IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
(JOHANNESBURG)

Case No: 2009/35416

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: Yes

9 September 2013

SIGNATURE DATE

In the matter between:

ABSA BANK LTD Plaintiff

And

UKWANDA LEISURE HOLDINGS (PTY) LTD Defendant

JUDGMENT

C. J. CLAASSEN J:

INTRODUCTION

[1] The case concerns the exchange trade of “derivatives” and “futures” securities in the form of corporate shares on the ALT-X exchange. This type of trading has been explained as follows:

> "Futures and commodity options trading is among humanity's more impenetrable concepts. It involves selling what one does not own and, as a rule, buying what one does not want. It is deeply shrouded in terminology that conceals its meaning. It operates in an arena where opinion is everything, where supply and demand are hard to distinguish from supposition and doctrine, and where inherent uncertainty has spawned an endless holy war between two religious-sounding antagonists, the "fundamentalists" and the "chartists", not to mention the new breed of computer-dependent faithful. Into this world comes the general public, eager to enjoy its riches and often unprepared to become its poor."[1]

[2] A derivative is a financial instrument whose value is derived from some other things, such as:

. a physical commodity (for instance, wool, cattle, oil, or gold)

. a financial asset (for instance, shares or bonds)

. an index (for instance, a share price index)

. an interest rate

. a currency

. another derivative.

[3] All derivatives are based on one or both of two primary elements:

(a) The *forward contract*, which is an agreement between two parties that take the opposite side of a transaction having particular agreed terms on a future date.

(b) The *option contract*, which obliges the grantor to enter into a transaction having particular agreed terms on a future date, generally in return for a premium, and gives the taker a right, not an obligation, to take the opposite side of the transaction.

[4] On the first day of the trial and during the opening address of Mr Harris, acting on behalf of the plaintiff, it transpired that there were no relevant disputes of facts between the parties. It also appeared that the parties had substantially

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[1] PM Johnson & TL Hazen, *Commodities Regulation* (2nd ed, Little Brown and Company, 1989) Volume III at p. 155. As a matter of interest, the Enron scandal in America occurred as a result of Enron trading energy futures.

narrowed the issues to be decided during several pre-trial discussions. Upon my suggestion, the parties then prepared a stated case for decision by this court which was handed in on the second day of trial as exhibit "H". As a result, I made an appropriate separation order in terms of Rule 33(4) of the Uniform Rules of Court whereby the issues mentioned in the stated case were to be decided first and all other issues postponed *sine die*.

[5] In exhibit "H", paragraph 2, five issues are listed for decision. It is further recorded in paragraph 3 of exhibit "H" that if any of the issues are determined adversely to the defendant, then the parties agree that such determination would be dispositive of the defendant's counterclaim and, furthermore, entitle the plaintiff to judgment in its favour as prayed for in prayers 1, 2 and 3 of the particulars of claim.

THE STATED CASE

[6] The stated case in exhibit "H" reads as follows:

> "1. The issues proposed to be determined separately in terms of rule 33(4) will be determined on the following basis:
>
> 1.1 The correctness of annexures C, E and H to the particulars of claim, as admitted in terms of the defendant's notice of issues placed beyond dispute (Bundle B: Notices p 426 para 6) and the defendant's admissions (Bundle A: Pleadings p 380-2 paras 5, 6 and 7) read with the fourth pre-trial minute (Bundle D: Pre-trial p 51 para 5.3).
>
> 1.2 As appears on annexure E, the account maintained by Cortex at the plaintiff in respect of the defendant ('the account') was in credit on 17 Nov 2008 and remained in credit until 26 November 2008 when it went into debit of R7 036 744.72. The account remained in debit at all times thereafter.
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> 1.3 The defendant requested payment of the sum of R5 million on 17 November orally and on 21 November in writing.
>
> 1.4 Cortex conveyed the request to Absa. Absa refused the payment.
>
> 1.5 Cortex did not pay the amount requested.
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> 1.6 On 9 December 2008 the defendant conveyed its opinion to the JSE that Cortex was in default as provided for in the Derivative Rules (Bundle C Vol 4 p 1190). On 11 December 2008 the JSE notified the defendant that it disagreed with the defendant's contention (Bundle C vol 4 p 1212) and accordingly held the view that Cortex was not in default as provided for in the Derivative Rules.

1.7 It is common cause that no review proceedings were instituted arising from the facts set out in the previous sub-paragraph.

1.8 The issue of whether or not there was an agreement to maintain total margin at 22.5% is not included and is to be disregarded for purposes of this determination and will stand over for determination with any issues that might remain.

1.9 Save in respect of the issue of whether or not there was an agreement to maintain total margin at 22.5% which is not included as set out in paragraph 1.8 above, the parties may refer to the affidavits in the application in the Bundle C: Core bundle pp CB 1122.1 – CB 1373 in addition to any other relevant document in the core bundle and the admitted facts.

1.10 The facts set out in paragraphs 48, 49 and 50 of the plaintiff's opening address are correct.

2. On the basis of the aforegoing the following issues ('the issues') are to be determined:

2.1 Whether the JSE's view that Cortex was not in default in terms of the rules constituted administrative action as defined by the Promotion of Administrative Justice Act, 3 of 2000 (as amended) ('PAJA');

2.2 If it did constitute administrative action, whether the defendant is precluded from raising the question of whether Cortex was in default as provided for in Derivative Rule 12 in these proceedings;

2.3 If not, whether Cortex was in default as provided for in Derivative Rule 12;

2.4 If Cortex was in default as provided for in Derivative Rule 12, was the consequence of the default that the close out of Ukwanda's positions on 9 December 2008 was unlawful, and if so

2.5 If the close out of Ukwanda's position on 9 December 2008 was unlawful, did the consequences set out in paragraph 52.5 of the defendant's counterclaim follow (Bundle A: Pleadings p 217.3 para 52.5).

3. If any of the issues are determined adversely to the defendant the parties agree that this is dispositive of the counterclaim and furthermore that the plaintiff is entitled to judgment in its favour as prayed for in prayers 1, 2 and 3 of the particulars of claim (Bundle A: Pleadings p 18)."

[7] The annexures referred to in paragraphs 1.1 and 1.2 of the stated case are all attached to the plaintiff's particulars of claim. The Pleadings Bundle was handed in as exhibit "A". The Core Bundle ("CB") of documents consists of 4 volumes and these were handed in as exhibit "C".

[8] Paragraph 1.10 of the stated case confirms the correctness of facts set out in paragraphs 48, 49 and 50 of the plaintiff's opening address. These facts referred to the default process as practised by the Johannesburg Stock Exchange ("JSE"). Mr du Toit for the defendant was at pains to explain that although the facts set

out in these paragraphs are conceded as a factually correct setting out of the practice at the JSE, they do not necessarily constitute the correct legal conclusions of how the applicable Acts and Regulations are to be implemented. He submitted that it remained for this court to determine the correct interpretation of all relevant statutory and regulatory provisions. Subject to the aforesaid qualification, it is then necessary to state the default process as documented in paragraphs 48 – 50 of the written opening address of Mr Harris. These are:

> "48. For purposes of ascertaining whether there was a default in any particular case, which has severe and material consequences, the JSE oversees the relevant default procedure and makes a finding regarding default.
>
> 49. The consequences of default are dire. Once a default is reported, the JSE conducts an investigation and ascertains the reason/s for the alleged default. If the JSE determines that there was a default as contemplated in DR 12.10 by the member, the clearing member has to effectively step into the shoes of the member and take over the entire balance sheet of that member in relation to all its positions and all its clients. This entails *inter alia* an enormous administrative and logistic process including notification to the Financial Services Board, the orderly and structured closing down of the member's business, the management of the member's staff complement, contacting and informing all the member's clients of the situation that has arisen (which number could run into the thousands), and investigating and (the JSE) determining an appropriate price for the position/s to be taken over. Where the JSE determines that there is a default of a member, it consults with the clearing member in order to ascertain whether the clearing member can take over all the positions of the member, including positions where clients are not in default. If the clearing member is unable to do this, the JSE will do so itself or appoint relevant persons to do so, the cost of which is for the account of the clearing member. This process necessarily takes anything from a few days to several weeks. It must be controlled and managed properly in order to avoid losses.
>
> 50. Any default in terms of DR12 is dealt with by the JSE (delegated to the JSE Executive Committee). This is in turn practically managed on behalf of the JSE Executive Committee by *inter alia* the head of listings, the director of market surveillance, and the head of legal."

<u>THE SECURITIES ACT AND THE RULES</u>

[9] The JSE is operated by the Johannesburg Securities Exchange Limited, which is a self-regulatory organisation, being an exchange as defined in the Securities Act

36 of 2004 ("the Act"). Although the Act has been recently repealed, it was the Act in force at all relevant times in this action.

[10] The JSE has made exchange rules in accordance with section 18 of the Act which rules relate to transactions in "*listed securities*" which include "*derivative instruments*" [2] as defined in section 1[3] of the Act.[4] By virtue of section 18(4) of the Act, such exchange rules are "*binding on an exchange, an authorised user, an issuer and their officers and employees, and on clients*." A "*client*" is defined in section 1 of the Act to mean "*any person who uses the services of an authorised user or a participant, as the case may be*."

[11] On 1 August 2005, the JSE made rules, in accordance with the Act, relating specifically to derivative instruments. A copy of these rules name "*Derivative Rules and Directives*" ("DRD"), as amended and applicable at the time relevant to the present action, is annexure "B" to the plaintiff's particulars of claim.[5] These rules provide, *inter alia,* for "*Single Stock Futures"* ("SSF") contracts.

[12] An SSF is a contract in terms of which the purchaser is entitled to demand delivery of the underlying share on the "*close out"* [6] date of the SSF. In essence,

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[2] In terms of the definitions section 1 of the Securities Services Act 36 of 2004 derivative instruments means any (a) financial instrument; or (b) contract, that creates rights and obligations and that derives its value from the price or value, or the value of which may vary depending on a change in the price or value, of some other particular product or thing.

[3] In paragraph (a)(3) of the definition of "securities", derivative instruments are also included as a security.

[4] In the United Kingdom similar rules were made by "*The International Swaps and Derivatives Association"* (ISDA).

[5] Pleadings Bundle pp. 31 – 135

[6] The term "close out" is defined in section 2 of the DRD Rules as meaning: "*The cancellation of a position in one direction with an equal and opposite position (e.g. a long position in an exchange contract is cancelled by a short position in the same exchange contract*." The term "*position*" is defined as meaning, "*either a long position or a short position*." The terms "*long position*" and "*short position*" are defined in section 2 of the Rules as follows:

> "*Long position means a number of exchange contracts registered by the clearing house in the name of a member or client in terms of which –*
>
> *(a) in relation to futures contracts, the member of the client is obliged to take delivery of the underlying instrument from the seller at the agreed price on the future date; or to pay an amount of money to the seller if on the future date, the price or value of the underlying instrument is less than the agreed price; or*

it is a contract in terms of which the purchaser purchases and the seller sells the underlying shares for delivery at a future specified date, usually three, six or nine months in the future. Each SSF covers a hundred of the underlying shares. So, the purchaser of one SSF contract purchases and is entitled to demand delivery of 100 of the underlying shares on the close out date. Each SSF has a particular close out date on which all obligations in terms of that SSF must be settled.

[13] The price, at which an SSF trades, comprises the spot price at which the share is trading in the market on the JSE, multiplied by a hundred to take account of the fact that the SSF covers 100 shares, plus an interest component. This interest is to take account of the fact that the purchaser of an SSF is not required to put up the entire price of the position on the day he/she purchases the SSF, but is required to pay only a percentage of the value of the position. This is referred to in the Rules as the "*initial margin*"[7] which was held, in this case, as a deposit with the JSE. (In addition, a purchaser may be required to put up "*additional margin.*")[8] The initial margin acts as a guarantee that the party undertaking to

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(b) *in relation to option contracts, the member or client has the right to buy or sell the underlying instrument of the option contract at the agreed price on or before the future date.*"

"*Short position means a number of derivatives exchange contracts registered by the clearing house in the name of a member or client in terms of which –*

(a) in relation to futures contracts, the member or client is obliged to make delivery of the underlying instrument at the agreed price on a future date or to pay an amount of money if on the future date, the price or value of the underlying instrument is greater than the agreed price; or

(b) *in relation to option contracts, the member or client has granted the right to another person to buy or sell the underlying instrument of the option contract at the agreed price on or before the future date*."

[7] See DRD rule 8.60.1 in the Pleadings Bundle p. 96 where "*initial margin*" is defined as: "*Initial margin shall be paid to or by a member or client whenever the risk of loss, as determined by the JSE, changes with respect to the aggregate position of such member or client.*"

[8] See DRD rule 8.60.3 where "*additional margin*" is defined as:

"*8.60.3.1 A clearing member may require a trading member with whom he has entered into a clearing agreement to deposit with him, with respect to the propriety position of the trading member or the position of any of the clients of the trading member, an amount of additional margin equal to a factor of the initial margin kept by the clearing house with respect to such position as agreed to in writing between the clearing member and trading member.*

8.60.3.2 A member may require a resident client to deposit with him, with respect to the resident client's position, an amount of additional margin equal to a factor of the initial margin kept by the clearing house, with respect to the said positions, as agreed to in writing between the member and the client."

See Pleadings Bundle, p. 96-7

pay or deliver something in future will comply with such undertaking. Hence, it is to be paid at the inception of the transaction. In this regard it was held by Stegmann, Blieden and Cachalia JJ in **Nedcor Bank Ltd v First Financial Futures (Pty) Ltd** 2003 JDR 0260 (W) at page 2 as follows:

> "Because the futures contract is a guarantee to deliver something in the future, some form of financial guarantee is required from the investor that the parties will perform their obligations in the future. This is done in the form of what is called a "margin". This is an amount of money that is put up by the investor as a guarantee of performance. The initial amount so put up is the "initial Margin" and this is determined by the risk management committee of SAFEX."

[14] Because the purchaser of an SSF only has to put the initial margin, SSF's provide a capital efficient way to participate in the market movements of a particular share. For example, if a purchaser wished to purchase a hundred shares in any particular listed public company and the price was R1 per share, the purchaser would be required to pay R100 for the 100 shares. As already indicated, the standard size of 1 SSF contract on SAFEX is 100 shares. Therefore, if the purchaser purchased one SSF contract on SAFEX in respect of that public company, he/she would only initially be required to put up the required initial margin (leaving aside, for the moment, any additional margin which might be required). Assuming the initial margin requirement was R10 per contract, then the purchaser would be required to put up a margin of R10 per SSF. Thus, the purchaser who has R100 to buy shares could obtain exposure to ten times more of such underlying shares by purchasing SSF's, than he could purchase if he purchased the underlying shares for immediate delivery. With R100, he could purchase ten SSF contracts, i.e. exposure to 1000 of the company shares. Of course, assuming there has been no price change from the date on which he purchased the shares to the future date on which he is entitled to take delivery of the shares, he will have to come up with 100% of the purchase price on the future close out date (less the initial margin he has already posted). In the example, this would mean that he would have to come up with R900 on the close out (i.e. the remaining R90 per SSF times the ten SSF's).

[15] Assuming the share price increased to R1.10 by the close out date, then by having purchased a hundred of the underlying shares, the purchaser would have made a profit of R10. By purchasing ten SSF's, he would make a profit of R100. This is so because he obtained exposure to the price increase on one thousand underlying shares. On the close out, if he takes delivery of the underlying shares, he would have a thousand shares, worth R1100 against which he would owe the purchase price of R1000. From a cash-flow point of view, he would at that stage have to come up with R900, being the purchase price of R1000 less the initial margin of R100.

[16] For most clients, SSF's provide a cheaper way, and sometimes the only way, to obtain what is called in the industry, "*leverage*". By leverage is meant the ability to purchase shares with a greater value than the amount required to be paid immediately.

[17] There is another way in which SSF's can be used, and that is as a means of obtaining a loan against an existing holding of shares. For example, if a party holds a hundred shares in a listed company which are trading at R1 and he wishes to obtain a cash advance against this holding, but wishes to retain exposure to movement in the share price, he can sell the shares to a market maker (in this case Nedbank) and simultaneously purchase the equivalent number of SSF's in the company, entitling him to claim delivery from the market maker of 100 shares on the close out. If he does so, he will immediately obtain payment of R100, but will only be obliged to put up R10. He therefore has the use of R90 until the close out, when he would be liable to pay for and take delivery of a hundred underlying shares. At that stage, he would have to pay R100 (initial margin of R10 would be applied to the purchase price). So, he would have to come up with an additional amount of R90. As already stated, the futures price has a built-in interest component and this would represent the interest cost to the purchaser of the SSF's. If the purchaser has retained the R90 he received when he sold the hundred PNG shares, then on the close out of the

SSF, he would be in exactly the same position as if he had simply held onto his shares, save that he will have had use of the R90 and will have paid a wholesale interest cost (built into the futures price which will be marginally higher than the spot price of the share). Of course, if the purchaser has used the R90 for another purpose, he will have exposed himself to the risk of not being able to fulfil his obligations on the close out to pay the balance of the purchase price and to take delivery of the shares.

[18] The potential risk was that if the share price kept declining, the client would have to keep funding the variation margin. It is also important not to lose sight of the client's obligation to pay the entire settlement value plus interest on the expiry date of the SSF. If the client wishes to own the shares on the expiry date, he will be required to fund the full purchase price of the shares covered by the SSF (less any initial margin he has paid). If he does not wish to own the shares covered by the SSF on the expiry date, he may sell the shares on the JSE and utilise the proceeds to settle the balance of the purchase price of the shares covered by the SSF (after taking account of any initial margin). If the proceeds are insufficient, the client must pay the shortfall. The client's obligation is to pay the entire settlement value plus interest on the expiry date. Furthermore, if the market for shares is illiquid, the client may not be able to realize all the shares at an acceptable price and, if it cannot do so, it would still have to come up with the cash to settle the full purchase price of the shares covered by the SSF.

[19] "*Variation margins*"[9] are payable by the client to the trading member (in this case Cortex) who then pays the clearing member (in this case, Absa). The variation margin paid by the clearing member is cleared through the clearing house, Safcom, and paid to the clearing member of the counterparty who pays the trading member of the counterparty who pays the client by crediting the

[9] Valuing a transaction according to fluctuations in the market is known as "*marking to market".* Margin usually has to be provided on very short notice, and sometimes several times in the day if prices are falling rapidly.

accounts held by the trading member at a bank in respect of trades by that client. Exhibit "I" gives a visual presentation of how this works.[10]

[20] The payment of the variation margin is dealt with in Rule 8.50.1 and 8.60.2:[11]

1. Rule 8.50.1[12] provides that at 17:00 on each business day, the position in each exchange contract of all members and their clients shall be marked-to-market on such basis as the JSE may determine.

2. Rule 8.60.2[13] provides that variation margins shall be paid to or by a member or a client in whose name a position in the exchange contract is registered as the result of the marking-to-market of a position in terms of Rule 8.50.

[21] Rule 8.90[14] deals with the settlement procedures in relation to payments, so as to ensure the integrity of the market. The Rule deals with the settlement procedures which are necessary to be effected so as to ensure that when a trade occurs on SAFEX, the relevant securities are delivered by the seller to the trading member and in turn by the trading member to the clearing member and in turn by the clearing member to the clearing house and down the chain on the other side, by the clearing house to the clearing member and by the clearing member to the trading member and from the trading member to his client. Correspondingly, the payment due by the purchaser is settled by the purchaser paying the trading member who traded on his behalf, that trading member paying the clearing member, who pays the clearing house, who pays the seller's clearing member, who pays the seller's trading member, who ensures that the settlement is completed by crediting the account of the seller, maintained by the trading

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[10] See also a similar explanation of the system in **First Financial Futures** *supra* paragraphs (a) to (m) at pages 2 to 5
[11] Pleadings Bundle p. 96
[12] Pleadings Bundle p. 96
[13] Pleadings Bundle p. 96
[14] Rules 8.90.1 – 8.90.7; Pleadings Bundle p. 98

member at a bank in relation to that seller. In so far as variation margin is concerned, the settlement procedures are designed to ensure that the relevant cash flows are settled through the settlement system so that the losers pay and winners get paid and the integrity of the market is thereby maintained. Rule 8.90 does not deal at all with the contractual arrangement between a trading member and his client as to when the money standing to the credit of the client in the trust account maintained by the trading member at a bank in relation to that client becomes due and payable to that client. It merely ensures that trades are settled as between counterparties so that the securities purchased are cleared through the system and delivered to a trading member who allocates them to a particular client account and that payments due for securities purchased are made and credited by the trading member to the trust account maintained by the trading member in relation to the client who is the seller of the securities. When this occurs, the trade has been fully settled as far as the market is concerned. Variation margin payments are dealt with in similar fashion.

THE CONTEXT IN WHICH PLAINTIFF'S CLAIM AROSE

[22] This is a claim by ABSA Bank Ltd ("Absa") against the defendant, Ukwanda Leisure Holdings (Pty) Ltd ("Ukwanda") for an amount owing of R732 191 068.00. The claim arose out of Ukwanda's default in respect of SSF contracts which it held. The SSF's which are the subject matter of this action are SSF's on the listed securities of a company, Pinnacle Point Group Limited ("PNG"). Previously Pinnacle Point Group Limited was known as Acc-Ross Holdings Limited. These were small capital shares listed on the ALT-X exchange.

[23] The purchasers in this case were holders of approximately 1.2 billion PNG shares. They utilised SSF's primarily in the second way described above, i.e. as a means to obtain finance whilst still retaining exposure to share price movements. Obtaining such finance was the attraction of buying SSF's in the present case.

[24] Many of the entities had received their shares in Acc-Ross upon the initial listing (in approximately 2004) of Acc-Ross on the JSE's ALT-X market, an alternative exchange, being a division of the JSE. They had acquired their shares at a subscription price of R1. By November 2006, the share price had declined to around the 20 cent level. The initial idea of utilising SSF's was proposed by Mark Weetman, then the managing director of Cortex Securities. The idea proposed was to enable Acc-Ross shareholders who had purchased shares in Acc-Ross on listing at R1 to reduce the average price required to break even. The idea was to utilise the finance obtained by selling the Acc-Ross shares to Nedbank, and then to simultaneously buy back an SSF for an equivalent number of Acc-Ross shares from Nedbank. Since the clients would only have to pay the full purchase price for the SSF on the close out date, the client could, in the meanwhile, utilise the proceeds of the sale of the Acc-Ross shares to Nedbank, to purchase more Acc-Ross shares.

[25] In essence, the transaction worked as follows:

1. Nedbank purchased the shares held in PNG by various entities ("the entities") which were later consolidated into Ukwanda, which is an investment holding company.

2. Nedbank paid the entities for the shares and simultaneously sold SSF contracts to the entities in respect of PNG shares.

3. The ultimate expiry date of the relevant futures contracts was 18 December 2008. At each previous expiry date, the entities had managed to extend the positions by closing out the existing positions and buying corresponding SSF's expiring on the next expiry date. This is known as "rolling over the positions". In order to roll over the positions, it is necessary for the counterparty (Nedbank) or another counterparty to be

willing to enter into the new positions and for the purchaser to be able to find the then required margins. For so long as a purchaser is able to roll over the position, he is not required to come up with the purchase price, but merely has to come up with the initial margin in respect of the SSF's on the roll-over date. If the position is not rolled over, the purchaser would have to close out the position on the expiry date of the position and, on that date, the purchaser would have to pay the purchase price for the shares covered by the SSF at the then current market value and would be entitled to take delivery of the PNG shares covered by the SSF.

4. On a daily basis, the JSE marks all futures contracts to market (which is essentially a daily valuation of the SSF, with reference to the discounted expected value of the share at the close out).[15]

5. A variation margin is payable daily by one of the counterparties to the other, depending on the daily marked-to-market price of the contracts. The variation margin represents the daily price movement in the share multiplied by 100 (to take account of the fact that one SSF covers 100 of the underlying shares). It is in simple terms the profit or loss on a daily basis in respect of the SSF with reference to the previous day's price. Thus, if the previous day's price of a PNG share was R1 and the JSE marks the PNG SSF to market at a price of 90 cents per PNG share, the purchaser of an SSF would suffer a loss on the day of 10 cents per PNG share and accordingly a loss of R10 per SSF contract. The purchaser of the SSF would be required to pay the amount lost as the variation margin. Such daily adjustment is automatically done by debit or credit entries in the client's account held by the trading member.

[26] Leaving aside the question of whether Ukwanda was entitled, as of right, to payment of amounts standing to the credit of the account maintained by Cortex

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[15] Rule 8.50; Pleadings Bundle p. 96

at Absa in relation to Ukwanda and whether or not there was a valid demand for payment of such amounts (which is in dispute), Ukwanda essentially admits all the elements of the plaintiff's claim. The contents of annexures "C", "E" and "H" attached to the particulars of claim, in so far as they set out details of the SSF's held by Ukwanda, the initial margin paid by Ukwanda and the amounts standing to the credit or debit of the account maintained by Cortex at Absa in relation to Ukwanda, although initially disputed, are now admitted.[16]

[27] From these admissions, it emerges that between 17 November 2008 and 25 November 2008, Ukwanda's account had a credit balance (some R82 million on 17 November reducing to R12 480 851 on 25 November). On 26 November 2008, the account went into debit as a result of the marking-to-market of the position, and a variation margin became due by Ukwanda in the sum of R19 516 598 resulting in a debit balance of R7 035 744.42. The account remained in debit at all times thereafter. Ukwanda was notified that the margin was owing on 28 November 2008 and advised that it was in default. On 4 December 2008 Ukwanda was advised that in terms of Rule 12.10, the account was in default and that Cortex would proceed as prescribed by Rule 12.20.2. The positions were closed out on 9 December 2008 in accordance with that Rule resulting in a debit balance of R732 191 068 as set out in Annexures "C", "E" and "H" of the particulars of claim.

DEFENDANT'S DEFENCE AND COUNTERCLAIM

[28] The central feature of the defendant's defence is that, because it was entitled to payment of the money standing to the credit of the account, it requested payment in respect of R5 million on 17 November 2008 orally, and on 21 November 2008 in writing. Cortex conveyed the request to Absa, but Absa refused the withdrawal. Cortex did not pay the amount requested. The defendant contends

[16] Annexure "C" in Pleadings Bundle p. 136; Annexure "E" in Pleadings Bundle p. 140; Annexure "H" in Pleadings Bundle p. 143

that Cortex's failure to effect payment constituted a breach of the agreement between Cortex and Ukwanda.

[29] The central edifice of the defendant's defence, and the foundation of its counterclaim, is that:

1. Cortex was therefore "in default" as provided for in DRD Rule 12 and its membership was automatically terminated in terms of Rule 12, read with Rule 3.60.1.6 and the definition of "default" in terms of section 1 of the Rules;

2. Absa, in its capacity as clearing member, automatically and immediately stepped into the shoes of Cortex;

3. Ukwanda became the client of Absa;[17]

4. As a result, the margin call was unlawful as Cortex was in default of the Rules, alternatively because of its breach, it is not entitled to claim further performance under the contract;

5. Cortex defaulted in terms of DRD 8.90.7 and Cortex was, therefore, automatically suspended as a trading member in accordance with DRD 12.30.1 (dealing with the consequences of a trading member's default), read with DRD 3.60.1.6, and the definitions of "default" in section 1 of the DRD (which merely states that a default means a default contemplated in Rule 12). Absa (in its capacity as clearing member) stepped into the shoes of Cortex, by virtue of the provisions of DRD 12.30.1 by noon on 18 November, alternatively by noon on Monday, 24 November 2008.[18]

[17] Ukwanda's Counterclaim, Pleadings Bundle pp. 213 – 213.1 par 33 and 34; pp. 214 – 214.1 par 37 – 39.5

[18] Ukwanda's Counterclaim, Pleadings Bundle pp. 217.2 – 217.3 par 52.1 – 52.4

6. The close out of Ukwanda's positions on 9 December 2008 was accordingly unlawful, with the following consequences:

   6.1 The amounts equalling the amounts of the shortfall created by the marked-to-market adjustment on those days and specifically as on 4 December 2008 in an amount of R365 748 845, accordingly became loans due to Absa in accordance with derivative Rule 11.50;[19]

   6.2 Such loans were payable on demand in terms of the Derivative Rules, but Absa never demanded payment of the loans and they were accordingly not payable ever since;

   6.3 The initial margin standing to Ukwanda's credit as on 3 December, and subsequent days, amounting to R174 176 355, was accordingly not capable of set-off against the loan amount which was due, but not payable, yet it was applied in the unlawful closing of the position.

EVALUATION

[30] It now becomes necessary to evaluate this defence which, in this case, relies on a legal interpretation of the Rules for its success. Also, in terms of the first issue to be decided in terms of exhibit "H", it is necessary to determine, as a preliminary issue, whether the defendant can raise the alleged default of Cortex and Absa as a defence and a basis for the counterclaim in light of the view which had been

[19] Pleadings Bundle p. 110. Rule 11.50 states: "*A member who gives any relaxation or indulgence to a client regarding the payment of margin, whether initial margin, variation margin or additional margin, shall be deemed to have granted the client a loan repayable on demand in the amount of the shortfall for the period of the relaxation or indulgence at a rate of interest specified in the client agreement between them…and the member shall, if such loan is for a period exceeding two business days, immediately inform the client thereof in writing.*"

previously expressed by the JSE that Cortex was **not** in default. The answer to this question depends upon whether or not the views expressed by the JSE constituted administrative action as defined by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[31] The underlying facts relating to this issue is also undisputed and emanates from the correspondence. On 10 December 2008 Ukwanda filed a complaint dated 9 December 2008 through its attorney, Veneziano, with the JSE ("Ukwanda's complaint").[20] Ukwanda alleged *inter alia* that Cortex and Absa were in default of the JSE's Derivative Rules because of their failure to pay Ukwanda the R5 000 000.00 it requested on 21 November 2008.[21] Ukwanda requested that the JSE "*implement the procedures as contemplated in Rule 12.40*" (dealing with the consequences of a clearing member's default).[22] For these procedures to be implemented, it logically necessitated the JSE finding that Cortex and thereafter Absa were indeed in default of the Rules.

[32] On 11 December 2008, after having considered Ukwanda's complaint, the JSE responded and stated *inter alia* that: "*[t]he JSE does not agree with your client's views as stated in paragraphs 2, 3, 4 and 5 of your letter under reply* [*i.e. those paragraphs in Ukwanda's letter dated 9 December alleging a default by Cortex and Absa]*."[23]

[33] On 12 December 2008 Ukwanda wrote to the JSE and requested "*a full explanation as to why the non-payment of monies in terms of a valid written request from our client [Ukwanda, on 21 November 2008], did not, in terms of*

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[20] Core Bundle p. 1190
[21] Core Bundle p. 1190 par 2 - 5 – there was an additional complaint contained in the letter relating to allegations of market manipulation which is not relevant to these proceedings and may be disregarded.
[22] Core Bundle p. 1190 par 5
[23] Core Bundle p. 1212 par 2

the JSE (sic), constitute a 'default' as defined in Rule 12.10.1 of the Derivative Rules." [24] The holiday period descended and the JSE did not reply.

[34] On 19 January 2009 Ukwanda wrote to the JSE again and indicated that it sought to have its complaint (the alleged default by Cortex and Absa) resolved in terms of the dispute resolution procedure envisaged in Rule 17. [25]

[35] On 20 January 2009 the JSE replied to both of Ukwanda's letters (of 12 December 2008 and 19 January 2009).[26] The JSE once again dismissed the allegations of default by Cortex and Absa in terms of the Rules.[27] The JSE also explained how and why, on Ukwanda's own version, the dispute did not fall within the jurisdictional limit of R500 000-00 stipulated in Rule 17 and invited Ukwanda to provide the JSE with any information that suggested otherwise.[28] No such information was forthcoming.

[36] On or about 6 April 2009 Ukwanda launched an application ("the application") seeking:

1. Declaratory relief declaring Cortex and Absa in default of the Rules,[29] and

2. A rule nisi calling on the JSE to indicate why the consequences of default set out in Rules 12.30 and/or 12.40 should not be implemented against Absa.[30]

[37] The JSE opposed the application.[31] In its answering affidavit the JSE:

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[24] Core Bundle p. 1213 par 3
[25] Core Bundle pp. 1215-6
[26] Core Bundle p. 1223 par 1
[27] Core Bundle p. 1223 par 3
[28] Core Bundle pp. 1223-4 par 7 – 9
[29] Core Bundle p. 1129 par 1 – 2
[30] Core Bundle p. 1130 par 3
[31] Core Bundle p. 1226

1. Set out four reasons justifying the dismissal of the application,[32] including that the application constituted an abuse with an ulterior purpose in an attempt to embarrass Absa and the JSE;[33]

2. Pertinently pointed out that the application held no financial consequences for Ukwanda who on its own version did not dispute: i) its default on its account, ii) that it was obliged to meet margin calls, and iii) that it had an indebtedness in terms of the Rules that rose beyond R739 000 000.00 (seven hundred and thirty nine million rand);[34] and

3. Significantly, as one of its reasons for opposing the application, explained in great detail why Cortex and Absa were not in default of the Rules and why they therefore were not being suspended in terms thereof.[35]

[38] Absa too opposed the application.[36] Absa made common cause with the JSE.[37]

[39] Ukwanda failed to file any replying affidavit. On 28 July 2009 Absa's attorneys set the matter down for hearing on Tuesday 22 September 2009.[38] The JSE's and Absa's allegations were not challenged. Instead, two court days before the hearing, on 17 September 2009, Ukwanda withdrew its application and tendered the wasted costs.[39] Thus, the allegations made by Absa and Cortex under oath, remained unanswered.

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[32] (i) Core Bundle p. 1344 par 4 (the application constitutes an abuse); (ii) Core Bundle p. 1345 par 5 (the powers under Rule 12 are exercisable solely in the public interest and are not enforceable at the instance of private parties); (iii) Core Bundle p. 1346 par 6 *et seq* (Ukwanda has no *locus standi*), and (iv) Core Bundle p. 1351 par 7 *et seq* (Cortex and Absa were not in default in terms of the Rules)
[33] Core Bundle pp. 1344-5 par 4; Core Bundle p. 1348 par 6.3.1
[34] Core Bundle p. 1341 par (g) and (h); Core Bundle p. 1348 par 6.3.1
[35] Core Bundle p. 1351 par 7 *et seq*
[36] Core Bundle p. 1228
[37] Core Bundle p. 1242 par 42.8
[38] Core Bundle p. 1122.2
[39] On the eve of the previous hearing date of this trial in March 2012 and without any notice Ukwanda commenced business rescue proceedings, thus scuppering the trial. Absa brought an application to have those business rescue proceedings set aside as an abuse. However, just a day before the hearing date of Absa's application to have the business rescue proceedings set aside as an abuse, the business rescue proceedings were withdrawn. All of this is undisputed. Moreover, it occurs in

Issue 2.1: Was the view held by the JSE an administrative act?

[40] Before analysing the legal requirements for a decision and purely based on the aforesaid common cause facts, it seems to be quite clear that the JSE indeed took a decision to the effect that no default in terms of the Rules was committed by either Cortex or Absa. By way of analogy – if the JSE had held that the conduct of Absa and/or Cortex did indeed constitute a default under the Rules, no one would have contended that the JSE, in so holding, did not take a decision thereon. It follows that the conclusion reached by the JSE to the contrary, equally amounts to a decision on the Ukwanda complaint.

[41] For a decision to be regarded as "administrative action" in terms of PAJA, the prerequisites set out in the definition of this concept in section 1 of PAJA have to be complied with. In this regard, section 1 defines "administrative action" as follows:

> "'**administrative action**' means any decision taken, or any failure to take a decision, by –
> (a) An organ of state, when –
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
> which adversely affects the rights of any person and which has a direct, external legal effect…"

[42] In order to determine whether there has been administrative action in *casu* the facts must be read against the seven requirements gleaned from the definition of "administrative action" in PAJA, namely:

1. A decision;

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circumstances where on Ukwanda's own version it is a shell of a company which is being drip-fed funds by an entity managed and controlled by Jac De Beer who happens presently to also be Ukwanda's sole director.

2. By an organ of state or a natural or juristic person (this point is not in issue);

3. Exercising a public power or performing a public function;

4. In terms of any legislation (or in terms of an empowering provision);

5. That adversely affects rights;

6. That has a direct, external legal effect; and

7. That does not fall under any of the listed exclusions.

A Decision

[43] For the purposes of PAJA "decision" means:

> "any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to -
> (a) making, suspending, revoking or refusing to make an order, award or determination;
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
> (d) imposing a condition or restriction;
> (e) making a declaration, demand or requirement;
> (f) retaining, or refusing to deliver up, an article; or
> *(g)* doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to taken a decision must be construed accordingly;" (Emphasis added)

[44] Three requirements flow from this definition before it can be found that the JSE's decision was a "decision" as contemplated in PAJA:

1. First, it must have been a decision with finality, as opposed to, for example, a suggestion or a preliminary statement;

2. Secondly, it must have been a decision of "an administrative nature"; and

3. Thirdly, the JSE's decision must have been "made under an empowering provision".

[45] First, the JSE's refusal to find that Cortex and Absa were in default constituted a refusal to do something (para (g) of the definition of "decision") and/or a refusal to make a determination (para (a) of the definition of "decision"). The JSE's decision was final. It was not a suggestion. Nor was it a preliminary statement.

[46] In **Bhugwan v JSE Ltd** 2010 (3) SA 335 (GSJ) at par [10], [11] and [12] I had occasion to state guidelines to determine whether a "decision" that was capable of review, existed:

> "[10] Having regard to the aforesaid definitions and authorities, it would seem to me correct, as submitted by Mr. *Marcus* that for a decision to have been taken which is capable of review, all or at least some of the following steps must have been completed in the decision-making process:
>
> 1. Save where an authority legitimately acts coercively or of its own accord, *a final application, request or claim* must have been addressed by a subject to an authority which exercises statutory or public powers to exercise those powers in relation to a set of factual circumstances applicable to the subject.
>
> 2. All relevant information, either presented by the subject or otherwise reasonably available *must have been gathered* (which may require an investigative process) *and placed before the authority* which is to make the decision.
>
> 3. There must have been an *evaluative process* where the authority considers all of the information before him or her, identifies which components of such information are relevant and which are irrelevant and in which the authority assigns, through a process of value judgments, a degree of significance to each component of the relevant information, regard being had to the relevant statute or other empowering provision in terms of which the authority acts.

4. A *conclusion* must have been reached by the authority, pursuant to the evaluative process, as to how his or her statutory or public power should be exercised in the circumstances.

5. There must have been an *exercise of the statutory or public power* based on the conclusion so reached.

[11] Ultimately the facts in each circumstance will have to be evaluated to determine whether or not the processes referred to above have been complied with or to what degree these processes exist, for purposes of deciding whether an administrative decision had been taken. When applied to a set of facts it will be a matter of degree to determine whether an issue is ripe for review adjudication on the basis that the decisional process had been completed. In Baxter *Administrative Law* 1984 page 720 the following is said in regard to the process of determining whether or not a decision had been taken:

> 'It is submitted that the appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not. Once unlawfulness is manifest in a form which cannot be corrected no matter how the public authority continues to act, there is no point in insisting that the complainant should continue to go through the motions before bringing the matter to court.'

[12] Of importance is for the adjudicator to evaluate the decision-making process in the context in which it is alleged a decision was taken. In *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 1 SA 155 (SCA) at para[1] Nugent JA quoted with approval the remark made by Lord Steyn in *R v Secretary of State for the Home Department, Ex parte Daly* 'context is everything'. Nugent JA continued:

> 'And so it is when it comes to construing the language used in documents, whether the document be a statute, or a contract, or, as in this case, a patent specification.'"

[47] The context in which the action by the JSE in the **Bhugwan** case was decided is, however, substantially different to that which prevails in the present case. In the present instance there was indeed a decision taken whereas in the **Bhugwan** case there was correspondence indicating only that certain information was "held" by the JSE. Mr du Toit's reliance on my judgment in the **Bhugwan** case is therefore misplaced and not apposite to a proper resolution of the context in which the JSE's action in the present instance is to be adjudicated.

[48] Secondly, the JSE's decision was "*of an administrative nature*":

1. There appears to be little judicial content given to the requirement that the decision concerned must be "of an administrative nature". However, in **Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and Others** 2010 (5) SA 574 (KZP) at para 61 Wallis J (as he then was) suggested that the phrase "of an administrative nature" serves two related purposes: i) first, it emphasises that the identification of administrative action requires a positive finding to that effect by the court; and ii) secondly, it ensures that the diagnosis of administrative action involves a considered process.

2. In the present matter, the JSE made a ruling. There can be no merit in a suggestion that it was not of an administrative nature. This is particularly so if one has regard to the other elements of "administrative action" dealt with below.

[49] Thirdly, it is similarly uncontroversial that the JSE's decision was "*made under an empowering provision*":

1. The definition of "empowering provision" in PAJA is a very broad one. It means "*a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken*".

2. The Derivative Rules made in accordance with the Act are the empowering provision in this instance. It is trite that the Rules give rise to both a public (administrative law)[40] dimension and a private (contract law) dimension.[41]

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40 In **Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange** 1983 (3) SA 344 (W) at 364H–365A the court was asked to review the JSE's failure to comply with its own listing requirements. The JSE was not a statutory body and there was no contractual relationship between it and the applicant. However, Goldstone J decided that its decision was reviewable because the JSE was under a statutory duty to act in the public interest. In arriving at this conclusion Goldstone J took into account the important public function performed by

[50] In my view and in the face of Uwkanda's request to declare Cortex and Absa in default and have them suspended in terms of the Rules, the JSE's repeated, final and unequivocal refusal to do so, constituted a decision as contemplated in PAJA.

The JSE was exercising a public power performing a public function

[51] As demonstrated above, with reference to **Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange** 1983 (3) SA 344 (W) at 364H–365A (approved by the then Appellate Division in **Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 (A)** at 152E–I), the JSE as a statutory body exercises public power or performs a public function because it is under a statutory duty to act in the public interest.

[52] A key purpose of the JSE in overseeing and implementing the Rules is to ensure the integrity of the market. In doing so, it acts for the public good and in the public interest. Therefore, in considering Ukwanda's complaint by evaluating it

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the exchange. This approach was approved by the then Appellate Division in **Johannesburg Stock Exchange v Witwatersrand Nigel Ltd and Another** 1988 (3) SA 132 (A) at 152E–I.

41 In **Herbert Porter & Co Ltd v JSE** 1974 (4) SA 781 (W) at 788C, Coetzee J held that the relationship between a listed company and the JSE was contractual in nature. He held further, with reference to the Stock Exchange Control Act 7 of 1947 that the stock exchange was (at 791E-F) that the JSE was not a statutory body even though it must conform to certain standards laid down in that Act.
The JSE has made exchange rules in accordance with the then applicable section 18 of the Securities Services Act 36 of 2004 (now repealed) ("the Act"), which rules relate to transactions in "listed securities" which include "derivative instruments" as defined in section 1 of the Act.
By virtue of section 18(4) of the Act, such exchange rules are binding on an exchange, an authorized user, an issuer and their officials and employees and on clients as defined in section 1 of the Act. A client is defined in section 1 of the Act to mean any person who uses the services of an authorized user or a participant, as the case may be.
On 1 August 2005, the JSE made rules, in accordance with the Act, relating specifically to derivative instruments. A copy of these rules is the named "Derivatives Rules and Directives", as amended and applicable at the time relevant to the present action, and appearing as annexure "B" to the Particulars of Claim ("the rules" or "DR") (PB 31-135).

in terms of the Rules, and responding thereto, the JSE was classically exercising a public power and/or exercising a public function.

The JSE's decision was taken in terms of an empowering provision

[53] As demonstrated above, in meeting the definition of "decision" in PAJA, the JSE acted "under an empowering provision". The reference to an 'empowering provision' is repeated in the definition of 'administrative action'. This element of the definition of 'administrative action' has accordingly already been established.

The JSE's decision adversely affects rights and has a direct, external legal effect

[54] In **Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works** 2005 (6) SA 313 (SCA) at par [23] Nugent JA held as follows:

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

[55] This dictum and the broad approach it entails, was subsequently referred to with approval by the Constitutional Court.[42]

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[42] **Joseph v City of Johannesburg and Others** 2010 (4) SA 55 (CC) (2010 (3) BCLR 212) at par 27, and **Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Lt**d **and Another** 2011 (1) SA 327 (CC) at par 37

[56] On the present facts, the JSE's refusal to find that Cortex and Absa were in default and suspend them, had the capacity to affect Ukwanda's legal rights and thus impacted on Ukwanda as contemplated in PAJA.

Conclusion

[57] The JSE's decision did not fall under any of the listed exclusions in the definition of "administrative action".

[58] Therefore, I am satisfied that the JSE's decision on the facts of this case meets all the elements for classifying it as "*administrative action*" as defined in PAJA.

<u>Issue 2.2: If the JSE's decision constitutes "administrative action", can Ukwanda challenge such administrative action in these proceedings?</u>

[59] In light of my finding that JSE's conduct constituted administrative action, I now consider the manner in which Ukwanda seeks to attack such administrative action.

[60] It is common cause that Ukwanda and its controller/s chose not to –

1. review the JSE's administrative action in terms of rule 53 of the Uniform Rules of Court and thereby seek to have it declared invalid and set aside;

2. pursue any of its/their statutory remedies in terms of *inter alia* section 93 of the then applicable Security Services Act 36 of 2004; and

3. proceed with Ukwanda's application seeking, i) declaratory relief that Cortex and Absa were in default of the Rules, and ii) the issue of a rule nisi calling on the JSE to show cause why the consequences of default set out in Rules 12.30 and/or 12.40 should not be implemented against Absa.

[61] Instead, Ukwanda and its controller/s have sought to challenge the JSE's administrative action in an indirect manner. They seek to have this court, in a dispute purely between two private parties and where the JSE is not a party to this litigation, overturn the JSE's administrative action. In my view, they are precluded from doing so by law. It is settled law that administrative decisions stand until they are set aside by a court, and outside of direct review proceedings the circumstances in which a party may indirectly or collaterally challenge the validity of administrative action are narrow.[43]

[62] In **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) at par [35] it was held that *"...a collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings'"*. Generally, this is where an administrative authority seeks to coercively enforce an invalid act against the party challenging the validity of that act.

1. In **V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others** 2006 (1) SA 252 (SCA) at 255F (para 10), the Supreme Court of Appeal per Howie P was faced with the applicability of a *"collateral challenge"* in circumstances where in a contractual dispute between two private parties, one of the parties sought as part of its defence to collaterally challenge an administrative decision issued by a regulator who was not before the court. The SCA refused to permit such an attack on the administrative decision and held as follows:

> "[10] The defence which the respondents sought to raise in this respect has sometimes been called 'collateral challenge'. Its applicability was examined and explained by this court in *Oudekraal Estates (Pty) Ltd v City of Cape*

[43] See **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) at para 35; **V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others** 2006 (1) SA 252 (SCA) at 255F

> *Town and Others*. In brief, it is applicable in proceedings where a public authority seeks to coerce a subject into compliance with an unlawful administrative act. If these proceedings are not of that nature then the grounding order [the administrative decision sought to be challenged collaterally] will have legal effect until set aside by a reviewing Court" (Emphasis added).

[63] The decision in **V & A Waterfront Properties** was taken on appeal to the Constitutional Court, specifically on the point that the SCA had stated the scope of collateral challenge too narrowly by insisting that it arise only where a public authority seeks to coerce a subject into compliance with an unlawful administrative act. The Constitutional Court upheld the SCA's decision and dismissed the application for leave to appeal, holding that it was unnecessary to decide the question of whether the scope of collateral challenge set out by the SCA was too narrow.[44] Significantly, the Constitutional Court held that even if the doctrine of collateral challenge was more widely framed as sought by the applicants in that case, this would not assist them because they had the alternative remedy of reviewing and setting aside the decision of the regulator, which they chose not to use.[45]

[64] The SCA decisions in **Oudekraal** and in **V & A Waterfront Properties** have been followed in numerous decisions.[46]

[65] More importantly, the facts and the circumstances in **V & A Waterfront Properties** are in principle identical to the present matter. Ukwanda seeks to collaterally challenge the JSE's administrative action in a dispute between two private parties, which dispute the JSE is not even privy to, and where there is no coercion by any public authority (no matter how widely one conceives of that

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[44] **Helicopter & Marine Services (Pty) Ltd and Another v V & A Waterfront Properties (Pty) Ltd and Others** 2006 (3) BCLR 351 (CC) at para 5

[45] **Helicopter & Marine Services (Pty) Ltd and Another v V & A Waterfront Properties (Pty) Ltd and Others** 2006 (3) BCLR 351 (CC) at par 7

[46] **Club Mykonos Langebaan Ltd v Langebaan Country Estate Joint Venture and Others** 2009 (3) SA 546 (C) at par 38, **Offit Enterprises (Pty) Ltd v Coega Development Corp (Pty) Ltd** 2009 (5) SA 661 (SE) at 672G – J

concept) against Ukwanda or anyone else for that matter. The circumscribed concept of collateral review does not, therefore, apply in the present circumstances.

[66] Furthermore, even if I was inclined to consider broadening the concept of collateral review, that would not assist Ukwanda. As demonstrated above, Ukwanda had several remedies at its disposal to vindicate its rights, including judicial review. It elected to withdraw its review application on the eve of the hearing thereof, and not to proceed with its other remedies. In these circumstances, as illustrated above by the Constitutional Court decision in **V & A Waterfront Properties**,[47] any widening of the concept of collateral review cannot assist Ukwanda.

[67] Therefore, the JSE's decision which constitutes "administrative action" under PAJA cannot be indirectly challenged by Ukwanda in these proceedings. In other words, this court must accept that Cortex and Absa were not in default and were not suspended in terms of the Rules.

[68] I conclude that Ukwanda's allegations and assertions to the contrary are dismissed. For these reasons Ukwanda's counterclaim must fail and Absa's claim must succeed.

[69] If, however, I am incorrect in the aforesaid conclusion, I was specifically asked by counsel to decide the next issue mentioned in item 2.3 of the stated case.

<u>Issue 2.3: If the JSE's decision does not constitute "administrative action", was Cortex in default as provided for in Derivative Rule 12?</u>

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[47] **Helicopter & Marine Services (Pty) Ltd and Another v V & A Waterfront Properties (Pty) Ltd and Others** 2006 (3) BCLR 351 (CC) at par 7.

[70] Section 2 of the Rules defines 'default' to mean a default by a client or member, as contemplated in DRD12. DRD12.10.1 provides that a member shall default if he fails to fulfil any of his obligations in terms of a *"trade or a position*".[48]

[71] Upon a proper construction of DR 12.10.1, read with the definition of 'trade' and 'position', any obligation which a trading member (Cortex in this case) may have towards its client (Ukwanda in this case), such as to pay any amount standing to the credit of the account maintained by the member at a bank in relation to such client, is not an obligation in terms of a trade or a position. An obligation in terms of a trade or a position is an obligation owed by the client to the counterparty, i.e. the seller, where the client has bought securities or taken a long position, or to the buyer, if the buyer has sold securities or taken a short position.[49] An obligation in terms of a trade or position does not arise in relation to a member unless the member himself has, for his own account, a trade or position.[50] In fact, Cortex was never suspended from trading. This is admitted.

[72] In any event, the suspension of a trading member from trading does not occur automatically, but is required to be effected by the JSE Executive Committee.[51] Absa never in its capacity as clearing member stepped into the shoes of Cortex, and Ukwanda never became a client of Absa.[52]

[73] As indicated earlier, paragraphs 48, 49 and 50 of the opening address by Mr Harris has been admitted as factually correct. This means that the requirements for a default have to be seen in the light of those practices and the applicable Rules. I cannot fault the practical implementation by the JSE of these Rules as explained in the opening address of Mr Harris.

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[48] Sub-Rules 12.10.2 and 12.10.3 are not relevant to Ukwanda's allegations
[49] See again exhibit "I"
[50] Absa's Replication to Ukwanda's Plea, Pleadings Bundle p. 252 par 8A, 8A.2, 8A.3
[51] Absa's Replication to Ukwanda's Plea, Pleadings Bundle p. 252 par 8A.4 and 8A.5
[52] Pleadings Bundle p. 253 par 8A.6

[74] Rule 12.10.1 provides that a member (which includes a trading member and a clearing member) shall be in default *inter alia* if "*he fails to fulfil any of <u>his obligations</u> <u>in terms of a trade or position</u>"* (emphasis added). In section 2:

1. a "*trade*" is defined as meaning "*to buy or to sell securities...*";

2. a "*position*" is defined as meaning "*either a long or a short position*";

3. a "*long position*" is defined as meaning –

> "a number of exchange contracts registered by the clearing house in the name of a member or client in terms of which –
> (a) in relation to futures contracts, the member or client is obliged to take delivery of the underlying instrument from the seller at the agreed price on a future date; or to pay an amount of money to the seller if, on the future date, the price or value of the underlying instrument is less than the agreed price; or
> (b) …;"

and

4. A "*short position*" is defined as meaning –

> "a number of derivatives exchange contracts registered by the clearing house in the name of a member or client in terms of which –
> (a) In relation to futures contracts, the member or client is obligated to make delivery of the underlying instrument at the agreed price on a future date or to pay an amount of money if, on the future date, the price or value of the underlying instrument is greater than the agreed price; or
> (b) …"

(The references to a "member" are to a member who has taken a proprietary position for his own account, as appears from the words "*registered by the clearing house in the name of a member…*")

[75] As appears from above, it is clear that the concept of a default in the Act and the Rules has a specified and defined meaning which is divorced from the normal meaning of default in contractual and legal terminology. The obligations incurred by a client who trades or opens a position, are obligations towards the

counterparty, i.e. to the seller where the client has bought securities or taken a long position, and to the buyer if the client has sold securities or taken a short position. As between the client and the trading member to whom he has given a mandate to trade or open a position on his behalf, there is no "*trade*" and no opening of a "*position*". Hence, if there is, as between the trading member and his own client, any failure of either the trading member or the client to fulfil his obligation towards the other, such failure may constitute a contractual breach in terms of their agency contract, but it cannot be a failure to fulfil his obligations "*in terms of a trade or position*" as envisaged in DRD12.

[76] The obligation to render performance on the future date under a "*trade*" or "*position*" as set out above is not the only obligation of the client who trades or takes a position, towards the counterparty. Because of the high risks involved in the derivative market, as set out above, a client is also required to make margin payments (initial margin, variation margin and (possibly) additional margin) which are designed to ensure that he meets his obligations towards the counterparty. These obligations, being obligations of a client towards a counterparty, are obligations "*in terms of a trade or position*", as envisaged in DRD 12.10 and DRD 12.10A.

[77] In the absence of any failure to fulfil any obligations towards a counter party by Cortex (the trading member) or by Absa (the clearing member), there can be no default as contemplated in the Rules by either of them. This is so because there had been no failure by any member "*to fulfil any of his obligations in terms of a trade or position*" as envisaged in DR12.10.1. In other words, any failure by Cortex to pay the defendant the R5 million requested (even if it were a valid obligation) does not involve Cortex or Absa's failure to fulfil any obligation to any counterparty to any trade with Ukwanda. Furthermore, it does not involve any contraventions of obligations incurred by Cortex in relation to a "*trade or position*" <u>of Cortex's</u> counterparty i.e. in relation to Cortex's <u>own trades</u> (i.e. trades by Cortex for its own account). Therefore, the alleged failure by Cortex to

pay the defendant the R5 million could not constitute a default as envisaged by DR 12.10.1 and could not provide any ground for suspension of Cortex as alleged by Ukwanda. Thus, if Cortex could not be suspended, Absa could also not be suspended for the same alleged failure.

[78] I agree with Mr Harris' argument that Ukwanda's version of what constitutes default in terms of DRD 12.10.1 is commercially and practically unviable. It is not adopted or applied by the JSE. It would lead to absurdity and undermine, rather than promote, the integrity of the market for the following reasons:

1. Ukwanda's contention assumes that every breach of the Rules constitutes a default. In other words, on such a construction, if Cortex's failure to pay Ukwanda the requested R5 million constituted a breach of the Rules then this was a default in terms of DRD12.10.1. This construction is incorrect. This is because default in terms of DRD12.10.1 is limited to contraventions of obligations incurred by a member: i) <u>in relation to a counterparty</u> (which arises from a "*trade or position*") and ii) <u>in respect of that member's own proprietary position</u> (i.e. the member's own trade or position), neither of which occurred.

2. Further and in any event, Ukwanda's construction is that the default occurs and that the consequences therefrom flow immediately and automatically with effect from the time of such breach of the rules (assuming this to constitute a default). This is not the case. In the event of a default of DRD12.10.1, the consequences of such default is set out in DRD 12.30 (i.e. whereby the clearing member steps into the shoes of the member and takes over all its positions and trades) can only commence once the relevant practical steps required to be taken have been taken as described above.

3. In addition, Ukwanda's assertions assume that in the event of a default under DRD12.10.1 the consequences of DRD12.30 flow (essentially that the clearing member steps into the shoes of the member) only in relation to a particular position. However, this is incorrect. The consequences of such default set out in DRD 12.30 are far more severe with wide ranging practical ramifications – the clearing member steps into the shoes of the member and takes over all of its positions and trades i.e. its entire book. In the present instance, because Cortex had in excess of a 1000 clients, had there been a default by Cortex this process would have taken a considerable period of time in excess of several days, if not lasting weeks to unravel.

<u>CONCLUSION</u>

[79] For the reasons set out above I am also of the view that issue 2.3 must be answered in favour of the Absa.

[80] Having come to the conclusions that question **2.2** and **2.3** of the stated case are answered in favour of Absa, it became unnecessary to answer the remaining questions **2.4** and **2.5**. I therefore make the following order:

a. The defendant's counterclaim is dismissed with costs, including the costs occasioned by the employment of two counsel.
b. The defendant is ordered to pay the plaintiff the sum of R732 191 068.00.
c. Interest on the aforesaid amount at the rate of 15.5% per annum *a tempore morae* from 10 December 2008 to date of final payment.
d. Costs of suit, including the costs occasioned by the employment of two counsel.

DATED THE 9th DAY OF September 2013 AT JOHANNESBURG

C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv L. N. Harris SC
Adv F. Ismail

Counsel for the Defendant: Adv J. du Toit SC

Attorney for the Plaintiff: Webber Wentzel
Attorneys for the Defendant: Veneziano Inc

The trial commenced on 21 August 2013 to 22 August 2013 and 26 August 2013