REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

31 July 2020 Valley J

Case No.: 2020/03656

In the matter between:

Chris Legakwa Moropa	**First Applicant**
Esau Frans Makamole	**Second Applicant**
Shalimane Richard Nkosi	**Third Applicant**
Vusi Johannes Selepe	**Fourth Applicant**
Mathapelo Shirley Rambau	**Fifth Applicant**
Dineo Priscilla Gamede	**Sixth Applicant**
Christopher Mazwisikhwebu	**Seventh Applicant**
Jack Tema Nkgapele	**Eighth Applicant**
NBC Holdings (Pty) Ltd	**Ninth Applicant**
NBC Fund Administration Services (Pty) Ltd	**Tenth Applicant**
and	
Chemical Industries National Provident Fund	**First Respondent**
Bonginhlanhla Dangazele	**Second Respondent**
Reginald Sema	**Third Respondent**

Faiz Davids	**Twentieth-sixth Respondent**
Akani Retirement Fund Administrators (Pty) Ltd	**Twentieth-seventh Respondent**
Novare Actuaries and Consultants (Pty) Ltd	**Twentieth-eighth Respondent**
Moruba Consultants and Actuaries	**Twentieth-ninth Respondent**
Chemical, Energy, Paper, Printing, Wood And Allied Workers Union	**Thirtieth Respondent**
The Financial Sector Conduct Authority	**Thirty-first Respondent**

JUDGMENT

Vally J

Preface

[1] The finalisation of this case has posed considerable challenges, many of which could have been avoided. It was brought in two parts: a part A dealing with interim relief and a part B dealing with final relief. I issued an interim interdict on 12 March 2020. The order I issued was lengthy and comprehensive in relation to finalising part B. The order was specific that the interim order would only last until 31 July 2020. It further laid out what the parties were required to do in order to make part B of the matter hearing-ready. A date for the hearing of part B was set in the order. However, the parties were unable to comply with aspects of the order. It is not necessary to go into detail as to why this was so and which party(ies) were responsible for this. The important fact is that the failure to comply with the terms of the order resulted in condensing the time

Ayanda Sithole	Fourth Respondent
Lucas Mashego	Fifth Respondent
John Baloyi	Sixth Respondent
Poppy Motlakeng	Seventh Respondent
Caswell Z Makhaba	Eighth Respondent
Dan Tjiane	Ninth Respondent
Monde Dyonta	Tenth Respondent
Zwelihle Reginal Ngonyama	Eleventh Respondent
Bheki Zungu	Twelfth Respondent
Temba Siqiti	Thirteenth Respondent
Alexander Arendse	Fourteenth Respondent
Sina Pelo	Fifteenth Respondent
John Tshambu	Sixteenth Respondent
Lizette Olivier	Seventeenth Respondent
Sbongile Sholoko	Eighteenth Respondent
William Matloga	Nineteenth Respondent
Gloria Joyful Sibiya	Twentieth Respondent
Shandrika John	Twentieth-first Respondent
Ernolene Loots	Twenty-second Respondent
Laura de Vos	Twenty-third Respondent
Bulelani Nolingo	Twenty-fourth Respondent
Zanele Ester Magagula	Twenty-fifth Respondent

period available to finalise all the pre-hearing arrangements in order to hold onto the date set for the hearing of part B. Eventually, and unfortunately, the hearing had to be moved. But the date when the interim relief expired had to be adhered to. This was to ensure that any harm some of the parties might suffer as a result of the interim order was restricted to a minimum. To hold onto the new date, directives specifying what the parties should do and by when they should do so were issued. Unfortunately, these were not always adhered to. And this caused great inconvenience to the Court (myself and my registrar), as well as to the opposing parties. Most significant of these was the failure of the applicants to file their replying affidavits and their heads of argument as per my directive. It is in this context that what is said in [2] must be understood.

[2] Parties to a dispute may, understandably, engage robustly with each other. They may even display some vitriol towards each other, and there has been no shortage of vitriol in this case. However, the vitriol of the parties must remain just that. It must never seep into the relationship between counsel and between attorneys. Legal representatives, especially counsel, should at all times avoid getting entangled in the dispute. They must represent their clients as vigorously as they can and to the best of their capabilities, but they must never treat the case as their own. The case always remains that of their client. And, they must always remain courteous and respectful to their opponents. They should strive to maintain discipline and composure throughout the litigation process. Counsel must communicate with their opponents at every material turn in the case and avoid ambushing or embarrassing them. They should at all times respect the orders and directives of the Court, and if they

cannot do so, they must either seek the leave of the Court, or at the very least they or their counsel should communicate with the Court and their opponents. Regrettably neither the applicants nor their counsel did this. That caused undue inconvenience to the Court as well as to the respondents' legal representatives.

The *dramatis personae*

[3] There are ten applicants in this matter and thirty-one respondents.

a. The ten applicants

i. There are eight individual applicants who are members of the first respondent. These eight applicants will be referred to as the member applicants.

ii. The ninth and tenth applicants are two private companies. They will be referred to as NBC.

iii. The cases of the NBC and member applicants are identical in almost every respect. At times it may be necessary to refer to them collectively as the applicants.

b. The thirty-one respondents

i. The first respondent is Chemical Industries National Provident Fund, a registered national provident fund. It will be referred to as the Fund.

ii. The second to twenty-sixth respondents are the duly appointed trustees of the Fund. As they collectively constitute the board of trustees they will be referred to as the board.

iii. The twenty-seventh, twenty-eighth and twenty-ninth respondents are private companies. Of these only the twenty-seventh respondent opposed the application. It will be referred to as Akani. The twenty-eighth and twenty-ninth respondents will respectively be referred to as Novare and Moruba.

iv. The thirtieth respondent is a registered trade union. It elected to abide the decision of the Court. It will be referred to as Ceppwawu.

v. The thirty-first respondent is the Financial Sector Conduct Authority. It is established in terms of s 56(1) of the *Financial Sector Regulation Act, 18 of 2018*. It will be referred to as the FSCA.

c. Some respondents and other persons who make an appearance in this judgment:

i. The second respondent, a Mr Bonginhlanhla Dangazele who is the Principal Officer (PO) of the Fund. He will be referred to as Mr Dangazele.

ii. The third respondent, a Mr Reginald Sema who is the chairperson of the board. He will be referred to as Mr Sema.

iii. The fourth respondent, a Mr Ayanda Sithole who is the vice chairperson of the board. He will be referred to as Mr Sithole.

iv. A Mr Sipho Ginya who is an ex-employee of NBC. He will be referred to as Mr Ginya. Mr Ginya is now employed by another private company, Neighbourhood Funeral Scheme, which is associated with the main shareholder of Akani. His new employer will be referred to as NFS.

v. A Mr Victor Chaane who is an ex-employee of NBC. He will be referred to as Mr Chaane. Like Mr Ginya, Mr Chaane is now employed by NFS.

Introduction

[4] For many decades NBC was contracted to the Fund to provide it with administrative and other services. On 21 and 22 November 2019 the board resolved by unanimous vote to terminate the suite of contracts (the contracts) the Fund had concluded with NBC. The suite of contracts related to the provision of the following services: (i) administration services, (ii) health and risk management services, (iii) investment consulting services, and (iv) legal and actuarial services.

[5] On 13 December 2019 the board appointed Akani to provide administration services. Novare and Moruba, two parties having no links with Akani, were appointed to provide the rest of the services previously provided by NBC. NBC and the member applicants are aggrieved by the two decisions. They launched proceedings in this Court in two parts – a part A and a part B - to have the decisions set aside. Part A called for amongst others interim relief. On 12 March 2020 I granted the interim relief. This judgment deals with part B of their claim. As will be seen, the relief sought was expanded in an amended notice of motion.

[6] Very late in the day, after all pre-hearing arrangements were finalised and heads of argument filed, 110 members of the Fund brought an application to intervene in the proceedings. Their ambition was to support the relief sought by NBC in its amended notice of motion, namely, the removal of the PO and the entire board. Given the very short time available to the relevant respondents (the Fund, the board, the PO and Akani), they filed very limited opposing papers. The intervenors filed replying papers. A copy of the founding affidavit, without an accompanying notice of motion, was sent to my registrar as was the answering affidavit of Akani. I did not receive the answering affidavit of the Fund. Nor did I receive the replying affidavit of these members. Nevertheless, on the day of the hearing, which was carefully structured to ensure that the merits of the matter were fully canvassed, counsel for the intervenors, Mr Subel, made an appearance on their behalf and asked to move their motion. At the same time, counsel for NBC, Mr Watt-Pringle, sought to move a motion from the bar

calling for one of the disputes in the matter to be referred to oral evidence. The motion was supported by Mr Kennedy for the member applicants, although it was made plain that the member applicants were of the view that the matter could be decided on the papers. Their support for the NBC application was on the basis that they were not to be treated as co-applicants with NBC on the issue.

[7] The application was opposed by Mr Maleka for the Fund and by Mr Franklin for Akani. After canvassing the views of all parties it was decided to entertain the motion of NBC first, then the motion of the intervenors and finally, depending on the outcome of NBC's motion, the merits of part B. All the parties, including the intervenors, were of the view that this was the most prudent way to proceed.

[8] Entertaining NBC's motion consumed the entire day's proceedings, at the end of which an order dismissing the application with costs was made. The full order is presented at the end of the judgment.

Reasons for dismissing the application

[9] At the commencement of his address, Mr. Watt-Pringle indicated that the motion was:

> "The matter is referred to oral evidence on the issue whether the payments made on 20 December 2019 to Messrs Dangazele, Sithole and Sema was *bona fide* pursuant to their membership of the NFS."

[10] He indicated that at the end of the submissions he would present a draft order. After Akani and the Fund responded to the motion, he shared a draft order. It reads:

> "1 The matter is referred for the hearing of oral evidence on the issue whether the payments made to the Second, Third and Fourth Respondents respectively on 20 December 2019 were:
>
> 1.1 *Bona fide* payments made pursuant to the Second, Third and Fourth Respondents' membership or putative membership of Neighbour [sic] Funeral Scheme; and/or
>
> 1.2 gave rise to a conflict of interest between the Second, Third and Fourth Respondents respective duties as Principal Officer and Trustees for the First Respondent, and their personal interests.
>
> ...
>
> 7 The order granted pursuant to paragraphs 1, 2 and 3 of Part A of this application is hereby extended until ... / pending determination of this application"

[11] Paragraph 1.2 of his draft order was certainly not part of his motion. It was added in after all the parties had made their submissions. Mr Watt-Pringle, it seems, took the view he could expand his motion since he had informed the Court that he would be presenting the Court with a draft order at the end of all the parties' submissions. Mr. Maleka and Mr. Franklin objected to this, noting that it was prejudicial to their clients if NBC were allowed to expand upon, alter or amend its motion after full argument had been presented. Nevertheless, they maintained that even on the expanded or amended motion, NBC had failed to meet the requirements for a referral to oral evidence. On that score, they asked for the motion to be dismissed with costs.

[12] There is no dispute of fact on the papers. The parties are *ad idem* that three board members received payments from NFS. They part company on why those payments were made. NBC does not accept the explanation proffered in the answering affidavits of Akani and the Fund that they were "*bona fide*". It wants to test that version by allowing witnesses to be cross-examined. It also wants the order to allow for more documentary evidence to be produced through the processes set out in Rule 35 (which deals with discovery), and for parties to be free to subpoena any witness, and call that witness to testify without first giving a statement about his/her evidence. None of this was part of the motion, it was slipped into the draft order. The important point is not that it was slipped in, but that it reflects uncertainty on the part of NBC as to what dispute of fact it actually wants referred to oral evidence.

[13] An application to refer a matter to oral evidence must be timeously brought – an opponent should not be ambushed at the hearing as has occurred here. The application must be clear in its intent and focussed on a real dispute of fact. Put differently, a matter should not be referred to oral evidence if no facts are to be elicited. The evidence to be presented must be clearly, concisely and unambiguously identified. To avoid entering the realms of trial, it should not be open-ended or overly wide. A referral to oral evidence is very different from a referral to trial. While the NBC motion asks for the former it is actually seeking more than that, something closer to a referral to trial. This is manifest in the marked difference between what the motion says and what the draft order contains.

[14] The legitimacy of those payments has been referred to the police and the FSCA. It is presently being investigated by those bodies. The referral to oral evidence would simply duplicate the work of those bodies and may even impede it. In these proceedings the issue presented itself in the form of an allegation by NBC and the member applicants to the effect that the Fund's decisions to terminate the NBC contracts and to appoint Akani was tarnished by corruption. I explain below why those bodies, especially the FSCA, are more suited to undertake the task of determining whether the three board members were engaged in a corrupt relationship with Akani. Referring the matter to oral evidence would not take the matter any further.

[15] After hearing NBC in reply it was clear to me that the issue of extending the interim order lay at the heart of NBC's motion. A consequence to that effect would cause irreparable harm to the Fund and to Akani.

The intervention application

[16] Six calendar days before the hearing of the matter, which hearing was carefully scheduled, the intervenors brought what they say is an urgent application. They sought to join the proceedings in order to make common cause with NBC's request that the Court remove the PO and the entire board, alternatively order the FSCA to remove them. They produced no real facts for this relief. They relied solely on the facts alleged in the NBC supplementary founding affidavit for the relief. They asserted that as they are members of the Fund they have a direct and substantial interest in the application entitling them to intervene. They provided no acceptable explanation for why they arrived so

late in the day with their application. Attached to their papers are the following documents:

a. A letter sent to each of the trustees setting out details of the interim order and details of alleged payments to the three board members by NFS. The letter was sent on 23 March 2020. It was drafted and sent by Livingstone Crichton Attorneys who claimed to be representing these intervenors.

b. As early as 15 April 2020 a complaint to the FSCA against the board and the PO was sent on behalf of some of the intervenors. It was drafted by Livingstone Crichton Attorneys. It made full reference to the interim order and made specific reference to the fact that in terms of that order part B of the application was set down for hearing on 10-11 June 2020.

[17] The present attorneys (Livingstone Crichton Attorneys did not represent them in these proceedings) for the intervenors were challenged by Akani's attorneys to file a power of attorney in terms of Rule 7 to prove that they were mandated to act for the intervenors. They were not able to file one that indicated that all 110 applicants had mandated them to act on their (the intervenors') behalf. They filed documents that supposedly contained signatures of some of the applicants. The documents were filed a few days before the hearing. The contents of the documents made it very difficult for Akani to verify their authenticity or the veracity of the signatures. Thus, the issue of the authority of their attorneys to act on their behalf remained alive. Given the manner in which

they brought the application, they gave Akani no real opportunity to deal with this issue. Akani has every right to challenge their authority. It would not be correct to hold that the challenge was unnecessary. Akani in its heads makes it unambiguously clear that it is of the view that the intervenors are a front for NBC. However, it was not able to investigate the matter further and produce evidence to that effect. This is understandable given how the intervention application was brought. In fact, in the supplementary answering papers of the Fund and Akani, which were filed long before the intervention application was brought, there are affidavits from some of the persons whom Livingstone Crichton claimed to be representing but who dissociated from Livingstone Crichton. I quote from one of those affidavit as it has a bearing on the claim of Akani. The deponent of the affidavit avers:

> "1. I am an adult male and a member of [the Fund]
> 2. I was made aware by my LAC colleagues that my name was mentioned on the letter written by Livingstone Attorneys to [the [Fund's] Trustees.
> 3. I was told that in the letter, Livingstone Attorneys claimed that they are representing me and that I have instructed them to communicate on my behalf with the Fund Trustees to challenge the termination of NBC and the appointment of Akani.
> 4. I need to make it categorically clear that I have never given instruction to Livingstone Attorneys or any other firm of Attorneys to write a letter to [the Fund's] Trustees or its lawyers on my behalf.
> 5. I only remember receiving a call from [a named individual] who is one of the CEPPWAWU Shop Stewards, who subsequently requested for my personal details since I am a member of [the Fund], that is how my details was obtained to include me as one of the clients to Livingstone Attorneys.
> 6. I deny that I'm a client of Livingstone Attorneys and I also need to distance myself from the letter or letters written by Livingstone Attorneys on my behalf.
> 7. I deny that I have attended any consultation with Livingstone Attorneys nor giving them instructions to represent me. After all I can't afford any legal fees to pay Livingstone. Should there be any person paying legal fees on my behalf, I deny ever given such person instructions to do so.

> 8. I was satisfied with the reasons for terminating NBC as explained to me by the LAC members Representative who attends the RAC meetings in my region and [the Fund's] Trustees because I believe they are acting in my best interest as a member of [the Fund]." (Quote is verbatim.)

[18] In the light of the contents of these affidavits Akani had good reason to investigate the authority of the intervenors' attorneys and to check whether each of the intervenors had personally associated him/herself with this litigation.

[19] On the Thursday 16 July, which was three calendar days before the hearing, the attorney for the intervenors telephoned my registrar during the day and asked if I had seen their application. He told my registrar that he was awaiting my directions. My registrar informed him that we were busy in Court and that our emails were down. That evening the attorney sent an email to my registrar stating that they had brought an urgent application to intervene and that they await my directions. On Friday 17 July he telephoned my registrar again and he was told that I was awaiting a response to his letter and application from the respondents before I would consider issuing directions, and that the arrangements for the hearing of 20 July remained in place.

[20] The intervenors clearly knew about these proceedings since early March 2020. Yet they only brought their application six calendar days before the hearing on 20 July 2020. They said that their case was urgent yet failed to set out any detail justifying urgency, save to say that the matter was set down for 20 July 2020 and that they had initially decided to bring their own separate application. They later came to realise (when this was they do not say) that if they followed this course there was a risk of there being two applications before

the Court dealing with the same matter, against the same respondents, asking for the same relief. Therefore, they sought to urgently intervene in this matter. Their explanation is woefully inadequate. It simply does not explain why they did not intervene immediately after the interim order was granted. The very reason they give about avoiding a duplication of proceedings existed as soon as they thought of bringing their own application. It is at that point that they should have intervened. They fail at the first hurdle of showing that they deserve the urgent attention of this Court.[1]

[21] The application disrupted the preparation of Akani and the Fund for the hearing, and both of them correctly pointed out the manner and timing of the application caused them great prejudice. The papers in the main application consist of thousands of pages. Moreover, the intervention application was not placed properly before the Court. Some of the papers were not brought to my attention. The parties were not afforded a fair opportunity to file heads in the intervention application. The intervenors themselves were, I was told at the hearing, only able to file their heads by uploading it on CaseLines late on the Sunday evening of 19 July 2020.

[22] The intervenors did not file heads of argument on the merits of the case. If their application were to be granted they would, naturally, have to be afforded an opportunity to file heads on the merits. Automatically, this would entail a postponement of the hearing. Aware of this they could only ask for the matter to be postponed for them to file heads and make oral submissions, or allow the

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[1] *In re: Several matters on the urgent court roll* 2013 (1) SA 549

merits to be finalised without making any oral, and providing written, submissions on the merits. At the hearing, Mr. Subel asked for an order allowing them to join the proceedings, that the matter be postponed so that they could file detailed heads on the merits, and in the meantime that the interim order be extended. This made it patently clear that their intervention was designed to protect the interests of NBC, allowing for the contracts to remain extant for as long as the matter was not finalised. Akani and the Fund complained that granting such an order would cause them irreparable harm.

[23] As a result the intervenors have to fail in the quest to intervene. Further, the intervenors tied their case entirely to that of NBC. Given the conclusion I arrive on the standing of NBC, which is detailed below, the intervenors' case loses all meaning. I hold that the intervention application was nothing short of an abuse of court process. Akani asks for a punitive costs order. I believe it is so entitled.

Relief

[24] At first both the member applicants and NBC sought only to review and set aside the

a. decision to terminate the contracts with NBC,

b. appointment of Akani, Novare and Moruba as replacement parties that would provide the same services provided by NBC.

[25] As there is neither debate nor doubt that the contractual requirements for the

termination of the contracts were complied with and that the Fund, Akani, Novare and Moruba, being private parties, were free to conclude contracts with each other, the applicants saw it necessary to pivot their relief on public law principles – particularly those prevalent in administrative law and encapsulated in the Promotion of Administration Justice Act. No 3 of 2000 (PAJA).

[26] The member applicants held on to this relief. NBC, on the other hand, amended its notice of motion to include an order removing:

a. Mr Dangazele from his post as PO of the Fund.

b. all the trustees from their position, alternatively directing the FSCA to remove and replace them with a new board of trustees.

[27] Their case is premised on the following allegations:

a. The trustees had failed to consult with the member applicants regarding the termination of the contracts with NBC;

b. There has been an improper and corrupt relationship between Messrs Dangazele, Sema and Sithole and Akani;

c. Messrs Dangazele, Sema and Sithole received payments from Akani and therefore were conflicted at the time when the decisions were taken by the Fund to terminate the contracts with NBC and to appoint Akani, Novare and Moruba.

[28] The first issue that requires attention is this: does NBC enjoy the legal standing (*locus standi*) to challenge, by review proceedings on public law grounds, the decision of the Fund to:

a. terminate the contracts with it?

b. appoint Akani, Novare and Moruba to replace the services it provides?

c. to apply for the removal of the PO and trustees and replace them with other persons, or to ask this Court to order the FSCA to do this?

NBC's legal standing

[29] The NBC challenges the decision of the board to terminate its contracts on the basis that the board was driven by improper motive. NBC does not claim that the board was not entitled to terminate the contracts, either in terms of the contracts themselves or on the basis of public policy. In fact, NBC accepts that the board complied with the terms of the contracts in terminating them. NBC, nevertheless, wishes to remain the service provider to the Fund. It is, therefore, litigating in its own interests. It does not claim to be representing anyone else. It is a private entity, as is the Fund. They owe no duty to each other, save for any rights and obligations they have *vis-a-vis* each other in terms of the contracts. As long as the challenge to the termination of the contracts is not based on the terms of the contracts, NBC is required to show that it has legal standing. To show this it must demonstrate that it has an interest arising from

the termination and not just an interest in the termination. Its interests in the termination would arise from the rights it has in terms of the contracts, and since there is no issue there it would have to show an interest post the termination.

[30] NBC claims to act solely in own capacity and in pursuance of its own interests.

[31] Once a litigant claims to assert its own interests it is incumbent on the Court to examine those interests to determine its "*title to challenge the transaction.*"[2] The legal standing must be determined independently of the merits of the challenge. The consequence of this is, in the words of the Constitutional Court (CC), two-fold:

> "[33] ... First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.
> [34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings"."[3]

[32] The litigant claiming own interest and failing on this score may still be allowed to proceed with the challenge if it is in the interests of justice, such as,:

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[2] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) at [31]
[3] Id at [33] – [34], citations ommitted

> "where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."[4]

[33] This, of course, is the exception not the rule. The rule is:

> "[35] ... where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown."[5]

[34] The exception applies to a decision of a public body and not to a decision of a private body. This, in my view, is patent from the following *dictum*:

> "...When a party has no standing, it is not necessary to consider the merits, unless there is at least a strong indication of fraud or other gross irregularity in the conduct of a public body."[6] (Emphasis added.)

[35] To establish standing on the basis of commercial own interests when challenging a decision of a private body a litigant must show that the challenged decision "*affects his or her own rights or potential rights or interests.*"[7] The scope of a litigant's standing on the basis of own interest in a challenge against a public decision is broader, but it, too, is not "*limitless*".[8] For even in that case, the requirement that "*a successful challenge to a public decision can be brought only if the right remedy is sought by the right person in the right proceedings.*"[9]

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[4] Id
[5] Id at [58]
[6] Id at [41], see also [43]
[7] Id at [41], see also [43]
[8] Id at [50]
[9] Id at [34]. This is quoted from the SCA judgment of the same case, *Rinaldo Investments (Pty) Ltd v Giant Concerts and Others* [2012] 3 All SA 57 (SCA) at [14]

[36] The approach adopted in *Giant* was followed in *Areva.*[10] In *Areva* though, a minority judgment based on the facts of the case was penned, and although it differed with the majority on the facts, it agreed with the principles set out in *Giant.*

[37] Here, just as in *Giant,* the sole interest asserted by NBC is commercial. What is clear here though is that NBC does not have a right to the contracts it has lost. It addition, it can show no interest in which parties are appointed to replace it: none of its rights or potential rights were affected by that decision. Which parties replace it is a matter that rests solely in the discretionary hands of the Fund. Consequently, NBC has no standing to approach this Court for the relief it seeks.

[38] As I have found that NBC lacks standing to bring the application on the grounds it did, there is no need to examine the merits of its case. It would simply be non-suited. Once NBC is non-suited its evidence plays no further role in the determination of the matter.

The member applicants' standing

[39] Akani challenges the standing of the member applicants on the grounds that they are simply the *alter ego* of NBC. To this end, it relies on a number of averments in the supplementary founding affidavit of NBC, the contents of its own supplementary answering affidavit, and the contents of various

[10] *Areva NP Incorporated in France v Eskom Holdings SOC Ltd and Another* 2017 (6) SA 621 (CC)

correspondences exchanged between its attorneys and the attorneys of the member applicants. In these correspondences its attorneys asked the attorneys of the member applicants to admit or deny whether NBC is directly or indirectly funding the litigation costs of the member applicants. The response was that it was not prepared to answer the question. At the hearing, the issue was obliquely mentioned. It elicited a response from NBC's, and not the member applicants', counsel who said that "*it is none of the business*" of Akani as to who is funding the member applicants' litigation costs. Akani also brought substantial evidence to show that NBC involved itself without lawful cause in the affairs of the thirtieth respondent, Ceppwawu. The evidence aims to show that the involvement was disrespectful of Ceppwawu, disruptive to its activities and destructive of its structures. Relying on it, Akani asks that an inference be drawn to the effect that the member applicants are no more than the *alter ego* of NBC. It says that one of the most compelling reasons for drawing the inference is that, absent the member applicants' involvement in the matter, NBC has no basis to approach the Court as it lacks standing. The Fund also contends that the member applicants are not acting in their own interest but in the interests of NBC, but it does not argue for them to be non-suited on the ground that they are no more than the *alter ego* of NBC. They challenge the standing of the member applicants on the ground that no right or interest of the member applicants is adversely affected by the decisions to terminate NBC contracts and to appoint Akani as a replacement service provider.

[40] The Fund has certainly brought weighty evidence of NBC's destructive involvement in the affairs of Ceppwawu. There is substantial evidence showing

that NBC interfered in the affairs of Ceppwawu in the quest to get the board to reverse its decision to terminate its contracts. And in the course of that interference it sought to recruit members of the Fund to launch these proceedings, with a promise that it would fund the proceedings. A crucial and unanswered piece of evidence is to be found in the Fund's answering affidavit in part A, which reads:

> "I would like to confirm that a meeting was called by NBC in Secunda on 03 December 2019 to address some of the shop stewards about the decision taken by [the Fund's] board to terminate NBC services to the fund. The name of [a particular person] was mentioned and in a bad light as he was mentioned as a champion of the board's actions; and that he stood to gain a lot and corruptly so from his endeavours.
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> A man who introduced himself as Bassie, who further proclaimed himself to be the CEO of NBC was present and pretty much involved in the discussions as they progressed. We were briefed about the developments at [the Fund] and a strategy was proposed on how the attendants could assist NBC not to loose (sic) [the Fund].
>
> Furthermore to the strategy were calls made during the continuation of the meeting to [a named individual] of the Eastern Cape Region to set up meetings in that province as well as what was called a command centre as it was put. Last but not least was the strategy to identify fund members that could be utilized in legal documents that were to follow, and that funding would be availed by Mr Bassie to run legal battles.
>
> I want to confirm that at the end of this clandestine meeting I declared to the participants that I was going to inform leadership about the proceedings.
>
> I am of the view that the plan for the participants is not just about [the Fund] vs NBC, and that this funding may also be angled at destroying CEPPWAWU; ...
>
> My belief is that [the Fund] as the brainchild of CEPPWAWU remains independent from the Union and that [the Fund] is now belonging to its members and not the organization: it therefore worries me when elements want to use it as a assegai against our glorious worker movement."

[41] The Fund also annexed a copy of a message posted on a Whatsapp portal by one of its members complaining about the conduct of NBC. The message reads:

> "[a named individual] has started his movements and propaganda campaign to have NBC reinstated. He is currently in the Eastern Cape meeting some Organisors and Shopstwerds. The objective is to get other Fund members from the regions to support NBC's bid to force the Fund to stay with them." (Quote is verbatim.)

[42] The contents of the letter, the Whatsapp message and the averments in the answering affidavits of the Fund strongly castigate the member applicants. They pertinently and directly question the independence of the member applicants. They allege that the member applicants may be pursuing not their self-interest but that of NBC. Yet, inexplicably, the member applicants saw no need to address the evidence and the allegations, save to baldly deny them.

[43] Nevertheless, despite the weighty evidence of the Fund concerning the lack of independence on the part of the member applicants, I take the view that it would not be in the interests of justice to non-suit them.

The case of the member applicants, the Fund's response and findings thereto

[44] Before addressing the merits of their case it is necessary to deal with the legal grounds they rely on for their relief. As the application is a review, they say they rely on the common law, incorporating the principle of legality, alternatively the provisions of the PAJA.

[45] To rely on PAJA they have to show that the decision to terminate the contracts and to appoint Akani constitute administrative action. Administrative action is defined in s 1 of PAJA as:

> "any decision taken or failure to take a decision, by
> (a) an organ of state ..., 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." (Underlining added.)

[46] There can, in my view, be no doubt that the Fund when taking the two impugned decisions – terminate the contracts, and appoint Akani – was not "*exercising a public power or performing a public function*". Any suggestion to the contrary is simply wrong.[11] Further, the relationship between the member applicants and the Fund is governed purely by contract. The fact that the contractual relationship is regulated by statute, the Pensions Fund Act, 24 of 1956 (the Act), does not change the nature of the relationship.[12] When terminating the contract and appointing Akani the Fund was acting in terms of a contractual right and not exercising public power.

[47] The member applicants take the view that the principle of legality in the present context can be subsumed as part of their challenge in terms of the common law. I will deal with their challenge on this basis.

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[11] See *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC) for a careful analysis of what constitutes administrative action as envisaged in s 1 of PAJA. See also *South African National Parks v MTO Forestry (Pty) Ltd and Another* 2018 (5) SA 177 (SCA) at [49] – [61]

[12] *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA) at [18]; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at [11] – [12]; *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) at [18] ; *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 (3) SA 242 (CC) at [83]

[48] The member applicants' case lay in three contentions: there was a failure to consult Regional Advisory Committees (RACs), decisions were marred by corruption and/or a conflict of interests on the part of three board members.

Failure to consult RACs

[49] Section 13 of the Act prescribes that the rules of the Fund are binding on the Fund and the members. Rule 13.9.1 of the Fund's rules (the rule) provides:

> "Regional advisory committees up to six in number, shall be established to advise and assist and make recommendations to the trustees in all matters relating to the operation of the funds."

[50] Relying on rule 13.9.1 read with s 13 of the Act the member applicants maintain that it was incumbent on the board to consult the RACs before it took the decisions to terminate the contracts with NBC and to appoint Akani. I disagree. The reasons are set out below.

[51] The Fund says that the termination of the contracts with NBC was based on the following facts and circumstances:

a. In 2018 the board asked NBC to invite asset managers to bid for the property portfolio of the Fund which was at that stage run by Absa. NBC recommended a company, Motheo, to take over the portfolio. Motheo made a presentation to the board that was wholly unsatisfactory. The board called for a due diligence to be conducted on Motheo, which should have been undertaken by NBC before it recommended Motheo as the replacement service provider. During the process it transpired that Motheo did not hold a trading licence to

trade in the relevant sector, and was therefore disqualified from providing the necessary service. The board took the view that NBC had failed the Fund.

b. The board also terminated the services of one of its service providers, 27four Investment Managers (27four) for poor performance. The board requested NBC to recommend a suitable replacement for 27four. NBC recommended that a company, Effectus, be appointed as the replacement manager. After doing its own investigation, the board discovered that Effectus did not hold a trading licence and was therefore disqualified from being appointed as a replacement manager.

c. Concerned at the service the board received from NBC, it wrote to the CEO of NBC on 29 March 2019 informing him that it believed that it had received very poor service from the Investment Consulting Services Department of NBC. Apart from making it plain in the letter that the board was concerned at the unprofessional treatment it was subjected to at the hand of this department, the board advised the CEO that "*it would like to encourage the NBC Management to give this matter the serious attention it deserves and revert to*" it "*urgently with the corrective measures that the company will put in place to ensure that such an incident does not*" recur. NBC promised to respond to the letter within three weeks but only did so after five months. It responded by letter. Thereafter, the issue was placed on

the agenda of one of the board meetings. The CEO of NBC sent an employee, a Mr Deresh Lawangee, to attend to the concerns of the board. He admitted to the board that he was the author of NBC's response. The board also learnt that he was the employee that had recommended the two unlicensed firms, Motheo and Effectus. The board was aggrieved by these developments. It came to the conclusion that NBC was not treating it with the respect it deserved.

d. The board was concerned at the poor performance of the investments embarked upon by NBC.

e. It was also concerned at the lack of reporting on important investment and disinvestment decisions taken by NBC.

f. NBC had invested some of the Fund's monies in an offshore account in the FCI[13] and NBC could not, when questioned, shed any light as to where these monies were.

g. The board was also concerned about the fees that NBC charged. It was of the view that these were not in accordance with clause 5 of their Service Level Agreement.

[13] Despite searching through the affidavits, both part A and part B, I was not able to establish which country, or bank, is referred to by the acronym "FCI". Given the sheer volume of papers filed it is possible that I missed the reference to full name the country or bank. Nevertheless the allegation presented in the answering affidavit of the Fund in part A was not responded to in the replying affidavits of the member applicants or even of NBC.

h. At one point an NBC consultant addressed the board. He presented a report which showed that one of the portfolios in which the Fund's monies was invested, the Vunani Investment Managers' Money Market Portfolio, almost collapsed due to disinvestments. The NBC consultant was unable to enlighten the board as to why this was so. This upset the board and resulted in it having to do its own investigation of the matter. It resulted in the board becoming suspicious that there may be "*maladministration and corruption*" of the Fund's monies, since some of it was being disinvested from some portfolios without its knowledge.

i. The grievance as well as the concerns prompted the board to resolve that a forensic investigation into the affairs of NBC in relation to the Fund be conducted. An auditing firm, Gobodo Forensic and Investigative Accounting (GFIA), was appointed to conduct the investigation. The board took the view that the investigation was necessary, as from its perspective these facts demonstrated that NBC was grossly negligent in its dealings with the Fund. In its eyes, the *bona fides* and integrity of NBC was tarnished. The decision to undertake the forensic investigation was conveyed to the RACs.

j. GFIA conducted the investigation as per its mandate. A fairly comprehensive report from GFIA was presented to the board. It details that the investigators did not receive full co-operation from NBC and from NBC's auditors, Grant Thompson. Nevertheless, they

uncovered a string of problems, resulting in them making a number of recommendations. These were:

i. The fees charged by NBC were not market related and therefore not in the best interest of the Fund. In this regard they found that the fees charged for "*Admin*" increased by 25.4% during the period 2017 and 2019 and that fees for "*investment consulting*" increased by a whopping 336.11% between the period 2016 and 2017. Thus, they recommended that the board "*consider going to the Market with a view to securing a better rate.*"

ii. The Fund was over-dependent on NBC for amongst others guidance and advice on whom to appoint as asset managers. This over-dependence was not, they concluded, in the best interest of the Fund. They recommended that the board "*consider unbundling certain of the services currently being provided by NBC such as Investment Consulting.*"

iii. NBC was levying fees of R700 000.00 per month for members who no longer belonged to the Fund. The authors were not sure if this was legally permissible. They recommended the board seek details of these charges from NBC as well as legal advice on their validity.

iv. NBC levied a separate fee of R4 231 724.00 for the administration of one of the services ("*Agterskot payments*" made to qualifying members) it provides, and recommended that the board investigate the matter internally and satisfy itself that it had approved the payments.

v. The Fund suffered a loss of R52 829 929.14 during the period when a company, Avior Capital, was appointed to manage the transition of funds between the old and the new asset manager. They recommended that the board consider "*requesting Avior Capital to come and explain the reasons for the recorded loss, with a view to determining if such a loss was market related and whether Avior Capital in executing its mandate acted in accordance with the wishes of the*" board.

vi. Sufficient documents pertaining to disinvestments of funds during the months of May, June and December 2017 were not provided despite them requesting these documents from NBC. They recommended that the board "*request NBC and/or the respective asset managers to explain what happened to the recorded disinvestments by providing documentary evidence of where such was re-invested and or accounted for on the books of the*" Fund.

k. The GFIA report was not shared with the RACs. Neither was its contents formally brought to meetings of the RACs. It was however, brought to the attention of the chairpersons of the RACs, all of whom are members of the board.

[52] On these facts and in these circumstances the Fund asserts an irretrievable breakdown of trust in the relationship between it and NBC.

[53] The Fund's version of the facts are borne out by objective evidence. There is substantial evidence in the minutes of the board meetings demonstrating that the board was anxious about the conduct of NBC in general, the treatment it was receiving from NBC, the impact of NBC's conduct on the investments of the Fund, and about the fees it was being charged. NBC was given more than one opportunity to address the board's concerns and it failed to deal with them comprehensively or satisfactorily. And, very importantly, the results of the GFIA investigation demonstrate without doubt that the anxieties and concerns of the board bore substance, and that the board acted prudently by resolving to embark on the forensic investigation.

[54] The member applicants claim that they should have been given an opportunity to comment on the GFIA report. They go further to say that the failure to consult with the RACs on the content of the GFIA report in and of itself vitiated the decision as it breached the rules of the Fund, more particularly rule 19.3.1. I do not accept the submissions. The material contained in the GFIA report is highly technical. Its contents cannot meaningfully be dealt with in a

large meeting of an RAC. Further, the board had no duty to consult the RACs and therefore no duty to afford the RACs an opportunity to comment on the GFIA report.

[55] Upon consideration of the contents of the GFIA report, the trustees individually and the board collectively would, in my judgment, have been obliged in terms of their fiduciary duties to terminate the contracts. Thus, even if the board was required to consult the RACs after receiving the GFIA report, nothing could come from such consultations that could detract from the fact that the board was under a legal duty to terminate the contracts. The consultations would serve no material purpose. Differently conceived, even if there was a duty on the board to consult the RACs its failure to do so is of no legal moment. The rule does not require the board to consult the RACs before it takes a decision to enter into any contract, or to terminate any contract. The board is entrusted to make such decisions without having to seek the opinions of any member of the Fund or of any of its structures. That the Fund has established structures such as LACs and RACs does not mean that the board has relinquished its powers or can abdicate its responsibilities and duties, especially its fiduciary duties, to administer the affairs of the Fund. These structures exist for the benefit of the board. The board can, if it wishes, seek the advice, assistance or recommendations of these structures, but the board is not beholden to them. The rule does not elevate these structures to a level equal to or above the board. A reading of the board minutes reveals that the board does receive recommendations from the RACs which it takes seriously. The recommendations focus on issues such as problems the members face when

claiming for or receiving benefits, problems they face when making applications for Home Loans[14], and other matters of a similar nature. The LAC and RAC structures are there to assist the board in keeping contact with the members and in assisting the board in addressing some of the day-to-day problems faced by members. The board has also taken advantage of them to educate the members about various aspects of the Fund's work. The board has no duty to consult these structures about any decision it may wish to take. That it does inform them of its decisions does not mean that, prior to taking decisions, it should consult with these structures. If that were the case the board would effectively have been paralysed. These structures are not there to run the affairs of the Fund. That function, rightly so, is reserved exclusively for the board. It is the board that owes the Fund a fiduciary duty, not the LACs or the RACs.

[56] I do however note that the Fund, as well as Akani, has pointed out that the chairperson of each of the RACs is a member of the board. They represent the interests of the RACs on the board. They each voted in favour of the termination. The views of the RACs were, through them, taken into account. Each of the chairpersons of the RACs filed an affidavit essentially stating that when the RAC was informed that the board had resolved to investigate its dealings with NBC, the RAC resolved that the investigation should proceed and that urgent steps be taken to protect the Fund. The RAC did not resolve to have the matter brought back to it before any action was taken by the board as such would defeat the need for urgent action. However, I need not pronounce further on whether the RACs were consulted given that I conclude that the board is

[14] The Fund allows for Home Loans to be accessed by its members.

under no obligation to consult them before taking a decision to terminate or enter into a contract.

[57] The member applicants further ask me to infer from (i) the failure of the board to consult the RACs and (ii) from the speed with which the contracts were terminated, that the decision was taken for ulterior purpose. They do not identify what the ulterior purpose is. The factual evidence before me lays no basis for such an inference to be drawn. The board has furnished detailed reasons, supported by substantial factual evidence, as to why the contracts were terminated. The reasons furnished are compelling. I hold that the contracts were justifiably terminated.

[58] In the circumstances, I hold that the challenge to the board's decision to terminate the contracts with NBC on the grounds of its failure to consult the RACs bears no merit.

[59] The next issue is the appointment of Akani, Novare and Moruba as replacement service providers. Akani, we know, was only appointed to provide administration services. Novare and Moruba, which do not oppose the application, were appointed to provide the other services. No allegations of impropriety have been levelled against them.

[60] At the outset it must be noted that, just as in the case of the termination of the contracts, the board is under no legal duty to consult the RACs before it appoints any party to take over the services provided by NBC.

Corruption

[61] In part A the member applicants, together with NBC, made allegations of corruption between Akani and two ex-employees of NBC, Messrs Chaane and Ginya. The alleged corruption took the form of Akani paying Messrs Chaane and Ginya some monies. The explanation given by Akani and Messrs Chaane and Ginya was that they were now employed by NFS. They put up their employment contracts with NFS to evidence their claim. The explanation was rejected by the member applicants and NBC. They insisted that NFS was not a real business and the employment contracts were "*a sham*". Substantially more evidence was availed to the parties in part B of the application. This evidence shows that the claim that the contracts were "*a sham*" lacks cogency.

[62] In part B they focus their attention on the payments made to three board members by NFS: Messrs Dangazele, Sema and Sithole. Mr Dangazele received a payment of R40 000.00, while Messrs Sema and Sithole each received a payment of R25 000.00. The payments were made by NFS after Akani had already secured the contract with the Fund. The member applicants claim that the payments prove the existence of a corrupt relationship between Akani and the three trustees. The corrupt relationship, they claim, lies at the heart of the appointment of Akani.

[63] The receipt of the payments resulted in a criminal charge being laid against the three board members and NFS. The police are busy investigating the matter. The matter has also been reported to, and a complaint has been laid with, the FSCA. It, too, is in the process of investigating the matter.

[64] The three board members as well as Akani explain the receipts as being monies due to them in terms of their membership of a funeral scheme run by NFS. They bought insurance policies sold by NFS, and the peril they were insured against materialised, thus entitling them to the payments. Their version prompted NBC to conduct further investigations into the matter. The investigations revealed that the versions put up by the three board members raise many questions, all dealing with the credibility of the explanations.

[65] Corruption is a very serious problem in our society. It is much too prevalent. It threatens in a fundamental way the social fabric of our society. Its pernicious effect, particularly with regard to public bodies, is eloquently captured in the following *dicta* of the CC and the SCA respectively:

> "There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-worn constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the State to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn the stability and security of society is put at risk.
>
> This deleterious impact of corruption on societies and the pressing need to combat it concretely and effectively is widely recognised in public discourse, in our legislation. ..."[15]

And:

> "The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the

[15] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at [166] – [167], references omitted. See also [172] –[173]

> promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe."[16]

[66] Its impact in the private sphere is equally devastating to the rule of law.

[67] In this case the allegations of corruption have not only been levelled against Akani and the three board members, they were also levelled against Messrs Chaane and Ginya in part A of the proceedings. On the basis of those allegations, NBC and the member applicants succeeded in securing the interim order. They have since accepted that at the very least the allegations against Messrs Chaane and Ginya are not as forceful as initially claimed, and that they may even be baseless. However, allegations of widespread corruption have been levelled against NBC too. The allegations have been supported by substantial evidence. As with the allegations against Akani and the three board members, these allegations are disconcerting.

[68] On the evidence before me it is not possible to find that NFS and the three board members were engaged in a corrupt relationship to benefit Akani.[17] The explanation given by the three is not far-fetched or untenable. The allegations levelled against the three board members and Akani have been placed before the FSCA in the form of a complaint. The FSCA is in the process of investigating them. It has its own investigative *modus operandi.* It has its own processes to follow. These embody giving effect to the procedural rights

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[16] *S v Shaik and Others* 2007 (1) SA 240 (SCA) at [223]
[17] *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA) at [19]

accorded to the parties facing the allegations of impropriety. The rights are conferred in terms of the PAJA and the common law. It cannot circumvent these processes without placing itself at peril of flouting the law or, what amounts to the same, breaching the rights of these parties. The investigation required is extensive in detail and scope. The FSCA has stated that the complaint against the three board members and Akani is receiving its attention. The member applicants cannot and do not gainsay this.

[69] The FSCA asks that it be allowed to exercise its powers and perform its functions in terms of the Act. It is a request that is reasonable. I believe it should be allowed to do its work. The Court should not hamper the FSCA or undermine its work by passing judgment on the same issues involving the same parties that are before the FSCA. It was also pointed out by FSCA's counsel, Mr Mbikiwa, during oral argument on the question of referring the matter to oral evidence, that the FSCA is better suited than this Court to investigate claims as its proceedings are inquisitorial, it has subpoena's powers as well as powers of search and seizure. And, it has the expertise to conduct the necessary investigation to unravel the payments. Mr Mbikiwa's submission dovetailed with that of the Fund, which in its written submissions stated that the police and the FSCA are best suited to investigate and determine if the payments were irregular and/or unlawful. I agree with those submissions. It is a matter best left to the police but more particularly the FSCA.

[70] The registrar of the FSCA is empowered by s 8(5)(a) of the Act to object to the appointment of the Principal Officer (PO), Mr Dangazele in this case, if

s/he believes that the PO is not "*fit and proper*" to hold or continue to hold office, or if it is in the public interest that the PO no longer hold or continue to hold office. However, before the FSCA takes the decision to object to the PO it is required to follow the processes and procedures set out in the PAJA. Once it has taken the decision to object to the appointment of the PO, it must, in terms of sub-section 8(5)(b) of the Act, inform the chairperson of the board as well as the PO of its decision, and the board must within thirty days of receipt of the information terminate the appointment of the PO. It is peremptory for the registrar to follow due process before s/he takes the decision to object to the appointment. And, s/he must consider a number of issues or take into account a number of factors when assessing the fitness of the PO to hold office. A non-exhaustive list of the factors is outlined in sub-section 8(5)(c). S/he has to take these into account before arriving at a conclusion.

[71] Section 26(4) empowers the registrar to "*direct*" that a board member vacate office. The registrar can only do so if s/he "*has reason to believe*" that the board member "*is no longer fit and proper to hold office*". And then too, the registrar is obliged to give the board member a "*reasonable opportunity to be heard*". Should the registrar take such a step s/he is required to replace the board member with another person on conditions and for a period prescribed by the registrar.

[72] In the light of the position adopted by the FSCA, I take the view that the allegations against the three board members and Akani best be left to it. It is a principle of our constitutional order that the courts do not interfere with the work

or usurp the powers or functions of administrative bodies. Courts must show due deference to these bodies.[18]

[73] It is hoped that the FSCA, which has been served with a full set of the voluminous papers in this matter, will also look into the allegations against NBC. It is important that they deal with them, for while allegations of corruption should not be made lightly, they should also not be treated lightly.

[74] In closing on the issue of the termination of the contracts, it is crucial to note that, despite the contents of the answering affidavit of the Fund, the GFIA report and the answering affidavit of Akani, the member applicants' support for NBC remained robust, unabated and uncritical. So uncritical and unthinking was their support for NBC's case that even when they disagreed with NBC on whether the matter should be referred to oral evidence they supported the application of NBC. They could simply have remained neutral but chose not to. They refused to accept the cogent explanation provided by the board for the termination of the contracts. They ignored altogether the very serious allegations of corruption mounted against NBC, despite the extensive evidence presented, that is detailed and discloses a deep level of corrupt practices by or on behalf of NBC. There is simply no explanation for this stance. This is all the more disturbing when considering the evidence that the CEO of NBC attended meetings of Ceppwawu to mobilise individual members of the Fund to bring an application to review and set aside the decision to terminate the contracts, which

[18] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at [46] – [48]

evidence they did not dispute. It is impossible in these circumstances to view their appearance in this case as a *cri de coeur* for help. The criticism by the Fund and Akani that they have allowed themselves to act as a conduit for the pursuance of the interests of NBC is neither a lame nor lazy one.

Conflict of interest in the appointment of Akani

[75] The member applicants attack the receipt of the monies by the three board members from another flank: they say that even if the payments were legitimate, the decision to appoint Akani was tainted with irregularity because the three board members were part of the board meetings that considered the bids of the parties seeking to replace NBS. As Akani was one of those parties, the three board members were under a duty to disclose a conflict of interest, which they failed to do. The taint, according to the member applicants, vitiates the decision to appoint Akani as a replacement service provider.

[76] The Fund gave notice in late November or early December 2019 to NBC that the contracts would be terminated in 3 months. A sub-committee consisting of the three board members against whom the allegations of corruption are levelled and three other members was established to identify new service providers. An independent consultant, Mr Alwyn Jackson (Mr Jackson), who specialises in employment benefits, was appointed to manage the process. On 2 December 2019 a number of entities were invited to participate in a closed tender for the contracts. There were ten in total. Akani, Moruba and Novare were amongst these. These three parties took advantage of the invitation and submitted detailed bids. On 6 December 2019 the sub-committee, under the

guidance of Mr Jackson, prepared a shortlist of potential service providers. On 9 December 2019 Akani received notification from Mr Jackson to make a presentation to the entire board in support of its bid. Other entities too, were invited to the present their bids to the full board. On 11 December 2019 a Mr Zamani Letjane (Mr Letjane), the Managing Director of Akani, and two senior members of the Akani management appeared before a sitting of the full board and presented details of Akani's bid. The presentation was comprehensive. The representatives of Akani were interrogated on various aspects of its bid by the members of the board and Mr Jackson. At the conclusion of the presentation, the board asked if it would be allowed to conduct a due diligence of Akani's systems. Akani agreed. It was informed that its bid was accepted, but the acceptance was conditional upon the outcome of the due diligence. On 12 December 2019 the due diligence was conducted. On 13 December 2019 the Fund informed Akani that its bid was accepted, subject to the successful conclusion of Service Level Agreements between them. The decision to accept the bid and appoint Akani was unanimous.

[77] None of the board members had any dealings with Akani. That three of the board members had dealings with NFS does not taint the decision of the entire board. The rest of the board members had no dealings with NFS. The decision to appoint Akani was taken after an independent expert assessed the various bids received and came to the conclusion that the bid of Akani was the most economical and best suited to the needs of the Fund. The board, too, independently of the expert satisfied itself that Akani's bid was most suited for

the Fund's needs. The Fund stands to save millions of rands per year by having Akani perform the services that NBC provided.

[78] There is no evidence that the failure to disclose the purchase of funeral policies from NFS was deliberate and designed to mislead the board. The policies were bought from NFS, not Akani. It was Akani that bid for the contract, not NFS. Whether Akani's bid was successful or not had no bearing on the fortunes of NFS and no impact on the funeral policies held by the three trustees. NFS is a separate legal entity. It is not Akani. That it is linked to Akani is not relevant. The three board members had no duty to disclose the purchase of funeral policies from another legal entity. The best that can be said for the member applicants' case is that it may have been prudent, *ex abundante cautela*, for the three members to disclose the purchases, but that is not the same as saying that there was a duty to disclose. There was only a duty to disclose if there was a conflict of interest. Accordingly, the failure to disclose the purchases of funeral policies from NFS by the three board members does not vitiated the decision of the board to appoint Akani.

[79] In the result, the member applicants' case fails.

Costs

[80] Akani seeks costs of three counsel on the scale as between attorney and own client. The Fund seeks costs of two counsel on the normal party and party scale. A substantial part of Akani's heads dealt with the issue of attorney and own client costs.

[81] Akani maintains that it was forced by the exceptional volume of the papers, the limited time to prepare and the unduly broad allegations of corruption made against it, to employ three counsel. Any less number of counsel would have resulted in it not being able to prepare and present its case comprehensively, with the risk that a failure of justice would prevail. Further, it says, correctly in my view, that it was put to unnecessary expense as a result of the irresponsible and unreasonable conduct of the applicants and especially of NBC which, in addition, went to great lengths to unlawfully defame it using my order of 12 March 2020. It contended that NBC not only exploited the status of the member applicants to advance its own commercial ends, but was willing to sow division and confusion within Ceppwawu simply to hold onto the contract with the Fund, thus making it necessary to order it to pay Akani's costs on an attorney and own client scale.

[82] *In re Alluvial Creek*[19] opened the door to punitive costs orders by holding:

> "An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense, which the other side ought not to bear."[20]

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[19] *In re Alluvial Creek Ltd* 1929 CPD 532
[20] Id at 535

[83] In support of its contention for allowing for costs on an attorney and own client scale it drew on the learnings from *Swartbooi*[21], *Claase*[22], *Sayed*[23], *Cape Pacific Ltd*,[24] *Cambridge Plan*,[25] *Sentrachem Ltd*,[26] *University of Stellenbosch Legal Aid Clinic*,[27] *Delfante*,[28] and *Fidelity Bank Ltd*[29]

[84] The basic principles derived from these cases are:

a. A litigant who, through irresponsible and unreasonable conduct, forces its opponent to expend unnecessary financial resources by pursuing the litigation, must be made to pay for most of the expenses incurred by the opponent. That is done through a punitive costs order.

b. Litigation that is frivolous and vexatious should attract a punitive costs order in order to protect the party that is vexed by the litigation. Frivolous and vexatious litigation need not be motivated by malice or bad faith. It is the effect of the litigation and not the motive or intention of the culpable party that is important.

c. A litigant who (i) behaves reprehensibly, (ii) is guilty of fraud or dishonesty, (iii) falsely and/or irresponsibly accuses its opponent

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[21] *Swartbooi v Brink* 2006 (1) SA 203 (CC), at [27]
[22] *Claase v Information Officer, SAA* 2007 (5) SA 469 (SCA) at [11]
[23] *Sayed v Editor, Cape Times* 2004 (1) SA 58 (C) at 67E-J
[24] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 807C - D
[25] *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T) at 589B-G
[26] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 22B-E
[27] *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services* 2016 (6) SA 596 (CC) at [8] and fn 5
[28] *Delfante and Another v Delta Electrical Industries Ltd and* Another 1992 (2) SA 221 (C) at 233B
[29] *Fidelity Bank Ltd v Three Women (Pty) Ltd and Others* [1996] 4 All SA 368 (W) at 407

of acting fraudulently, or dishonestly, (iv) defames its opponent, (v) makes unwarranted attack on its opponent, (vi) misleads the court, or (vii) fails to disclose material facts to the Court, should be mulcted with a punitive costs order. The list, of course, is not exhaustive. There are other cases that have expanded on the factors that may be taken into account when determining an appropriate costs order.

[85] The Courts in *Cape Pacific Ltd*, *Sentrachem Ltd*, and in *Cambridge Plan* referred to "*an award of costs on the very punitive attorney and own client scale*", and in *University of Stellenbosch Legal Aid Clinic and Others* a costs order to this effect was recognised as "*the highest permissible scale*" of costs. But in none of these cases or the other cases, save for *Delfante*, referred to in [83] above was an order to that effect granted.[30] The order granted was on an attorney and client scale. In *Delfante* such an order was issued, but the Court did not pronounce on the legal validity of the attorney and own client scale, nor did it say anything about the difference between the two scales.

[86] The *obiter dicta* of the then Appellate Division in *Cape Pacific Ltd* and of the then Transvaal Provincial Division in *Cambridge Plan AG* did not pronounce on whether the concept of costs on an attorney and own client scale exists in our law. Thus the debate on the issue remained alive. A robust contribution to

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[30] *In Cambridge Plan* the Court was required to review a taxation of a bill drawn in the matter where the successful litigant was awarded a costs order on an attorney and own client scale. The Court in the course of doing so discussed the difference of taxation of costs on an attorney and from that of costs on an attorney and client scale, but there was no discussion of whether the two scales are different and, if so, whether the attorney and own client scale forms part of our law.

the debate can be found in the judgment of the full bench of the Cape Provincial Division, which held that the taxation scales only allow for party and party costs and for attorney and client costs.[31]

[87] This led the Court to conclude that an award of costs on an attorney and own client scale is not "*generically different*" from an award of costs on an attorney and client scale.[32]

[88] The *ratio decidendi* in *Windvogel* found favour with this Court sitting in *Aircraft Completions Centre*[33] and in the Transvaal Provincial Division in *Ben McDonald Inc*[34]. An elaboration of the reasoning based on the provisions of Rule 70 of the Uniform Rules of Court[35] is to be found in the latter case.[36]

[89] Noting the debate to be far from settled the SCA in *Thoroughbred Breeders' Association*[37] observed that:

> "... this Court appears to have accepted in principle, but without pertinent consideration, that an order for attorney and own client costs would in appropriate circumstances be competent. This remains yet another issue for future consideration by this Court."[38]

[90] On this analysis, I hold that an attorney and own client scale of costs is not part of our law. While the issue of developing our law to include it was raised by Akani, I am of the view that the issue did not receive sufficient attention in

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[31] Id at 1179C-E
[32] Id at 1180 I
[33] *Aircraft Completions Centre (Pty) Ltd v Rossouw* 2004 (1) SA 123 (W) at [10] – [12]
[34] *Ben McDonald Inc and Another v Rudolph* 1997 (4) SA 252 (T)
[35] Rule 70 deals with "*Taxation and tariff of fees of attorneys*"
[36] *Ben McDonald Inc.* n34, at 255 I – 257A
[37] *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 561 (SCA)
[38] Id at 596H

this case for a definitive determination to be made on it. It is an issue best left for another day, when it is directly and not peripherally raised and when all parties have been afforded an opportunity to make full submissions on it.

[91] Akani's case for a punitive costs order is based on (i) outside these proceedings NBC had misrepresented the interim order and defamed Akani – a full judgment to this effect was delivered by Sutherland ADJP (as he then was), (ii) NBC interfered in the affairs of Ceppwawu in order to bolster its case, (iii) by seeking to secure Ceppwawu's members to join in this litigation with the promise of fully funding it, (iv) by using the member applicants to advance its case, (v) the application is nothing short of an abuse of process of court, (vi) by defaming Akani and the entire board, and (vii) by filing voluminous papers with numerous irrelevant materials, but which forced Akani to expend a very large sum of money to deal with them.

[92] I agree that NBC's conduct in this case has been far from exemplary. It should be ordered to pay Akani's costs on an attorney and client scale.

Order

[93] The following order is made:

a. The order issued on 12 March 2020 in part A of this application

   i. Paragraphs 1, 2 and 3 of that order are hereby set aside and replaced with the order set out in sub-paragraph d. of this order.

b. The application to refer the matter to oral evidence

i. The application by the ninth and tenth applicants to refer the matter to oral evidence is dismissed.

ii. The ninth and tenth applicants are to pay the costs of the application including those occasioned by the employment of two counsel.

c. The application to intervene

i. The application to intervene is dismissed.

ii. The applicants in the intervention application are to pay the costs of the application including those occasioned by the employment of two counsel. The costs of Akani are to be taxed on an attorney and client scale.

d. The application to review and set aside the decisions of the first respondent

i. The application is dismissed.

ii. The applicants are to jointly and severally pay the costs of the first to twenty-sixth respondents which costs are to include those of two counsel;

iii. The applicants are to jointly and severally pay the costs of the twenty-seventh respondent which costs are to include those of two counsel and which are to be taxed on an attorney and client scale.

Vally J

Gauteng High Court (Witwatersrand Local Division)

Date of hearing: 20 July 2020
Date of judgment: 31 July 2020

For the 1st – 8th applicants:	Mr P Kennedy SC with Ms S Martin
Instructed by:	Knowles Hussein Inc
For the 9th – 10th applicants:	Mr C Watt-Pringle SC with Ms KS Mclean
Instructed by:	Shepstone & Wylie Attorneys
For the 1st - 26th respondents:	Mr I V Maleka SC with Ms N Kekana
Instructed by:	T D Mashele Attorneys
For the 27th respondent:	Mr AE Franklin SC with Mr JPV Mcnally SC and Mr BL Manentsa
Instructed by:	Webber Wentzel Attorneys
For the 31st respondent:	Mr M Mbikiwa
Instructed by:	Jassat Dlamini Inc
For the intervenors:	Mr A Subel SC with HWS Martin
Instructed by:	Ramsay Webber Inc