

SOUTH AFRICA / JUDGMENT

R N Griffin Investments (Pty) Limited and Another v Sneeche (19101/2014, 19450/2014) [2016] ZAGPJHC 168 (24 June 2016)

[2016] ZAGPJHC 168

COURT

South Gauteng High Court, Johannesburg

BEFORE

Van der Linde

CASE / FILE NUMBER

19101/2014, 19450/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO.: 19101/2014

CASE

NO.: 19450/2014

DATE:

24 JUNE 2016

In the

matter between:

R N

GRIFFIN INVESTMENTS (PTY)

LIMITED.....First

Applicant

NOBRE,

RUI MIGUEL

RODRIGUES.....Second

Applicant

And

SNEECH,

BARRY

HYLTON.....Respondent

JUDGMENT

Van der Linde, J:

Synopsis

- [1] There are two applications before the court, both in terms of s.31 of the Arbitration Act 42 of 1965 (“the Act”) respectively to make an arbitral award, and an arbitral appeal award, orders of court. Costs on a punitive scale are sought. In the way of the applicants’ success stands two counter-applications to set aside both the arbitral award a quo and the arbitral appeal award[1] on the ground of perjury of the second applicant before the first arbitral tribunal. [2]
- [2] In addition, the respondent submits that this court, in deciding whether or not to make an arbitral award an order of court, does not act as a mere rubber stamp. Specifically, the respondent submits that this court will not make an arbitral award an order of court if it would be contrary to public policy to do so.
- [3] The alleged perjury, said to be sustained by evidence recently discovered, would justify this court not only setting aside the two awards, but would in any event also justify declining the relief sought. Reliance on s.33 of the Act is expressly eschewed.[3]
- [4] Finally, in oral argument the respondent submitted that it was illustratable on the material that was before the arbitrator that the second respondent had given false evidence; and on that basis alone the arbitrator should refuse the applicants’ relief claimed, since it would offend public policy.

The basic**facts**

- [5] The basic facts that are relevant to dispose of this matter are far simpler than the voluminous papers[4] suggest. They are succinctly collected and presented in the judgment of Sutherland, J[5] when the learned judge was asked to decide whether to grant the respondent’s application to review and set aside the arbitral

appeal award on the basis that the arbitrator and the appeal panel had exceeded the pleadings and thus their power.

- [6] The learned judge dismissed the application and made a special costs order; and he dismissed the subsequent application for leave to appeal. An application to the Supreme Court of Appeal for leave to appeal was also dismissed.

[7] In a nutshell, the respondent had sued the applicants for damages arising from an alleged dishonest concealment of facts in the face of a legal duty to disclose. The respondent's company, Hannington Ltd, had sold its 50% shares in a private property-owning company to the first applicant, the other 50% shareholder. In broadly the same time-frame the applicants were negotiating a financially advantageous fresh ten year lease with the tenant of the property, but did not tell the respondent about it.

[8] The respondent says that had he been told about it, he would have not have sold his shares. The initial arbitrator dismissed the

respondent's claims, holding that the deal between the applicants and the respondent was, in principle, done by mid-2003,

whereas the deal with the tenant was only negotiated in the second half of 2003 and finally done in 2004. Any duty to disclose, if indeed there was such, had ceased to exist by mid-2003. The appeal tribunal upheld the arbitrator.

[9] The respondent has now in fact sued the applicants under a different case number for various forms of relief, including for damages in excess of R70m.

The submissions more closely viewed

[10] There were initially a number of procedural issues in the applications. The respondent's answering affidavits are out of time; he filed a supplementary answering affidavit without leave to do so; and he has now filed two further affidavits without leave.[6] The applicants have however abandoned their opposition to these papers being admitted, but say that these remain relevant to costs.

[11] The applicants submitted that their own onus for the relief in convention was readily discharged. They needed to show only a valid arbitration agreement; the proper appointment of the arbitrators; and valid awards within the terms of the reference. Since these issues were either common cause or *res judicata*, [7] the respondent bore the onus on all other issues.

[12] The applicants oppose the substance of the respondent's case on perjury. Not only do they dispute that there was any perjury, but they also resist the admission of the four pieces of evidence relied on by the respondent for his contention.

The time-bar

[13] As an *a priori* point, however, the applicants contend that the respondent, to set aside the arbitral awards, must bring himself within s.33 of the Act or fail, and that section requires of him to have done so within six weeks of the award. This was not done. Although there is provision in s.38 of the Act for a court extending that period on good cause shown, there was no such application here; and in any event good cause has not been shown. This therefore remains a live issue, and since it is in the nature of a point in limine, it is best dealt with now.

[14] The respondent's application in reconvention for the setting aside of the arbitral awards is founded on the same material as his resistance to the application in convention, being the fraud. The implication is that if he succeeds in resisting the application in convention, from a substantive point of view the result is the close to being same: the applicants will have the arbitral awards still standing, but only notionally, since they will not be capable of being enforced.[8]

[15] As regards the main application then, as intimated above the respondent contends that the enforcement of the awards will offend public policy, having regard to the fact that the awards were obtained through fraud. By extension the argument for the respondent is that since he does not apply for relief under s.33 of the Act, the time-bar does not apply to him.

[16] Our courts may decline to enforce arbitral awards if to do so would be contrary to public policy.[9] This concept of public policy is self-evidently one of wide berth, and it has famously been described as an "unruly horse".[10] In *Cool Ideas* the majority of the Constitutional Court discusses the issue at [53] and following.

[17]The majority was careful not to lay it down as a general rule, because the countervailing public policy consideration is to respect parties' choice of arbitral proceedings to bring speedy finality to the resolution of their disputes. But the majority held that to uphold the award in *Cool Ideas* would be to offend the principle of legality, a foundational value of the Constitution.

[18]The hypothesis of the present discussion is an arbitral award obtained through an illustrated fraud. If the courts are to respect parties' choice of the arbitral process because it provides a speedy and final resolution of their disputes, and it is in the public interest that that should be so, it is difficult to conceive that this should be at all cost, even at the cost of fraud, for the following reason.

[19]That which is to be respected is the reasoning and conclusion of the arbitrator applying an open mind to the matter before him/her.

His/her decision can hardly be worthy of protection if the award would not have been arrived at had it not been for a fraud perpetrated on the arbitrator. That seems to pervert the very objective sought to be protected by recognition of the public policy consideration referred to by the Constitutional Court in *Lufuno Mphaphuli*. [11]

[20]It is relevant to observe that in *Cool Ideas*, as in this case, and contrary to *Lufuno Mphaphuli*, the court was concerned with an application to enforce an arbitral award, not with an application to set it aside under s.33. Put differently, the respondent in each instance was/is involved in a collateral challenge, not a direct challenge, to the enforceability of the award. Different considerations then come into play.[12]

[21]The case of an administrative act invalid for lack of power or failed process is obviously not the same as an arbitral award obtained by fraud, but the direct enforcement dimension has this in common: in both instances the respondent is threatened “with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question.”[13]

[22]It follows that in my view the time-bar in s.33(2) does not prevent the respondent from raising the alleged fraud as a defence to the applicants’ application under s.31 of the Act.

[23]With that aspect out of the way one can turn now to consider the arguments put up by the respondent for admission of the contentious material.

Is there scope for the introduction of the new evidence now?

[24]Some background is necessary to appreciate the proposed relevance of the new evidence. There are two important time frames in this arbitration. The first is represented by the late 1990s, and the second by the year 2003. The first time frame was when Messrs Nobre, the second applicant, and the respondent, through their respective companies, the first applicant and Hannington Ltd, each acquired one half of the issued shares in Blue Dot Properties 56 (Pty) Ltd (“Blue Dot”). Blue Dot then acquired fixed property in Meadowdale, Germiston for R18,6m. On 14 January 1999 Blue Dot let the property to Midas Ltd for ten years, from 1 February 1999 to 31 December 2008.

[25]In the second time frame, the year 2003, two important events occurred. First, Hannington, represented by the respondent, sold its shares in Blue Dot to the first applicant, represented by the second applicant for R2.5m payable in six instalments. The written sale of share agreement was dated 12 December 2003. Second, the second respondent negotiated with Midas to terminate the existing ten year lease and to substitute for it, on favourable terms, a fresh lease commencing 1 March 2004 to 28 February 2014.

[26]The respondent was not told about these negotiations; and since this new lease was so favourable, the respondent contended that had he known about it, he would not have sold his shares. So he sued the applicants for damages for misrepresentation in the form of non-disclosure. The parties agreed to go to arbitration, where it was further agreed first to have a determination on the issue of liability.

[27]The central issue before the arbitrator was whether the applicants owed the respondent a legal duty to tell him about these negotiations.

The arbitrator’s essential factual and legal findings

[28]The arbitrator held it common cause that the second applicant did not make the disclosure to the respondent. He held too that on 6 August 2003 the second applicant had met with Mr Odgers of Midas to put the new proposition to him, and that on 22 October 2003 resolved to enter into the new lease with Blue Dot. On 12 December 2003 ABSA approved the finance for the transaction and on 15 December 2003 the second applicant, on behalf of Blue Dot, accepted the terms and conditions.

[29]The arbitrator held that the respondent's case was that the second applicant had approached him only at around 10 December 2003, and that the deal was done two days later on 12 December 2003. He held that the competing case of the second respondent was that he and the respondent had agreed in March 2003 on the sale, subject to Hannington agreeing, and subject to the agreement being reduced to writing and signed.

[30]As to the alleged legal duty, the arbitrator held that no partnership was established, whether as between the two individuals or as between their companies. He held further however that had the negotiation between the second applicant and Midas to extend the lease been afoot in the period March 2003 to 6 June 2003, the second applicant would have been duty bound to disclose them to the respondent. But he held too that that duty did not extend beyond 6 June 2003, for reasons referred to below.

[31]The arbitrator held that at a meeting on 10 April 2003 between the second applicant, the respondent and Mr Odgers, the latter, who was called as a witness by the respondent, was told that the second applicant had bought the respondent's shares in Blue Dot. He held further that by 20 May 2003 a beefed-up draft sale of shares agreement was exchanged between the protagonists.

[32]The arbitrator concluded that by the end of May 2003 the respondent had indicated his agreement to the then current draft agreement but was secretly holding back from committing himself in writing while exploring other more attractive opportunities.

[33]The arbitrator accepted the version of the second respondent to the effect that they had arranged to meet on 5 June 2003 to sign the final draft, but the respondent did not turn up, but that by the next day, 6 June 2003, the second applicant was justified in accepting that there was a firm deal between him and the respondent.

[34]The arbitrator held that the second applicant's version was generally the more plausible and probable one than that of the respondent, and that the deal never broke down; it had simply taken longer to be finalised than had originally been envisaged, due to a delay caused by the respondent.

[35]The arbitrator reached the same conclusion, that is the absence of a legal duty to disclose, on the basis that the extension of the lease could not have occurred had the ABSA requirements not been met; and those would not have been met had Hannington remained as a shareholder, since Hannington would not have been able to put up a credible guarantee. Of this conclusion the arbitrator said: "... it ... goes to whether ... there is any exigible duty to disclose in the first place." [14]

The respondent's more detailed submissions

[36]The respondent in his written submissions expressly disavows any imputation of dishonesty or improper conduct on the part of any of the legal representatives, or any of the arbitrators. He says the lawyers and the arbitrators all were misled.[15] In oral submissions the respondent expressly disavowed any suggestion that the awards were “incorrect”. The attack, he submitted, “had nothing to do with the Arbitration Act.” The court was informed that subsequent to the awards, the respondent has been searching “for ways in which the arbitrator was misled”.

[37]The case that the respondent mounted is that “fraud cuts through everything.”[16] On the basis of that proposition it is contended that the alleged perjury equals causative fraud in the proceedings, rendering them liable to be set aside.[17] To be fair, the respondent's case is not that this court should find that fraud. He argues that it is a matter for the trial court, already engaged in his pending suit; this court should simply refer it there for determination.[18]

[38]Assuming without deciding in the respondent's favour that this approach is legitimate, i.e. to accept that fraud cannot be found on these affidavits, but then to resist the main relief by asking for a referral to the pending action, it seems that the correct approach at this stage is to enquire whether there is at least a *prima facie* case for the causative fraud that the respondent avers. Only if there is, would the deferment of making the awards orders of court be justified.

The four pieces of new evidence

[39]The respondent relies on four pieces of new evidence which it is appropriate now to discuss. The first is a thread of emails[19] said to have been “recently unearthed”. [20]These are said to prove that as of April 2003 (they are dated 11 and 14 April 2003) there was no firm agreement yet on the sale of shares, as the second applicant had contended.

[40]The respondent accepted in argument that he received the thread of emails on 14 April 2003. He accepted too in argument that since the arbitrator found that the second applicant was entitled to believe that by 6 June 2003 a firm oral agreement had been reached, these emails would not have mattered to the end result. That applies also to the May 2003 emails.[21]

[41]There was no answer to the applicants' argument that these emails were actually sent to the respondent and therefor available to the respondent at the time of the arbitration, and that the applicants' case before the arbitrator was not a written but an oral agreement reached in March 2003.

[42]The second piece of new evidence is the schedule BS 11.[22] The purpose for which the respondent seeks to rely on it, is that the fourth column, reflecting as it does an anticipated “net cost of reversion to market”, is said to show that by 14 April 2003, when the spreadsheet was created by the second applicant, the second applicant was already planning to earn a cash surplus of R18 264 174 behind the respondent's back.[23] The respondent says that he could not open the spreadsheet at the time.[24]

[43]There was however, in the respondent's oral submissions, no answer to the applicants' submission that this piece of evidence was untruthful. The applicants pointed out that the spreadsheet was, in hard copy, in the trial bundle before the arbitration.[25]

[44]The third piece of new evidence is the affidavit of Mr Odgers.[26]In this affidavit, deposed to on 12 July 2014, he says that it was in around May 2003 that he and the second applicant had reached an agreement on the new Midas lease.[27] He says too that on 5 June 2003 the respondent told him that the second applicant had confirmed to him that he was not going to take up his right of pre-emption in terms of the offer that the respondent had made to him.[28]

[45]Again, there was no answer to the applicants' argument that Mr Odgers' recent version is contrary to what he said in his evidence in 2008. It bears reminding oneself that Mr Odgers was called by the respondent. There was no answer also to the applicants' pointing out that even the affidavit does not explain the change in version, nor why his earlier version – that it was in the third quarter that he met with the second applicant to do the Midas deal - was wrong.

[46]Apart from these criticisms, the admissibility of the affidavit evidence, insofar as it contains self-corroboration, was not addressed.

[47]The fourth piece of new evidence is an extract of the respondent's diary.[29]The object of the extract was to show that on 26 and 27 May 2003 the second applicant sent him more versions of the draft sale of shares agreement. In oral argument the respondent submitted that the fact that the respondent sent a new offer on 26 May 2003, and again on 27 May 2003, proved that at that stage no firm agreement could have been reached.

[48]There was no answer to the applicants' submissions that since this was an extract of the respondent's own diary it was always available; and that it was in any event consistent with the second applicant's version that after the meeting of 26 May 2003 updated versions of the agreement would be sent. In addition, the arbitrator held, as has been pointed out, that it was at 6 June 2003 that the second applicant could have believed that the parties had reached a final agreement.

Respondent's additional submissions

[49]After the lunch adjournment the respondent followed a line of reasoning that was based on the fact that the respondent remained a director of Blue Dot at all relevant times, and so neither the extension of the Midas lease nor the transfer of shares in Blue Dot could have occurred without his approval. There was thus a duty in law to disclose these transactions to him in that capacity, according to the argument.

[50]Further, he submitted that the applicants raised R64.5m from ABSA against Blue Dot assets without board approval; they drew R10.6m from Blue Dot without board approval; and the second applicant used R2.5m of Blue Dot to pay for the shares bought from the respondent without board approval.

[51]The respondent accepts that these arguments were available to him at the time of the arbitration, but told the court that these matters could only be extracted from the record, upon post-award analysis conducted now. The respondent submitted further that the second applicant could not have believed that by 6 June 2003 that he had a final deal with the respondent. For this submission, he argued, he relied both on material that was, and was not, before the arbitrator.

[52]The respondent submitted too that the arbitrator relied on an unpleaded case, never introduced or put to the respondent, to arrive at his award. This submission was the lead-in to a series of submissions that after 5 June 2003 the second applicant bore a duty of disclosure; that it was the second applicant that had withdrawn from the negotiations; that the ownership clause 5.1 of the sale of shares agreement supported Mr Odgers' version now in his latest affidavit; that these issues were all before the arbitrator who disregarded them, and that it would be an injustice now to ignore them; that since the respondent never signed the CM 29 form the second respondent could not have avoided the legal duty of disclosure; that the second applicant was probably guilty of fraud, theft and insider trading; and that the arbitral award failed to deal with the duties of a director, and this was fundamental.

[53]Where does all of this go?

How would the four pieces of new evidence, and the further submissions of the respondent, have affected the arbitrator's findings?

[54]It is accepted in our case law that a judgment obtained by the fraud of a party cannot stand. But the cases also require that the plaintiff shows that the judgment would not have been obtained had it not been for the fraud.[30] Apart from this requirement, I accept too[31] that a party who wishes to introduce new evidence to prove the fraud would have to show why the evidence was not available earlier.

[55] It also stands to reason that it is impermissible now to re-argue the merits, as the respondent has done to the extent indicated above. There was an appeal process, and it was exhausted. No appeal lies to this court. It is equally impermissible to re-argue the power issue, as the respondent has done, again as indicated above. The respondent has reviewed the arbitral awards in a court on that basis, and has been refused leave to appeal, twice, against the dismissal of those grounds of review.

[56]That leaves the questions of the admissibility of the new material, and of causation. As to the first, it has been pointed out above that in not one of the three instances of documents that existed at the time of the arbitration was the respondent able to illustrate that the material was not available to him then. In one of those cases, the spread sheet, the respondent's version that he was unable to open it at the time, has been illustrated not to be credible. In the case of the affidavit of Mr Odgers, no basis at all was made out for its admission.

[57]In these circumstances those four new pieces of evidence accordingly cannot be admitted. That has the consequence that there is no material on which to find that there is a *prima facie* case for resisting the relief applied for in convention.

[58]I should add that, even if the material were admitted, I would have concluded that the respondent is not able to show that the award would have been any different, having regard to the arbitrator's indication that he would likely have come to the same result, i.e. no legal duty, along a different course, the factual basis for which was not in contestation.[32] The application must accordingly succeed and the counter-application must fail.

[59]The question of a punitive costs order arises. In this regard there are the following considerations. First, I have quoted some of the respondent's submissions beyond those relative to the four pieces of new evidence above, to illustrate an approach which the respondent has adopted in these proceedings. That approach was that all the bases on which the arbitral awards have been attacked before, and in addition the merits of the awards, could legitimately be revisited before this court.

[60]That is of course not so. The merits were definitively dealt with by the appeal tribunal. The lack of power argument was definitively dealt with by Sutherland, J, and confirmed by the two refusals of leave to appeal. There was no scope for any of these issues to be raised again.

[61]Second, the material in the two lengthy answering affidavits, as well as the two further affidavits,[33] and was presented without regard to the distinction between fact, submission and vexation.

[62]Third, the respondent has ignored some of the fundamental rules of court in presenting his case. The answering affidavit was out of time; a further answering affidavit was filed without leave; a notice of counter-application was filed out of time; two further affidavits were filed without leave.

[63]Fourth, the case mounted by the respondent is fraud. Such a case is regarded by our courts as serious, so much so that groundless allegations of fraud, even in a formal litigious context, are actionable at defamation. In this instance the respondent's case was found to have no merit at all. These considerations, taken together, justify a special costs order. The employment of two counsel was a reasonable precaution.

[64]In the result I make the following order:

- (a) The arbitration award made on 22 December 2009 in the arbitration between the respondent and the applicants which appears at pages 66/67, paragraph 133 of the papers is made an order of court.
- (b) The arbitration appeal award made on 13 June 2011 in the arbitration appeal between the respondents and the applicants, which appears at page 83, paragraph [29] of the application papers, is made an order of court.
- (c) The respondent is to pay the costs of the applicants in the applications under case numbers 19101/2014 and 19450/2014 on the scale as between attorney and client, such costs to include the costs of two counsel, which costs are to include the costs reserved on 16 July 2014 and 20 August 2014.

- (d) The respondent's counter-application is dismissed with costs on the scale as between attorney and client, such costs to include the costs of two counsel.

WHG van der Linde

Judge, High Court

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Date argued: 13 June 2016

Date judgment: 24 June 2016

- [1] At the outset of the proceedings, Mr Cohen for the respondent moved for an amendment from the Bar to the notices of counter-application to make this clear; it was unopposed and was granted. (Vol 3 page 250 should be read as

referring to both arbitral awards; vol 3, page 256 therefor no longer serves any purpose, and vol 3, page 258 has been withdrawn by notice, at vol 9 page 817).

- [2] Respondent's heads, paragraphs 15; 17.

- [3] Respondent's heads, paragraphs 8; 28; 29; and 30.

- [4] 1000 pages at the last count, including the respondent's further affidavit dated 3 June 2016.

- [5]

[2012] ZAGPJHC 125 (14 June 2012).

[6] Apparently yet a further affidavit, by one Hulme, would be tendered for admission, and the applicants remained opposed to its admission. Nothing came of it.

[7] Referring here to the awards having been made within the terms of reference.

[8] They may still contend that, until set aside, the arbitral award dispositively dealt with their dispute with the respondent as to the existence of a duty to have disclosed the Midas lease extension, whether or not a court order is actually made.

[9] Cool Ideas 1186 CC v Hubbard and Another, 2014

(4) SA 474 (CC).

[10] Referred to as such by the then Chief Justice Corbett, in *Administrator, Transvaal and Others v Traub and Others*,

[1989] ZASCA 90; 1989 (4) SA 731 (A) at 761F – G.

[11] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*, 2009 (4) SA 529 (CC) at [235].

[12] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*, 2004 (6) SA 222 (SCA) at [35] – [36]: “[35] It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. 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'. 28 Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law.

[36] It is important to bear in mind (and in this regard we respectfully differ from the Court a quo) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and ex hypothesi the subject may not then be precluded from challenging its validity. 29 On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. 30 It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.”

- [12] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others, 2004 (6) SA 222 (SCA) at [35] – [36]:

“[35] It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. 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'. 28 Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law.

- [36] It is important to bear in mind (and in this regard we respectfully differ from the Court a quo) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and ex hypothesi the subject may not then be precluded from challenging its validity. 29 On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. 30 It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.”

- [13] Ibid.

- [14] Vol 1, pages 64, 65, paragraphs 124 to 130.

- [15] Respondent's heads, paragraphs 27; 35.

- [16] Respondent's heads, paragraph 39.

- [17] Respondent's heads, paragraphs 20; 21. The respondent refers to Viljoen v Federated Trust Ltd, 1971 (1) SA 750 (OPD), a judgment by MT Steyn, AJ. Reference may also be had to Makings v Makings, 1958 (1) SA 338 (A) at 342 in fin, ff; and also Rowe v Rowe, 1997 (4) SA 160 (SCA).

- [18] Compare respondent's heads, paragraphs 18; 41.

- [19] Answering Affidavit, page 190.

- [20] Answering Affidavit, page 180, paragraph 3.

- [21] Answering affidavit, page 190, 191.

- [22] Answering Affidavit vol 3, pages 206 to 208.

- [23] Answering Affidavit, page 184, paragraphs 18, 19.
- [24] Supplementary Answering Affidavit, page 282, paragraph 60.
- [25] Pages 433 and 434, reproduced at vol 8 page 750, 751 in this matter.
- [26] Answering Affidavit, vol 3, pages 201 to 205.
- [27] Op cit, page 202, paragraph 11.
- [28] Op cit, page 203, paragraph 19.
- [29] Op cit, vol 3, page 198..
- [30] Compare Makings v Makings, 1958 (1) SA 338 (AD), quoted by the respondent, and the cases annotated on it, particularly Rowe v Rowe, 1997(4) SA 160 (SCA).
- [31] On the basis of the two judgments quoted in paragraph 93 of the applicants' heads of argument.
- [32] Vol 1, pages 64, 65, paragraphs 124 to 130.
- [33] Respectively at vol 9, pages 797 to 816, and vol 10, pages 820 to 1000.
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