of representatives of the plaintiffs.

[35] The true dispute between the parties is whether the mandate agreement, the authority documents and confirmatory affidavits filed on behalf of the plaintiffs, read together, are sufficient to establish ECKA's authority. The applicant disputed this.

[36] On behalf of the applicant, the defects in the authority documents which, according to the applicant, remained unremedied and/or unexplained to date of the application were summarised to be as follows:

36.1A document purporting to be a DoA, when it is in fact merely a written confirmation that a DoA exists;

36.2A document confirming the authority of an employee/representative who, ex facie the document, does not have authority to appoint attorneys of record, such as ECKA;

36.3Documents that refer to, and/or depend entirely on the validity of other documents, which documents have not been provided;

36.4The respondents' and/or ECKA's failure to provide necessary and valid board resolutions and/or minutes;

36.5Undated documents or documents and/or resolutions dated after the institution of the action proceedings, without ratifying the actions taken by ECKA;

36.6Unsigned documents and/or documents purporting to be resolutions;

36.7Documents that have been signed by only a number of board members, without any explanation regarding the omission of the remaining board members' signatures;

36.8Documents that authorise the institution of legal proceedings based on an entirely different cause of action than the cause of action relied upon by the plaintiffs in the action proceedings.

[37] In its argument that these documents should not satisfy the court that ECKA has the necessary authority to act on behalf of the plaintiffs, reliance was placed on the dicta of Satchwell J in the unreported matter of *PMG Mining (Pty) Ltd and Another v JD Chen and others*.[3] In this matter, it was found that the documents provided failed to constitute all the *'pieces of the jigsaw puzzle*' to establish the authority of the attorney. Part of this '*jigsaw puzzle'* would be to receive documents that satisfy a court that:

37.1The *'housekeeping arrangements'* or *'internal compliance'* for the plaintiffs have been satisfied; and

37.2Consequently, ECKA was duly authorised to institute action proceedings on behalf of the plaintiffs.

[38] The court will now continue to consider the mandate provided to ECKA to institute proceedings against the applicant. In ECKA's endeavour to prove authority, it filed the mandate agreement and company resolutions. Apart from these documents filed, ECKA annexed to its answering affidavit, the supporting and confirmatory affidavits '*deposed to by duly authorized representatives of each of the insurance companies.'*

[3] (Case No. 2016/19065X (GJ)

[39] On perusal of the mandate agreement, it becomes clear that the *client* referred to in the mandate agreement is IGML, an entity which was liquidated after the mandate agreement was signed. The mandate was provided by the shareholder companies of IGML (the plaintiffs) to ECKA to take legal action on behalf of IGML against directors (including the applicant) and others arising from the conduct of the affairs and business of IGML prior to 14 September 2018. One of the conditions to the mandate before legal proceedings were instituted was to obtain authority from shareholders, the majority of which are the plaintiffs in the action and respondents in this application. The mandate agreement was purportedly signed by representatives of the shareholding companies mentioned in the mandate agreement.

[40] The plaintiffs in the action against applicant are creditors of IGML who also happen to be the majority shareholders of the IGML. The claim against the applicant as former director of IGML, is to hold him liable for payment of the debt of IGML owing to the plaintiffs.

[41] The mandate agreement does not provide authority to ECKA, provided by the plaintiffs in their capacity as creditors of IGML, to institute proceedings against applicant. It served a different purpose at a stage when IGML was still in business. At that stage, the aim was to institute a claim on behalf of IGML against its former directors. Once the moneys were obtained, the creditors could have been paid. Consequently, the mandate agreement does not provide authority to ECKA to institute action on behalf of the plaintiffs against the directors of IGML. The creditors could have instituted action against the directors either before or after liquidation but the mandate envisaged a claim by IGML in its capacity as the client of ECKA. Thus, the mandate agreement failed to provide proof of authority to institute the current proceedings. For purposes of this application this fact adds to the factual matrix when the company resolutions and other evidence are considered. The mandate purportedly providing authority to ECKA to institute action on behalf of the creditor/shareholding companies. What it does show, on the face of the mandates, is that the current plaintiffs authorized ECKA to act on behalf of the same shareholders who became creditors of the defendants, including the sixth applicant, pursuant to the terms of section 424 of the 1973 Companies Act.

The authority documents

Hollard

[42] An undated letter signed by Ms Zinhle Mariani, in her stated capacity as Hollard Group General Counsel and in accordance with her mandate issued in terms of the Hollard Group Delegation of Authority, was provided by ECKA in which she approved the institution of legal proceedings against former directors and further appointed ECKA as attorneys to pursue such claims. A further letter, dated 25 May 2021, was provided, signed by the Group Company Secretary of Hollard in which it was confirmed that the Board of Hollard, from 6 December 2019, authorized Zinhle Mariani in respect of any legal proceedings to initiate and defend actions and applications. She could represent Hollard and sign documents and affidavits. She could delegate her authority.

[43] The relevant resolutions were neither filed nor confirmed under oath. As far as Hollard is concerned, a confirmatory affidavit was deposed to my Ms Magasela, who described herself as the Head of Legal and Governance of the Hollard Group, reporting to the Group General Counsel, whom she identified as Ms Zinhle Mariani. She stated that Ms Mariani approved the institution of the action in accordance with the Hollard Group Delegation of Authority BK 18.5, which was confirmed under oath by Ms Magasela, provided authority to the Group General Secretary to institute litigation on behalf of Hollard. This confirmatory affidavit went beyond mere confirmation as to what was stated in the answering affidavit of Mr Classen. It was not explained why Ms Zinhle Mariani did not depose to a confirmatory affidavit herself, but Ms Magasela confirmed her authority.

[44] The court must satisfy itself as to the authority of anyone acting on behalf of a party. In its consideration, a court will be entitled to consider the contents of confirmatory affidavits and not only the documents filed prior to the application.[4] As far as Hollard is concerned, the Head of Legal & Governance of the Hollard Group confirmed under oath that Ms Zinhle Mariani approved the institution of the action and the appointment of ECKA as attorneys to act on behalf of Hollard.

[45] ECKA had to satisfy the court that the firm is authorized to represent Hollard. This, ECKA could do by adducing any acceptable

[4] See: *Johannesburg City Council v Elesander Investments (Pty) LTD and Others* 1979 (3) SA 1273 (T) at 1279D-H.

form of proof and not necessarily by filing a written power of attorney.[5] Each case should be considered on its own merits and it is for the court to decide if enough had been placed before it to warrant the conclusion that it was the plaintiff that was litigating and not some unauthorized person on its behalf.[6]

[46] The applicant has placed extensive reliance on the decision of Satchwell J in the unreported matter of *PMG Mining (Pty), supra.* According to this decision, the applicant was entitled to receive documents that would satisfy the court that the '*housekeeping arrangements'* or '*internal compliance'* of the respondents had been satisfied. I am of the view that there is no need to file every resolution and minutes of meetings before a court will be satisfied as to authority of a person to act on behalf of a legal entity. The court will take a more holistic view and consider probabilities.

[47] In *Unlawful Occupiers*, *School Site v City of Johannesburg,*[7] Brand JA stated as follows in relation to an alleged unauthorized application:

> 'After all, there is rarely any motivation for deliberately launching an unauthorized application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to supplementary affidavits followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? The question can, in my view, be answered only in the negative.'

[48] In this case, the same question can be asked as to whether it is conceivable that the largest insurance companies in the country, who allege that the applicant is liable to them for an enormous amount of money, would not authorize their attorney, who was acting on their behalf prior to the liquidation of IGML, to act for them in pursuing a

---

[5] See: *Elesander* above*; Administrator, Transvaal v Mponyane and Others* 1990 (4) SA 407 (W) at 409F-H; *Tattersall and Another* v *Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228E-J.

[6] See: *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) 347 (C) at 352A-B.

[7] 2005 (4) SA 199 (SCA). See headnote at 200.

claim against the applicant? The court will consider the authority of ECKA in light of this fact. Moreover, the applicant had mentioned no apparent reason why he doubted the authority of ECKA. Clearly, it was a shot in the dark because after the documents were provided, the applicant, through its attorneys, BKI, maliciously scrutinized the documents for shortcomings in an attempt to convince the court that it should not be satisfied about the authority of ECKA and also not be satisfied that the mentioned officers of Hollard could bind it.

[49] There are shortcomings in the documents, which render them less than perfect. For instance, the document at BK 18.3 is undated. This is of no consequence. The document headed *Delegation of Authority Mandate* refers to a DOA which was not attached. This document was separately provided and marked BK 18.5.

[50] In my view, the document at BK 18.4 was prepared by the Group Company Secretary of the Hollard Group to reflect the authority of the Group General Counsel which is Ms Zinhle Mariani. Her position and authority was confirmed under oath by Ms Magasela.

[51] The court is satisfied that ECKA was duly authorized to act on behalf of Hollard in its claim against applicant.

SANTAM

[52] The document, BK 18.6, is a document of Sanlam Limited, headed: *GENERAL AUTHORITY BY CEO IN ACCORDANCE WITH DELEGATED POWERS BY THE SANLAM BOARD.* The CEO of Santam authorized the action proceedings against, inter alia, the applicant, and also appointed ECKA. This document was signed by the CEO on 2 February 2022.

[53] The document marked BK 18.7 is a delegation of authority and in terms of this document, the CEO was authorized to institute legal proceedings. Moreover, the Chief Financial Officer of Sanlam Ltd, Mr Henderik David Nel, confirmed under oath that the CEO, Ms Lize Lambrechts, executed the document appearing as BK 18.6.

[54] The court is satisfied that Sanlam Limited authorized the litigation against the applicant and that ECKA was duly appointed to represent it.

Bryte Insurance Company

[55] Considering what has been stated hereinabove about the improbability of unauthorized litigation in a matter of this magnitude, and the documents filed on behalf of Bryte, the court is satisfied that Bryte duly authorized the action against the applicant. The documents

which were provided included a resolution of the board of directors at BK 18.8 and at BK 18.9 as well as the voting results concerning the institution of action against applicant and others. Four directors voted in favour of instituting action against applicant. The resolution at BK 18.8 makes it clear that ECKA was mandated to act on behalf of Bryte.

[56] A confirmatory affidavit was filed deposed to by Mr Wynand Louw, the Head: Legal and Compliance of Bryte in which he specifically confirmed that the board of directors adopted the resolution, appearing as BK 18.88 and BK 18.9 which authorized the institution of the action on behalf of Bryte and that it appointed ECKA to appear on its behalf.

[57] Considering all the evidence, the court is satisfied that the authority of ECKA has been established.

Guardrisk Insurance Company Limited

[58] I agree with the submissions made on behalf of Guardrisk and ECKA that the latter was authorized to act on behalf of Guardrisk. According to BK 18.11 and BK 18.13, a directors meeting was held on 27 May 2021 and it was resolved to institute such proceedings as would be necessary to protect Guardrisk's interest with regards to the IGML matter. On 27 January 2022, the board of directors passed a resolution to the effect that action proceedings be instituted against the directors of IGML, including the applicant and that ECKA be appointed as attorneys. Mr Botha, a director of Guardrisk, was authorized to present the company in any proceedings.

[59] A confirmatory affidavit was filed deposed to by Mr Lourens Johannes Botha, a director of Guardrisk, in which he, as a witness, specifically confirmed that Guardrisk's board of directors adopted the resolution, appearing as BK 18.10 and BK 18.11, which authorized the institution of the action and the mandate of ECKA.

[60] The court is satisfied that authority pursuant to the terms of rule 7(1) was established.

Old Mutual

[61] BK 18.14 is a resolution by the directors of the company to institute action against the directors of IGML, including applicant, and to appoint ECKA as attorneys and MR Pedra as a representative for Old Mutual.

[62] The court already found that a court can be satisfied about the authority to institute legal proceedings without all resolutions and delegations of authority being filed, especially in a case where no

specific point had been raised regarding authority before a rule 7(1) challenge was filed. In the case of Old Mutual, sufficient proof of authority to satisfy this court was filed. The confirmatory affidavit of Mr David Pedra, the Executive: Outsourced Business Solutions Retail of Old Mutual, was filed wherein he confirmed that Old Mutual adopted a resolution, BK 18.14, authorizing the institution of the action on behalf of Old Mutual and the appointment of ECKA to act on behalf of Old Mutual against the applicant. It is highly unlikely and improbable that an attorney would go on a frolic of his own to institute an action without being mandated by corporate entities. Moreover, it is improbable that corporate entities, which aver that huge sums of moneys due to them were unlawfully not paid over, would not pursue such claim as against the alleged wrongdoers.

New National Assurance Company Limited

[63] The court is satisfied that the extract of a resolution, BK 18.15, passed by the directors of the company on 28 August 2020, provided authority to institute an action against applicant and that ECKA be appointed as attorneys to pursue this claim. This resolution was passed before the institution of proceedings.

[64] A confirmatory affidavit was deposed to by Mr Kalim Muhammad Rajab, the Managing Director of New National, in which he specifically confirmed that New National's board of directors adopted a resolution authorizing the institution of the action against applicant and the appointment of ECKA. The court is satisfied that the required authority has been established.

[65] In conclusion, it is the view of the court that the plaintiff insurance companies have satisfied this court that they authorized the action against applicant and that ECKA has also satisfied the court that it was duly authorized to appear on behalf of the plaintiffs.

Condonation

[66] Despite the finding of the court on the merits of the rule 7(1) notice, the court will grant the applicant the required condonation for the late filing of the notice. The notice was only one day late and the delay was explained. Moreover, ECKA replied to the notice and the interest of justice required a consideration of the authority of the relevant parties to have instituted the action.

Costs

[67] It was argued that the entire challenge of authority was an abuse of process designed to frustrate the plaintiffs in the advancement of

their action. The court already ruled that the rule 7(1) challenge to authority can be pursued without any prior specific reason for believing that an attorney does not act with authority. Consequently, the route which was followed by the applicant and BKI cannot be labelled as an abuse of the process. Costs should however follow the result and the costs consequent upon the employment of two counsel, including one senior counsel, was warranted.

[68] The following order is made:

68.1 Condonation is granted to the applicant for the late filing of the Rule 7(1) notice.

68.2 The seventh respondent is joined in this application.

68.3 The applicant's application is dismissed with costs, including the costs of one senior and a junior counsel.

68.4 The court is satisfied that the authority of ECKA has been established and that the plaintiffs in the action against the applicant authorized the institution of the action.

ENFORCED INVESTMENTS (PTY) LTD v VERIFIKA INC

Once there is an event of default, there is no duty on a creditor to notify its debtor that it intends to call up its security as one of the options available to it.

Judgment given in the Supreme Court of Appeal on 25 January 2023 by Salie AJA (Ponnan, Makgoka and Gorven JJA and Nhlangulela AJA concurring)

Torres sold 50% of her shareholding in Verifika Inc to Laferla. Laferla was then appointed as director of Verifika and although Torres resigned as a director of Verifika, she remained a signatory on its bank accounts. Three years later, on 6 June 2019, Torres sold the remaining 50% of her shares in Verifika to Laferla for the sum of R2m. Laferla paid a deposit of R100 000. On the same date, Enforced Investment (Pty) Ltd, represented by the third appellant, Woodnutt, lent and advanced an amount of R1.9m to Verifika.

Clause 5 of the Loan and Repayment Agreement concluded on 6 June 2019 between Enforced, as lender, and Verifika, as borrower, provided that Laferla ceded and assigned all right title and interest in the Security to Enforced Investments Pty Limited as security for the loans. Clause 7 provided that Verifika was to repay the Loan Principal and interest to Enforced in accordance with a Payment Schedule set out in Appendix 2. Clause 11 provided that an event of default would occur if Verifika failed to pay to Enforced any amount becoming payable by it strictly on due date, and failed to remedy such default within three business days of written demand. If an event of default occurred Enforced would be entitled, without notice to Verifika to accelerate or place on demand all amounts owing under the agreement, so that all such amounts would immediately become due and payable, and Enforced could call up the Security.

On 8 August 2019, Woodnutt, on behalf of Enforced, personally delivered by hand to Verifika a demand for payment of arrears Interest of R32 343.19. Enforced made further written demands on 18 October 2019 and 24 January 2020 respectively, claiming payment of the arrear interest. On 28 January 2020, Enforced called up its security by entering Torres' name in Verifika's securities register and she was appointed a director of Verifika. On 31 January 2020, Enforced sent a letter of demand to Verifika claiming payment of the full amount due in terms of the loan agreement. Laferla made his first payment of arrear interest on 24 February 2020. Woodnutt was appointed as a director of Verifika on 10 March 2020. On 11 March 2020, a special resolution was passed by Verifika, and signed by Torres, for the voluntary winding up of Verifika on the basis that it was insolvent.

Verifika contended that the breach notices were defective as they were not clear and unequivocal as to the consequences of a failure on their part to

perform timeously. Its argument was that if cancellation was intended, it ought to have been expressed in the notice.

Held—

The question was whether any of the three demands triggered the entitlement of Enforced to claim the acceleration of all amounts and to call up the security.

Once there was an event of default, there was no duty on Enforced to notify Verifika that it intended to call up the security as one of the options available to it. What Enforced conveyed was not an intention to enforce a *lex commissoria*, but an indication that there was a breach and a demand for payment of the arrears. Three business days after this written demand, if the breach was not remedied, an event of default occurred. Accordingly, Enforced became entitled to accelerate payment of all amounts owing and to call up the security in terms of clause 11.2 of the loan agreement. An event of default had occurred inasmuch as no interest had been paid by Verifika between the advance date, 6 June 2019, and 24 February 2020. The decision to accelerate payment and perfect the security was taken by Enforced on 28 January 2020. Verifika only paid the arrear interest on 24 February 2020. By then the security had been perfected and the total amount, including interest, had become due.

Once the first written demand was valid, Enforced could perfect the security on 28 January 2020 and accelerate payment of the amounts outstanding, as it had done. Upon the failure by Verifika to pay the arrear interest within three business days of the first written demand, Enforced became entitled, in terms of the provisions of the loan agreement, to accelerate payment of the full amount then owing and to call up its security without further notice.

Advocate S Burger SC and Advocate S Georgiou instructed by Hahn & Hahn Attorneys, Pretoria, appeared for the appellant
Advocate C Georgiades SC and Advocate R Bosman instructed by Messina Incorporated, Johannesburg, appeared for the respondent

Salie AJA:

[1] The second appellant, Fatima Pereira Torres (Ms Torres), was formerly the sole shareholder of the first respondent, Verifika Incorporated (Verifika). On 18 March 2016, Ms Torres sold 50% of her shareholding in Verifika to the second respondent, Bernard John Laferla (Mr Laferla). Mr Laferla was then appointed as director of

Verifika and although Ms Torres resigned as a director of Verifika, she remained a signatory on its bank accounts. On 6 June 2019, Ms Torres sold the remaining 50% of her shares in Verifika to Mr Laferla for the sum of R2 million. Mr Laferla paid a deposit of R100 000. On the same date, the first appellant, Enforced Investment (Pty) Ltd (Enforced), represented by the third appellant, John Robert Woodnutt (Mr Woodnutt), lent and advanced an amount of R1.9 million to Verifika. The purpose of the loan was to enable Verifika to expand its business operations. It is common cause, however, that Mr Laferla misappropriated the R1.9 million, which he used to pay Ms Torres for her shareholding in Verifika. She was however not aware of this when the payment was made to her. As security for the loan, Mr Laferla ceded his shareholding in Verifika to Enforced.

[2] This appeal centres on the legal effect of any one of three breach notices sent by Enforced to Verifika in terms of the Loan and Repayment Agreement (the loan agreement) concluded on 6 June 2019 between Enforced, as lender, and the first respondent, as borrower.

[3] The relevant provisions of the loan agreement are clauses 5, 7 (read with appendix 2) and 11. They provide:

> '5 CESSION
>
> 5.1 Laferla hereby cedes and assigns all right title and interest in the Security to Enforced Investments Pty Limited as security for the loans.
>
> 5.2 Upon signature hereof Laferla will deliver to the company secretary of Enforced Investments Pty limited the following:
>
> 5.2.1 Signed and undated share transfer forms for the Security.
>
> 5.2.2 The share certificates in respect of the Security.
>
> 5.2.3 His written and undated resignation as a director of Verifica Inc.
>
> 5.3 Laferla upon signature hereof agrees to the company secretary giving transfer of the security from his name into the name of Enforced Investments Pty Limited or its nominee in the event of a default as set out in paragraph 11 below.
>
> . . .
>
> 7LOAN: INTEREST AND PRINCIPAL REPAYMENTS

7.1 For each Interest Period the Loan Principal shall accrue interest at the Loan Interest Rate. The aforesaid interest shall:-
7.1.1 accrue on a day-to-day basis; and
7.1.2be calculated on the actual number of days elapsed and on the basis of a 365 (three hundred and sixty five) day year, irrespective of whether or not the applicable year is a leap year.
7.2 The Borrower shall repay the Loan Principal and interest to the Lender in accordance with the Payment Schedule set out in Appendix 2.
11EVENTS OF DEFAULT
11.1 An Event of Default shall occur if any of the following events, each of which shall be several and distinct from the others, occurs (whether or not caused by any reason whatsoever outside the control of the Borrower)
11.1.1the Borrower fails to pay to the Lender any amount which becomes payable by it pursuant to this Agreement strictly on due date, and the Borrower fails to remedy such default within 3 (three) Business Days of written demand;
11.2 If an Event of Default occurs the Lender shall be entitled, without notice to the Borrower accelerate or place on demand all amounts owing by the Borrower to the Lender under this Agreement, whether in respect of principal, interest or otherwise so that all such amounts shall immediately become due and payable, and call up the Security.'
Appendix 2 reads:
'PAYMENT SCHEDULE
1 The Loan is repayable as follows:
Years one and two
R500 000 per annum
Year three
R1 000 000
payable at each year end.
2 Interest payable monthly on the outstanding balance.'

[4] By 30 June 2019, interest in the amount of R14 054.79 was due and payable by Mr Laferla to Enforced in terms of the loan agreement. This amount had escalated to R32 343.19 by 31 July 2019 and led to the first letter of demand on 8 August 2019. On that date, Mr Woodnutt, on behalf of Enforced, personally delivered by hand to

Verifika's chosen *domicilium citandi et executandi* the following letter:

> 'Arrears Interest payment: R32 343.19
>
> The foregoing amount remains unpaid and needs to be settled immediately in respect of your loan to Enforced Investments (Pty) Ltd. Please note that in terms of the loan agreement any failure to pay is an act of default. For ease of reference the following amounts, based upon current interest rates are due and payable at each month end.
>
> . . .
>
> Please ensure that the arrears are settled immediately and that all future payments are made on due date.'

[5] Enforced made further written demands on 18 October 2019 and 24 January 2020 respectively, claiming payment of the arrear interest. On 28 January 2020, Enforced called up its security by entering Ms Torres' name in Verifika's securities register and she was appointed a director of Verifika. On 31 January 2020, Enforced sent a letter of demand to Verifika claiming payment of the full amount due in terms of the loan agreement. Mr Laferla made his first payment of arrear interest on 24 February 2020. Mr Woodnutt was appointed as a director of Verifika on 10 March 2020. On 11 March 2020, a special resolution was passed by Verifika, and signed by Ms Torres, for the voluntary winding up of Verifika on the basis that it was insolvent. At that time, it appeared to Mr Woodnutt and Ms Torres that Verifika did not have sufficient funds to pay its liabilities because unbeknown to them, Mr Laferla had in fact been depositing Verifika's funds into a separate bank account.

[6] This breakdown in the relationship between Ms Torres and Mr Woodnutt, on the one hand, and, Mr Laferla, on the other, led to several applications and counter-applications being launched. On 25 February 2020, Verifika and Mr Laferla brought an urgent application under case number 6183/2020 before the Gauteng Division of the High Court, Johannesburg (the high court) against Enforced and Ms Torres, seeking interim relief pending a final order that the entire shareholding of Verifika be restored to Mr Laferla and that the cession activated by Enforced, in terms of the loan agreement, be set aside (the main application). The main application was postponed to 4 May

2020, but an interim order issued by consent on 11 March 2020, which inter alia reinstated Mr Laferla as a director of Verifika.

[7] The main application was opposed by Enforced and Ms Torres, who also brought a wide-ranging counter-application under the same case number on 4 May 2020. An urgent application by Verifika and Mr Laferla followed on 29 June 2020 under case number 14799/2020. They sought to set aside the resolution to place Verifika in voluntary liquidation (the liquidation application). That application prompted a conditional counter-application on 3 July 2020 by Ms Torres and Mr Woodnutt, seeking the final winding up of Verifika. On 14 July 2020, an interim order was granted by the high court (per Yacoob J) setting aside the voluntary liquidation of Verifika.

[8] The two applications led to a consolidated hearing before Dippenaar J in the high court. On 18 January 2021, the learned judge issued the following order:

> 'Case number 14799/2020
>
> [1] The first and second respondents' taking possession of the second applicant's shareholding in the first applicant is set aside;
>
> [2] The voluntary winding up of the first applicant is set aside;
>
> [3] The fourth respondent is directed to reinstate the first applicant to an enterprise status of *"in business";*
>
> [4] The second respondent's appointment as a director of the first applicant is set aside;
>
> [5] The first and second respondents are interdicted and restrained from interfering with or altering the status of the first applicant;
>
> [6] The first and second respondents' counter-application is dismissed with costs;
>
> [7] The first and second respondents are directed to pay the costs of this application jointly and severally, the one paying the other to be absolved, including the costs of two counsel where employed.
>
> Case number 6183/2020
>
> [1] The first and second respondents' taking possession of the second applicant's
> shareholding in the first applicant is set aside;
>
> [2] The second applicant's entire shareholding in the first applicant is restored.

> [3] The first and second respondents' counter application is dismissed with costs, including the costs of two counsel
> [4] The first and second respondents are directed to pay the costs of the application jointly and severally, the one paying, the other to be absolved, including the costs of two counsel where employed.'

[9] The appeal by Enforced, Ms Torres and Mr Woodnutt (as the first to third appellants respectively), with the leave of this Court, is directed at paragraphs 3 and 4 of the order issued under case number 6183/2020 and the costs order in paragraph 6 that followed upon the dismissal of their counter-application under case number 14799/2020.

[10] The question therefore in the appeal under case number 6183/2020, as the high court recognised, is whether any of the three demands triggered the entitlement of Enforced to claim the acceleration of all amounts and to call up the security. The respondents contended that the breach notices were defective. Inasmuch as they were not clear and unequivocal as to the consequences of a failure on their part to perform timeously. Their argument was that if cancellation was intended, it ought to have been expressed in the notice.

[11] Dippenaar J's reasons for rejecting reliance on the first demand were:

> 'Even if it was not necessary to specify a time. In the notice, as I have concluded, the applicants were not notified of the consequences if the breach was not remedied. The letter further did not unequivocally and unconditionally state Enforced's intention if the breach was not remedied. In those circumstances, I conclude that the first demand was not in compliance with the *lex commissoria* and was defective.'

[12] The reasoning of the learned judge, with respect, does not withstand scrutiny. Once there was an event of default, there was no duty on Enforced to notify Verifika that it intends to call up the security as one of the options available to it.[1] Importantly, what

[1] See Winter v South African Railways and Harbours 1929 AD 100 at 105-6; Chesterfield Investments (Pty) Ltd v Venter 1972 (3) SA 777 (T) at 780F-H.

Enforced conveyed was not an intention to enforce a *lex commissoria*, but an indication that there was a breach and a demand for payment of the arrears. Three business days after this written demand, absent the breach having been remedied, an event of default occurred. Accordingly, Enforced became entitled to accelerate payment of all amounts owing and to call up the security in terms of clause 11.2 of the loan agreement. An event of default had occurred inasmuch as no interest had been paid by Verifika between the advance date (6 June 2019) and 24 February 2020. The decision to accelerate payment and perfect the security was taken by Enforced on 28 January 2020. Verifika only paid the arrear interest on 24 February 2020. By then the security had been perfected and the total amount, including interest, had become due.

[13] Once the first written demand was valid, Enforced could perfect the security on 28 January 2020 and accelerate payment of the amounts outstanding, as it had done. In the circumstances, Dippenaar J ought to have held in the main application that upon the failure by Verifika to pay the arrear interest within three business days of the first written demand, Enforced became entitled, in terms of the provisions of the loan agreement, to accelerate payment of the full amount then owing and to call up its security without further notice. This conclusion renders it unnecessary to consider the legal effect of the two further written demands. It follows that the appeal under case number 6183/2020 must succeed with costs, including the costs of two counsel.

[14] Turning to the appeal in respect of the costs of the counter-application under case number 14799/2020. The high court found that the application for Verifika's winding up was fatally defective on the basis that no valid certificate of security in terms of s 346(3) of the Companies Act 61 of 1973 had been filed. The appellants have not sought to assail that finding. The high court dismissed the counter-application on that basis alone, without having to consider its merits. In the circumstances, it follows that the order as to costs was correctly granted, and the appeal in respect thereof must fail.

[15] As to costs: Insofar as the costs of the counter application under case number 6183/2020 are concerned, those must obviously follow the result. The costs of the main application are less straightforward. The main application succeeded in having Ms Torres' shareholding in

Verifika set aside and restored to Mr Laferla. To that extent the main application was successful. However, sight cannot be lost of the fact that what precipitated the dispute between the parties, was Mr Laferla having deliberately caused Verifika, a personal liability company of which he was a director and shareholder, to breach its obligations to Enforced by failing to effect payment when due. Ms Torres had made plain in her answering affidavit, that she was intent on avoiding costly and protracted litigation. According to Ms Torres, Mr Woodnutt had personally delivered the first demand to Verifika's chosen domicilium. That was confirmed by the latter on oath. Those allegations in Ms Torres' answering affidavit, had been preceded by a version in Mr Laferla's founding affidavit that whilst he did have knowledge of all three demands, they had not been sent to him; were not 'proper' breach notices according to the loan agreement and had not been sent to the chosen domicilium. In his replying affidavit, Mr Laferla contended that the first demand was not a breach letter; that there was no proof of delivery – he asserted that there was no confirmatory affidavit from Lynn, despite the fact that Ms Lynn worked as the receptionist at Verifika's chosen domicilium; that both Ms Torres and him were overseas at the time and that the demand was not given to him. As mentioned already, the first demand did however comply with clause 11.2 of the loan agreement.

[16] In his founding affidavit, Mr Laferla asserted:

> '43.2 It was an express; alternatively tacit; further alternatively implied term of the agreement that the amount of interest would be communicated to me on a monthly basis, and demand would be made for same.
>
> 43.3 Alternatively, in accordance with commercial practice, the amount of interest would be communicated to me on a monthly basis, and demand would be made for same.
>
> 43.4 I was therefore entitled to receive demand for the outstanding interest, in order to effect payment of same.'

As a qualified chartered accountant and auditor, it was disingenuous for Mr Laferla to assert that further notice was required before payment became due and payable. Mr Laferla had, in effect, borrowed the money in his personal capacity from Verifika presumably upon the same or similar terms to those afforded by Enforced. He would

accordingly have been obliged to make monthly interest payments to Verifika in respect of those obligations. The monthly interest charges, he would have had to raise upon himself and receive in Verifika in his capacity as Verifika's accountant and financial director. Once Verifika received the monthly payments from Mr Laferla, it logically would have been obliged to pay those on to Enforced. Thus, however, one looks at it, Mr Laferla ought to have been fully aware of his obligations as to payment, yet refused to honour same, by raising what may be described as untenable dilatory defences. Verifika had not paid either the interest or any part of the capital until 24 February 2020, yet Mr Laferla had enjoyed the benefits of the loan agreement. Accordingly, the unreasonable refusal on the part of Mr Lafela to make good his obligations bordered on the dishonest. In these circumstances, despite their partial success in the main application, Mr Laferla and Verifika should jointly and severally be liable for those costs. It is also appropriate that, as contended on behalf of the appellants, they be paid on a punitive scale, because in terms of clause 16.1 of the loan agreement all legal costs incurred by either party in consequence of any default shall be payable on a punitive scale.

[17] In the result, the following order is made:

1 The appeal under case number 6183/2020 succeeds with costs, including the costs of two counsel.

2 Paragraphs 3 and 4 of the order of the high court are set aside and substituted as follows:

'(3) In the counter application, the second applicant is ordered to pay to the first respondent an amount of R1 361 704.74 together with interest thereon at the rate of 10% per annum *a tempore morae*;

(4) The applicants shall pay the costs of the application and counter-application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved, such costs to be paid on an attorney-client scale.'

3 The appeal under case number 14799/2020 is dismissed with costs.

SNOWY OWL PROPERTIES 284 (PTY) LTD v MZIKI SHARE BLOCK LTD

Confirmation of arbitrator's award not constituting endorsement of unlawful act

Judgment given in the Supreme Court of Appeal on 19 January 2023 by Kgoele AJA (Zondi and Mothle JJA and Makaula and Windell AJJA concurring)

Snowy Owl Properties 284 (Pty) Ltd and Mziki Share Block Limited owned farms bordering each other. Snowy's farm fell within the boundary of the Mun-Ya-Wana Conservancy. On 27 August 1990, the parties' predecessors in title concluded a servitude agreement that reciprocally allowed each of these owners to traverse over all of the lands of the other, solely for game viewing. Clause 4.2.2 required each party to take all steps necessary to maintain 'existing roads' on their respective properties (road maintenance) and clause 4.2.6 imposed an obligation on the parties to prevent veld fires and soil erosion on their respective properties.

The relationship between the parties deteriorated some ten years later and sparked a series of disputes and arbitration awards. Mziki instituted arbitration proceedings against Snowy for the reinstatement, re-opening, and repair of servitude roads used by it and its members for game viewing purposes in terms of the servitude rights it held over Snowy's servient properties. The arbitration proceedings were triggered by the ripping up of roads by Snowy in July 2017, commencing with a boundary road between Snowy's farms and a farm known as Little Zuka, also subject to the servitude agreement.

The dispute was brought before an arbitrator who dealt not only to the road closures which were occasioned by Snowy, but also to the alleged failure to maintain the roads in their form. Whilst Mzikint pleaded a breach of the servitude agreement by Snowy during the arbitration proceedings, Snowy pleaded that the servitude agreement, properly interpreted, did not prohibit the parties from closing existing roads or making new roads. Alternatively, that it contained a tacit term to the effect that parties could close existing roads should it be necessary for ecological and or legislative reasons. Concerning road maintenance, Snowy denied any breach of the duty to maintain.

At the conclusion of the arbitration, the arbitrator dismissed all of Snowy's defences. He found that Mziki had succeeded in making a case concerning its road maintenance claim. As regards the roads closure claim, the arbitrator found that none of the statutory instruments referred to by Snowy sanctioned

the closure of roads nor did they preclude the reinstatement of existing roads that had been closed and destroyed. The arbitrator stated further that if authorisation was required by any provisions whatsoever, Snowy could make such an application.

On 18 February 2021, the high court granted the application with costs and made the award an order of court.

Held—

Snowy contended that the order sought would require it to perform an unlawful act and thus, could not be made an order of court. Paragraph 1.3 of the award obliged it to reinstate and reopen River Link, Plover Drive, and large parts of the Links Roads. Snowy claimed that these roads were closed because of the adverse ecological impact they had as they were situated within a wetland area. It argued that the high court's order required it to perform unlawful acts which it was not permitted to perform without prior authorisation in terms of various statutes concerned with environmental protection.

These contentions were to be rejected for the simple reason that the justification for the closure of the roads concerned was raised before the arbitrator and he rejected it after considering the factual and expert evidence presented to him. The arbitrator found that there were no legislative reasons for the closure nor was there any provision in the servitude agreement that mandated the closure of any of the existing roads.

The arbitrator also dealt with the argument based on this plethora of environmental legislative instruments to the effect that the relief sought by Mziki compelling the reinstatement of the roads amounted to the creation of 'new' roads. The arbitrator found that the issues related to 'existing roads' and therefore, none of the statutory instruments relied upon by Snowy precluded the reinstatement of existing roads which had been closed and destroyed.

The appeal failed.

Advocate R S Shepstone instructed by Errol Goss Attorneys, Johannesburg, appeared for the appellant

Advocate S Burger SC instructed by: Cliffe Dekker Hofmeyr Inc, Cape Town, appeared for the respondent

Kgoele AJA:

[1] A long-running dispute regarding a registered notarial agreement of servitude No. K1287/1990S (the servitude agreement) between the

appellant, Snowy Owl Properties 284 (Pty) Ltd, and the respondent, Mziki Share Block Limited, sparked a plethora of arbitration awards that were made in terms of Clause 4.3 (the arbitration clause) of that agreement. The latest one (the award), which is a subject of this appeal, was made by Advocate Dodson SC (the arbitrator) on 2 April 2020. The appellant was, in terms of the award, directed to reopen certain roads closed by it in 2017 and further ordered to maintain others. The respondent applied to the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court), to make the award an order of court in terms of s 31(1) of the Arbitration Act 42 of 1965 (the Arbitration Act). The appellant opposed the relief sought on the basis that the award was unenforceable.

[2] The high court made the award an order of court. Aggrieved by the order, the appellant sought and was granted leave to appeal to this Court, mainly on the basis that the award was incapable of enforcement. The appellant also seeks leave to admit further evidence in terms of s 19(*b*) of the Superior Courts Act 10 of 2013 (Superior Courts Act).

The Background

[3] The appellant and the respondent own farms that border each other. The appellant's farm falls within the boundary of the Mun-Ya-Wana Conservancy (the Conservancy), which was declared a protected area on 5 December 2019, in terms of the National Environmental Management Protected Areas Act 57 of 2003 (NEMPAA). On 27 August 1990, the appellant's and respondent's predecessors in title concluded a servitude agreement that reciprocally allows each of these owners to traverse over all of the lands of the other, solely for game viewing. The relevant provisions are clauses 3 and 4.1. Clause 4.2.2 requires each party to take all steps necessary to maintain 'existing roads' on their respective properties (road maintenance) whereas Clause 4.2.6 imposes an obligation on the parties to prevent veld fires and soil erosion on their respective properties.

[4] As already indicated above, after that outwardly optimistic start, the relationship between the parties deteriorated some ten years later and sparked a series of disputes and arbitration awards. With regard to the current dispute, the respondent instituted arbitration proceedings against the appellant for the reinstatement, re-opening,

and repair of servitude roads used by it and its members for game viewing purposes in terms of the servitude rights it holds over the appellant's servient properties. The arbitration proceedings were triggered by the ripping up of roads by the appellant in July 2017, which commenced with Plover Drive, which used to be a boundary road between the appellant's farms and a farm known as Little Zuka, also subject to the servitude agreement. When the appellant's farm manager, Mr Anton Louw (Louw), was approached to explain this breach of the servitude agreement, he informed the Chairperson of the Board of Directors of the respondent, Mr Norman Celliers (Celliers), that the ripping up of Plover Drive formed part of a new road rehabilitation plan, a step that had been taken for environmental reasons. Celliers, in turn, expressed his concern about the failure of the appellant to consult with the respondent before any of the steps were taken.

[5] Shortly thereafter, Plover Drive, Boundary Road, and several linking roads in the Plains (an open grassland area) referred to as 'the Links Road', which intersected with Plover Drive, were also ripped up and branches were placed across the entrances to prevent access by the respondent to the appellant's property. An exchange of WhatsApp messages between Louw and Celliers revealed that the closures were made on the basis that it was a 'project to rehabilitate the old boundary lines; roads subject to excessive erosion and roads running through "wetlands" and "marsh areas"'. Further WhatsApp exchanges and telephone calls culminated in a meeting between Celliers and Louw on 27 July 2017. At this meeting, Louw claimed that the steps were taken following an environmental management plan, which had been developed for the entire Mun-Ya-Wana Game Reserve, of which the appellant's farm forms part. According to Louw, the appellant was legally obliged to destroy those roads, in compliance with the national environmental laws, as these roads were in low-lying or wetland areas. Celliers was not happy with the explanation and once more, expressed a further complaint about the appellant not having, at the least, attempted to engage the respondent beforehand. He demanded that the roads be repaired and re-opened and further that, the various documents to which Louw referred, be given to him.

[6] An exchange of correspondence, this time between the attorneys of both parties, ensued when the requested documents were not

furnished. The correspondence did not yield an amicable solution. Instead, it fuelled the fire that was already burning between the parties, resulting in the appellant addressing a notice to the respondent and other parties traversing its farm on 29 September 2017 announcing the permanent closure of the areas: River Road, River Loop, and River Link (the 'Three River' roads). This notice was followed by the erection of chains with 'no entry' signs on them which were also hung between planted wooden poles at the entry points to the roads in question. The respondent retaliated by removing the chains and pole barriers of River Road and resuming the use of the road. As the pot on the fire was brewing at this time, the parties agreed to the activation of arbitration proceedings in terms of the arbitration clause.

The arbitration award

[7] The dispute before the arbitrator pertained not only to the road closures which were occasioned by the appellant, but also to the alleged failure to maintain the roads in their form. Whilst the respondent pleaded a breach of the servitude agreement by the appellant during the arbitration proceedings, the appellant pleaded that the servitude agreement, properly interpreted, does not prohibit the parties from closing existing roads or making new roads. Alternatively, that it contains a tacit term to the effect that parties can close existing roads should it be necessary for ecological and or legislative reasons. Concerning road maintenance, the appellant denied any breach of the duty to maintain.

[8] At the conclusion of the arbitration, the arbitrator dismissed all of the appellant's defences. He found that the respondent had succeeded in making a case concerning its road maintenance claim. As regards the roads closure claim, the arbitrator found that none of the statutory instruments referred to by the appellant sanctioned the closure of roads nor did they preclude the reinstatement of existing roads that had been closed and destroyed. The arbitrator stated further that if authorisation was required by any provisions whatsoever, the appellant could make such an application and pursue it with the necessary vigor.

[9] In the result the arbitrator rendered the following award:

> '234. I accordingly make the following award:
>
> 1. Subject to paragraphs 2 to 4 below, the respondent is ordered:
>
> 1.1 to complete the repair and maintenance of, and to reopen, River Road within 30 days of the termination of the lockdown

imposed in terms of Chapter 2 of the regulations in Government Notice 318 of 18 March 2020, as amended,[1] or any extension of the lockdown that applies to the area in which the respondent's farms are situated ("the lockdown termination date");

1.2 to reinstate and reopen River Loop within two months of the lockdown termination date;

1.3 to reinstate and reopen by no later than nine months from the expiry of the time period referred to in paragraph 2, the following roads on respondent's properties as highlighted in black on annexure "C" to the statement of claim;

1.3.1River Link;

1.3.2Plover Drive;

1.3.3The westerly group of three Links Roads that cross the Plains area, up to the point where, having converged, they intersect with Plover Drive, including the section where three of the Links Roads converge into a single road;

1.3.4The most easterly of the Links Roads that cross the Plains area up to the point where it intersects with Plover Drive, but excluding Boundary Road, and subject to the following:

(a) The reinstated roads must be no wider than is reasonably necessary for traverse by game-viewing vehicles and must in any event be no wider than 4 metres;

(b) Any watercourse of wetland crossing must be designed for the minimal impact reasonably possible on the natural functioning of such watercourse or wetland; and

(c) Upon completion of the reinstatement of any road, it must immediately be reopened, notwithstanding such completion having taken place prior to the expiry of the nine-month period provided for compliance with this paragraph;

1.4 Within 6 months of the lockdown termination date, to have taken and completed all steps necessary to adequately repair and maintain, the sections of the following roads identified in the

[1] GN 318 of 18 March 2020 issued in terms of section 27 (2) of the Disaster Management Act No. 57 of 2002 and contained in Government Gazette No. 43107, as amended by Government Notice R.398 in Government Gazette No. 43148 of 25 March 2020 and Government Gazette Notice R.419 contained in Government Gazette No. 43168 dated 26 March 2020.

minute of the site inspection of 12 and 13 October 2019, read with the annexures to it, as being in an unreasonable, unmaintained, undermaintained, eroded or otherwise unacceptable condition;

1.4.1Valley View Road;

1.4.2Brides Bush Road;

1.4.3Nkulukulu Loop;

1.4.4Lamara Loop;

1.4.5Nsumo Drive (excluding the rocky ascending portion described in paragraph 45 of the site inspection minute);

1.4.6Boma Road;

1.4.7Sidestripe Road;

1.4.8Amatchemthlope Drive.

1.5 to carry out the actions in subparagraphs 1.1 to 1.4 above in such a way as to minimise any negative impact upon the claimant's rights under the servitude; and

1.6 to pay 70 percent of the party and party cost of these proceedings, including the costs of the arbitrator, the recording services and senior counsel.

2. The duty to commence compliance with subparagraph 1.3 only, is suspended for a period of three months from the lockdown termination date to enable the parties to meet and attempt to reach agreement regarding-

2.1 the manner in which the reinstatement of any parts of the roads referred to in subparagraphs 1.3.2 to 1.3.4 that cross watercourses or wetlands, is to be dealt with, including any deviation from the original path of the road;

2.2 the manner in which River Link is to be reinstated, if at all; and;

2.3 such further matters as the parties may elect to reach an agreement on.

3. The parties may vary subparagraph 1.3 of this award or the time period in paragraph 2 of this award, by written agreement signed on behalf of each party by a duly authorised representative.

4. Failing agreement within the period referred to in paragraph 2 on the matters contemplated in paragraphs 2 and 3, subparagraph 1.3 shall become effective on the terms set out in that subparagraph.

5. Either party may seek an amendment of this award insofar as it pertains to the lockdown, by way of a short, written submission emailed within 5 court days of the date of the award, the other party having 2 court days to respond.'

Litigation history

[10] Subsequent to the grant of the award and during October 2020, the appellant seemingly continued to rip up and destroy roads on the servient property. This led to an interim interdict being granted in favour of the respondent on 20 October 2020.[2] Around the same time, the respondent brought an application to make the award an order of court.[3] On 4 December 2020, both matters served before the high court (Radebe J) and by agreement between the parties, the high court only proceeded with the latter application and postponed the interdict application for later determination. As already stated, the appellant opposed the application to have the award made an order of court. The basis for the opposition was that the terms of the award were at odds with some of the basic features of a court order and were thus unenforceable. On 18 February 2021, the high court granted the application with costs and made the award an order of court. Leave to appeal was granted to this Court on 27 July 2021.

The issues

[11] The primary question in this appeal is whether the high court was correct in making the award an order of court for the purposes of enforcement. The appellant raised three grounds in support of its contention that the award is unenforceable. The first complaint was that para 1.3 of the award cannot be enforced as the reinstatement, reopening, and maintenance of the relevant roads contemplated in para 1.3.2, 1.3.3, and 1.3.4 will require the appellant to perpetuate unlawful acts. The second was that para 1.4 of the award is vague and imprecise and cannot be made an order of the court. The last relates to the 'Three River' roads. The contention is that paras 1.1, 1.2, and 1.3 conflict with the provisions of para 11.10 of the Maintenance Management Plan (MMP) and will invite the appellant to conduct illegal activities.

The law

[2] Application under case number 7003/2020P.

[3] Application under case number 4444/2020P, as aforesaid.

[12] Our law has long recognised that any act performed contrary to a direct and express provision of the law is void and has no force and effect.[4] In general, it will be contrary to public policy for a court to enforce an arbitral award that is at odds with a statutory prohibition. However, this is not always the case. As recognised by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and Another* (*Cool Ideas*), the force of the prohibition must be weighed against the important goals of private arbitration.[5] This is because a court's refusal to enforce an arbitration award will also erode, to some extent, the utility of the arbitration process. But converting an award into a court order does not follow as a matter of course. A court is entitled to refuse to make an award an order of court if the award is defective or sanctions illegalities.[6]

[13] It is trite that a servitude is a limited real right often registered in favour of the dominant property which amounts to a detachment from ordinary property rights in respect of the servient property and a concomitant attachment thereof to the proprietary rights of the dominant property. To that extent, the servient property owner is neither empowered nor competent to negotiate those rights away without the consent of the dominant owner. The relationship between the parties as dominant and servient owners is governed by the principle of reasonableness.[7]

[14] Another principle relied upon by our courts to calibrate the relationship between two reciprocal servitude holders is the *civiliter modo* principle. It regulates the reasonable exercise of servitudal rights between the servient owner and the servitude holder. This concept was recently explained by this Court in *Morganambal Mannaru and Another v Robert MacLennan-Smith and Others*.[8] In *Gardens Estate*

---

[4] Schierhout v Minister of Ju`stice 1926 AD 99 at 109.

[5] *Cool Ideas 1186 CC v* Hubbard *and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 136.

[6] Ibid paras 53-62.

[7] A J Van Der Walt and G J Pienaar *Introduction to the Law of Property* 4 ed, (2004) at 274.

[8] *Morganambal Mannaru and Another v Robert MacLennan-Smith and Others* [2022] ZASCA 137 para 13: 'Often the relationship arising from the exercise of a servitude is fraught with tensions that sometimes develop into disputes, for the most part, between the user rights of the dominant owner

Ltd v Lewis[9] it was held that the owner of a servient property that is subject to a specified servitude of right of way cannot subsequently insist on changing the location or route of the servitude road unilaterally.[10] In *Linvestment CC v Hammersley and Another*,[11] this Court pronounced that the *civiliter* principle cannot be relied on to justify unilateral relocation of a specified right of way to a route that suits the servient owner better. However, the Court also found it justified to develop the common law to make unilateral relocation of a specified right of way by a court order (in favour of the servient owner) possible under certain circumscribed conditions.[12] In this

and the rights of the servient owner. The approach adopted by our courts in resolving such disputes is reliance on the principle of *civiliter modo*. Relying on J Scott, it has been pointed out that: "the principle of *civiliter*…is a particular expression of the principle of reasonableness..." And at 242-243 "in modern South African servitude law the Latin phrase *civiliter modo* is consistently read as a set of adverbs that both qualify the conduct of a servitude holder, so that a servitude holder who acts reasonably is said to be acting in a civilised (*civiliter*) manner (*modo*)." In modern South African servitude law the Latin phrase civiliter modo is consistently read as a set of adverbs that qualify the conduct of the servitude holder, so that a servitude holder who acts reasonably is said to be acting in a civilised (civiliter) manner (modo).'

[9] *Gardens Estate v Lewis* 1920 AD 144. See also C G van der Merwe *Sakereg* 2 ed (1989) at 467, where this decision is still discussed as the current law.

[10] See ch 4.7 on amendment of existing servitudes. In the case of a specified consensual servitude of right of way, the parties not only agreed upon the creation of the right to use a road but also on the location or route of the road. Both are bound to that route and it can in principle only be changed by consensus. In the case of a general (*simpliciter*) consensual servitude of right of way, the parties agree on the creation of the servitude but not on the route, in which case the servitude holder can select a route, subject to the principle that it must impose the least possible burden on the servient owner. Thereafter the servitude holder is bound to the selected route, but the servient owner can change the route unilaterally if her continued reasonable use of the servient land demands it, provided the change does not infringe upon effective use of the servitude.

[11] *Linvestment CC v* Hammersley [2008] ZASCA 1: 2008 (3) SA 283 (SCA) para 20. See also *LAWSA* 2 ed para 544 fn 4. See also para 559 discussing this decision.

[12] 24 *LAWSA* 2 ed para 25.

regard, I echo the remarks by Van der Walt that 'This decision does not have a direct bearing on the *civiliter* principle because the order for unilateral relocation of the road was granted on application by the servient owner, but the decision confirms that consensual specified right of way cannot be amended unilaterally with an appeal to the *civiliter* principle'.[13]

The illegality opposition

[15] With this background I turn to deal with the appellant's contention that the order sought would require it to perform an unlawful act and thus, cannot be made an order of court. Paragraph 1.3 of the award obliges the appellant to reinstate and reopen River Link, Plover Drive, and large parts of the Links Roads. The appellant claimed, initially during the arbitration proceedings, that these roads were closed because of the adverse ecological impact they had as they were situated within a wetland area. Before the high court, the appellant further attempted to rely on the expert evidence of Mr David Rudolph, an environmental assessment practitioner (the EAP), Mr Jacques Du Plessis, a civil engineer, and Mr Jeanrick Janse van Rensburg, an ecologist, to the effect that para 1.3 of the award cannot be enforced because the permanently closed roads implicated in paras 1.3.2, 1.3.3 and 1.3.4 of the award are all within a wetland and the scope of works identified in the award cannot be carried out without obtaining prior environmental authorisation. The appellant argued that the high court's order required it to perform unlawful acts which may not be performed without prior authorisation in terms of:

(a) Section 24 of the Constitution of the Republic of South Africa;
(b) The National Environmental Management Act 107 of 1998 (NEMA);
(c) The National Water Act 36 of 1998 (NWA);
(d) NEMPAA;
(e) The relevant Environmental Impact Assessment Regulations (EIA regulations) published under ss 24(2), 24(5), 24D and read with s 47A(1)(*b*)(i) of NEMA promulgated and amended on 7 April 2017 in the Government Notice Regulations (GNR) Nos 324, 326 and 327.

[16] The appellant submitted that in terms of the NEMA, certain activities with potentially detrimental impacts on the environment

[13] A J Van der Walt *The Law of* Servitudes (2018) at 259.

may not be undertaken without prior authorisation. According to the appellant, the environmental authorisation required for all the works to be done in terms of para 1.3 of the award has been confirmed by the EAP who indicated in his report that at least four listed activities are triggered by the works required to be done in terms of the award. As a consequence of the above, the appellant would have to obtain environmental authorisation from the competent authority, the KwaZulu-Natal Department of Economic Development, Tourism, and Environmental Affairs before it undertakes the scope of works described by the civil engineer, to comply with para 1.3 of the award concerning the roads in paras 1.3.2, 1.3.3 and 1.3.4. If it were to proceed to perform in terms of the award, the appellant submitted, its performance will be illegal because a person who conducts a listed activity without authorisation commits an offence in terms of s 49A(1) of NEMA read in conjunction with s 24F(1).

[17] A similar argument was raised in respect of the two additional listed activities identified by the EAP in terms of the NWA. The appellant contended in this regard that the fact that the roads will impede or divert the flow of water in a watercourse and alter the beds, banks, course, or characteristics of a watercourse, will require a water use license in terms of section 21 of the NWA. Without such a licence, the appellant submitted, it will be committing an offence. Lastly, the appellant also contended that para 1.3 is in conflict with the provision of the MMP. The appellant relied heavily on the principle outlined in *Cool Ideas* to support the contention that the award cannot be enforced as it sanctions illegal conduct.

[18] In relation to para 203 of the award, in which the arbitrator urged the appellant to pursue the authorisation with vigor in case one is needed, the appellant argued that the arbitrator overlooked these statutory provisions referred to above. The appellant argued that the high court's order falls short of being immediately capable of execution because statutory authorisation is required before it could be enforced. It contended that it will be unable to successfully apply for environmental authorisation as, if it were to do so, it would not have any support from an independent and objective EAP for the re-opening of the roads, as there is a viable alternative route.

[19] Firstly, to debate what an EAP may or may not recommend *if* the appellant applies for authorisation is both irrelevant and unhelpful.

But more importantly, the appellant's contentions must be rejected for the simple reason that the justification for the closure of the roads concerned was raised before the arbitrator and he rejected it after considering the factual and expert evidence presented to him. The arbitrator found that there were no legislative reasons for the closure nor was there any provision in the servitude agreement that mandated the closure of any of the existing roads. The evidence in the affidavit of the EAP seems to be another version of the evidence already presented by the witnesses of the appellant, including, an environmental expert, Mr Neary, before the arbitrator. This is not an appeal against the factual finding of the arbitrator. It is therefore not permissible, nor appropriate for the appellant to engage in a factual debate on matters already considered in the arbitration proceedings and decided upon by the arbitrator. As a result, the high court cannot be faulted for equating the evidence in the affidavit of the EAP as the introduction of 'new evidence' which will amount to an appeal against the award.

[20] Secondly, the appellant sought to further justify its actions by relying on the MMP. This justification, too, cannot salvage the appellant's case. First, there was no decision by a Mun-Ya-Wana Conservancy Warden to close any of the roads including the three "River Roads". In fact, from the report of the EAP, it would appear that no recommendation could have been made to the competent authority. Moreover, the evidence presented at the arbitration indicated that River Road was closed for maintenance purposes while River Link was closed because it went straight up the side of a very steep hill.

[21] Lastly, the record of the arbitration proceedings reveals that the arbitrator also dealt with the argument relied upon by the appellant which was based on this plethora of environmental legislative instruments to the effect that the relief sought by the respondent compelling the appellant to reinstate the roads amounted to the creation of 'new' roads. The arbitrator, after a thorough analysis of the servitude agreement, found that the issues in this matter relate to 'existing roads' and therefore, 'none of the statutory instruments relied upon by the appellant preclude the reinstatement of existing roads which have been closed and destroyed. Nor do any of them sanction the original closure by Snowy Owl [the appellant] of the roads'. Mr

Neary, the legal expert of the appellant, had also, prior to this finding, accepted the fact that existing roads in the servitude were thus not affected by the legal requirements in relation to environmental impact assessments.

[22] Reliance on the *Cool Ideas* authority to support the introduction of the new 'expert evidence' before the high court, was also in my view, correctly rejected by the high court as the facts thereof are distinguishable from this matter. Unlike in the *Cool Ideas* matter, the award that was made an order of court in this matter does not infringe any law. The arbitrator made a definitive conclusion that none of the legislative instruments referred to by the appellant during the arbitration hearing precludes the maintenance or reinstatement of existing roads that had been closed or destroyed, nor do any of them sanction the original closure or the ripping up of these roads. In addition to this, I find the remarks made by the Constitutional Court in *Cool Ideas* that '. . . If a court refuses to freely enforce an arbitration award, thereby rendering it largely ineffectual, because of a defence that was raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out–of–court means of finally resolving the dispute,' apposite in this matter.

The vagueness opposition

[23] The second ground of attack on the award is that it is vague and thus incapable of enforcement. It is contended by the appellant that para 1.4 of the award orders it, within six months of the lockdown termination date, to have taken and completed all steps necessary to adequately repair and maintain the sections of the various roads listed in this paragraph and identified in the minute of the site inspection of 12 and 13 October, read with the annexures to it. The complaint is that the order made by the high court does not identify the minute of the site inspection and the annexures, nor are these documents attached to the order. Further, it is contended that the order does not identify the roads referred to in para 1.3 of the award which are '. . . *highlighted in black on annexure "C" to the statement of claim.*' To substantiate this contention, the appellant listed a host of examples in an attempt to demonstrate that it is impossible to interpret the award without reference to these documents. According to the appellant, this renders the order of the high court vague and incapable of enforcement.

[24] This complaint is ill-conceived. The record of the arbitration proceeding reveals that the minute of the inspection *in loco* was dictated by the arbitrator in the presence and concurrence of the representatives of all the parties during the inspection. It is simply not open to the appellant to now claim a lack of understanding of the roads in question, including the contents of this minute, when its representative was present during the inspection *in loco* and is fully aware of which roads and parts thereof the arbitrator referred to in the award. Secondly, the record of the proceedings reveals that the minute and annexures were placed before it and the high court referred to them. In my view, the appellant would be able to ascertain which roads are affected by the award by having regard to this documentation.

[25] The second leg relied upon by the appellant to substantiate this complaint is the 'changed circumstances'. The argument is that the state of the roads observed by the arbitrator in October 2019, bore little or no resemblance to the state of the roads three months later because of the torrential rains that fell in January 2020. As a result of these significant changes, the argument continued, the appellant does not know where the parts of the roads that are to be repaired are situated; the award is subject to uncertainty which can result in further litigation, and the dispute between the parties cannot be resolved by the award because road maintenance and repair is a never-ending cycle. To bolster these arguments, the appellant submitted that the constant state of flux within the Conservancy causes the conditions of defects to change in form. Fixing a position to a specific date and expecting that snap-shot to remain unaltered and require remediation, is according to the appellant not competent on the facts. Once one problem is addressed, others arise due to rain, erosion, or poor driving skills. Therefore, according to the appellant, para 1.4 of the award cannot be made an order of court.

[26] The 'changed circumstances' arguments cannot salvage the appellant's case. Firstly, in para 52 of their answering affidavit, the appellant alleged that an application to have the evidence of the torrential rains and flooding to be admitted was refused by the arbitrator before he made his award on 2 April 2020. Therefore, with the risk of repetition, the appellant cannot, before the high court and us, as already indicated above, re-argue factual matters that were already dealt with by the arbitrator.

[27] Secondly, the appellant's duty to maintain the roads is a servitudal obligation that takes into account the reserve's conditions, including rainfall. As a result, the submission that the award will not resolve the issues between the parties cannot assist the appellant's case. Maintenance, in various forms, forms part of the duties of any owner, and such is the nature of the beast, more particularly so in this matter as this duty is specifically entrenched in the servitude agreement of the parties. Therefore, maintenance hardships cannot be used to the detriment of another owner. If the duties imposed become unbearable, avenues provided for by the arbitrator in the award itself which replicate the principles governing reciprocal servitudes as espoused in the previous paragraphs ought to be explored whereby the two parties can find a mutually beneficial solution. There is therefore nothing vague or imprecise about the award contained in para 1.4 as to what the appellant is required to do, and the torrential rains cannot make the award unenforceable either.

The 'Three Rivers' roads opposition

[28] The argument before the high court related to paras 1.1, 1.2, and once again,1.3 of the award in terms of which the appellant was directed to repair, maintain and reinstate River Link, River Loop, and River Road within the stipulated period. The argument advanced is that the closure of these roads was done as the appellant wanted to reinstate the ecological attributes and systems to prevent further environmental degradation and to ensure compliance with para 11.10 of the MMP, which was approved by the MEC: Environmental Affairs in KwaZulu-Natal. Paragraph 11.10 provides that in the event that the Mun-Ya-Wana Conservancy Warden, in conjunction with the relevant landowner, decides certain roads need to be closed for ecological reasons, this will also fall under maintenance. The appellant contends that to comply with the provisions of the MMP, the closure of the 'Three Rivers' roads was imperative. The granting of the orders in paras 1.1, 1.2, and 1.3 are thus, argues the appellant, in conflict with the provisions of the MMP.

[29] This argument is once more raised before us but in a reformulated manner. As an example and to lay this argument to rest, the Mun-Ya-Wana Conservancy was declared a Protected Area on 5 September 2019 in terms of s 23 of NEMPAA. The arbitration hearing took place on 15 March 2020 and the MMP was approved on 5 March 2020. The

latter date pre-dates the hearing of the arbitration and the resultant award which was made on 2 April 2020. Therefore, the conclusion I reached regarding the MMP in the previous paragraphs equally applies here. Much reliance was also placed on the Mun-Ya-Wana Conservancy or its Warden, but we are also not told what its/his attitude is to the debates raised by the appellant including the authorisations bemoaned about. Another important consideration to make in this regard is that the respondent is not a member of the Mun-Ya-Wana Conservancy. The respondent was never consulted before the MMP, heavily relied upon by the appellant, was prepared and allegedly approved as required by s 39(1) of NEMPAA. This section is peremptory and provides that when a management plan for a protected area is being prepared, all the affected parties who have an interest must be consulted.

[30] It is important to add that the arbitrator was alive to the principles that govern the rights of the parties under a reciprocal servitude agreement as set out in the previous paragraphs. This is the reason why he made a finding that there is a servitude over the land and any road closure had to be made jointly with the dominant landowner, which did not happen. Also, the other difficulty with the appellant's argument stems from the fact that the arbitrator, in refusing the defence raised by the appellant that the servitude was subject to a tacit term, remarked: '. . . it is highly improbable that, in a contract based on reciprocity, the one party would have allowed the other to act unilaterally and on the basis of its exclusive assessment of what sustainable environmental management required, in closing the roads.' Therefore, the arguments in this regard cannot salvage the appellant's case at all. The 'wetland' argument raised on this issue was also analysed above and needs no repetition here.

Application in terms of s 19*(b)* of the Superior Courts Act

[31] The application relates to the admission of the affidavit of the appellant's attorney to introduce a notarial deed which was registered on 18 June 2021. The appellant contends that it could not file this document as it was not available at the time of the hearing before the high court. The importance thereof, according to the appellant, is to bring to this Court's attention that a real right has been registered; that it is the final step in the process of declaring the Conservancy as a Nature Reserve, and that the consequence of this registration is that

the appellant is obliged henceforth, to protect the environment for the benefit of present and future generations by complying with the provisions of the Constitution, NEMPA, the Protected Area Management Plan (PAMP) and the MMP, failure of which will invite the appellant to perpetrate unlawful acts. The application falls to be summarily dismissed because the registration is irrelevant, does not affect, and did not alter the tenor of the issues that were raised in this appeal including the resultant findings.

[32] The conclusion I reach is that the award meets the requirements of an order that is capable of being enforced.

[33] Consequently, the following order is made:

1The application in terms of s 19*(b)* of the Superior Courts Act 10 of 2013 is dismissed.

2The appeal is dismissed with costs