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Commercial Law Reports

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DRIFT SUPERSAND (PTY) LIMITED v MOGALE CITY LOCAL MUNICIPALITY

A municipality obliged to consider the objections of a neighbouring property owner when considering an application for the development of a township

Judgment given in the Supreme Court of Appeal on 22 September 2017 by Leach JA (Navsa ADP, Petse JA, Molemela AJA and Mokgohloa AJA concurring)

In 2006, Greenville Gardens CC applied to the Mogale City Local Municipality for the development of a township on Portion 33 of the farm Roodekrans 183 IQ. The application was made in terms of the provisions of section 69 of the Town Planning and Townships Ordinance (no 15 of 1986).

On hearing of the application, Drift Supersand (Pty) Ltd, a nearby landowner, took steps to oppose it. On 17 August 2007, its attorneys wrote to the municipality detailing its objection to the proposed development and arguing that for various reasons based on Drift's nearby quarrying operations, the proposed township was simply inappropriate and should be avoided.

In March 2008, in purported compliance with the provisions of section 69(6)(b) of the Ordinance, the municipality forwarded copies of the application to various government departments, local authorities and functionaries, inviting their comment on the proposed development within 60 days.

In June 2011 a representative of Drift's attorneys telephonically discussed the proposed development with the municipality's chief town planner, Mr Van Wyk, who told him that the township application had not yet been approved as Greenville Gardens' basic assessment report under the environment legislation was still being awaited. The representative asserted that Van Wyk informed him that as a result of its objection, Drift had been duly placed on record as an interested and affected party; that the township application would therefore be referred to a tribunal for hearing and that Drift would be notified and invited to attend the tribunal hearing when it was held. A consultant in Drift's firm of attorneys confirmed these arrangements in a letter telefaxed to Mr Van Wyk. The municipality admitted that the letter was received.

In May 2012, Van Wyk prepared a report on the development to be submitted to a committee appointed in terms of section 79 of the Local Government: Municipal Structures Act (no 117 of 1998), to assist the executive mayor. Van Wyk recorded in this report that the application had been duly advertised and that no objections or representations had been received against the application, which was therefore unopposed.

The report was placed before the section 80 committee, which approved it and recommended that the township development be approved. The executive

mayor then relied on the report and the committee's recommendation, to approve the township application. Drift's objections were not referred to a tribunal for hearing at any stage before this decision was taken.

Drift then applied to court for an order reviewing and setting aside the municipality's decision to approve the establishment of the township.

Held—

The municipality had the constitutional obligation to attempt to ensure that regard was had to the views of all residents within its jurisdiction whose rights might be affected before a decision was taken in regard to the establishment of the township. To seek to regard a party who clearly was affected by such a decision as being not 'interested' was inconsistent with the values a municipality is expected to observe in the performance of its constitutional obligations. For the municipality to regard a party whose rights of ownership would clearly be affected as not being interested, was simply unfair and unjust. Drift clearly was a party interested in the application.

As owner of property situated in the immediate vicinity, Drift clearly had standing to question the validity of the decision to allow a township to be established on property in the immediate vicinity of the site of its quarrying operations. This was all the more so bearing in mind the likely adverse consequences of that activity and the fact that the decision might well have been granted in breach of the municipal integrated development plan.

Despite its obvious interest in the township application, the municipality neither forwarded a copy of the application to Drift nor called for its comments. Drift relied on an express assurance given by the municipality to found its contention that it had a legitimate expectation to a hearing before the decision to approve the township development was taken. Its argument in this regard was based upon the conversation between its attorney and Mr Van Wyk, the letter sent to the municipality following that conversation and the fact that despite that letter having been received by the municipality, it failed to respond.

Mr Van Wyk's representation was one which was competent and lawful for the municipality to make, and induced a reasonable expectation that the appellant would be afforded a hearing – or at the very least that its representations in its objection would be taken into account before a decision on the application was taken. Drift was clearly an interested party who had sought to object to the township application. In addition, the municipality told it that it had been recorded both as an interested party and as an objector, that it would be notified of the date on which a tribunal would consider its objection, and that it would be invited to attend that hearing. As an interested

party, it was denied the opportunity of placing its views before the executive mayor, the functionary entrusted with the discretion to approve the application. This was not procedurally fair.

This resulted in the executive mayor not having a complete picture of the relevant facts and circumstances. There could be no doubt that the decision taken to approve the establishment of a township was consequently fatally flawed by reason of procedural unfairness. The decision to approve it had to be set aside.

Advocate S J Grobler SC and Advocate J G Uys instructed by Brand Potgieter Inc, Craighall Park, appeared for the appellant

Advocate J Both SC and Advocate A W Pullinger instructed by ODBB Inc, Sandton, appeared for the first respondent

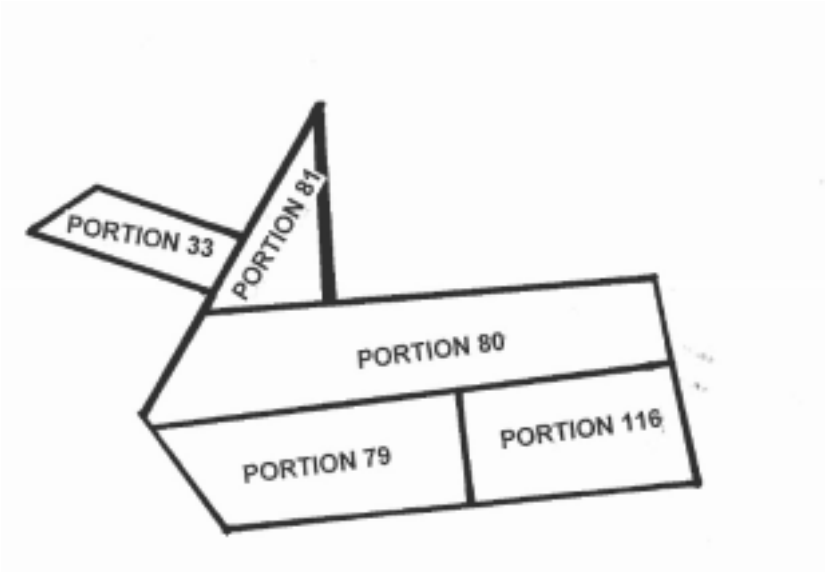
Advocate M M Rip SC and Advocate P Lourens instructed by Ivan Pauw & Partners, Pretoria

Leach JA:

[1] During August 2012, after a process that had been initiated some six years previously, the first respondent, the Mogale City Local Municipality (the Municipality) approved an application of the second respondent to establish a township on a piece of immovable property known as Portion 33 (a portion of Portion 6) of the farm Roodekrans 183 IQ (the subject property). The appellant, a nearby landowner, thereafter applied to the Gauteng Local Division, Johannesburg for an order, inter alia, reviewing and setting aside the Municipality's decision to approve the establishment of this township. Its application was dismissed and it appeals to this Court with leave of the court a quo. Also before us is a cross-appeal by the second respondent against the court a quo's refusal to strike out certain factual allegations made by the appellant in its replying affidavit.

[2] It is common cause that the appellant is the registered owner of three pieces of immovable property known, respectively, as the remainder of Portion 79, the remainder of Portion 80, and Portion 116 of the farm Roodekrans 183 IQ. For convenience I intend to refer to these properties either as Portion 79, 80 and 116 respectively or, collectively, as 'the appellant's property'. They are contiguous with each other and in the immediate vicinity of both the subject property,

Portion 33, and the property known as Portion 81 of the farm Roodekrans 183 IQ. The latter property, which is also owned by the appellant (although the appellant's allegation to this effect forms part of the striking out application and the cross-appeal) borders on both Portion 80 and the subject property. According to the Municipality, the subject property is at its closest point some 50 metres from Portion 80 and about 350 metres from the furthest point the appellant's property. The position of these various properties in relation to each other is set out in the plan below[1]:



[3] The appellant's property (ie Portions 79, 80 and 116) is a so-called 'mining area,' in respect of which a mining right was granted under s 9 of the Minerals Act 50 of 1991 to a wholly owned subsidiary of the appellant, Drift Supersand Mining (Pty) Ltd (Supersand Mining). This was an 'old order mining right' as referred to in the Mineral and

[1] This has been prepared from the plan annexure EDJ28 to the Municipality's answering affidavit.

Petroleum Resources Development Act 28 of 2002. In March 2012, it was converted into a mining right for a period of one year under item 7 of Schedule II of the latter Act. In April 2013 that period was extended to 25 years. The appellant, in reply, stated that although the mining right had been granted to Supersand Mining, it had at all material times exercised that right under a verbal agreement it had concluded with Supersand Mining. In doing so it operates an open cast mine, quarrying sand and gravel. This involves the blasting and crushing of rock.

[4] The appeal to this Court has a long and drawn out history commencing some 11 years ago, when, in September 2006, the second respondent applied to the Municipality to establish a township on the subject property. In its papers the appellant had sought to impugn the decision to approve the township application on the strength of various contentions. Inter alia, it argued that the decision had been irrational; that there had been a failure to evaluate all relevant facts and considerations; and that the decision was wholly unreasonable, had been arbitrary or capricious and had been taken for an ulterior purpose, namely, to generate greater revenue. In this Court, however, the appellant essentially confined itself to contending that the ultimate approval of the second respondent's application was the product of a procedurally unfair process in breach of s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which was reviewable under s 6(2)(c) of that Act. In the light of this, it becomes necessary to examine the circumstances under which the Municipality came to approve the second respondent's application.

[5] The relevant history of the application is as follows:

(a) In its initial form, the second respondent's application proposed the development of a township on the subject property having 25 dwelling units per hectare, a floor area ratio of 0,6 and a building coverage of 40 per cent. However, in March 2007, the second respondent amended the application in order to increase the density to 60 dwelling units per hectare, with concomitant increases in both the floor area ratio and the building coverage. It was in this amended form that the application came to be approved. For convenience I shall refer to it simply as the 'township application'.

(b) The township application was made to the Municipality under the

provisions of s 69 of the Town Planning and Townships Ordinance No 15 of 1986 (the Ordinance)[2], ss 69(1) and (2) of which prescribe that any landowner who wishes to establish a township may apply in writing to the relevant local authority to do so, and provide certain prescribed information and documentation. The section then goes on to lay down a consultative procedure to be followed to obtain objections, views and comments from various persons and entities before a final decision is taken in regard to a new township development.

(c) As part of this process, s 69(6)(a) of the Ordinance provides that on receipt of an application to establish a township in prescribed form, 'the local authority may, in its discretion, give notice of the application by publishing once a week for two consecutive weeks a notice in such form and such manner as may be prescribed'. In compliance with this, on 18 and 25 April 2007 a notice of the township application was published in both the Provincial Gazette and newspapers sold in the district, calling for written objections to the proposed township to be filed with the Municipality by 16 May 2007.

(d) It is not disputed that these notices did not come to the appellant's attention. It came to learn of the application only several months later, in August 2007, during the course of a public participation process being undertaken by the second respondent under the National Environmental Management Act 107 of 1998 (NEMA) in order to obtain environmental approval for the township.

(e) On hearing of the application, the appellant immediately took steps to oppose it. On 17 August 2007, in a four page letter, annexure JH5 to the appellant's founding affidavit, the appellant's attorneys wrote to the Municipality detailing the appellant's objection to the proposed development and arguing that for various reasons based on the appellant's nearby quarrying operations, the proposed township was 'simply inappropriate and should be avoided'. I shall return to this letter in due course.

(f) It is common cause that JH5 was received by the Municipality's

[2] A provincial Ordinance of the former province of Transvaal, the administration of which was assigned to the province of Gauteng with effect from 31 October 1994.

chief town planner, Mr Van Wyk, to whom the Municipality had delegated responsibility for handling the proposed township application. However, the Municipality failed to respond to it.

(g) Indeed nothing relevant appears to have been done by the Municipality until 3 March 2008 when, in purported compliance with the provisions of section 69(6)(b) of the Ordinance (again, a section that I shall refer to later in more detail), it forwarded copies of the application to various government departments, local authorities and functionaries, inviting their comment on the proposed development within 60 days. Why this was only done almost a year after the publication of the notices under s 69(6)(a) is a mystery unexplained on the papers.

(h) A few days later, on 7 March 2008, the Municipality circulated the township application to five persons whom it perceived to be the owners of the various properties bordering the subject property, and called on them to lodge any comments and representations they might have in respect of the proposed development by 7 April 2008. This was done under a municipal policy that had been in place since 1998 (the Policy) which regulated the procedure to be implemented in relation to town planning and township establishment applications. Inter alia, this Policy provides that in the case of a party applying under the Ordinance to establish a township, the application 'be advertised in the press as prescribed and the consent of the adjoining property owners be obtained'.

(i) The Municipality's records reflected an S Fourie as being the owner of Portion 81 and, on 7 March 2008, a copy of the application was accordingly addressed to such a person. However, as appears from the title deeds of Portion 81 attached to the appellant's replying affidavit, no person named S Fourie was or had been an owner of that property. In 2003 Portion 81 had been registered in the name of E M Fourie and S Strydom who, in 2005, had transferred it to a company, Yellow Star Prop 103 (Pty) Ltd. Thereafter, on 31 August 2007, Portion 81 was transferred to the appellant (this too is an issue to which I shall return when dealing with the cross-appeal).

(j) In any event, what is apparent from this is that the appellant's objection to the township development, seemingly prepared without sight of the township application or the second respondent's

representations in that regard, had been received by the Municipality well before it delivered copies of the township application to the adjoining landowners and called for their comments.

(k) After the notices of March 2008, proceedings relating to the proposed development moved at the pace of a snail. It is undisputed that after delivering the letter of objection JH5, the appellant's attorneys periodically liaised with the Municipality on whether there had been any movement in regard to the township application, although quite what passed between them, or between any of the other interested parties for that matter, is not clear from the papers. But in 2011, more than three years later, certain significant events took place.

(l) First, on 1 June 2011 a representative of the appellant's attorneys, Mr Gonsalves, telephonically discussed the proposed development with Mr Van Wyk, who told him that the township application had not yet been approved as the second respondent's basic assessment report under NEMA was still being awaited. Mr Gonsalves alleges Mr Van Wyk went on to inform him that as a result of its objection, the appellant had been duly placed on record as an interested and affected party; that the township application would therefore be referred to a tribunal for hearing; and that the appellant would be notified and invited to attend the tribunal hearing when it was held. Two days later, on 3 June 2011, a consultant in the appellant's firm of attorneys, Mr Athienides, confirmed these arrangements in a letter, annexure JH7 to the founding affidavit, that was telefaxed to Mr Van Wyk. The Municipality admits that this letter was received and does not dispute that it did not reply. I shall return to this aspect in greater detail below.

(m) Secondly, the appellant's attorneys had been in contact with the Department of Mineral Resources regarding the proposed development. In a letter dated 14 February 2011, the Department's regional manager had informed an environmental management consultant employed by the second respondent that 'the proposed township is unlikely to impede the objects of the Mineral and Petroleum Resources Development Act at this time' and that approval under s 53 of that Act had been granted for a period of five years. However, the Department changed its stance. In a letter to the

attorneys dated 26 September 2011, it stated:

'2 The proposed area is adjacent to Drift Supersand and 400 metres north east from W G Wearne (Pty) Ltd sand mine. Mining is being conducted by means of explosives. A provision of 1000 metres buffer zone from the abovementioned mines has to be implemented.

3 It is likely that the aforementioned township will impede the objects of the Mineral and Petroleum Resources Development Act, in terms of the Provision of section 53 of the Act and the approval of the Minister has not been granted for the proposed township.'

(n) I must record that subsequently, after the disputed decision of the Municipality to approve the township application, the Department seems to have changed its position yet again to grant approval but, for present purposes, nothing turns on this. What is relevant is that on 17 November 2011 the appellant's attorney forwarded the Department's letter of 26 September 2011 to the Municipality and advised that, in the light of its contents 'we are of the view that the environmental authorisation of the proposed township can no longer proceed'. Once more, the Municipality does not appear to have responded.

(o) Be that as it may, it is of some importance that during the course of 2011 the Municipality adopted an integrated development plan as envisaged by s 35 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). This included a so-called Precinct Plan for the Muldersdrift Development Zone into which the subject property falls (Precinct Plan). Section 7.3 of the Precinct Plan sets out environmental guidelines in which it is recorded that a quarry increases the risk of dust pollution and poses the danger of sinkholes developing, and states that any development adjacent to a quarry should therefore be required to observe a buffer zone of 750 metres.

(p) Thereafter, on 18 May 2012, Mr Van Wyk prepared a report on the development to be submitted to what was referred to as 'the municipal section 80 committee' – presumably a committee appointed in terms of s 79, read with s 80 of the Local Government: Municipal Structures Act 117 of 1998, to assist the executive mayor. Mr Van Wyk recorded in this report, JH24 to the appellant's replying affidavit, that the application had been duly advertised and that no objections or representations had been received against the application, which was therefore unopposed. This flew in the face of the appellant's unchallenged statement concerning the discussion between Mr Van Wyk and Mr Gonsalves, as recorded in the letter JH7. Interestingly, the report also states that the township application 'is in line with the latest planning policies of the relevant authority', a statement which is somewhat dubious in the light of the proposed township falling within both the buffer zone for quarries recently imposed in the Precinct Plan and the 1000 metres buffer zone insisted on by the Department of Mineral Resources in its letter of 26 September 2011.

(q) In due course JH24 was placed before the section 80 committee, which approved it and recommended that the township development be approved. Presumably, although no affidavit from him or her was forthcoming, the executive mayor then relied on JH24 and the section 80 committee's recommendation, to approve the township application on 28 August 2012. It is common cause that, despite the terms of the letter JH7 and what the appellant alleges Mr Van Wyk had said on 1 June 2011, the matter was not referred to a tribunal for hearing at any stage before this decision was taken.

[6] No more need be said in regard to the history of the second respondent's application to establish a township on the subject property. More than a month after the application had been approved in this way, and in response to a letter written to Mr Van Wyk on behalf of the appellant on 1 October 2012 requesting 'an update regarding the status of the above mentioned township application', the Municipality informed the appellant of the executive mayor's decision. In due course, in March 2013, the appellant proceeded to institute proceedings in the court a quo seeking to have that decision reviewed and set aside.

[7] It is accepted by all parties that the decision to approve the township application constituted an 'administrative action' by an organ of state as contemplated by PAJA, being one 'which adversely affects the rights of any person and which has a direct, external legal effect . . .'[3] Section 3(1) of PAJA goes on to require that '[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'. As already mentioned, the appellant seeks to review the Municipality's decision on the basis that

[3] See the convoluted definition of 'administrative action' in s 1 of PAJA.

it was the result of a process that was not procedurally fair and therefore breached this requirement.

[8] In *Joseph & others v City of Johannesburg & others*[4], the Constitutional Court observed that 'a finding that the rights of the applicants were not materially and adversely affected would have the result that s 3 of PAJA would not apply'[5]. Seizing on this, and relying upon the appellant's explanation in reply that its wholly owned subsidiary, Supersand Mining, to whom the mining right had been granted, had authorised it to exercise the right to mine on its behalf, the respondents argued that any rights likely to be affected by a township being developed nearby the quarry were not those of the appellant but its subsidiary. They therefore argued that whilst its subsidiary may have had standing to review the executive mayor's decision, the appellant did not.

[9] In the light of this, I turn at the outset to consider the question of standing. In addition to that which I have already mentioned, the respondents also argued that the allegation that the appellant was quarrying in terms of an agreement with Supersand Mining lacked detail and cogency and that, as this had emerged in reply, the appellant had impermissibly tried to make out its case in reply. They therefore submitted that the appellant's allegations in reply should either be ignored or struck out.

[10] There is in my view no merit in any of this. As this Court recently stated in Lagoon Beach[6], not only must a court exercise practical, common sense in regard to striking out applications but there is today a tendency to permit greater flexibility than may previously have been the case to admit further evidence in reply. Consequently, as stated in Nkengana,'if the new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have

[4] Joseph & others v City of Johannesburg & others [2009] ZACC 30; 2010 (4) SA 55 (CC).

[5] Para 27D.

[6] Lagoon Beach Hotel (Pty) Ltd v Lehane NO & others [2015] ZASCA 210; 2016 (3) SA 143 (SCA) para 16.

been included in the founding affidavit in order to set out a cause of action, the court will refuse an application to strike out'[7]. The appellant's case was always that it was the person who was carrying out the mining activities on its property. As proof of that, it attached to its founding affidavit the mining right granted to Supersand Mining. In their answering affidavits the respondents contended that the appellant's mining activities were illegal as it was not the person to whom the mining right had been granted. It was in order to rebut this that the appellant explained in reply that it was conducting its activities on behalf of Supersand Mining in terms of an agreement between them. This was merely a gloss on what it had set out in its founding affidavit. It was not seeking to make out a fresh cause of action in reply, and there is no reason either to strike out the explanation made in reply or to ignore it.

[11] Moreover, the respondents' argument on this issue seeks to limit the rights of the appellant which were potentially adversely affected by the decision solely to those associated with the mining activities being conducted on its property. This is both a strained and unnecessary limitation. Whilst the appellant, as owner of the property, has indeed permitted mining activities on its property, it would be wrong to regard those activities as being the only legal rights to which regard can be had in considering whether the establishment of a township in the immediate vicinity impacts upon the appellant's rights as owner. Adopting the phraseology of this Court in JDJ Properties[8] the appellant, as owner, had the 'right to safeguard the amenity of [its] immediate neighbourhood'[9] which would be potentially affected by a decision to allow a township to be developed in the immediate vicinity of its quarry. In that case, the owner of land had sought to review a municipality's approval of building plans. This Court held that the owner, as a person in whose interest a town planning scheme had been

[7] Nkengana & another v Schnetler & another [2010] ZASCA 64; [2011] 1 All SA 272 (SCA) para 10.

[8] JDJ Properties CC & another v Umngeni Local Municipality & another [2012] ZASCA 186; 2013 (2) SA 395 (SCA).

[9] Para 21.

enacted, had the necessary standing to do so. It referred with approval[10] to the decision in *BEF (Pty) Ltd v Cape Town Municipality & others*[11] in which it had been held that a person living in an area, generally speaking, has the right to take legal steps to enforce compliance with a town planning scheme. (Although the court in BEF went on to say that it 'would not like to assert dogmatically that such a remedy would be available to all persons living in the area covered by a scheme as large as that of Cape Town' that was not an issue on which it had to engage as the case involved 'an immediate neighbour to the property on which the non-conforming garage was built'.)[12]

[12] In the present case, as I have already pointed out, not only is the subject property in the immediate vicinity of the appellant's property, but at first blush the approval granted by the Municipality offends the buffer zone of its own Precinct Plan that forms part of the Municipality's integrated development plan adopted under the Municipal Systems Act. A municipality is bound in the exercise of its executive authority (which was so exercised in approving the township application) by s 35(1)(b) of the Municipal Systems Act. In addition, s 36 of that Act goes on to provide that a municipality 'must give effect to its integrated development plan and conduct its affairs in a manner which is consistent with its integrated development plan'.

[13] The Municipality avers that this buffer zone was only introduced several years after the second respondent had lodged its application and notice thereof had been advertised in November 2006 and April 2007. If this was an attempt to evade the applicability of the integrated development plan to the township application, it must be rejected. If the buffer requirement was introduced before the application was considered, it clearly had to be taken into account in considering whether the application should be approved.

[14] The Municipality also contended that the dimensions of the buffer zone in the Precinct Plan were not binding and operated only as a

[10] Para 32.

[11] BEF (Pty) Ltd v Cape Town Municipality & others 1983 (2) SA 387 (C).

[12] BEF at 401E-F.

guideline. Even if this is correct, however, the closer a proposed township development is to a quarry, the greater the imperative for the guideline to be observed, especially where, as here, the effects of blasting rock and related quarrying activities are likely to have potentially substantial adverse effects on nearby residents. As the appellant's property at its furthest point is less than half the prescribed width of the buffer zone from the subject property, and only some 50 metres away at its closest, there was every reason to take the Precinct Plan recommendation relating to the buffer zone into account. In these circumstances, even should the binding nature of the buffer zone and whether it ought to have been taken into account be matters of debate, the appellant was entitled to have its voice heard in determining the outcome of that debate.

[15] As I understood the respondents, they sought to buttress their argument in regard to the appellant's alleged lack of standing by contending that the appellant was not an 'interested party' as envisaged under its Policy to whom notice or a copy of the application had to be given – and that accordingly the appellant lacked standing to seek to review the approval of the township application. Although this contention is also relevant to the aspect to whether the approval of the township application involved a fair administrative process, an aspect to which I shall return, it is convenient to deal with it at this stage.

[16] At its outset the Policy provides that 'the various procedures to notify adjoining property owners on town planning applications as depicted by different legislation, be noted'. It goes on to state 'that due to the subjective nature of the word "interested party/parties" the terms "interested parties" and "adjoining property owners" used in the Policy – and presumably the relevant legislation – be defined as "the owner/occupant of any land" abutting or sharing a common boundary with such land (specifically including any land which is only separated by road) and to any other person who may in the opinion of the authorised local authority, be directly affected by the application'(my emphasis.) As already mentioned, the Policy then provides that in the case of an application under the Ordinance to establish a township, the application 'be advertised in the press as prescribed and the consent of the adjoining property owners be obtained.'

[17] The Municipality's argument is that as the appellant's property did

not share a common boundary with the subject property and was neither 'adjoining' nor 'adjacent' to nor 'abutting' the subject property – terms used in the Policy – the appellant was not an 'interested party', as envisaged by the Policy. For this reason it also alleged that it had not been of the opinion that the appellant was directly affected by the application. In my judgment, to uphold this would be to allow semantic formalism to trump administrative justice. The appellant's property and the subject property are in the immediate vicinity of each other, and by their very nature the mining and quarry activities upon the appellant's property, of which the Municipality has stressed throughout it was aware, are wholly inimical to a nearby residential township having its closest point about 50 metres from the appellant's property. There was, if anything, more reason to regard the appellant as an interested party, particularly after it had lodged its objection JH5, than any of the five adjoining neighbours who had neither responded to the published notices nor, for that matter, to the copies of the township application forwarded to them on 7 March 2008.

[18] In these circumstances it is nothing short of spurious for the Municipality to allege that because the situation of its land did not precisely fit that of an interested party as set out in the Policy, the appellant was not an interested party and was not directly affected by the application. Under s 195(1)(e) of the Constitution 'the public must be encouraged to participate in policy-making'. This Court pointed out in *Koukoudis & another v Abrina 1772 (Pty) Ltd & another*[13] that, in matters of local government, the right to object to the establishment of a township forms part of a legislative scheme founded upon the Constitution which both entitles and encourages individual members of society to actively participate in municipal decision-taking. Further, in Joseph[14] the Constitutional Court stated that the values and principles reflected in s 191 of the Constitution of the Republic of South Africa, 108 of 1996 oblige government to act in a respectful and fair manner, when fulfilling its constitutional and statutory obligations and that:

[13] Koukoudis & another v Abrina 1772 (Pty) Ltd & another [2016] ZASCA 95; 2016 (5) SA 352 (SCA) para 33.

[14] Joseph fn 4 para 46.

> 'This is of particular importance in the delivery of public services at the level of local government. Municipalities are, after all, at the forefront of government interaction with citizens. Compliance by local government with its procedural fairness obligations is crucial therefore, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy.'

[19] **In the light of these authorities, the Municipality had the constitutional obligation to attempt to ensure that regard was had to the views of all residents within its jurisdiction whose rights might be affected before a decision was taken in regard to the establishment of the township. To seek to regard a party who clearly was affected by such a decision as being not 'interested' merely because of a loose definition in its Policy, is inconsistent with the values a municipality is expected to observe in the performance of its constitutional obligations. More simply put, for the Municipality to regard a party whose rights of ownership would clearly be affected as not being interested, is simply unfair and unjust. The appellant clearly was a party interested in the application.**

[20] Consequently, the issue whether the appellant's financial interests or those of its wholly owned subsidiary would potentially be adversely affected by the approval of the township scheme, is no more than a red herring. As owner of property situated in the immediate vicinity, the appellant clearly has standing to question the validity of the decision to allow a township to be established on property in the immediate vicinity of the site of its quarrying operations. This is all the more so bearing in mind the likely adverse consequences of that activity and the fact that the decision may well have been granted in breach of the municipal integrated development plan[15]. The court a quo was therefore correct in holding that the appellant had standing in the review application and the respondent's argument to the contrary cannot succeed.

[21] Having determined that issue in favour of the appellant, I turn to deal with the question of the fairness of the procedure adopted by the

[15] Compare further Esterhuyse v Jan Jooste Family Trust & another 1998 (4) SA 241 (C) at 253H-254B.

Municipality before the township application was approved. For the reasons already mentioned, the appellant clearly had an interest in the application. However, whether it was an 'interested party' as envisaged in s 69(6)(b) of the Ordinance is another disputed aspect which needs to be mentioned in regard to the question of the fairness of the process adopted by the Municipality.

[22] Section 69(6)(b) of the Ordinance provides that on receipt of an application to establish a township:

> '(b)the local authority or the applicant with the consent of the local authority shall forward a copy of the application to-
>
> (i) the [Gauteng] Roads Department;
>
> (ii) every local authority whose area of jurisdiction is situated within a distance of 10 km from the land in respect of which application has been made;
>
> (iii)every local authority or body providing any engineering service contemplated in Chapter V to the land contemplated in subparagraph (ii) or to the local authority contemplated in subsection (1);
>
> (iv)any other department or division of the [Gauteng] Provincial Administration, any State department which or *any other person who*, in the opinion of the local authority, *may be interested in the application,*
>
> and every such department, local authority, body, division or person may, within a period of 60 days from the date on which a copy of the application was forwarded to him or it, or such further period as the local authority may allow, comment in writing thereon: Provided that an applicant who has forwarded a copy in terms of this paragraph shall submit proof to the satisfaction of the local authority that he has done so.' (My emphasis.)

[23] **Despite its obvious interest in the township application, the Municipality neither forwarded a copy of the application to the appellant nor called for its comments.** It sought to justify its failure to do so by relying on the unreported decision of A Gautschi AJ in the matter of *Abseq Properties (Pty) Ltd v Maroun Square Shopping*

Centre (Pty) Ltd[16]. In that case, the first two respondents had applied to establish a township and to rezone their properties in order to develop a shopping centre and residential accommodation. The applicant, the owner of a shopping centre situated a few 100 metres away, sought an interim interdict to stop the township establishment process, pending determination of a declarator for the review of certain decisions taken by the third respondent, the City of Johannesburg, relevant to the establishment of the proposed township. As in the present case, the applicant did not become aware of the notices which had been published in newspapers under s 69(6)(a) of the Ordinance, and as a result did not timeously file a formal objection. It argued, however, that the City of Johannesburg had breached s 69(6)(b)(iv) of the Ordinance in that it had failed to forward it a copy of the application. In this regard it relied on the phrase in that subsection that a local authority must provide a copy of the application to 'any other person who, in the opinion of the local authority, may be interested in the application'. The court rejected this argument. It held that the phrase in the subsection 'any other person who . . . may be interested' did not bear its ordinary, wide meaning but was to be interpreted euisdem generis and restricted to persons similar to those organs of state referred to in s 69(6)(b)(i)-(iii) 'such as parastatals, Eskom, Rand Water, Transnet and the like'.[17] It therefore held that the applicant was not a 'person . . . interested' for the purposes of s 69(6)(b)(iv) of the Ordinance, and dismissed the application.

[24] In the present instance, the learned judge in the court a quo expressed his reservations as to the correctness of this decision, but concluded that as he was not persuaded that it was clearly wrong, the rule of precedent obliged him to follow it. He therefore held that in the present case, too, the appellant was not a person 'interested' as envisaged by the subsection and for this reason alone dismissed the application.

[25] I, too, doubt the correctness of the decision in Abseq Properties.

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[16] Abseq Properties (Pty) Ltd v Maroun Square Shopping Centre (Pty) Ltd & others 27808/2011; [2012] ZAGPJHC 53 (2 March 2012).

[17] Abseq Properties para 23.

Like any other statutory enactment, the Ordinance must be interpreted in the light of the values enshrined in the Constitution which, as already mentioned, include the encouragement of public participation in policy making. To apply such a restrictive approach to the interpretation of the section would frustrate that purpose. But in my view it is unnecessary to deal further with this issue for, unlike the learned judge in the court a quo, I do not regard the issue as being determinative of the outcome of this matter.

[26] In deciding whether approval of the township application can stand, the provisions of the Ordinance are not to be considered alone. PAJA governs administrative action in general and its provisions are to be read together with the enabling legislation so that those authorised to take administrative decisions must do so in a manner consistent with PAJA[18]. Section 3(3) of PAJA provides that in order to give effect to the right to procedurally fair administrative action, an administrator in his or her discretion may also give the person whose rights or legitimate expectations are materially and adversely affected, the opportunity to, inter alia, present and dispute information. That brings me to the appellant's contention that it had a legitimate expectation to a hearing before the decision was taken, and that the failure of the Municipality to afford it such a hearing renders the decision void.

[27] As appears from the seminal judgment of Corbett CJ in *Administrator, Transvaal, & others v Traub & others*[19], the doctrine of legitimate expectation to a hearing bears as its hallmark the obligation of an administrative authority to act fairly. Thus in what has become known as SARFU[20], the Constitutional Court stated:

> 'The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether, in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a "legitimate expectation of a hearing" exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances. It is for this reason that the English courts have preferred the concept of "legitimate expectation" to that of "reasonable expectation".'

[18] See Zondi v MEC for Traditional and Local Government Affairs & others 2005 (3) SA 589 (CC) para 101.

[19] Administrator, Transvaal, &others v Traub & others 1989 (4) SA 731 (A), in particular at 754G-762G.

[20] President of the Republic of South Africa v South African Rugby Football Union & others 2000 (1) SA 1 (CC) para 216.

[28] Professor Hoexter points out that since its recognition in Traub, the expectations that the courts have recognised 'have been engendered in a variety of ways: by an express assurance, a settled practice or an established policy and, in a small but growing number of cases, by none of these things'[21]. And, of course, the expectation must qualify as being one that is legitimate. As this Court pointed out in *Duncan v Minister of Environmental Affairs and Tourism & another*[22] the requirements for legitimacy of such an expectation have been formulated as being:

> '(a) The representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications.
> (b) The expectation must have been induced by the decision-maker.
> (c) The expectation must be reasonable.
> (d) The representation must be one which is competent and lawful for the decision-maker to make.'

[29] **In the present case the appellant relies on an express assurance given by the Municipality to found its contention that it had a legitimate expectation to a hearing before the decision to approve the township development was taken. Its argument in this regard is based upon the events set out in para 5(l) above, namely, the conversation between its attorney and Mr Van Wyk, the letter JH7 sent to the**

[21] C Hoexter Administrative Law in South Africa 2 ed (2012) at 421.

[22] Duncan v Minister of Environmental Affairs and Tourism & another [2009] ZASCA 168; 2010 (6) SA 374 (SCA) para 15.

Municipality following that conversation (confirming that the appellant was on record as an interested and affected party and would be invited to attend a hearing), and the fact that despite that letter having been received by the Municipality, it failed to respond.

[30] Clearly Mr Van Wyk's representation was one which was competent and lawful for the Municipality to make, and induced a reasonable expectation that the appellant would be afforded a hearing – or at the very least that its representations in its objection JH5 would be taken into account before a decision on the application was taken. Thus the essential requirements envisaged in sub-paragraphs (b), (c) and (d) of the test for legitimacy as set out in Duncan were satisfied. However, based on an averment that Mr Van Wyk's assurance had simply been that the appellant would be informed of a tribunal hearing if one was convened, the Municipality sought to argue, in essence, that requirement (a) was not fulfilled as there had not been an unconditional statement that there would be a hearing. It also argued that the contents of JH5 were taken into account before approval of the township was granted.

[31] I shall return to this latter aspect in due course. But dealing with the question of whether the promise to hold a hearing was unconditional, the Municipality based its argument on the answering affidavit of the municipal manager, Mr Dan Mashitisho. In stating that the Municipality was unable to comment on how it had received Mr Athienides' letter JH7, he also alleged that Mr Van Wyk had advised the appellant that should any hearing in respect of the proposed township be held the appellant would be notified in respect thereof. Details as to when, where or in what terms this was allegedly conveyed were not set out, nor is there a meaningful affidavit from Mr Van Wyk himself. Instead the Municipality adopted the sloppy method of adducing evidence by way of a hearsay allegation made by Mr Mashitisho supported by a so-called 'confirmatory affidavit' by Mr Van Wyk, who stated no more than that he had read the affidavit of Mr Mashitisho and 'confirmed the contents thereof in so far as it relates to me and any of activities'. This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to

do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency.

[32] Importantly, not only is the averment relied on by the Municipality vague in the respects already mentioned, but it is extremely improbable. The excuse offered by the Municipality for not having a hearing before a tribunal was that when Mr Van Wyk spoke to Mr Gonsalves he 'was under the mistaken apprehension that objections to the township had been received' and that it was only later when the file was being prepared for consideration of the application by the Municipality that it was established that the letter of objection JH5 was not an objection as contemplated by the Ordinance and had in any event been lodged out of time. As a result, Mr Van Wyk felt that as no valid objections had been received, no tribunal needed to be convened. The Municipality therefore alleged there was nothing 'Van Wyk could have or should have informed the applicant of.' However, in response to the appellant's specific allegation in regard to the phone call between Mr Gonsalves and Mr Van Wyk, the contents of which were confirmed in the letter JH7, the Municipality admitted the phone call without qualifying it in any way. In doing so it admitted that the appellant's attorney had been told that the appellant had been recorded as an interested party who had objected to the development. As Mr Van Wyk at that stage regarded the appellant as an objector who was entitled to a hearing before a tribunal, he would hardly have told the appellant that it would be informed of when the hearing would take place only if a tribunal was convened. Any contrary suggestion can be rejected outright on the papers.

[33] In the light of these considerations, I understood counsel for the Municipality not to persist in the argument that what Mr Van Wyk had told Mr Gonsalves had been conditional upon a hearing being held, and to accept that JH7 correctly recorded the essence of what the appellant had been told.

[34] **In the light of what I have said, the appellant was clearly an interested party who had sought to object to the township application**. In addition, the Municipality told the appellant that it had been recorded both as an interested party and as an objector, that it would be notified of the date on which a tribunal would consider its objection, and that it would be invited to attend that hearing. That the appellant

persisted in its objection was obvious in the light of its letter to the Municipality of 17 November 2011, expressing the view that the attitude of the Department of Mineral Resources meant that the proposed township could not proceed. The failure to reply to this letter made it all the more reasonable for the appellant to expect that it would be afforded a hearing if the Municipality was intending to consider granting the township application. That being so, all the requirements of a legitimate expectation of a hearing flowing from the conversation between Mr Van Wyk and Mr Gonsalves were fulfilled. In any event, the Municipality's failure to reply to the letter JH7 amounted to a representation that the Municipality accepted the correctness of its contents. That representation is, in itself, sufficient to ground a legitimate expectation that the arrangements set out in JH7 would be honoured by the Municipality.

[35] The excuse offered by the Municipality for failing to convene a tribunal and to invite the appellant to attend a hearing, namely, that it later decided that it was not in fact an objector, is disingenuous. As Cameron J stated in Kirland Investments[23] there is no reason to exempt government from due process and that '(o)n the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights'[24]. This, the Municipality failed to do. In breach of the legitimate expectation the appellant had to a hearing, it failed to honour its promise to convene a tribunal to hear the appellant's objection. Instead it sought to place form above substance and to regard the appellant as not having been an objector in disregard of its earlier contrary promise and in circumstances in which, as I have already remarked, it was unfair not to have recognised the appellant as an interested party under the Municipality's Policy. In the circumstances, I have no hesitation in finding that on this basis alone its decision to approve the establishment of a township was procedurally unfair and cannot stand.

[36] There are, however, other features of the process that need to be

[23] MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute [2014] ZACC 6; 2014 (3) SA 481 (CC).

[24] Para 82.

mentioned. In this regard it is once again necessary to comment adversely on the manner in which the Municipality placed its evidence before court. As already mentioned, its answering affidavit was deposed to by its municipal manager, Mr Mashitisho. He alleged that 'the City' (ie the Municipality) was aware of the activities being conducted in the vicinity of the subject property, that the City formed the opinion that the appellant 'was not a person who may be directly affected by the granting of the township application', that the City took the 'financial interests' of the appellant into account in considering the application before the City approved the application on 28 August 2012. In fact the functionary who took that decision was the executive mayor but, noticeable by its absence, is an affidavit from the latter to explain why he or she granted approval. In fact no affidavit was forthcoming from the executive mayor to explain what information was available or what steps were taken into account before granting the necessary approval. As the relevant functionary whose decision was subject to review and who was therefore a crucial witness, it is inexplicable that no evidence from the executive mayor was placed before court.

[37] Furthermore, Mr Mashitisho alleged in his affidavit that the contents of the appellant's objection, JH5, were taken into account by the 'City' when considering whether to grant the township application. In the light of the executive mayor's failure to depose to an affidavit, this bold allegation can be ignored as hearsay in regard to whether he or she took JH5 into account. Surprisingly, although the truth of the statement that regard had been had to JH5 was denied by the appellant in its replying affidavit, it was not directly challenged by the appellant in this Court. Not only is the averment hearsay, but it flies in the face of the further factual averments made by Mr Mashitisho. He alleged that any correspondence received in respect of the township application would be filed and that, when the application is later prepared for consideration, such correspondence is then carefully read and attended to at that stage. He went on to allege that in the present case it was only when the file was being prepared for the consideration of the application by 'the City' (in this context, he presumably meant by the section 80 Committee rather than the executive mayor) that it was established that JH5 was not an objection as contemplated by the

Ordinance as it had been lodged after the date for objections set out in the notices published in the press. As already mentioned it was for this reason, that JH5 was considered not to be an objection and no tribunal hearing was convened.

[38] Consequently, in his report to the section 80 Committee, JH24, Mr Van Wyk stated that no objection or representations had been received against the application which was therefore 'unopposed'. Nothing could have been further from the truth. Moreover, in the light of the failure to either mention the appellant's objection or to attach it to JH24, the municipal manager's allegation that JH5 had been taken into account by the City before granting its approval simply cannot be accepted. In JH5, the appellant's attorney had drawn attention to there being three quarry mining operations, including that of the appellant, operating close to the subject property, and that the appellant's operations involved, inter alia, sand excavation, rock crushing and rock blasting which would result in excessive dust, vibration, noise and blasting in close proximity to residents on the subject property. He had further alleged that the large transportation vehicles used by the quarries travelling along the gravel roads in the area would make it hazardous and undesirable for urban residential traffic; and that for these reasons the location of a residential zone close to quarrying activities was 'simply inappropriate and should be avoided'. He had concluded by contending that the approval of the proposed township would prevent the appellant from extending its business operations on its property which would 'constitute a gross and unjust infringement upon our client's right in terms of the licenses issued to it to utilise the entire property owned by it for its commercial purposes and to enable it to gain the maximum financial benefit there from'. None of these contentions were mentioned by Mr Van Wyk in JH24. One can therefore accept that the legitimate expectation the appellant had of its representations being taken into account before a final decision was taken on the township application, was not met.

[39] We were informed from the bar that the prevailing practice in implementing the procedures provided by s 69 of the Ordinance is to treat only objections made timeously pursuant to s 69(6)(a) notices as 'objections' and those out of time merely as 'comments'. Whatever the rights or wrongs of this practice may be, it seems to me to matter not

a whit. As a matter of fact, even if JH5 was merely a 'comment', it was in substance an objection. To state, as Mr Van Wyk did in JH24, that the application to establish a township was unopposed, was to his knowledge factually false. Moreover, even if JH5 fell to be treated merely as a 'comment' rather than an 'objection', s 69(8) required all comments and representations made in respect of the township application to be forwarded to the second respondent who, under s 69(9), had 28 days from receipt to reply thereto. Whether this was done in respect of JH5 does not appear from the papers, but nothing of moment turns on that for present purposes. What is of importance, however, is that s 69(10) goes on to provide that 'the local authority shall consider the application with due regard to every objection lodged and all representations and comments made and every reply contemplated in subsection (9) . . .'.

[40] Despite these provisions, the contents of the appellant's objection and the representations therein contained were not mentioned in Mr Van Wyk's report. All that was stated was the following:

> 'Sand and aggregate quarries
>
> Due to the location of the proposed township in the vicinity of active sand and aggregate quarries the Gauteng Department of Mineral Resources has indicated that the following conditions must be inserted into the title deeds of all erven in the township when the opening of the townships register takes place:
>
> (a) As the erf (stand, land, plot, etc) forms part of land which is located in close proximity to active sand and aggregate quarries the erven in the proposed township may be subject to subsidence, settlement, shocks and cracking due to quarrying operations past, present or future, the owner thereof accepts exclusively all liability for any damage thereto and any structure and building thereon which may result from such subsidence, settlement, shocks and cracking.
>
> (b) As the erf (stand, land, plot) forms part of an area which may be liable to fly rock, dust pollution, noise and fumes created by the detonation of explosives as a result of the nearby quarrying activities in the area, the owner thereof shall accept that inconvenience and possible health hazards may be experienced as a result thereof.
>
> (c) The municipality nor the Gauteng Provincial Government shall in any way or form be liable for any damage to property,

inconvenience or any health problems that may result from quarrying activities in the area.'

[41] Thus, while the section 80 committee was told of the existence of a nearby quarry, and this was presumably brought to the attention of the executive mayor (although one has to infer this from the papers) the fact that the appellant had objected to the development and the nature and importance of its opposition thereto, do not appear to have been placed before either that committee or the executive mayor who had to take the final decision. The Municipality repeatedly stated that the contents of JH5 were taken into account by 'the City' (and indeed suggested in its papers that this constituted a hearing, a contention not persisted in during argument in this Court). However, in the light of what I have mentioned and the contents of Mr Van Wyk's report JH24, that was not the case.

[42] As a result the appellant, an interested party, was denied the opportunity of placing its views before the executive mayor who was the functionary entrusted with the discretion to approve the application. This was not procedurally fair. As Professor Hoexter has commented, in a passage approved by the Constitutional Court in Joseph[25]:

'Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'[26]

[43] **To sum up, the appellant was an interested party who had as a matter of fact objected to the application; it had a legitimate expectation to a hearing which was breached; and it was denied the opportunity of having its views considered by the relevant functionary by reason of an unfair process that was adopted.** The Constitutional Court in *Janse van Rensburg NO & another v Minister of Trade and*

[25] Joseph fn 4 para 42.

[26] C Hoexter Administrative Law in South Africa 2 ed (2012) at 363.

Industry & another NNO stated[27]:

'Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.'[28]

In the present circumstances, the procedure adopted by the Municipality had the very opposite effect. It resulted in the executive mayor not having a complete picture of the relevant facts and circumstances. There can in my view be no doubt that the decision taken to approve the establishment of a township was consequently fatally flawed by reason of procedural unfairness. The court a quo erred in not reaching this conclusion.

[44] Despite this, the respondent sought to take refuge in an argument that a court ought not to grant relief in favour of the appellant as it had failed to exhaust its domestic remedies under the Ordinance. Section 104(1) of the Ordinance provides that an applicant or objector who is aggrieved by a decision of an authorised local authority on an application such as that with which we are here concerned, may appeal within a prescribed period from the date upon which it was notified in writing of the decision. It is common cause that the appellant did not seek to exercise such right of appeal before it instituted proceedings in the court a quo.

[45] In the light of this failure, both respondents relied upon s 7(2) of PAJA which, inter alia, provides as follows:

'7(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for

[27] Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO 2001 (1) SA 29 (CC).

[28] Para 24.

judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

[46] As the appellant had failed to appeal under s 104 of the Ordinance and had also neither alleged any exceptional circumstances as contemplated in s 7(2)(c) of PAJA nor sought to obtain relief under that section, the respondents contended that the appellant should be non-suited. This argument was upheld in the court a quo which concluded that the appellant had been bound to appeal under the Ordinance before launching the review proceedings. In doing so, it said:

'Section 104 of the Ordinance provides that an objector who is aggrieved by a decision of an authorised local authority in a township application may appeal to the Provincial Government. The applicant is an objector. The letter of 17 August 2007 so illustrates. The fact that the letter was out of time and consequently invalid does not change the applicant's status as an objector as aforesaid. It only renders the objection invalid. It does not follow from the invalidity of an objection that the objector loses its status as an objector.'

[47] I must say I find this reasoning startling, to say the least. It would hold a person who as a result of having invalidly objected, and therefore excluded from the decision-taking process, being regarded as an objector for the purposes of an appeal against whatever decision was taken in the process from which it was so excluded. This would simply be absurd and nonsensical. I cannot see how the Municipality can be heard to say that the appellant had not objected to the application but, as an aggrieved objector, ought to have appealed against the decision to approve the application. And therein lies the answer to the respondents' argument on this issue. As Plasket AJA stated in JDJ Properties:

'How can a person appeal against a decision taken in proceedings in which he or she was not a party? The essence of an appeal is a rehearing (whether a wide or narrow) by a court or tribunal of second instance. Implicit in this is that the rehearing is at the instance of an unsuccessful participant in a process.'[29]

[48] **In the circumstances I have already detailed above, the Municipality excluded the appellant from the decision-taking process. As the appellant was not a party to that process, it was not incumbent upon it to attempt to appeal against the decision taken as a result of that process. Put somewhat differently, the appellant cannot be expected to exhaust its internal remedies when it was not afforded any remedies at all. In these circumstances, the respondents are not entitled to rely upon s 7(2) of PAJA to support an argument that the court a quo ought not to have reviewed the executive mayor's decision as the appellant had not sought to appeal under s 104 of the Ordinance.**

[49] Consequently, for the reasons already mentioned, the appeal must succeed. In its notice of motion, the appellant sought various orders of directory relief. Wisely, in this Court, it sought no more than an order setting aside the decision taken on 28 August 2012 to approve the establishment of a township on the subject property. This will be reflected in the order below.

[50] There is no reason for the costs of the appeal not to follow the event. As both respondents made common cause in opposing the relief sought by the appellant both in the court below and in this Court, their liability for costs should be joint and several.

[51] That brings me to the second respondent's cross-appeal. It sought to strike out various passages in the appellant's replying affidavit. The court a quo dismissed the application to strike out, and it was against this order that the second respondent cross-appealed. There are various reasons why the cross-appeal cannot succeed.

[52] The vast majority of the passages objected to refer to the appellant's statement in reply that it was the owner of Portion 81. The application to strike these averments was based on the contention that the appellant had not relied upon its ownership of Portion 81 in its founding affidavit in order to substantiate its entitlement to relief. However, as appears from the contents of this judgment, we have disposed of the matter without referring to the appellant's ownership of Portion 81 and these passages have caused no prejudice and are

[29] JDJ Properties fn 8 para 43; (See further in this regard City of Cape Town v Reader & others [2008] ZASCA 130; 2009 (1) SA 555 (SCA) para 30.)

irrelevant to the outcome, Moreover, the appellant raised its ownership of Portion 81 to rebut the Municipality's statement that it had given notice to all adjoining landowners, and therefore did not seek to make out a case in reply. Finally, it should be mentioned that the appellant's ownership of Portion 81 seems to be incontrovertible, supported as it was by a copy of the title deed. To strike out this allegation would in all the circumstances have been an exercise in futility and of academic interest only.

[53] Apart from those referring to Portion 81, there were only two other passages about which the second respondent complained. Both were wholly uncontroversial. In the first, the appellant alleged, justifiably, that its right to just administrative action, and its legitimate expectation to a hearing, had been infringed. In the second it complained, again justifiably, that as a person who had been directly affected by the application to establish a township, it ought to have been given notice of the application. It is self-evident that these passages ought not to have been struck out.

[54] Accordingly, there is no merit in the cross-appeal which falls to be dismissed with the second respondent paying the appellant's costs.

[55] It is therefore ordered:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and is replaced with the following:

'(a) The first respondent's approval on or about 28 August 2012 (acting through its executive mayor) of the application for the establishment of a township to be known as Greengate Extension 24 Township on Portion 33 (a portion of Portion 6) of the farm Roodekrans 183 IQ, is set aside.

(b) The respondents are to pay the applicant's costs, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.'

3 The second respondent's cross-appeal is dismissed, and the second respondent is ordered to pay the appellant's costs relating thereto.

YARONA HEALTHCARE NETWORK (PTY) LTD v MEDSHIELD MEDICAL SCHEME

Factors in proving that a party has been unjustly enriched as required by the condictio indebiti

Judgment given in the Supreme Court of Appeal on 22 September 2017 by Rogers AJA (Navsa ADP, Mathopo JA, Petse JA and Mbatha AJA concurring)

Calabash Health Solutions (Pty) Ltd provided managed care services to Medshield Medical Scheme. Yarona Healthcare Network (Pty) Ltd concluded an agreement with Calabash for the supply of network management services. Yarona invoiced Medshield for these services, and Medshield duly paid them over a two-year period.

At first, the payments made to Yarona were made by Medshield's administrator, Old Mutual Healthcare (Pty) Ltd. When OMHC was removed as administrator, Medshield made the payments direct.

In respect of payments made before self-administration began, there were several authorised signatories on the OMHC bank account. An Electronic Funds Transfer had to be authorised by two of them. The two signatories would be the persons who represented Medshield in respect of any particular payment. The EFT requisitions generally in fact, bore the signature of only one person, being an OMHC manager. They should also have been signed by the principal officer, Mr Alley, or by a second senior OMHC manager. On each occasion, Alley knew that the payments were not owing to Yarona. In respect of the first four payments made to Yarona however, invoice issued in July-October 2007, no documentation was available.

In respect of the payments made to Yarona after self-administration began in March 2009, two of the EFT requisitions were signed by two authorised signatories, being Alley and Ms Coetsee, Medshield's chief operating officer. In the case of the other two payments the EFT requisitions only contained Alley's signature.

Medshield sued Yarona for R6 110 237, being the sum of various payments made to Yarona over the period 6 August 2007 to 17 July 2009. Medshield alleged that the payments were made in the bona fide and reasonable but mistaken belief that they were owing, whereas in truth they were not, and that Yarona was unjustifiably enriched by the payments and Medshield correspondingly impoverished.

Held—

Since Alley's signature usually appeared on one or both of the payment instruction and invoice, it may be that OMHC, not unreasonably, regarded this

as a sufficient signed authority from him to proceed with the payment without obtaining his separate signature on the EFT requisitions. On that basis, excusability would on the face of it need to focus on the conduct of Alley and the relevant OMHC signatory.

In the absence of direct evidence, it was not possible to determine what went on in the minds of the OMHC officials who authorised the EFTs or what steps, if any, they took to satisfy themselves that the payments were owing. The furthest one might go in making assumptions in favour of the OMHC signatories is that they relied, without more, on Alley's approval for the payment of the invoices. This was inexcusably slack.

There was no evidence as to what knowledge the OMHC signatories had of Alley's credentials. As administrator OMHC could be expected to have been placed in possession of all material contracts concluded by Medshield. If not, OMHC ought to have demanded that they be made available. As a most basic precaution, the OMHC signatories should, when the payments started, have ascertained whether they were in accordance with a contract concluded by Medshield. It was not known whether they even asked Alley or anyone else whether a contract existed.

As far as payments made after self-administration began, it was clear that Coetsee's co-signing of the EFT requisitions was inexcusably slack. There was nothing to show that the money was not in fact owed to Calabash. Coetsee's error was to sign a requisition which resulted in the money going to Yarona instead of Calabash. She may not even have noticed that the bank details were those of Yarona. In respect of the other two payments made after self-administration began, the EFT requisitions did not contain Coetsee's signature, and only one of them contained Alley's signature. In the absence of evidence as to who caused these payments to be made, Medshield did not discharge the onus of proving excusable error.

Despite this, powerful considerations of policy require a focus on the persons in whose interests the representative signatory is meant to act. For purposes of the present decision it was unnecessary to go beyond the case of a medical scheme. Healthcare is a matter of fundamental importance to everyone. Medical schemes provide a way of ensuring as far as possible that people have access to adequate healthcare, often by a system in which contributions are made by members from their earnings and by employers for the benefit of members. Members of medical schemes are particularly vulnerable to abuse. Many of them earn modestly. If the funds which should be administered for their benefit are abused, they stand not only to lose moneys deducted from their earnings but to have their access to health care jeopardised.

Although Medshield had failed, in respect of all but one of the payments, to prove that the payments were made as a result of excusable error, Medshield's right to recover them by way of the condictio indebiti was not barred.

Advocate MC Maritz SC and Advocate DR van Zyl instructed by Gildenhuys Malatji Inc, Pretoria, appeared for the appellants
Advocate D Berger SC and Advocate K Millard instructed by Hogan Lovells, Sandton, appeared for the respondent

Rogers AJA:

Introduction

[1] The appellant (Yarona) and the respondent (Medshield) were the defendant and plaintiff respectively in the court a quo. Medshield, a medical scheme registered in terms of the Medical Schemes Act 131 of 1998 (the Act), sued Yarona for R6 110 237, being the sum of various payments made to Yarona over the period 6 August 2007 to 17 July 2009. Medshield alleged that the payments were made in the bona fide and reasonable but mistaken belief that they were owing, whereas in truth they were not, and that Yarona was unjustifiably enriched by the payments and Medshield correspondingly impoverished. The summons was served on 9 June 2011.

[2] Yarona defended the action, pleading that the payments were made for services rendered in terms of an agreement concluded during June 2007. Yarona counterclaimed for additional amounts allegedly owing under the agreement. There was also a special plea of prescription in respect of the payments made prior to 7 June 2008 – Yarona alleged that Medshield had the requisite knowledge, or could, by exercising reasonable care, have acquired the requisite knowledge, by the date of each payment, alternatively by 7 June 2008 at the latest. In its replication Medshield denied the existence of the alleged agreement.

[3] A separation order was made for the determination, in advance of other issues, of the question whether the service agreement had been concluded. The separated issue was enrolled for trial on 2 March 2015. On 26 February 2015 Yarona's attorneys wrote to Medshield's attorneys stating that during their client's trial preparation it had become evident that Yarona would not be able to prove that the persons

who purported to represent Medshield in concluding the agreement had the authority to do so and that Yarona thus conceded the separated issue. An order to this effect, including a dismissal of Yarona's counterclaim, was made.

[4] The trial of the remaining issues was conducted before Molefe J in April 2016. Prior to the commencement of evidence Yarona's counsel clarified that Yarona's concession that no valid service agreement was concluded did not entail an admission that Yarona had not performed work for Medshield's benefit or that such work could be left out of account in assessing Medshield's claim of unjustified enrichment. Apart from this reservation, the main issues were whether recovery was barred because of inexcusable slackness on Medshield's part and the date by which Medshield could, through the exercise of reasonable care, have acquired knowledge of the facts giving rise to Yarona's alleged indebtedness.

[5] Medshield called five witnesses. Yarona closed its case without adducing evidence. On 5 July 2016 Molefe J granted judgment in Medshield's favour. She gave leave to appeal to this court.

Factual background

[6] In what follows I shall, after their first mention, refer to individuals by their surnames. Medshield had four benefit options, the Access, Bonus, Value and Plus options. In 2006 Medshield concluded an agreement with Calabash Health Solutions (Pty) Ltd (Calabash) in terms of which Calabash was to provide managed care services in relation to the Access option for which it was entitled to a capitation fee (ie a specified amount per member subscribing to the Access option). Yarona in turn had an agreement with Calabash for the supply of network management services, namely the establishment and maintenance of networks of health practitioners who agreed to render services at negotiated rates. According to Ms Melani Coetsee, one of Medshield's witnesses, there was a corporate connection between Calabash and Yarona - they both formed part of what she called the Bathabile group of companies.

[7] With effect from 1 April 2007 Old Mutual Healthcare (Pty) Ltd (OMHC) replaced Medscheme as Medshield's administrator. OMHC had an office in Randburg dedicated to Medshield's administration. Medshield's only employees at that time were its principal officer and

his secretary. Until mid-2007 the principal officer was Mr Welcome Mboniso. When he resigned on account of ill-health he was replaced by Mr Clinton Alley. There was a short period of overlap between them. Alley's secretary was Ms Joselyn Baatjies.

[8] Yarona, which had an indirect involvement in Medshield's Access option via its contract with Calabash, wanted to extend its involvement to Medshield's other benefit options. There were discussions along these lines with representatives of OMHC, including a workshop in late May 2007. Yarona's managing director was Mr Bradley Soll. Alley, who was at this time a trustee and the principal officer in-waiting, was aware of the discussions. At Soll's request, Alley facilitated the obtaining of a letter dated 31 May 2007, purportedly signed by Mboniso, in which Medshield requested OMHC to provide Yarona with such information as Yarona needed to undertake 'an exercise on their risk sharing models and reimbursement strategies'. Mboniso testified that he had not signed or known about this letter but said that his secretary and Baatjies had access to his electronic signature for urgent documents.

[9] For its contention that there was a binding agreement, Yarona relied on this letter and on a draft service agreement with an effective date of 1 June 2007. Yarona's case (until it conceded the issue) was that Medshield had accepted the terms in the draft. The draft, which purported to have been signed by Soll on Yarona's behalf on 1 June 2007, made provision for Medshield to pay Yarona a monthly fee of R250 000 plus VAT. In fact, the draft agreement was not submitted to Medshield's board of trustees for approval and Medshield did not conclude a contract with Yarona.

[10] Notwithstanding this state of affairs, Medshield began to make monthly payments to Yarona. The first was on 6 August 2007 in the amount of R279 300 (R245 000 plus VAT). Although Medshield could not locate any documents relating to the first four payments, Yarona's documentation shows that it began invoicing Medshield in June 2007. Since the first payment for which Medshield had records was for an invoice in respect of services supposedly rendered in November 2007, the first four payments probably related to invoices covering July to October 2007. Yarona continued to issue monthly invoices well into 2009. Each invoice was for R279 300. Over the period 6 August 2007

to 17 July 2009 Medshield made 20 payments in this amount or multiples thereof. According to Medshield's records, these covered monthly invoices up to January 2009. There was no payment for April 2008 but the invoice for June 2008 was paid twice and the invoice for August 2008 thrice. In each invoice the services rendered were described as 'healthcare provider research and geo-mapping'.

[11] Medshield also paid Yarona an amount of R15 092 on 27 March 2008. According to Yarona's invoice, this was for flights and accommodation for Soll and Alley in respect of a 'Medshield roadshow' in March 2008. Furthermore, on 26 June 2009 Medshield paid Yarona an amount of R229 845 which, if it was owing at all, was due to Calabash, not Yarona. These further payments, together with the payments in respect of the monthly invoices, make up Medshield's claim of R6 110 237.

[12] In April 2008, and despite the absence of valid contracts, Ms Angela Blackburn, at that time employed by OMHC at the Randburg office as the Medshield claims manager, loaded Yarona 'baskets' onto OMHC's system in respect of the Value, Bonus and Plus options. These 'baskets' contained details of Yarona's health practitioner networks. Claims for services provided to Medshield members by health practitioners belonging to these networks were paid at the rates negotiated by Yarona. Blackburn testified that she loaded the baskets on Alley's instructions. She said that April 2008 was when 'we went live with the Yarona network'. This accords with internal Yarona documents stating that the implementation date of the 'reimbursement model' for Medshield's Bonus, Plus and Value options was 1 April 2008. The Yarona baskets were operative for the rest of the year. Blackburn accepted in cross-examination that over the period April to December 2008 OMHC processed thousands of Medshield claims for these options, some of which were from practitioners on the Yarona network who would have been remunerated in accordance with Yarona's discounted rates.

[13] During May 2008 Calabash defaulted on its obligations in respect of the Access option. After May 2008 Medshield paid Access claims directly. The Calabash agreement formally terminated in October 2008, though for several months there was a winding-down period during which Calabash performed certain administrative functions for which

it was paid an administration fee of around R230 000 per month.

[14] During August 2008 Medshield's board decided to terminate its administration agreement with OMHC. Preparation for self-administration took some months. In anticipation of self-administration, Blackburn resigned from OMHC and began employment with Medshield as from 1 October 2008 as General Manager: Operations. Ms Melani Coetsee, who served as a trustee from July 2007 to November 2008, was engaged as Medshield's Chief Operating Officer as from January 2009. By 1 March 2009, when self-administration began, Medshield had over a hundred employees. One of these was Ms Nawaal Davids, a former OMHC accountant who was appointed as Medshield's bookkeeper.

[15] In early January 2009 Blackburn asked Coetsee whether she should load the Yarona baskets for 2009. Coetsee testified that she did not know what Blackburn was talking about. She was aware of Yarona's involvement with the Access option via the Calabash agreement but knew that the Calabash agreement had terminated in October 2008. Coetsee instructed Blackburn not to load the Yarona baskets.

[16] I have mentioned that Medshield's last payment to Yarona was on 17 July 2009 (a delayed but duplicate payment for services supposedly rendered in June 2008) and that the last month of purported services for which payment was made was January 2009 (this payment was made on 20 February 2009).

[17] During September 2009 Medshield's financial department detected suspicious payments made from Medshield's bank account, apparently for Alley's personal benefit. Following preliminary investigation Alley was suspended. Soll, in the meanwhile, was claiming that Yarona had a valid contract with Medshield and was demanding ongoing payment. When Mr Clive Stuart, Medshield's acting principal officer, asked Coetsee whether she knew anything about payments due to Yarona, she told him that Medshield's contract with Calabash had ended in 2008 and that there was no contract with Yarona. Subsequent investigation revealed the payments which became the subject of Medshield's claim. Coetsee testified that Alley had instructed OMHC to allocate the payments to 'marketing fees', a single globular amount in the accounts which included payments to other service providers as well, with the

result that the monthly payments to Yarona were not detected. Coetsee testified that it was only in January 2010 that Medshield discovered the full extent of the unlawful payments to Yarona. Following a disciplinary hearing in January 2010 Alley was dismissed. Neither Alley nor Soll testified.

The payment procedure in general

[18] Coetsee, who was a trustee from July 2007 to November 2008 and thereafter Medshield's Chief Operating Officer, testified that only the board could authorise the conclusion of contracts. There was no delegated authority. Once a contract was duly concluded, the principal officer was responsible for authorising payment in terms of the contract. She said that there was a procurement policy in place but could not recall its content. No such document was produced by Medshield in discovery.

[19] From the evidence of Coetsee and Davids it emerges that the procedure for payment during the Alley era was as follows: Alley received the invoice and approved or declined it. If he approved it, he signed it. He gave the approved invoice to Baatjies who wrote it in her payment instruction book. Alley signed the instruction. Every few days an OMHC driver collected documents from Medshield, including invoices and accompanying payment instructions. On receipt of these documents, Davids checked that the instruction accorded with the invoice (both of which were meant to bear Alley's signature) and asked a clerk to prepare an electronic funds transfer (EFT) requisition. If the EFT requisition accorded with the invoice, Davids authorised it. The payment instruction was then loaded onto the electronic banking system. Davids thereafter sought a payment release authority from two of the signatories authorised to operate on Medshield's bank account. Usually the signatories would be Alley and an OMHC manager. Coetsee testified that a senior OMHC manager could sign in place of the principal officer. Normally, the authorised EFT signatories were presented with batches of EFT requisitions for signature. Davids testified that she never queried an instruction to pay, whether to Yarona or anyone else. Her role was limited to checking that the payment instruction and EFT requisition accorded with the invoice.

[20] It seems that when Medshield began self-administration in March 2009 the payment procedure carried on as before, save that the roles

previously played by the OMHC employees were now performed by corresponding Medshield employees.

The payment documentation in this case

[21] As I have said, Medshield was not able to locate any documentation relating to the first four payments (relating to the July-October 2007 invoices). One thus does not know to what extent the procedure described by Coetsee and Davids was faithfully observed. In respect of the November and December 2007 invoices, Medshield located the EFT requisition but not the invoices and payment instructions. The EFT requisition for the payment of these two invoices bears Alley's signature, though not in the place provided for the signature of the EFT signatories. The requisition was not signed by a second signatory. In respect of all but one of the subsequent payments there are payment instructions bearing Alley's signature. Where Medshield was able to locate the invoices, they generally bore Alley's signature though again there are exceptions. The EFT requisitions routinely contained the signature of only one authorised EFT signatory, presumably that of an authorised OMHC manager. Alley did not sign them. No EFT requisitions were discovered in respect of the payments of 27 March 2008 (R15 091,67 for the 'roadshow'), 12 February 2009 (R279 300 for Yarona's July 2008 invoice) and 20 February 2009 (R558 600 for Yarona's December 2008 and January 2009 invoices) and the related invoices did not bear Alley's signature (which may be because the copies in the record are Yarona's file copies).

[22] In respect of the four payments made to Yarona after self-administration began in March 2009, two of the EFT requisitions were signed by two authorised signatories, being Alley and Coetsee. In the case of the other two payments the EFT requisitions in the record only contain Alley's signature.

Error and excusability

[23] Medshield's pleaded case was the condictio indebiti. The payments were said to have been made in the reasonable but mistaken belief that they were owing. It is not every mistake which entitles the mistaken party to recover payment. Our courts have approved statements in the old authorities to the effect that the mistake should have been 'neither heedless nor far-fetched'; that it should not have been based on 'gross ignorance'; that it should have been 'neither slack

nor studied'.[1] In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another*[2] Hefer JA said the following:

> 'It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that, if the payer's conduct is so slack that he does not in the Court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others, and vice versa. Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no debitum and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment.'

Although this passage is formulated with reference to errors of law, it is equally applicable to errors of fact. As Hefer JA observed at an earlier point in his judgment[3], there is no logic in the distinction between mistake of fact and mistakes of law in the context of the condictio indebiti.

[24] The onus rests on the claimant to prove the excusability of the error[4]. In *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail*[5] a contractor implemented an increase in the rates payable for its services. The court found that the contractor had not been entitled to charge the increased rates. The employer, Transnet, sought to recover the amounts

[1] Union Government v National Bank of South Africa Ltd 1921 AD 121 at 126; Rahim v Minister of Justice 1964 (4) SA 630 (A) at 634A-C; Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another 1992 (4) SA 202 (A) at 223I-224B.

[2] See previous fn, at 224E-G.

[3] At 220H.

[4] Willis Faber fn 2 above at 224I-225A; Affirmative Portfolios CC v Transnet Ltd t/a Metrorail 2009 (1) SA 196 (SCA) para 29.

[5] See previous fn.

overpaid over a six-month period. The trial court found that Transnet's mistake was excusable but this court disagreed. Boruchowitz AJA said that although the nature of Transnet's mistake was clear the reason for the mistake was not. Transnet failed to explain why the mistake occurred and why it occurred repeatedly over a six-month period. The written agreement was readily accessible to its officials. Their failure to detect the unauthorized increase and to check the rates stipulated in the invoices against the agreement could only be attributed to extreme slackness or negligence on their part[6].

[25] In the present case Medshield submitted that the trial judge was right to find that the payments were made as a result of excusable error. In the alternative it argued that this court should hold that in the circumstances of this case excusability was not a requirement. We were asked to build on the exception recognised in relation to executors in Wessels The Law of Contract[7] and extended by analogy to liquidators and trustees in *Bowman, De Wet and Du Plessis NNO & others v Fidelity Bank Ltd*[8].

Payments pre-dating self-administration

[26] I start with the payments which occurred before Medshield's self-administration began in March 2009. Because a medical scheme is a corporate body[9], it is necessary – in order to assess excusability – to identify the individuals who represented Medshield in making the payments. Medshield did not plead their identity. The evidence was that there were several authorised signatories on the bank account and that an EFT had to be authorised by two of them. The two signatories would thus be the persons who represented Medshield in respect of any particular payment.

[27] Both sides focused their submissions on the responsibilities of the

[6] Paras 34-35.

[7] 2 Ed para 999.

[8] Bowman, De Wet and Du Plessis NNO & others v Fidelity Bank Ltd 1997 (2) SA 35 (A) at 44H-45G.

[9] Section 26 of the Act.

board of trustees and finance committee. In my view those submissions were misdirected. The board and finance committee were not involved in making the payments. The question is not whether these bodies were slack in failing to detect that unlawful payments had been made (though this may be relevant to prescription). Excusability is concerned with the mistakes made by those persons who actually effected payment, in this case the authorised signatories. It may be that if the board had established better systems of control, OMHC's authorised signatories would have been more careful. There is insufficient evidence to make a finding to this effect but I do not think it matters. The fact remains that the board was ignorant of, and thus not privy to, the making of the payments. The board was not the functionary which mistakenly made the payments and it thus makes no sense to enquire whether the board's 'mistake' was excusable.

[28] As I have said, the EFT requisitions generally bore the signature of only one person, being an OMHC manager. They should also have been signed by Alley or by a second senior OMHC manager. Since Alley's signature usually appeared on one or both of the payment instruction and invoice, it may be that OMHC, not unreasonably, regarded this as a sufficient signed authority from him to proceed with the payment without obtaining his separate signature on the EFT requisitions. On that basis, excusability would on the face of it need to focus on the conduct of Alley and the relevant OMHC signatory.

[29] **Medshield's case was conducted on the basis that Alley knew that the payments were not owing to Yarona. It is difficult to avoid that conclusion.** Medshield's counsel argued (albeit in relation to prescription) that Alley's knowledge should not be attributed to Medshield, invoking the rule that where an agent in the course of his employment defrauds his principal the latter is not charged with constructive knowledge of the transaction[10]. If Alley had acted alone in causing Medshield to make the payments, Medshield could not have brought its enrichment claim as a condictio indebiti because Alley did

[10] As to this principle, see R v Kritzinger 1971 (2) SA 57 (A) at 59H-60D; NBS Bank Ltd v Cape Produce Company (Pty Ltd & others [2002] 2 All SA 262 (A) para 34.

not mistakenly believe that the money was owing[11]. However Alley did not act alone. In such circumstances I consider (and the contrary was not argued) that the condictio indebiti is available if the second person, without whose participation the payment could not have been made, mistakenly believed the money was owing, provided of course the mistake was excusable.

[30] The difficulty confronting Medshield is that there is no evidence as to who signed the EFT requisitions as authorised EFT signatories or what their thinking was. Davids testified that the authorised OMHC signatories were Ms Nikita Sigaba and Mr Regan van Heerden. For eight of the payments which occurred before self-administration, no signed EFT requisitions were located so one does not know which OMHC official authorised them. For one payment the EFT requisition does not contain an OMHC signature. For the other nine payments the OMHC signatures are indecipherable but appear to come from three different people. Assuming two of them were Sigaba and Van Heerden, the identity of the third is unknown. Sigaba and Van Heerden did not testify. One thus does not know what went on in their minds when they authorised the EFTs or what steps, if any, they took to satisfy themselves that the payments were owing.

[31] **In the absence of evidence, the furthest one might go in making assumptions in favour of the OMHC signatories is that they relied, without more, on Alley's approval for the payment of the invoices. In my view this was inexcusably slack.** OMHC was a professional administrator. In accordance with good corporate governance, Medshield's rules required the board to ensure that proper control systems were employed and expressly specified that payments from its bank account had to be authorised under the joint signature of at least two persons authorised by the board. In order to obtain accreditation as an administrator, OMHC would have had to satisfy the Registrar that its own systems of financial control were adequate[12]. The OMHC signatories must have known that the purpose of requiring two

[11] Absa Bank Ltd v Leech & others NNO 2001 (4) SA 132 (SCA) para 8.

[12] Regulation 17(2)(d) of the regulations promulgated in terms of the Act (GNR 1262, 20 October 1999, as amended).

signatories was to neutralise as far as possible the dangers inherent in reposing complete confidence in one person. The advantage of the second signatory would entirely disappear if such signatory could rely solely on representations made by the first signatory. One has no evidence as to what knowledge the OMHC signatories had of Alley's credentials. One knows that the payments started very shortly after he assumed office. The payments were substantial and took place virtually every month. As administrator OMHC could be expected to have been placed in possession of all material contracts concluded by Medshield. If not, OMHC ought to have demanded that they be made available. As a most basic precaution, the OMHC signatories should, when the payments started, have ascertained whether they were in accordance with a contract concluded by Medshield. One does not know that they even asked Alley or anyone else whether a contract existed[13].

[32] In the passage quoted earlier from Willis Faber Hefer JA said that relevant considerations in assessing excusability included whether the defendant's conduct induced the plaintiff's mistake and whether the defendant knew that the money was not owing. Medshield argued that there was an improper relationship between Alley and Soll. In their heads of argument Medshield's counsel submitted that Alley and Soll actively deceived OMHC and Medshield's board. I do not think it is open to Medshield to advance that case insofar as Soll and Yarona are concerned. During the course of the trial Yarona's counsel objected to evidence designed to show that Yarona acted fraudulently and on the second occasion on which this occurred the judge disallowed the line of questioning. Yarona's counsel, in motivating the objection, submitted that fraud should be pleaded, an established principle recently reiterated by this court in *Home Talk Developments (Pty) Ltd & others v Ekurhuleni Metropolitan Municipality*.[14]

[33] If Medshield wanted to prove that Yarona acted in cahoots with

[13] See Greyling v ISCOR [1984] ZASCA 156 (unreported judgment in Case 233/83) where the defendant's counter-claim based on the condictio indebiti failed because the defendant failed to adduce evidence from the official or officials who caused payment of unowed sick leave to be paid to the plaintiff.

[14] Home Talk Developments (Pty) Ltd & others v Ekurhuleni Metropolitan Municipality [2017] ZASCA 77; [2017] 3 All SA 382 (SCA) paras 29-31.

Alley, the obvious claim would been one based on fraud or theft. I do not say that in such circumstances the condictio indebiti would not have been available as an alternative[15]. But if Medshield wished to rely on Yarona's alleged fraud as a factor excusing Medshield's mistake, it was required to plead it. Yarona's concession that no valid agreement existed was not a concession that it knew there was no agreement when it invoiced Medshield and received the payments. Although there are emails between Alley and Soll which might be thought suspicious, it is difficult to assess their import in the absence of evidence from Alley and Soll. If Medshield had pleaded fraud, Yarona might have been constrained to call Soll as a witness. For the rest it seems to me that the OMHC signatories probably relied not on Yarona's conduct in issuing the invoices but, improperly, on Alley's conduct in approving them.

Payments post-dating self-administration

[34] Coetsee co-signed two of the four EFT requisitions post-dating self-administration. The first was a payment of R279 300 on 17 April 2009 for Yarona's October 2008 invoice. Coetsee appended her signature to the invoice and EFT requisition on 16 April 2009, about a month and a half after self-administration began. She testified that Alley came to her office and told her that Medshield had reneged on its agreement with Calabash in respect of the Access option, that the outstanding invoice related to Access services rendered for October 2008 and that if Medshield did not pay it might be taken to court. She did not find it strange that the invoice was in Yarona's name – she saw Calabash and Yarona as the same thing and assumed Medshield would be making payment in terms of its agreement with Calabash. Although the Calabash agreement had terminated, Alley told her that the invoice related to October 2008. She knew that Calabash was entitled to a wind-down fee until the end of 2008. She continued:

> 'We were still in the process of setting, or starting the self-administration and he actually misled me into believing this was an outstanding payment which it was not. I did not have the ability to check the financials or question Mr Alley because he is the accounting officer of the scheme and he would have known what we

[15] Cf Diamond Fields Advertiser v Colonial Government Buch App Cases (1910-1911) 8.

had paid and not paid, he had been the accounting officer since 2007 so I did not question him. I trusted him and I signed the invoice.'

[35] **Coetsee's view that Alley could not be questioned was unreasonable. It was also unacceptable for her to assume that it made no difference whether the recipient of the payment was Calabash or Yarona. Her co-signing of this EFT requisition was inexcusably slack.**

[36] The second payment which Coetsee authorised was an amount of R229 845 on 26 June 2009. Unlike the first payment, this was in fact a payment arising from Medshield's contractual relationship with Calabash. Coetsee testified that Alley approached her to say that there was still a balance owing to Calabash in respect of the period ending December 2008. She was shown a spreadsheet listing all invoices and payments. The figures on the spreadsheet are not fully legible. Be that as it may, Alley's proposal was that Medshield settle with Calabash by paying 50 per cent of the allegedly outstanding amount. Alley told her he had confirmed with Calabash's managing director, Mr Martin Rimmer, that this would be acceptable. Coetsee understood that 50 percent totalled R229 845. It was on this basis that she co-signed the EFT requisition. The requisition reflected Calabash as the supplier but contained Yarona's bank details. **There is nothing to show that the money was not in fact owed to Calabash. Coetsee's error was to sign a requisition which resulted in the money going to Yarona instead of Calabash. She may not even have noticed that the bank details were those of Yarona. I think her explanation in this instance just passes muster though in the light of what follows this is not a matter of great moment.**

[37] In respect of the other two payments made after self-administration began, the EFT requisitions do not contain Coetsee's signature. And only one of them contains Alley's signature. The one payment was a third payment of Yarona's August 2008 invoice and the other a second payment of Yarona's June 2008 invoice. In the absence of evidence as to who (apart from Alley) caused these payments to be made, Medshield did not discharge the onus of proving excusable error.

Is excusability a requirement in this case?

[38] In his work The Law Of Contract[16] Sir John Wessels dealt with the question whether an executor who paid heirs or legatees with full knowledge of the facts but under a mistaken belief as to their legal rights could recover the money by way of the condictio indebiti. After observing that the decision in *Rooth v The State*[17] stood in the way of such a conclusion, he continued (citation of authority omitted):

> 'It seems, however, more reasonable to hold that a person who, like an executor, is acting for the benefit of others, and who in that capacity overpays an heir or legatee under a bona fide mistake as to their legal rights, should not suffer for his mistake . . . .'

[39] Although the focus of this passage was whether the executor could, contrary to the general rule then prevailing, rely on an error of law, this court in Bowman[18] understood Wessel's proposal as entailing the further proposition that excusability was not a requirement in the circumstances contemplated by the author[19]. In that case Harms JA said that Wessels' proposal seemed 'eminently sensible'. In support of this view Harms JA said that a creditor could by way of the condictio indebiti recover from an heir money improperly paid to him by the executor without having to prove that the executor's mistake was excusable. That being so, there was no reason why, if the executor himself instituted the condictio, he had to prove that his mistake was excusable. In Bowman this view was applied by analogy to liquidators and trustees who had paid more than was owing to a secured creditor. Their error, I should add, was one of fact.

[40] Medshield's counsel argued that we should extend this exception to errors made in the administration of a medical scheme's affairs. While recognising that a medical scheme is a separate juristic person, Medshield submitted that the Act requires medical schemes to be

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[16] Fn 7 above.

[17] Rooth v The State (1888) 2 SAR 259.

[18] Bowman Fn 8 above.

[19] 44H-45G.

administered in the interests of members and beneficiaries and that those charged with its administration can be seen to be acting in a representative capacity similar to executors, liquidators and trustees.

[41] Yarona's counsel argued that the rationale for the exception recognised in Bowman was the undesirability of holding the representative liable to the heir or creditor for his mistake. That did not apply here where the medical scheme itself as a corporate body made the payments. The members of the scheme would not have a claim against the medical scheme for negligent payments. There might be a claim for negligence against the trustees or principal officer but there was no reason in policy why they should not bear the consequences of their inexcusable slackness.

[42] Wessel's justification for the exception is unconvincing, at least under our modern system for administering deceased and insolvent estates. In insolvency cases, and in many deceased estates, the persons appointed as liquidators, trustees and executors are professionals who earn substantial fees and carry professional indemnity insurance. There is no compelling reason of policy from their perspective to make an exception to the excusability requirement. In Bowman Harms JA appears to have been swayed not so much by the need to protect executors and insolvency practitioners but by authority supporting the view that where an heir or creditor proceeds directly against the recipient of an unowed payment, the heir or creditor need not prove that the executor's mistake was excusable. It would be illogical in those circumstances to say that if the claim was instituted by the executor or liquidator rather than heir or creditor, the executor or liquidator has to prove excusable error.

[43] **In my opinion, the more powerful considerations of policy (and policy is a relevant factor, as the passage I earlier quoted from Wills Faber shows) are those which focus on the persons in whose interests the representative is meant to act. For purposes of the present decision it is unnecessary to go beyond the case of a medical scheme. Healthcare is a matter of fundamental importance to everyone. Medical schemes provide a way of ensuring as far as possible that people have access to adequate healthcare, often by a system in which contributions are made by members from their earnings and by employers for the benefit of members. Medical schemes are closely regulated to ensure that their**

assets are prudently administered for the attainment of the sole object of conducting the medical scheme business. One of the primary duties of a scheme's board is to take all reasonable steps to ensure that the interests of beneficiaries in terms of the rules and the Act are protected at all times[20]. The board must consist of persons who are fit and proper to manage the scheme's business[21]. Members of medical schemes are particularly vulnerable to abuse. Many of them earn modestly. If the funds which should be administered for their benefit are abused, they stand not only to lose moneys deducted from their earnings but to have their access to health care jeopardised.

[44] In deciding whether to extend the protection recognised in Bowman, I do not think it matters that a medical scheme is a juristic person. The important feature is that the scheme exists for the benefit of its members, often vulnerable people, and is administered by persons who owe a fiduciary duty to them. In that sense the persons charged with the administration of the scheme can be viewed as representatives standing in a similar position to executors, trustees and liquidators. Indeed, in the case of a company in liquidation its assets and liabilities do not vest in the liquidator. The liquidator succeeds to the administration of the company in the place of its directors[22]. A similar view was taken by a full court in *Grant Thornton Capital Umbrella Fund v Da Silva*[23] where the condictio was brought by a provident fund (also a juristic person). While it is unnecessary to decide whether the requirement of excusability should be relaxed in the case of provident funds, the full court was right not to regard the juristic personality of the fund as a bar to extending Bowman by analogy to other situations.

[45] In regard to Yarona's contention that there is no reason to shield a scheme's board and principal officer from liability for their negligence, I have already indicated that in my view the focus should

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[20] Section 57(6)(a).

[21] Section 57(1).

[22] Leigh v Nungu Trading 353 (Pty) Ltd & another 2008 (2) SA 1 (SCA).

[23] Grant Thornton Capital Umbrella Fund v Da Silva [2013] ZAGPJHC 231.

be on the vulnerability of the members rather than the need to protect the office bearers. This said, there are important differences between the trustees of a medical scheme on the one hand and executors and insolvency practitioners on the other. At least half of a scheme's board must be elected from among members of the scheme[24]. Often a fund's rules require (as in Medshield's case) that the remaining members of the board are to be elected from persons nominated by the employers. The trustees are not professional administrators. Furthermore, a remedy against them may be inadequate. They may not have the resources to meet claims. Litigation against them might be costly and protracted. An exception to the excusability requirement would not, I must emphasise, take away any rights which the scheme or members might have against delinquent office bearers; it would simply mean that the scheme can, in the interests of members, recover unowed payments even though its office bearers acted with inexcusable slackness. That said, I cannot stress enough that this is not an invitation to slackness on the part of office bearers who might face other sanctions for such conduct.

[46] **I thus conclude that although Medshield has failed, in respect of all but one of the payments, to prove that such payments were made as a result of excusable error, Medshield's right to recover them by way of the condictio indebiti is not barred.**

Impoverishment

[47] Yarona contends that Medshield was required to prove not only that Yarona was enriched by the amounts claimed but also that such enrichment occurred at Medshield's expense, ie that Medshield was impoverished by the amounts claimed[25]. Since Yarona received unowed moneys, its enrichment was presumed and it bore the onus to plead and prove loss of enrichment which it did not do[26]. Yarona argued, however, that Medshield failed to prove its impoverishment. This

[24] Section 57(2).

[25] For this requirement, see McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA) para 19 per Schutz JA and para 2 per Harms JA; Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 (5) SA 193 (SCA) para 17.

[26] African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd 1978 (3) SA 699 (A) at 713 in fine.

argument was based on Blackburn's evidence that the Yarona baskets were loaded onto Medshield's system in April 2008 and were used in meeting claims over the period April to December 2008. Simply put, the argument is that Medshield received value from the use of the baskets.

[48] I do not think that this argument can be upheld. It is as well to begin by emphasising that Medshield's claim was not a claim for restitutio in integrum. That is a special remedy accorded by our law where voidable contracts are rescinded on certain recognised grounds. A party seeking rescission and restitutio in integrum must generally be willing and able to restore what he has received and should tender such restoration when claiming[27]. Restitutio in integrum does not find application in a case such as the present, where no contract came into existence. Medshield's claim was thus correctly the condictio indebiti. In *Davidson v Bonafede Marais* J referred with approval to Prof de Vos' warning against the tendency to confuse restitutio in integrum, which is not an enrichment action, with the condictiones[28].

[49] There is no clear authority that a party who institutes a condictio indebiti in respect of performance made under a putative contract must tender to return what he received from the defendant[29]; still less that he must prove the value of what he received. Prof de Vos' view is that no such tender is needed[30]. He also makes the point[31] that even in cases of restitutio in integrum the plaintiff need not make a tender where what

[27] Feinstein v Niggli & another 1981 (2) SA 684 (A) at 700F-701C; Davidson v Bonafede 1981 (2) SA 501 (C) at 509D-511H. Cf Van der Merwe et al Contract: General Principles 4 ed at 116-118.

[28] Fn 27 above, at 510B, with reference to De Vos Verrykingsaanspreeklikheid 2 ed at 144.

[29] See Du Plessis The South African Law of Unjustified Enrichment (2012) at 161; Visser Unjustified Enrichment (2008) at 164 and fn 30.

[30] De Vos Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg 3 ed at 166-167.

[31] Loc cit.

he received was a factum (a service)[32].

[50] The authors of the chapter on enrichment in Lawsa[33] state that a party who uses the condictio indebiti to recover a transfer of value made under an unenforceable contract must tender to restore what he received. They cite four cases[34], all dealing with unenforceable oral agreements for the sale of land. The first three (Wepener, Van der Berg and Bushney) were rei vindicationes by sellers. Wepener and Van der Berg do not support the proposition. Although Bushney does, the court incorrectly based its statement on the two earlier case and incorrectly described the plaintiff's claim as one for restitutio in integrum. The fourth case, Mattheus, was a condictio by the purchaser and does not deal with the question of tender. In regard to the seller's rei vindicatio, there is more recent authority that no tender is required by the seller in such cases[35].

[51] This is not to deny that the seller is legally obliged to repay the purchase price. To say that no tender is needed merely acknowledges that the seller's rei vindicatio is independent of any claim which the buyer may have against him for unjustified enrichment. The purchaser's condictio indebiti could be adjudicated simultaneously with the buyer's rei vindicatio, which is what this court envisaged in *Menqa & another v Markom & another*[36].

[52] To return to Yarona's contention that Medshield failed to prove its impoverishment, the requirement of impoverishment in the condictio indebiti is concerned with whether the plaintiff suffered a loss in the act

[32] See, eg, Hall-Thermotank Natal (Pty) Ltd v Hardman 1968 (4) SA 818 (D) at 830G-831C.

[33] Lotz & Brand Lawsa 2 ed vol 9 para 213 and fn 12.

[34] Wepener v Schraader 1903 TS 629; Van der Berg v Shaw NO 1933 TPD 242; Bushney v Joliffe 1953 (4) SA 273 (W) at 276H-277A; Mattheus v Stratford & another 1946 TPD 498.

[35] See Vogel NO v Volkersz 1977 (1) SA 537 (T), a full court judgment, at 554H-555C; Hartland Implemente (Edms) Bpk v Enal Eiendomme BK & andere 2002 (3) SA 653 (NC) at 663I-664H.

[36] Menqa & another v Markom & others 2008 (2) SA 120 (SCA) para 25.

of making the payment or performance giving rise to the condictio. Issues of non-impoverishment typically arise in tripartite situations where on analysis it emerges that the loss was in truth suffered by a third party or where the claimant was shielded from loss by an indemnity or the like[37].

[53] **In the present case there were no circumstances prevailing at the time of each payment which would justify a conclusion that Yarona's enrichment did not occur at Medshield's expense and cause an immediate corresponding impoverishment. Medshield did not have a contractual arrangement with a third party which shielded it from the impoverishment. Whatever Yarona may have thought, there was in fact no contract between Medshield and Yarona. A non-existent contract cannot be used to forge a causal link between one or more of the unowed payments which Medshield made to Yarona and the benefit which Yarona supposedly conferred on Medshield by way of the loaded baskets.**

[54] I have no quibble with the proposition that in cases of bilateral performances by P and D under non-existent or unenforceable contracts our law of unjustified enrichment would be lacking if the end result were not, at least generally, a netting-off of gains but the question is how one reaches this result. The correct solution in my view is that P and D should each use the condictio indebiti to recover from each other. If this were done in the same proceedings, the end result would be set-off pursuant to the procedure provided for in rule 22(4) of the Uniform Rules. The party with the higher enrichment liability would have to pay the difference to the party with the lower enrichment liability.

[55] It might be argued that there is another solution, one which flows from the rebuttable presumption of enrichment which arises when an indebitum is transferred and the related right of the recipient to plead loss of enrichment as a defence[38]. The fallacy in this argument, so it seems to me, is the assumption that D's transfer of value to P results in

[37] See, eg, Visser op cit (fn 27 above) at 360 and 366; Gouws v Jester Pools (Pty) Ltd 1968 (3) SA 563 (T). And cf Kudu Granite fn 25 above para 23.

[38] African Diamond Exporters fn 26 above.

an irreversible diminution of D's patrimony (ie a loss of enrichment). If D has the right to recover what he has transferred, a defence of loss of enrichment is not available. In the case of a putative contract, D has the same right which P has to reclaim, by the condictio indebiti, his unowed transfers of value.

[56] The defence of loss of enrichment is also unsatisfactory in bilateral cases for other reasons. Other than in a simultaneous exchange of performances, D would usually have transferred value to P because of a mistaken belief that he had a contractual obligation to do so rather than because of any particular payment received from P. Furthermore the rules which determine whether and in what amount D has a condictio against P are not the same as the rules which determine whether D can raise loss of enrichment as a defence and the quantum of the permissible reduction. In a condictio by way of counterclaim, D would be limited to the lower of P's enrichment and D's impoverishment whereas a defence of loss of enrichment would entitle D to deduct the full extent of his own impoverishment, even though P may have derived no benefit from D's performance.

[57] I do not wish to be understood as elevating formality above substance. If a defendant were to plead loss of enrichment in circumstances where a condictio indebiti by way of counterclaim was technically the correct remedy, a court would not be precluded from awarding the plaintiff a net amount if all the issues relevant to a pleaded counterclaim had been canvassed at the trial. However the net position should be the one flowing from reciprocal condictiones indebiti.

[58] It is surprising that this situation is not the subject of clear authority. The question how to unwind void mutual contracts has engendered lively academic discussion[39]. Prof Visser and Prof

[39] See, eg, Peter Birks 'No Consideration: Restitution after Void Contracts' (1993) 23 Western Australian Law Review 195-234; Phillip Hellwege 'Unwinding Mutual Contracts: Restitutio in Integrum v. the Defence of Change of Position' in Unjustified Enrichment: Key Issues in Comparative Perspective Eds David Johnston and Reinhard Zimmermann (Cambridge University Press, 2012) pp 243-286; Sonja Meier 'Unwinding Failed Contracts: New European Developments' (2017) 21 Edinburgh Law Review 1-29.

Sonnekus in their respective works on unjustified enrichment[40] appear to approve the solution I have proposed – they do so with reference to this court's decision in *Rubin v Botha*[41] though the procedural methodology was not worked out in that case. In Dugas[42] the applicant sued for the return of payments he had made under an invalid hire-purchase agreement for the purchase of a car. The respondent contended that it would be unjust to allow the applicant to recover his payments without taking into account the benefit he had enjoyed by having the use of the car for 21 months. Without discussing the procedural aspects, Henochsberg J said that it was for the respondent to establish the applicant's unjustified enrichment[43]. This was also the view of the appeal court in the Scottish case of Haggarty[44].

[59] In German law[45] the initial approach to the problem was the one I have proposed, known in German as the Zweikondiktionentheorie (the two-claims theory). This theory was subsequently thought to produce potentially unfair results where one of the parties but not the other was able to raise a defence of loss of enrichment. This led to the emergence of the Saldotheorie (the balance theory). In terms of this approach P's claim is reduced by the amount of any enrichment that he has lost, even if the loss of enrichment was without fault on his part. Even so, German law still used the two-claims theory in certain cases of voidable contracts – for example where the recipient was in bad faith or the contract was voidable by reason of fraud, duress or immorality. The

[40] Visser op cit (fn 27 above) at 612 and fn 264; Sonnekus Unjustified Enrichment in South African Law (2008) at 50-51 and fn 40.

[41] Rubin v Botha 1911 AD 568.

[42] Dugas v Kempster Sedgwick (Pty) Ltd 1961 (1) SA 784 (D).

[43] At 793A. I express no opinion on the learned judge's further statement that use of the vehicle could not constitute unjust enrichment within the meaning of the law (793B).

[44] Haggarty v Scottish TGWU [1954] ScotCS CSIH 6; 1955 SC 109.

[45] As to which, see Visser op cit (fn 27 above) at 102-106 and 498-501; Du Plessis op cit (fn 27 above) at 387-388.

balance theory has also been thought to have its weaknesses with the result that the modifizierte Zweikondiktionentheorie (the modified two-claims theory) has gained traction. In terms of this theory P and D should each sue each other by way of the condictio but neither can plead loss of enrichment.

[60] It is unnecessary in this case to decide what modifications if any to the normal rules should be made where parties to a putative or void contract make cross-claims for enrichment against each other. They are best worked out on the facts of specific cases. The simple point is that Yarona did not institute a condictio against Medshield by way of a counterclaim and did not raise Medshield's supposed enrichment or its own impoverishment in any other way on the pleadings. Prescription

[61] The final issue is prescription. The onus rested on Yarona to establish the date by which Medshield acquired, or could by exercising reasonable care have acquired, knowledge of the facts giving rise to the claim[46]. In the absence of evidence that the authority to litigate was delegated, the requisite actual or constructive knowledge would have to be that of the board of trustees[47].

[62] Yarona pleaded that Medshield had or could have acquired the requisite knowledge by the date of each payment and at any rate by not later than 7 June 2008 (ie three years before service of summons). There is no evidence that the board had actual knowledge before January 2010 or that the board by 7 June 2008 had knowledge of circumstances which should have caused it to investigate. The board was entitled, in the absence of warning signs, to assume that the principal officer and OMHC were administering the scheme properly and in accordance with concluded contracts.

[63] Medshield's financial year-end was 31 December. Coetsee testified that the board would receive the audited financial statements for approval the following April. It may thus be assumed that as at 7 June 2008 the board had seen the financial statements for the year ended 31 December 2007. Those financial statements mentioned the

[46] Gericke v Sack 1978 (1) SA 821 (A) at 826B-828C.

[47] Cf PricewaterhouseCoopers Inc & others v National Potato Cooperative Ltd & another [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) paras 148-149.

contract with Calabash but made no reference to Yarona. The investigations undertaken in the latter part of 2009 revealed that the payments to Yarona were included in the line item 'marketing fees' which was in turn part of 'administration expenses'. For the year ended 31 December 2007 the administration expenses were R191 465 000 and the marketing fees R14 467 000. The latter figure probably included R1 396 500 in respect of payments to Yarona (being the payments for Yarona's invoices for July to December 2007) but this would not have been apparent to a reader of the financial statements.

[64] Included in the trial bundle were the management accounts for December 2008. According to Coetsee the monthly management accounts were prepared by OMHC and considered by the finance committee. The December 2008 accounts run to 31 pages and contain fairly dense financial information. Page 6 contained the income statement. The line item 'Marketing Fees and Promotions' was R1 555 023 as against a budgeted figure of R850 996. On page 7 a breakdown was provided of administration costs per line item. In regard to 'Marketing Fees and Promotions', the expenditure was said to comprise inter alia a marketing research fee of R1 275 261 and 'R279 300 Healthcare provider Research & Geo mapping supplied by Yarona Network'. It was noted that an identical amount had been paid to Yarona in the preceding month. Coetsee testified that the finance committee, whose members were drawn from the board, submitted reports to the board.

[65] If the above information had been reported to the board, there can be little doubt that the board could by the exercise of reasonable care have ascertained that unowed payments were being made. The board members would have known that they had not approved a contract with Yarona. The difficulty is that there is no evidence that the management accounts for earlier periods contained the same references to Yarona. One might expect that they would, but there is no explanation as to why, if that were so, the earlier management accounts were not adduced to support a contention that the finance committee, and potentially by implication the board, knew or could reasonably have ascertained that unowed payments were being made. When Coetsee was asked whether other management accounts contained a similar breakdown of administration expenses, she said she did not know

because she was not a member of the finance committee. There was also no explanation as to why the finance committee's reports to the board were not adduced. Coetsee was not asked in cross-examination what, if anything, those reports said regarding Yarona. It was not put to her that, as a trustee, she knew of the payments to Yarona.

[66] I do not think we would be justified, in the circumstances, in finding on a balance of probability that the management accounts which served before the finance committee prior to June 2008 explicitly referred to payments made to Yarona. In the circumstances it is unnecessary to decide whether, if it had been proved that the finance committee had the requisite knowledge by June 2008, such knowledge could have been imputed to the board.

Conclusion

[67] The following order is made:

The appeal is dismissed with costs including the costs of two counsel.

HMI HEALTHCARE CORPORATION (PTY) LIMITED v MEDSHIELD MEDICAL SCHEME

Basis of an interest in rescinding any judgment which prevents a party from proceeding with an action for payment

Judgment given in the Supreme Court of Appeal on 24 November 2017 by Ponnan JA (Petse JA, Tsoka, JA Lamont AJA and Mbatha AJA concurring)

Medshield Medical Scheme sought to prove claims amounting to approximately R40m against Calabash Health Solutions (Pty) Ltd after that company was placed in liquidation. The Master rejected the claims. Medshield then brought an action against the company claiming payment of the claims.

HMI Healthcare Corporation (Pty) Ltd, the sole shareholder of Calabash, obtained an ex parte order empowering it to defend the action instituted by Medshield against Calabash in the name of Calabash, empowering it to defend any other legal proceedings brought against Calabash by Medshield, and empowering it to institute action against Medshield.

Medshield obtained an order rescinding this order and declaring that HMI was not entitled to defend the action it had instituted against Calabash, in the name of Calabash.

HMI appealed the rescission order.

Held—

Medshield had a direct and substantial interest in the relief sought in the ex parte order. It was an asserted creditor of Calabash, being allegedly owed a total amount of approximately R40m and had instituted action against the latter for the recovery of the money. The Master expunged claims in order that Medshield could prove its claims by way of action proceedings. Until a decision was made in that action, Medshield retained a substantial interest in the affairs of Calabash and in particular, whether HMI was entitled to litigate on behalf of Calabash. Medshield's action against Calabash appeared to be the principal reason for the ex parte application.

It therefore appeared to be clear that Medshield was indeed an affected party and that the ex parte order was granted in its absence, despite it having a direct and substantial interest in the relief sought.

It followed that the ex parte order could not stand and was correctly rescinded.

Advocate E Kromhout instructed by Gildenhuys Malatji Inc, Pretoria, appeared for the appellant

Advocate A Subel SC and Advocate N Rajab-Budlender instructed by Hogan Lovells, Sandton, appeared for the respondent

Ponnan JA:

[1] The appellant, HMI Healthcare Corporation (Pty) Ltd (HMI), is the sole shareholder of Calabash Health Solutions (Pty) Ltd (in liquidation) (Calabash). Calabash was incorporated during 1999 and commenced business as a provider of capitation services to medical schemes in 2005. In October 2006 it concluded a written capitation agreement[1] with the first respondent, the Medshield Medical Scheme (Medshield). The agreement commenced operating with retrospective effect from 1 January 2006 and was to endure for a period of three years until 31 December 2008. During its subsistence several disputes arose between the parties, consequently the agreement came to be prematurely terminated during the middle of 2008.

[2] Calabash was liquidated by way of a creditors' voluntary liquidation pursuant to a special resolution dated 13 July 2009[2]. On 18 August 2009 Johannes Zacharias Human Muller NO (the second respondent) and Michael Mmathomo Masilo NO (the third respondent) were appointed by the fourth respondent, the Master of the Gauteng High Court, Pretoria (the Master) as the joint provisional liquidators of Calabash. Their appointment was subsequently made final by the Master, who issued a certificate to that effect on 23 October 2009. At the first meeting of creditors on 22 September 2009 HMI proved a claim in the sum of R3 530 000.00 against Calabash. The second meeting of creditors was held on 27 October 2009 at which, a related company, Agility Global Health Solutions Africa Ltd (Agility) proved a claim in the sum of R9 959 829.96 against Calabash. HMI, Agility and Calabash are related companies, being subsidiaries within the

[1] In terms of the general regulations promulgated under the Medical Schemes Act 131 of 1998, capitation agreement means: 'an arrangement entered into between a medical scheme and a person whereby the medical scheme pays to such person a pre-negotiated fixed fee in return for the delivery or arrangement for the delivery of specified benefits to some or all of the members of the medical scheme.'

[2] In terms of s 349 and 351 of the old Companies Act 61 of 1973.

Bathabile Group of Companies.

[3] During April 2011, Medshield called for a special meeting of creditors to be convened, at which it proved claims in the total sum of R39 226 814.40 against Calabash. On 29 November 2012 Medshield caused summons to be issued against Calabash, wherein it claimed payment as follows:

(i) R2 000 000.00 in respect of claim A;
(ii) R3 500 000.00 in respect of claim B;
(iii) R26 526 715.00 in respect of claim C;
(iv) R2 922 197.00 in respect of claim D;
(v) R2 952 831.00 in respect of claim E;
(vi) R1 025 375.20 in respect of claim F;
(vii) R299 696.18 in respect of claim G;
(viii) R935 605.00 in respect of claim H; and
(ix) R459 690.00 in respect of claim I.

[4] Claims A to G, although initially proved at a meeting of creditors, were subsequently expunged by the Master in terms of the provisions of s 45 of the Insolvency Act 24 of 1936 (the IA). Thereafter, Medshield sought to prove claims H and I at a further meeting of creditors, but these claims were also rejected by the Master. In expunging the claims, the Master stated:

> 'The nature of the factual disputes of these claims is of such technical intensity that the Master as a quasi-judicial officer cannot investigate and adjudicate on these claims. It would in this instance be prudent of the Master to expunge these claims and afford creditors the opportunity to prove their claims by way of action. All interested parties can voice their respective merits of either proving or disallowing the claims in a court of law.'

[5] On 2 October 2012 and, at the instance of the Registrar of Medical Schemes, Medshield was placed under provisional curatorship by the North Gauteng High Court, Pretoria. Mr Themba Benedict Langa was appointed the provisional curator of Medshield.

[6] On 18 December 2012 HMI applied ex parte to the North Gauteng High Court, Pretoria for an order in the following terms:

> '1. That, in terms of s 387(4) and s 388 of the Companies Act, 61 of 1973: –

1.1 the applicant be and is hereby empowered to defend the action instituted by Medshield Medical Scheme ("Medshield") against Calabash Health Solutions (Pty) Ltd (in liquidation) ("Calabash") out of the above Honourable Court under case number 2012/69139, in the name of Calabash and subject to the applicant furnishing an indemnity as to cost to the duly appointed joint liquidators of Calabash, Johannes Zacharias Human Muller NO and Michael Mmathomo Masilo NO ("the joint liquidators");

1.2 the applicant be and is hereby empowered to defend any other legal proceedings brought against Calabash by Medshield, in the name of Calabash and subject to the applicant furnishing an indemnity as to costs to the joint liquidators;

1.3 the applicant be and is hereby empowered to institute action against Medshield, or to launch a counterclaim under case number 2012/69139, for recovery of the claim articulated in the draft particulars of claim attached to the letter addressed by the applicant's attorneys to the joint liquidators on 6 September 2012, as well as for any other claim which Calabash may have against Medshield, in the name of Calabash and subject to the applicant furnishing an indemnity as to costs to the joint liquidators;

2.That the costs of this application be costs in the action under case number 2012/69139, alternatively, costs in the liquidation of Calabash, unless opposed by any third party, in which event such third party be ordered to pay the costs of this application.'

[7] The ex parte application succeeded before Van der Merwe DJP, who issued the following order:

'1. The applicant is empowered and authorised to defend the action instituted by Medshield Medical Scheme, against Calabash Health Solutions (Pty) Ltd (In Liquidation), in the North-Gauteng High Court under case number 2012/69139, in the name of Calabash Health Solutions (Pty) Ltd (In Liquidation), subject to it furnishing an indemnity as to costs to the joint liquidators, Johannes Zacharias Human Muller NO and Michael Mmathomo Masilo NO;

2.The applicant is empowered and authorised to defend any other legal proceedings brought against Calabash Health Solutions (Pty) Ltd (In Liquidation) by Medshield Medical Scheme, in the name of Calabash Health Solutions (Pty) Ltd (In Liquidation), subject to it

furnishing an indemnity as to costs to the joint liquidators, Johannes Zacharias Human Muller NO and Michael Mmathomo Masilo NO;

3.The applicant is empowered and authorised to institute legal proceedings, either in the form of a summons or a counterclaim, substantially in the form of annexure "A", against Medshield Medical Scheme, in the name of Calabash Health Solutions (Pty) Ltd (In Liquidation), subject to it furnishing an indemnity as to costs to the joint liquidators, Johannes Zacharias Human Muller NO and Michael Mmathomo Masilo NO;

4.The cost of this application will be cost in the action under case number 2012/69139.'

[8] On 4 April 2013 Medshield applied to the high court to rescind the order of Van der Merwe DJP. It sought an order in the following terms:

'2. Rescinding the ex parte order of his lordship, Mr Justice van der Merwe, dated 18 December 2012 ("the ex parte order"), in terms of rule 42(1)(a) of the Uniform Rules of Court;

3.Setting aside the further steps taken by HMI Healthcare Corporation (Pty) Ltd ("HMI") pursuant to the ex parte order, namely:

3.1 The notice of intention to defend Medshield's action in case number 2012/69139, filed on behalf of Calabash Health Solutions (Pty) Ltd (in liquidation) ("Calabash");

3.2 The notice of substitution in terms of Rule 15(2) filed by HMI on 18 December 2012; and

3.3 The special plea, plea over and counterclaim, filed on behalf of Calabash in case number 2012/69139;

4.Declaring that HMI is not entitled to:

4.1 defend the action instituted by Medshield against Calabash, in the name of Calabash, in case number 2012/69139;

4.2 defend any other legal proceedings brought against Calabash by Medshield, in the name of Calabash; and

4.3 institute any action against Medshield, or launch a counterclaim against Medshield under case number 2012/69139, in the name of Calabash;

5.Directing HMI to pay the costs, on an attorney and own client scale:

5.1 of this application, including the costs of two counsel; and

5.2 associated with the notice of intention to defend, the notice in terms of Rule 15(2) and the special plea, plea over and counterclaim under case number 2012/69139, including the costs of two counsel where applicable.'

[9] The rescission application succeeded before Tlhapi J, who subsequently granted leave to HMI to appeal to the full court of that division. The full court (per Tuchten J (Tolmay J concurring) and Makgoka J dissenting) dismissed the appeal. The further appeal by HMI is with the special leave of this court.

[10] I deal later in this judgment with whether an appeal against the order of Tlhapi J is competent. Before turning to that issue it is necessary to first consider whether Medshield had the necessary locus standi to bring the rescission application. HMI contends that Medshield is not an affected party as contemplated in Rule 42(1)(a) of the Uniform Rules of Court. That rule provides:

'The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary [a]n order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

An applicant for an order setting aside a judgment or order of court must show, in order to establish locus standi, that 'he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which judgment was given or order granted'[3]. A court will accordingly refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject matter and the outcome of the litigation, have been joined as parties[4].4 It has been held that a 'direct and substantial interest' is more than a financial

[3] Per Corbett J in United Watch & Diamond Co (Pty) Ltd & others v Disa Hotels Ltd & others 1972 (4) SA 409 (C) at 415A.

[4] See eg Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657 and 659; Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA) para 9; City of Johannesburg & others v South African Local Authorities Pension Fund & others (20045/2014) [2015] ZASCA 4 (9 March 2015) para 9.

interest in the outcome of the litigation[5].

[11] It is important to determine what interest it is that Medshield claims to have had in the proceedings leading to the grant of the ex parte order. HMI approached the court for relief in terms of s 387(4) of the Companies Act 61 of 1973, which provides that: '[a]ny person aggrieved by any act or decision of the liquidator may apply to the court after notice to the liquidator and thereupon the court may make such order as it thinks just.' That provision empowers a court in the exercise of its discretion to make any order that it considers that justice requires[6]. Medshield contends that HMI failed to properly disclose such interest as it (Medshield) had to the court hearing the ex parte application and that its version should have been placed before the court so as to enable that court to properly exercise the discretion conferred by s 387(4).

[12] **According to Medshield, that it had locus standi to bring the rescission application is evident from the following: First, Medshield has a direct and substantial interest in the relief sought in the ex parte order. The extensive references in HMI's founding affidavit to its interactions with Medshield are evidence of this. Second, Medshield is an asserted creditor of Calabash. It is allegedly owed a total amount of approximately R40 million by Calabash and has instituted action against the latter for the recovery of the money. Its claims are set out in its particulars of claim, which were attached to HMI's founding affidavit in the ex parte application. The Master expunged claims A to G, and rejected claims H and I, in order that Medshield could prove its claims by way of action proceedings. That case is pending. Until a decision is made in that action, Medshield retains a substantial interest in the affairs of Calabash and in particular, whether HMI is entitled to**

[5] See Judicial Service Commission & another v Cape Bar Council & another 2013 (1) SA 170 (SCA) para 12, where Brand JA stated: 'It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned . . . .'

[6] Cohen NO & another v Ruskin and Smith NNO & another 1981 (1) SA 421 (W) at 425

litigate on behalf of Calabash. Third, Medshield's action against Calabash appears to be the principal reason for the ex parte application. By contrast, neither HMI nor Agility, whose claims against Calabash were also expunged by the Master, have attempted to prove their claims against Calabash by way of action. Those claims might well have since prescribed, in that event, HMI and Agility would no longer be creditors of Calabash. Fourth, the terms of the ex parte order cite Medshield expressly.

[13] It thus seems clear that Medshield was indeed an affected party and that the ex parte order was granted in its absence, despite it having a direct and substantial interest in the relief sought. As it was put by Streicher JA in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*:[7]

> 'Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously.'

It follows that the ex parte order could not stand and was correctly rescinded by Tlhapi J.

[14] I turn to a consideration of whether the rescission order is appealable. It was stated in *Zweni v Minister of Law and Order*[8] that a judgment or order is a decision which, as a general principle, has three attributes: first, the decision must be final in effect and not susceptible to alteration by the court that made it; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. Zweni, more particularly the requirement of finality, has been affirmed by this court in a number of subsequent decisions[9]. In

[7] Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 para 24.

[8] Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 532I-533A.

[9] Those judgments are usefully collated in Maize Board v Tiger Oats Ltd & others 2002 (5) SA 365 (SCA) para 6.

Guardian National Insurance Co Ltd v Searle NO[10], Howie JA, with reference to the three Zweni attributes, said[11]:

> 'As previous decisions of this court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same court and at one and the same time. Where this approach has been relaxed it has been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes.'

[15] In *Pitelli v Everton Gardens Projects CC*[12] Nugent JA observed:

> 'An order is not final for the purposes of an appeal merely because it takes effect, unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable, but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it, and it is thus not final in its effect. In some cases an order that is granted in the absence of a party might be rescindable under rule 42(1)(a), and if it is not covered by that rule, as Van der Merwe J correctly found, it is in any event capable of being rescinded under the common law.'

[16] It is so that the Zweni attributes are not cast in stone[13] and that even where a decision does not bear all those attributes it may nevertheless be appealable if some other considerations are evident. This includes instances where the order disposes of any issue or any

[10] Guardian National Insurance Co Ltd v Searle NO [1992] 2 All SA 151 (A).

[11] Zweni supra fn 8 at 301B-C.

[12] Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA) para 27.

[13] Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A) at 10F-11C.

portion of the issue in the main proceedings[14] or if the appeal 'would lead to a just and reasonably prompt resolution of the real issue between the parties'[15]. This court has held that no distinction can be drawn between 'a decision' in s 16(1)(a) of the Superior Courts Act 10 of 2013 and 'a judgment or order' in s 20 of the Supreme Court Act 59 of 1959.[16] Therefore, a decision for the purposes of s 16(1)(a)(i) of the Superior Courts Act must still bear the three attributes identified in Zweni.

[17] More recently, this court and the Constitutional Court have expanded on this test by adapting the general principles on the appealability of interim orders to accord with the equitable and more context-sensitive standard of the interests of justice[17]. A consideration of the interests of justice is now of particular importance. But, this does not mean that it is the sole consideration or that one no longer takes into account the factors set out by this court in Zweni. Specifically, this court has held that in deciding what is in the interests of justice, each case has to be considered on its own facts, including whether a judgment is dispositive of the main or real issues between the parties[18]. The Constitutional Court has elaborated on this as follows:

'The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if leave to appeal is not granted. It

[14] Jacobs & another v Baumann NO & others 2009 (5) 432 (SCA) at 436F-G.

[15] Zweni supra fn 8 at 531D-E and Jacobs ibid at 436E-G.

[16] See Neotel (Pty) Ltd v Telkom SA Soc & others [2017] ZASCA 47 (31 March 2017) and the cases there cited.

[17] Philani-Ma-Afrika & others v Mailula & others 2010 (2) SA 573 (SCA) and International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) para 53.

[18] Nova Property Group Holdings v Corbett 2016 (4) SA 317 (SCA) at paras 8-10.

bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case.'[19]

[18] It is plain that a rescission order does not have a final and definitive effect. In *De Vos v Cooper & Ferreira* this court expressed the view that '[s]o 'n bevel [that is, a rescission order] het immers nie enige finale of beslissende uitwerking op die geskilpunte in die hoofgeding nie'.[20] The rescission order simply returns the parties to the positions which they were in prior to the ex parte order being granted. De Vos relied inter alia on *Gatebe v Gatebe*[21] and *Ranchod v Lalloo*.[22] In Gatebe, De Villiers JP held:

> 'The order therefore does not dispose of the main case or of any of the issues in the main case, and therefore has not the effect of a definitive sentence in this behalf. It still remains to consider whether it has not the effect of a definitive sentence in that it causes irreparable prejudice. Here again it seems to me to be clear that an order merely rescinding a default judgment does not cause irreparable prejudice, for in the definitive sentence the effect of the decision can obviously be repaired.'[23]

In Ranchod, Millin J endorsed the reasoning of De Villiers JP. He expatiated:

> 'The plaintiff's claim remains intact. Nothing has been decided about it. All that has happened is that the defendant has been given an opportunity of answering it; and the setting aside of the default judgment for that purpose is reparable in the final stage.'[24]

[19] Counsel for HMI sought to escape these authorities with the

[19] International Trade Administration Commission supra fn 17 at para 55.

[20] De Vos v Cooper & Ferreira 1999 (4) SA 1290 (SCA) at 1297A-D.

[21] Gatebe v Gatebe 1928 OPD 145.

[22] Ranchod v Lalloo 1942 TPD 211.

[23] Gatebe supra fn 21 at 149.

[24] Ranchod supra fn 22 at 217.

argument that the reasoning of Tlhapi J finally determined some of the issues between the parties and, as a result, on the facts of this case the order was indeed appealable. That argument is untenable. First, an appeal lies not against the reasoning, but the substantive order of the court below.[25] Second, as Ranchod makes plain: '[I]f the question of appealability were to depend on the facts of each case, the same order might be appealable by one litigant but not by another; and the court would in every case have to enter into the merits of the appeal in order to determine whether there should be an appeal.' It may be that the rescission order will cause HMI some inconvenience but as Harms AJA pointed out in Zweni:[26] '[t]he fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability'.

[20] **In my view, the rescission order bears none of the attributes identified by the court in Zweni. This is a central consideration in determining whether the interests of justice favour a finding that the order is appealable. By rescinding the ex parte order, the way is paved for the parties' respective versions to be fully ventilated and deliberated upon by a court, thereby ensuring a resolution of the real issues between the parties. To find that the rescission order is appealable will therefore effectively unnecessarily delay the resolution of the true issues between the parties. The interests of justice therefore do not favour such an order being appealable.**

[21] In the result the appeal must fail and it is accordingly dismissed with costs, including the costs consequent upon the employment of two counsel.

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[25] See inter alia Absa Bank Ltd v Mkhize & another, Absa Bank Ltd v Chetty, Absa Bank Ltd v Mlipha 2014 (5) SA 16 (SCA); Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 355; and Atholl Developments (Pty) Ltd v The Valuation Appeal Board for the City of Johannesburg & another [2015] ZASCA 55 (30 March 2015).

[26] Zweni supra fn 8 at 533B-C.