THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 729/2022

In the matter between:

CLOETE MURRAY N O	**FIRST APPELLANT**
GERT LOUWRENS STEYN DE WET N O	**SECOND APPELLANT**
MAGDA WILMA KETS N O	**THIRD APPELLANT**
(In their capacities as joint liquidators of Phehla Umsebenzi Trading 48 CC (in liquidation))	

and

MADALA LOUIS DAVID NTOMBELA	**FIRST RESPONDENT**
SEFORA HIXSONIA NTOMBELA	**SECOND RESPONDENT**
HUGO & TERBLANCHE AUCTIONEERS	**THIRD RESPONDENT**

Neutral citation: *Murray and Others NNO v Ntombela and Others* (729/2022) [2024] ZASCA 24 (14 March 2024)

Coram: PETSE DP and MABINDLA-BOQWANA and MOLEFE JJA and KATHREE-SETILOANE and KEIGTHLEY AJJA

Heard: 24 August 2023

Delivered: 14 March 2024

Summary: Review – whether it is competent for a court to compel delivery of a rule 53 record before determining whether what is before it is a review as contemplated in rule 53 when this is placed in issue *in limine* by the adversary.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Opperman J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Petse DP (Mabindla-Boqwana and Molefe JJA concurring):

[1] The issue in this appeal is whether the Free State Division of the High Court, Bloemfontein (the high court) was correct in compelling delivery of a rule 53 record at the instance of the applicants in a review application (the respondents in this appeal) in the face of an assertion by the appellants who were the respondents in the high court, that the proceedings before it were not a proper review as contemplated in rule 53, before deciding the anterior question of whether what served before it were in truth review proceedings.

[2] The facts in this case are largely common cause and can be briefly stated. The three appellants, Mr Cloete Murray N O, Mr Gert Louwrens Steyn De Wet N O and Ms Magda Wilma Kets N O, (the first to third appellants respectively) are joint liquidators (the liquidators) of Phehla Umsebenzi Trading 48 CC (in liquidation) (Phehla Umsebenzi). The first and second respondents, Mr Madala Louis David Ntombela and Ms Sefora Hixsonia Ntombela, (the respondents) are married to each

other in community of property. The third respondent, Hugo & Terblanche Auctioneers, did not take part in the litigation both in the high court and this Court. On 6 August 2015, the respondents allegedly purchased immovable property (the property) from Phehla Umsebenzi for a purchase price of R2 500 000. This amount was alleged to have been paid to the members of Phehla Umsebenzi, even before the agreement was signed. The property was, however, not transferred to the respondents' names and still remains in Phehla Umsebenzi's name.

[3] A couple of years went by without the transfer being effected. From 2015 to 2019, the respondents made relentless enquiries from Phehla Umsebenzi concerning the inordinate delay in transferring the property to them. They were informed by the transferring attorneys that the seller had not signed the transfer papers. In addition, the transferring attorneys indicated that they were experiencing problems in obtaining clearance figures from the Mangaung Metropolitan Municipality, due to a debt owed to the latter by Phehla Umsebenzi. The transferring attorneys nevertheless assured the respondents that transfer would take place as soon as those issues were resolved.

[4] In 2019, the first respondent decided to engage his own attorneys and instructed them to follow up with the transferring attorneys as to the causes of the delay in passing transfer. This intervention failed to bear fruit. On 21 November 2019, the respondents' attorneys were informed that Phehla Umsebenzi was in business rescue. It, however, later transpired that Phehla Umsebenzi had been placed in liquidation since 6 June 2018. This occurred whilst the property was still registered in its name, thus placing the property firmly in the hands of the liquidators.

[5] The liquidators elected not to transfer the property into the respondents' names but, instead, sought to sell it on auction. This then prompted the respondents to apply to court for an order staying the sale (on auction) pending an application to review and set aside the liquidators' decision, which stay was granted. The respondents thereafter brought an application to review and set aside the liquidators' decision. They also sought an order directing the liquidators to sign all transfer papers necessary, to enable the Deeds Offices to transfer the property to them.

[6] In reaction to the review application, the liquidators delivered a rule 6(5)*(d)*(iii)[1] notice, simultaneously with their answering affidavit, questioning the legal competence of the respondents' review application. This was firstly on the basis that the liquidators had neither exercised a public power nor performed a public function in terms of any empowering statutory provision, when making their decision. Secondly, the liquidators asserted that in terms of the prevailing legal position, specific performance could not be ordered against a liquidator – which is the substance of the relief sought by the respondents – in circumstances where that would have the effect of negating the fundamental purpose of a *concursus creditorum*.

[7] The respondents riposted by lodging a rule 30/30A interlocutory application, seeking the setting aside of the liquidators' rule 6(5)*(d)*(iii) notice on the grounds that such notice constitutes an irregular step. They also sought an order compelling the liquidators to file the record of the proceedings relating to the impugned decision in terms of rule 53(1)*(b)*.

[1] Rule 6(5)*(d)*(iii) of the Uniform Rules reads:
'[I]f such person intends to raise any question of law only, such person shall deliver notice of intention to do so, within the time stated in the preceding subparagraph, setting forth such question.'

[8] The high court determined that the only matter before it was the interlocutory application brought by the respondents. Having heard argument, it found in the respondents' favour, stating that the full record of the proceedings was fundamental to the full ventilation of the issues raised in the review proceedings as contemplated in rule 53. It referred to rule 53(4), which states that, upon the record being made available, an applicant may amend, add to or vary its notice of motion and supplement the founding affidavit. Therefore, the high court reasoned, it was not open to the liquidators to invoke rule 6(5)*(d)*(iii), as the review proceedings had not reached a stage where the applicants in the review application (ie the respondents in this appeal) have been afforded the opportunity to exercise their procedural right to supplement their founding affidavit in the review application in terms of rule 53. In its view, the question whether the rule 53 application was the correct and appropriate way to challenge the decision of the liquidators can competently be determined only in the main application once the required record has been produced. Accordingly, it concluded that the delivery of the rule 6(5)*(d)*(iii) notice by the appellants was premature.

[9] In this Court, the liquidators submitted that the respondents' entitlement, if any, to receive a record in terms of rule 53(1)*(b)* only arises once it is established, as a jurisdictional fact, that the proceedings sought to be reviewed and in respect of which the production of a record relates, are reviewable. In support of this submission, they initially pinned their faith on the decision of the Constitutional Court in *Competition Commission of South Africa v Standard Bank of South Africa Limited*.[2]

[2] *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* [2020] ZACC 2; 2020 (4) BCLR 429 (CC) paras 114-121 and 201-203 (*Standard Bank*).

[10] On this score, the liquidators contended that the right to demand the production of a record as envisaged and provided for in rule 53(1)*(b)* would arise only upon the determination by the high court that the appellants' election not to render performance in terms of the contract concluded by Phehla Umsebenzi prior to its liquidation, constitutes administrative action and therefore susceptible to review.

[11] Secondly, they asserted that the high court was enjoined to adjudicate and pronounce upon the competency of the relief claimed by the respondents in the review application, namely, whether the respondents' claim for specific performance against the appellants as liquidators is legally competent, before any decision could be made to compel the production of a record in terms of rule 53.

[12] In *Standard Bank*[3], the Constitutional Court held that a court ought not to order the production of a rule 53 record prior to the court first determining the question whether it has the requisite jurisdiction to entertain the claim asserted by an applicant in the first place. In this regard, the Court reasoned thus:

'. . . Where the jurisdiction of the court before which a review application is brought is contested, a ruling on this issue must precede all other orders. This is because a court must be competent to make whatever orders it issues. If a court lacks authority to make an order it grants, that order constitutes a nullity. . . .

By its very nature, rule 53 of the Uniform Rules finds application where review proceedings are instituted before a competent court. . . .

Therefore, the rule enables an applicant to raise relevant grounds of review, and the court adjudicating the matter to properly perform its review function. However, for a court to perform this function, it must have the necessary authority. It is not prudent for a court whose authority to

[3] *Standard Bank* fn 2 above.

adjudicate a review application is challenged to proceed to enforce rule 53 and order that disclosure should be made, before the issue of jurisdiction is settled. The object of rule 53 may not be achieved in a court that lacks jurisdiction.'[4]

[13] However, before us counsel for the liquidators disavowed any reliance on *Standard Bank* and conceded that that decision could not avail the liquidators in the context of the facts of this case. In my view, counsel acted wisely in so doing for reasons that will become apparent later.

[14] In the view I take of the matter, this Court – as was the high court – is not at this stage called upon to enter into the substantive merits of the review proceedings. Rather, what this Court is seized with is the interlocutory application brought by the respondents (as applicants) for an order directing the liquidators (as respondents) to provide them with the record of their decision not to implement the executory contract concluded between Phehla Umsebenzi and the respondents in relation to certain immovable property prior to the winding-up of the former. On this score, my line of thinking is relatively straightforward and will be made plain in the paragraphs that follow.

[15] In electing not to perform in terms of the sale agreement, the liquidators invoked the decision of this Court in *Bryant & Flanagan (Pty) Ltd v Muller and Another NNO*[5] in which the following was stated:

'[A] liquidator of a company in liquidation (see s 339 of the Companies Act 61 of 1973) is invested with a discretion to abide by or terminate an executory agreement not specifically provided for in the Insolvency Act, which had been concluded by the company in liquidation before its liquidation. Such agreement does not terminate automatically on the company being placed in liquidation...

[4] Paras paras 200-202.

[5] *Bryant & Flanagan (Pty) Ltd v Muller and Another NNO* 1978 (2) SA 807; [1978] 3All SA 438 (A).

The liquidator must make his election within what, regard being had to the circumstances of the case, is a reasonable time. Should he elect to abide by the agreement the liquidator steps into the shoes of the company in liquidation and is obliged to the other party to the agreement to [tender] whatever counter-prestation is required of the company in terms of the agreement.[6]

[16] Against the foregoing backdrop, the liquidators contended that in deciding to resile from the relevant agreement, they were not exercising a public power or performing a public function. Rather, so they asserted, they were performing a private law function and that their powers to do so derived from s 386 of the Companies Act.[7] Therefore, it was argued, the election of the liquidators – not to carry on with the relative agreement – is not reviewable because if this were permissible that would 'result in the interference [with] the rights of creditors after [the] date of institution of the *concursus creditorium*, contrary to the prevailing legal position.' And, since the liquidators' election entails that review proceedings are not competent, no obligation arises to produce a record under rule 53 of the Uniform Rules because such an obligation 'arises only once review jurisdiction has been established by the party seeking to compel the production of a record under Uniform Rule 53(1)(b).'

[17] Differently put, the main thrust of the liquidators' defence in the review application is that as a consequence of the crystallisation of the estate of the seller (ie Phehla Umsebenzi), the relief sought in the respondents' (qua applicants) review application is legally incompetent. And insofar as the respondents' interlocutory application to compel delivery of the record is concerned, the liquidators further contended that in any event none exists and, consequently, there is nothing to produce. I pause here to observe that having accepted that their powers in the course

[6] At 812G-H.
[7] This is a reference to the Companies Act 61 of 1973.

of the winding-up process derive from s 386 of the Companies Act, the liquidators' contentions are to my mind plainly unsustainable principally because they contain seeds of their own destruction. I shall elaborate on this later.

[18] I agree with some of the contentions advanced by the liquidators to a point. However, on balance I consider that their overall thrust in seeking to have their grounds of opposition to the relief sought in the review application determined before the rule 53 record is provided, cannot, in the context of the facts of this case and indeed what is at the core of this appeal, be upheld. The reasons that impel the conclusion reached in this judgment will become apparent in a moment.

[19] As I see it, the logical starting point is rule 53 itself, which provides for a procedure that follows as a matter of course after the issuance and service of a review application except in limited circumstances where the court's jurisdiction to hear the review application has to be determined first.[8] To the extent here relevant, rule 53 provides:

'53 Reviews

(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasijudicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the

[8] Compare: *Standard Bank* fn 2 above paras 119-121 and paras 201-204.

registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so.

(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.

(3) The registrar shall make available to the applicant the record despatched as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

. . .'

[20] Dealing with a situation comparable to what obtains in this case, this Court made the following pertinent remarks in *Competition Commission v Computicket (Pty) Ltd*:[9]

'...Moreover, upholding the Commission's argument would give rise to a two stage enquiry on the merits of the case: first, without the record to determine whether the applicant had made out a prima facie case. If the applicant clears that hurdle, the second stage enquiry then follows to finally determine the merits, this time with the benefit of the record which had now been made available. *Finally, the argument under consideration is not supported by Rule 53. In terms of this rule, the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be.*' (Emphasis added.)

As to the first issue, it suffices for now to observe that the essence of the liquidators' case in this appeal is that the merits of the review application must, in the light of

[9] *Competition Commission v Computicket (Pty) Ltd* [2014] ZASCA 185 (*Computicket*) para 20.

the contentions advanced in their rule 6(5)*(d)*(iii) notice, be determined upfront without the benefit of the record required by the respondents.

[21] The passage quoted from *Computicket* in the preceding paragraph was referred to with approval and endorsed by Theron J in *Standard Bank*.[10] The learned Justice stated the following:

'This finding[11] is entirely consistent with what the Supreme Court of Appeal and this Court have said about the importance of the rule 53 record and its availability to litigants. This is because a distinction must be made between the jurisdiction of the forum to hear the review application and the merits of the review application. If a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even if their grounds of review are meritless. As the Supreme Court of Appeal put it, "the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be". This is because, as recognised by the majority decision in *Helen Suzman*, rule 53 envisages the grounds of review changing after the record has been furnished. The record is essential to a party's ability to make out a case for review. *It is for this reason that a prima facie case on the merits need not be made out prior to the filing of [the] record*.

I accept that there are good reasons for the obligation to produce the record following automatically upon the launching of a review application. Delaying the production of the record is inimical to the exercise of the courts' constitutionally mandated review function. A lengthy delay may impede the courts' ability to assess the lawfulness, reasonableness and procedural fairness of the decision in question and undermine the purpose of judicial review. One reason for this is that documents and evidence, which should be included within the rule 53 record, may be lost if there is a considerable delay in the production of the review record. This does not, however, imply that a court should order production of a rule 53 record without first determining its competence to hear the review application.'[12] (Emphasis added.)

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[10] *Standard Bank* fn 2 above.
[11] This was a reference to paragraph 20 in *Computicket*, fn 8 above.
[12] *Standard Bank* fn 2 paras 120-121.

Although Theron J was writing for the minority, her remarks resonated with those of the majority in the same case.

[22] In *Van Zyl and Others v Government of Republic of South Africa and Others*[13] it was stated that review proceedings must, in the ordinary course, be brought under rule 53 unless they otherwise fall within the purview of the Promotion of Administrative Justice Act.[14] It is well settled that the primary purpose of the rule is to facilitate and regulate applications for review.[15] And what this Court said in *Jockey Club* some three decades ago is instructive. The Court there said the following:

'Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly the procedure created by the rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record...'[16]

[23] In *Johannesburg City Council v The Administrator Transvaal and Another*[17] a record for purposes of rule 53 was described thus:

'The words "record of proceedings" cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, *but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would,*

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[13] *Van Zyl and Others v Government of Republic of South Africa and Others* 2008 (3) SA 294 (SCA) at 305G.
[14] Promotion of Administrative Justice Act 1 of 2000 (PAJA).
[15] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (AD) at 661E (*Jockey Club*).
[16] Ibid at 660E-F. And compare: *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA).
[17] *Johannesburg City Council v The Administrator Transvaal and Another* 1970 (2) SA 89 (T) at 91G-92A (*Johannesburg City Council*).

I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. A record of proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it.' (Emphasis added.)

[24] It is apposite at this juncture to mention that the liquidators delivered their answering affidavit on 30 November 2020 simultaneously with a rule 6(5)*(d)*(iii) notice. To do justice to the appellants, I consider it necessary to quote their notice in its entirety in the footnote below.[18] The notice then concludes by asserting the following:

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[18] '**TAKE NOTICE THAT** the first to third and fifth respondents intend to raise the following point in law at the hearing of the application:

1.

1.1 Phehla Umsebenzi Trading 48 CC (in liquidation) ("**Phehla**"): -

1.1.1 was wound up with effect from 06 June 2018, as contemplated by section 66 of the Close Corporations Act 69 of 1984 ("**the Close Corporations Act**") as read with Item 9 of Schedule 5 of the Companies Act 71 of 2008 ("**the 2008 Companies Act**") as further read with section 348 of the Companies Act 61 of 1973 ("**the Companies Act**");

1.1.2 was wound up due to its inability to pay its debts, as contemplated by section 66 of the Close Corporations Act, read with the 2008 Companies Act and as further read with section 339 of the Companies Act;

1.1.3 is unable to pay its debts and therefore, by virtue of section 339 of the Companies Act, the law relating to insolvency, including the provisions of the Insolvency Act 24 of 1936 ("**the Insolvency Act**") and the common law relating to insolvency, apply in respect of any matter not specifically provided for in the Companies Act.

2.

2.1 The first to third respondents were appointed as the joint liquidators of Phehla on 23 July 2018.

3.

3.1 The applicants seek an order whereby the liquidators' election to terminate an executory contract which was concluded by Phehla on 6 August 2015 before its liquidation in relation to certain immovable property owned by it ("**the subject property**"), is reviewed and set aside.

3.2 The applicants furthermore seek an order for specific performance that the subject property be transferred and registered in the name of the applicants.

4.

4.1 Extant contracts that have not been properly fulfilled and are not brought to the whole fruition are executory contracts.

4.2 A liquidator is vested with a discretion whether to abide by or resile from an executory contract.

4.3 The discretion exercised by a liquidator to abide by or resile from an executory contract is exercised by virtue of the obligations and duties imposed on the liquidator by the Insolvency Act and the Companies Act, where applicable.

'It follows that the applicants are enjoined from claiming specific performance against the liquidators.'

[25] It will be helpful to quote rule 6(5)*(d)*. It reads, to the extent here relevant, as follows:

'...

(ii) within 15 days of notifying the applicant of intention to oppose the application, deliver such person's answering affidavit, if any, together with any relevant documents; and

(iii) if such person intends to raise any question of law only, such person shall deliver notice of intention to do so, within the time stated in the preceding subparagraph, setting forth such question.'

One pertinent observation of fundamental importance may be made in relation to rule 6(5)*(d)*(iii). As is evident from its text, the prominent feature of rule 6(5)*(d)*(iii) is that it may be invoked solely when a respondent intends to raise a question of law. Thus, in effect, it temporarily dispenses with the need to deliver an answering affidavit pending the determination by a court of the question of law raised. Therefore, it is plain from the wording of this rule that where a respondent intends to traverse the averments in the applicant's founding affidavit, it should deliver an answering affidavit. In that event, the person opposing the grant of the order sought in the notice of motion may also raise any question of law in his or her answering affidavit. To my mind, it follows axiomatically that on its plain meaning this rule

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4.4 No empowering provisions or statute exist in terms of which a court can review a discretionary decision taken by a liquidator.

4.5 It follows that the applicants are enjoined from making application to have the liquidators' decision reviewed and set aside.

5.

5.1 After the date of establishment of the *concursus creditorum*, nothing may be allowed to be done by any of the creditors to alter the rights of the other creditors.

5.2 A liquidator or company in liquidation is not bound to perform unexecuted contracts entered into by an insolvent before its insolvency.

5.3 In terms of the common law, a party cannot exact, and a court cannot order specific performance against a liquidator.'

does not contemplate nor countenance a situation where a respondent files an answering affidavit *pari passu* with a rule 6(5)*(d)*(iii) notice.

[26] In support of their case as foreshadowed in their rule 6(5)*(d)*(iii) notice, the liquidators heavily relied on a long line of cases going back more than a century ago.[19] I pause here to observe, as alluded to above, that before this Court counsel for the liquidators expressly disavowed any reliance on *Standard Bank*. Counsel's change of tack is hardly surprising because in *Standard Bank* the Constitutional Court was confronted with an entirely different situation. There, the central issue was whether it was legally competent for the Competition Appeal Court (CAC) to order production of a record in circumstances where its jurisdiction was contested in interlocutory proceedings before the CAC first determined upfront the question whether it had the requisite jurisdiction to entertain the main proceedings in the first place. Whilst I have derived valuable insights from the judgments upon which counsel heavily relied,[20] it is not my intention to discuss them in this judgment for the simple reason that given what is truly at issue in this case they offer no assistance to the liquidators. Nevertheless, I hasten to state that the conclusion relating to the narrow compass on which this appeal falls to be decided, as will be explained later, took into account the main thrust of the argument advanced by counsel for the liquidators.

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[19] *Walker v Syfret NO* 1911 AD 141 at 160 and 166; *Consolidated Agencies v Agjee* 1948 (4) SA 179 (N) at 189; *Bryant & Flanagan (Pty) Ltd v Muller and Another NNO* 1978 (2) SA 807 (A) at 812G-813B; *Du Plessis and Another NNO v Rolfes Ltd* 1997 (2) SA 354 (A) at 363; *Nedcor Investment Bank v Pretoria Belgrave Hotel (Pty) Ltd* 2003 (5) SA 189 (SCA) para 6; *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) para 75 and *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* 2020 (4) BCLR 429 (CC) paras 114-121 and 201-202.

[20] See fn 19 above.

[27] In my judgement, the fact that the respondents' review application may well be manifestly doomed to failure because the relief sought therein is legally untenable matters not at this stage. That issue will be ripe for determination only when the time comes for the substantive merits of the review itself to be considered. What we are concerned with at this stage of the proceedings, is solely the respondents' entitlement, as of right, to the record evidencing the decision taken by the liquidators not to implement the agreement of purchase and sale allegedly concluded between Phehla Umsebenzi and the respondents.

[28] Lest I be misunderstood, this judgment does not say that in circumstances where a court patently lacks jurisdiction to even entertain the matter, it should nevertheless go through the motions, in a manner of speaking, and order a respondent to provide a record to the applicant as contemplated in rule 53(3). Far from it. Where the very jurisdiction of the court is contested, which is not the case here, the court must naturally determine that issue upfront. This, of course, is precisely what the Constitutional Court decided in *Standard Bank*. However, the facts of this case, are materially distinguishable from those that confronted the Constitutional Court in *Standard Bank*. The present case is starkly different – here the high court is indubitably empowered in terms of s 169 of the Constitution to deal with all manner of causes of action except those explicitly (or by necessary implication) excluded from its jurisdiction. [21] Tellingly, before us counsel for the liquidators expressly

[21] Section 169 of the Constitution reads:
'(1) The High Court of South Africa may decide ---
(a) any constitutional matter except a matter that -
(i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or
(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
(b) any other matter not assigned to another court by an Act of Parliament.
(2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for--
(a) the establishing of Divisions, with one or two more seats in a Division; and
(b) the assigning of jurisdiction to a Division or a seat with a Division.

disavowed any reliance on the *Standard Bank* decision. Rather, he unequivocally stated that the liquidators were no longer contending that the high court had no jurisdiction to entertain the review application. In my view, counsel's stance in disavowing reliance on *Standard Bank* was, in the light of what I have already said above, perfectly understandable. However, it bears mentioning that having made this concession, counsel struggled to locate the point sought to be made by the liquidators within the realm of the exception in *Standard Bank*.

[29] Insofar as the liquidators' assertion that they do not have the record is concerned, it is difficult to accept that this is indeed the position. I say so because s 382(1) of the Companies Act[22] (which is still in operation notwithstanding the repeal of the 1973 Companies Act by the current Companies Act[23]) provides that: 'When two or more liquidators have been appointed they shall act jointly in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them jointly.' It is clear from a reading of this provision that the manifest purpose of s 382(1) is to ensure that joint liquidators act jointly in whatever is required to be done in relation to the corporate entity being wound-up. In this case, it is common cause that the liquidators were appointed as joint liquidators of Phehla Umsebenzi which was wound up by special resolution registered on 6 June 2018.

[30] Moreover, it is common cause, on their own account, that the liquidators took a joint decision to not perform the contractual obligations undertaken by Phehla

(3) Each Division of the High Court of South Africa--
(a) has a Judge President;
(b) may have one or more Deputy Judges President; and
(c) has the number of other judges determined in terms of national legislation.'

[22] Companies Act 61 of 1973.
[23] Companies Act 71 of 2008.

Umsebenzi in terms of the sale agreement. It therefore goes without saying that having regard to the fact that they are required to take decisions jointly the liquidators must have had a meeting – whether formal or informal – at which their impugned joint decision was taken in whatever way such a decision was reached. Having regard to the fact that we have here three liquidators – required by law to act jointly – it is difficult to understand how their decision not to perform Phehla Umsebenzi's contractual obligations could have been reached without at least one of them having broached the topic with the others either by way of exchange of correspondence or otherwise.

[31] As Marais J rightly observed in *Johannesburg City Council*[24], a record as contemplated in rule 53(3) can take any form or shape. Where the decision, for example, was taken after a long and drawn-out enquiry the record may well run into multiple pages. But there will no doubt be instances – not rare – where, as here, the record may comprise either a single document or a few pages. That will still constitute the record as envisaged in rule 53(3). It cannot, in these circumstances, be understood on what tenable basis can it be contended that there is not a single document in which the joint liquidators' decision to not implement the relevant agreement is recorded. If anything, all indications seem to point the other way – bearing in mind that here we have three liquidators who are in law required to act jointly in whatever decision or action they take in the winding-up process – namely, that some or other form of record exists somewhere. It is, however, neither necessary nor desirable for present purposes to come to a definitive conclusion on this issue. This must be left to the parties – should the need arise – to ventilate this issue in their affidavits and for the high court to determine it.

[24] Fn 17 above at 91G-F.

[32] The observation by M S Blackman et al *Commentary on the Companies Act* is instructive and, in consequence, bears mentioning. Apropos this very topic, the learned authors have this to say:

'A person who holds an office under the Companies Act [Close Corporation Act], which office confers on him [or her] various powers to enable him [or her] to wind-up the company [close corporation]. One of these powers is the power to bind the company's [close corporation] estate; another is the power to institute or defend proceedings in the company's [close corporation] name.'

[33] Furthermore, it is as well not to lose from sight that a liquidator is a creature of statute; appointed by the Master under the Companies Act or, where applicable, the Close Corporations Act; derives his or her powers from those Acts read with the Insolvency Act[25] within whose parameters he or she is obliged to act. Therefore, in such capacity a liquidator administers the estate of the corporate entity in liquidation as laid down by the law[26] and is also statutorily bound to act under the control of the Master[27] of the relevant Division of the High Court.

[34] For the sake of completeness, s 386*(g)* of the Companies Act which confers on a liquidator – subject to necessary changes – the same powers set out in s 35[28] of the Insolvency Act also merits brief reference.

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[25] Insolvency Act 36 of 1924.

[26] See, in this regard, M S Blackman, R.D. Jooste & G.K. Everingham vol 3 at 14-288.

[27] See, in this regard, s 381 of the Companies Act.

[28] Section 35 of the Insolvency Act, which is headed 'Uncompleted acquisition of immovable property before sequestration' reads as follows:

'If an insolvent, before the sequestration of his estate, entered into a contract for the acquisition of immovable property which was not transferred to him, the trustee of his insolvent estate may enforce or abandon the contract. The other party to the contract may call upon the trustee by notice in writing to elect whether he will enforce or abandon the contract, and if the trustee has after the expiration of six weeks as from the receipt of the notice, failed to make his election as aforesaid and inform the other party thereof, the other party may apply to the court by motion for cancellation of the contract and for an order directing the trustee to restore to the applicant the possession of any immovable property under the control of the trustee, of which the insolvent or the trustee gained possession or control by virtue of the contract, and the court may make such order on the application as it thinks fit: Provided that this section shall not affect any right which the other party may have to establish against the insolvent estate, a non-preferent claim for compensation for any loss suffered by him as a result of the non-fulfilment of the contract.'

[35] It bears emphasising that in every review proceedings contemplated in rule 53, the applicant is entitled as of right – derived from rule 53(3) itself – to a record of the decision sought to be reviewed. This, as the enduring long line of cases demonstrates, is designed to afford the applicant the opportunity to discern from a perusal of the record whether there are additional review grounds that can be deployed to prove or disprove either party's case. And, if it turns out that there is any benefit to be derived from the record or the record reveals additional grounds of review that can be relied upon to amplify the grounds of review, the applicant would, as a result, be entitled as of right, to amend his or her notice of motion and supplement the founding affidavit. And, as the Constitutional Court aptly put it,'. . . the rule enables an applicant to raise relevant grounds of review, and the court adjudicating the matter to properly perform its review function.'[29]

[36] Accordingly, if at this stage, even before the record is provided to the respondents (as applicants), the court enters into the substantive merits of the review itself, as the liquidators would have it, this would have the potential to disarm the applicants in the review proceedings and, most likely, put paid to their quest to review the impugned decision. The inevitable consequence of such an approach would not only be subversive of the respondents' rights (qua applicants) under rule 53(3) but also deny them their right to have the real dispute resolved by the application of law decided in a fair public hearing before, in this instance, a court, in breach of the right of access to courts entrenched in s 34[30] of the Constitution. In truth, what the liquidators seek to do is, borrowing the expression used in *Computicket*, to 'effectively place the cart before the horse' by requiring issues that

[29] *Standard Bank* fn 3 above para 203.
[30] Section 34, which is headed 'Access to courts' reads in relevant part as follows:
'Everyone has the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a court or, . . .'

must rightly be decided in the review application itself determined in the respondents' interlocutory application. In my judgement, no court should countenance such a radical departure from a well-entrenched practice and procedure.

[37] As already indicated and subsequently accepted by counsel for the liquidators, the decision of the Constitutional Court in *Standard Bank* upon which they pinned their faith in their heads of argument does not avail them. As I have demonstrated above, in *Standard Bank* the Constitutional Court dealt with an entirely different question. Pertinently, at issue in that case was whether it was competent for the CAC to entertain an application at the instance of a party who sought an order for the production of the record in circumstances where the jurisdiction of the CAC to entertain the very application was contested by the adversary. The answer to the question with which the CAC was seized was entirely dependent on the antecedent question, namely, whether the CAC had the requisite jurisdiction to entertain the main application in the first place.

[38] It is trite that any order made by a court that has no jurisdiction in any given matter is a nullity.[31] Therefore, absent jurisdiction, the order would amount to no more than *brutum fulmen*. Hence, it was necessary that this issue be determined upfront by the CAC before all else. That this is so is manifest from what the Constitutional Court said in *Standard Bank* when it expressed itself thus:

'[f]or a court to perform its [review] function, is must have the necessary authority. It is not prudent for a court whose authority to adjudicate a review application is challenged to proceed to enforce rule 53 and order that disclosure should be made, before the issue of jurisdiction is settled. The object of rule 53 may not be achieved *in a court that lacks jurisdiction*.'[32] (My emphasis.)

[31] See, for example, *Standard Bank* fn 7 above para 201.
[32] Para 203.

[39] In these circumstances the notion that there will be cases where a respondent in review proceedings can insist on the determination of the substantive merits of the review itself without the procedural requirements of rule 53 first being satisfied, as the liquidators in this case would have it, would fly in the face of abiding judicial authority and therefore untenable.

[40] As to the fundamental importance and litigation utility of rule 53 in review proceedings, the remarks of the Constitutional Court in *Standard Bank* bear repeating. The Court expressed itself as follows:

'By its very nature, rule 53 of the Uniform Rules finds application where review proceedings are instituted before a competent court. The rule was designed to serve a dual purpose of informing both the applicant for a review and the court of what actually happened in the process of making the impugned decision . . . Most often than not, those on whom decisions had an adverse impact had no knowledge of what transpired in the process and were placed at a disadvantage when they sought to challenge the decision in question. Rule 53 became a useful tool in terms of which access to information could be achieved.'[33]

[41] In this case there is not even the slightest suggestion that the high court lacks jurisdiction to entertain the review application. On the contrary, its jurisdiction has been accepted without question. On this score it bears mentioning that ordinarily the high court may decide any constitutional matter except matters that reside within the exclusive domain of the Constitutional Court[34] or are assigned by national legislation to another court of equivalent status to that of the high court. In addition, the high court may hear any other matter not assigned to another court by national legislation.[35] That the appellants themselves desire that the high court itself deal with

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[33] Para 202.
[34] See s 167(3)(b), (c) and s 167(4) and (5) of the Constitution.
[35] See in this regard the Labour Relations Act 66 of 1995 and the Competition Commission Act 89 of 1998 that confer exclusive jurisdiction to the Labour Court and the Competition Tribunal respectively in all matters regulated by those Acts.

and adjudicate the liquidators' point of law set forth in their rule 6(5)*(d)*(iii) notice attests to the fact that its jurisdiction is not contested. In reality, the crux of the liquidators' case is that the relief sought by the respondents in their review proceedings is not only ill-conceived but also legally untenable. That may well be so. But that question must – for reasons already stated – be determined only once the review application is ripe for hearing and not before.

[42] As already indicated, rule 53, which is designed specifically to regulate review proceedings, forms an integral part of the Uniform Rules regulating the way proceedings in the high court generally ought to be conducted. And, as I have demonstrated above, the high court has inherent jurisdiction to hear any dispute that can be resolved by the application of the law and decided in a fair public hearing, save only in relation to matters assigned to other courts by the Constitution or national legislation. The respondents' review application currently pending before the high court to which this appeal pertains is not one of the exclusions. Accordingly, in the context of the facts of this case, the jurisdiction of the high court can hardly be contested on any tenable legal grounds, and any order it may make ultimately – whether right or wrong – will not, as a result, constitute a nullity.

[43] As I see it, the fundamental fallacy in the liquidators' case and approach has all to do with timing or, put differently, ripeness of the so-called questions of law that they have raised in resisting the respondents' review application. There can be little doubt that those questions of law are at the heart of the relief sought in the review application. Nevertheless, it is only when the review application is ripe for hearing would a court have to decide whether there is merit in the defences – including the various questions of law – advanced by the liquidators. That stage will be reached after the respondents – as applicants in the review proceedings – have

exercised their indisputable right under rule 53 – or elect not to avail themselves of that right – and all of the issues have crystallised would the high court be enjoined to adjudicate those issues.

[44] To sum up, the substantive point made in this judgment is that once the jurisdiction of the court before which review proceedings are pending is beyond question the reach of rule 53 of the Uniform Rules becomes unavoidable. In the light of the turn of events in and the detour taken by this case, a postscript might be the appropriate point where this judgment should end. It is to say that no amount of any legalistic acrobatics or sophistries that we have witnessed in this case should prevail. However, I hasten to add that this, in no way questions counsel's probity. It is more to demonstrate that as those well versed in law are all aware, it often happens in litigation that the ingenuity of lawyers to conjure up ingenious legal points is infinite.

[45] It remains to mention that I have had the advantage of reading the judgment of my colleagues, Kathree-Setiloane and Keightley AJJA. However, I remain unpersuaded by the conclusion they have reached and its underlying reasoning. Furthermore, to the extent that the liquidators' quibble about the high court's order setting aside their rule 6(5)*(b)*(iii) notice, their complaint amounts to a red herring. As my colleagues recognise in their minority judgment, the high court's order is provisional, implying that once the record is provided in terms of rule 53 such an order, on its own terms, will automatically fall away. To conclude, it suffices to say that the proposition in my colleagues' judgment that a decision taken by liquidators to terminate an executory contract entered into by a liquidated company or close corporation before its winding-up is immune from judicial review is, with respect, simply untenable.

[46] Before making the order, I am constrained to state that there is regrettably a matter for adverse comment. It is that in this case scarce judicial resources were not utilised optimally for after two court hearings both in the high court and this Court during which considerable costs must have been incurred the real dispute between the parties has yet to be adjudicated. This is undesirable and must be deprecated.

[47] In the result, the following order is made:
The appeal is dismissed with costs.

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X M PETSE
DEPUTY PRESIDENT
SUPREME COURT OF APPEAL

Kathree-Setiloane and Keightley AJJA (dissenting):

[48] We have had the benefit of reading the judgment of Petse DP (the main judgment) in this appeal. Regrettably, we are unable to agree with both the legal reasoning and the order made. In our view, the appeal ought to have been upheld, with an ancillary order remitting the main issue in this appeal to the high court for determination.

[49] It is important to contextualise the issues that arise in the appeal against the litigation history of the matter. The respondents seek to review and set aside the

election by the appellants, who are the liquidators of an insolvent entity, to terminate an executory agreement for the sale of certain immovable property owned by the insolvent entity. The parties to the agreement of sale were the insolvent entity and the respondents. They also seek an order directing the appellants to sign all transfer documents necessary to enable transfer of the property to them.

[50] The notice of motion was issued in terms of rule 53, with the respondents expressly relying on PAJA as the basis for their review. In response, the appellants filed their notice in terms of rule 6(5)*(d)*(iii) simultaneously with their answering affidavit. That notice identified two points of law they intended raising as points *in limine*. The first, recorded in paragraphs 1 to 4 of the notice, was that the exercise of a discretion by a liquidator to resile from an executory agreement is not subject to judicial review. The second was that, at common law, a party cannot order specific performance against a liquidator. We take the view that the appeal turns on only the first of these points of law.

[51] In response, the respondents filed a notice in terms of rule 30/30A. They cited, as their complaint, that the appellants had failed to dispatch the record in compliance with rule 53(1)*(b)*. The notice afforded the appellants ten days to emove the cause of complaint. The notice was dated 21 December 2020 but was served on 11 January 2021. The appellants did not file the record within the specified ten days. At the end of March 2021, the respondents instituted an application to set aside the appellants' rule 6(5)*(d)*(iii) notice on the basis that it constituted an irregular step (the first prayer), and to order them to comply with rule 53(1)*(b)* within ten days from the date of the order (the second prayer).

[52] This interlocutory application was supported by a founding affidavit to which the appellants answered. In it, they asserted that the purpose of a rule 6(5)*(d)*(iii) notice is to dispose of a point of law prior to a hearing on the merits of a matter. According to the appellants, what the respondents sought to do, in the interlocutory application, was to compel the appellants to file a record in relation to a review application which was the very subject of the rule 6(5)*(d)*(iii) notice. The appellants, therefore, took issue with the respondents' contention that the notice constituted an irregular step.

[53] The appellants further pointed out that the complaint identified in the respondents' rule 30/30A notice, which preceded the interlocutory application, was limited to a complaint about the failure to file a record. It did not include a complaint that the rule 6(5)*(d)*(iii) notice was an irregular step. For this reason, they submitted that the respondents were precluded from seeking the relief in the first prayer as it was not preceded by the necessary notice.

[54] The appellants also took issue with the respondents' failure to comply with the time periods prescribed in rule 30(2)*(c)*. That rule requires an application to be made to court no more than 15 days after the expiry of the period afforded to a party to regularise an irregular step identified in a rule 30 notice. The appellants recorded that the interlocutory application was served well after this prescribed period.

[55] The appellants submitted to the high court that, before it could order them to supply the record, in terms of prayer 2 of the interlocutory notice of motion, the court would first have to determine whether the review application was competent. In other words, the high court would have to decide the first of the two legal issues raised by the appellants in their rule 6(5)*(d)*(iii) notice. The high court declined to

do so. It opted instead to work from the premise that the respondents had a right to access the court with a review application and that it was for the review court ultimately to decide the viability of the review.

[56] The high court found that the appellants' rule 6(5)*(d)*(iii) notice was premature as the respondents' founding affidavit in the review application was not 'complete'. It held that only after the record had been supplied and the founding affidavit supplemented, would it be procedurally permissible to file a notice under rule 6(5)*(d)*(iii). The high court made an order provisionally setting aside the rule 6(5)*(d)*(iii) notice, and giving the appellants leave to file it within ten days of any supplementary founding affidavit filed by the respondents. It also ordered the appellants to make the record available to the respondents within 15 days of the date of the order.

[57] The core question in this appeal is whether the high court was correct in refusing to entertain the legal question of whether the exercise of a liquidator's discretion to resile from an executory agreement is administrative action, and hence reviewable under PAJA. Following from this, was the high court correct in setting aside the rule 6(5)*(d)*(iii) notice as an irregular step, and ordering the appellants to supply the record as a prerequisite for the consideration of that legal issue? The main judgment takes the view that the high court acted correctly in doing so. We do not agree.

[58] The main judgment is premised on three essential pillars. First, it finds, based on Standard Bank, that the only exception to the general rule that an applicant for judicial review is automatically entitled to the record is where the court's jurisdiction is challenged.

[59] Second, the main judgment highlights that the case of Standard Bank is distinguishable from this appeal. This is because that case involved a challenge to the review jurisdiction of the Competition Appeal Court. In this appeal, on the contrary, the appellant accepts that the high court has review jurisdiction, and for this reason it expressly disavows reliance on Standard Bank. The main judgment finds that this is fatal to their appeal.

[60] Third, and again with reference to *Standard Bank*, together with *Computicket*, the main judgment emphasises that an applicant in review proceedings has an automatic right to the record, prior to a court's determination on the merits of the matter, and regardless of how groundless those merits may be. The main judgment characterises the appellants' case as subversive to this established principle by insisting that the merits of the review should be weighed without the respondent having the benefit of the record. In other words, the main judgment interprets the issue raised by appellants in their rule 6(5)*(d)*(iii) as requiring the court to enter the merits of the matter.

[61] We take no issue with the finding in the main judgment that the case of Standard Bank is distinguishable from this matter on the basis that it concerned the issue of whether the court in question had jurisdiction to entertain the review. We agree that there is no dispute that the high court in this appeal has review jurisdiction. The appellant correctly placed no reliance on that case for this very reason. However, we disagree that this is fatal to the appeal.

[62] We also take no issue with the main judgment's exposition of the general principle that an applicant is entitled as of right to access to the record of the decision under rule 53(3) (the general principle). The main judgment correctly articulates the

purpose of this rule: to afford the applicant the opportunity to assess whether additional or amended grounds of review may be called in aid to support her case. This is why the rule further provides for supplementation of the founding affidavit.

[63] Where we disagree with the main judgment on this score, is that it adopts the view that there is only one exception to the general principle, namely when the jurisdiction of the reviewing court is called into question. It finds that, save only in those circumstances, an applicant is entitled as of right to the record on the mere filing of an application under rule 53. In our view, this approach is too narrow. We also disagree that the main issue raised in the rule 6(5)*(d)*(iii) notice filed by the appellants required the court to enter into the merits of the review. Properly understood, it did not do so. As such, the main judgment is, respectfully, wrong in characterising the appellants' case as an attempt to subvert the general principle.

[64] A respondent in motion proceedings is entitled to file a notice under rule 6(5)*(d)*(iii) that she intends to raise a specified question of law. The rule requires this notice to be filed within 15 days of notifying the applicant of her intention to oppose. Under rule 53(4), an applicant in review proceedings may file an amended notice of motion and supplemented founding affidavit within ten days of being given access to the record of the impugned decision. These comparative time periods demonstrate that the rules presuppose that a notice under rule 6(5)*(d)*(iii) will precede any supplemented founding affidavit filed by an applicant for review under rule 53.

[65] It follows that the rules envisage that the legal issue identified in a rule 6(5)*(d)*(iii) notice may be heard as a point *in limine*, prior to any hearing on the merits. In such cases, the court must accept the allegations in the original founding affidavit as established facts. The respondent stands or falls on her question of law

without the advantage of putting factual averments before the court for its consideration. It makes no difference, therefore, that a respondent, like the appellants did in this case, filed an answering affidavit simultaneously with their rule 6(5)*(d)*(iii) notice. It would simply be ignored by the court considering the *in limine* legal question identified in a rule 6(5)*(d)*(iii) notice.

[66] Of course, much will depend on the nature of the legal question raised as to the further conduct of proceedings. In some cases, a court may entertain the question only after the rule 53 steps have been followed to completion. In other cases, such as in this appeal, the court would be enjoined to entertain the legal question as a prior step. The point is that it is permissible under the rules for a rule 6(5)*(d)*(iii) notice to be filed before the applicant exercises her right, post access to the record, to supplement her founding affidavit and grounds of review.

[67] On a plain reading of the rules, the high court erred in granting prayer 1 of the respondents' interlocutory application and, in finding that the rule 6(5)*(d)*(iii) notice was premature and thus irregular. The appellants acted in accordance with the prescribed time-period in filing their rule 6(5)*(d)*(iii) notice. They were entitled to file their notice when they did and there was nothing irregular in their actions. Accordingly, the high court erred in setting the notice aside, albeit provisionally.

[68] However, this does not answer the question of whether the high court was correct, in granting the relief sought in prayer 2 of the interlocutory motion and, in directing the appellants to make the record accessible to the respondents at that stage, rather than first determining the legal question raised in the rule 6(5)*(d)*(iii) notice. The main judgment finds that the high court correctly granted that relief as the legal issue raised in the rule 6(5)*(d)*(iii) notice is not a challenge to the review jurisdiction

of the high court. On its finding, this is the only acceptable departure from an applicant's automatic right to access to the record on the mere filing of a review application.

[69] We reiterate our view that this is too narrow an approach to the question of when a departure from the general principle is competent. We accept that, to achieve the purpose of rule 53, it is inappropriate for a court to entertain the merits of a review before the applicant has been provided with the record and has been given the opportunity to amend its notice of motion and supplement its founding affidavit. However, in this case, the core legal issue raised by the appellants in their rule 6(5)*(d)*(iii) notice does not require the high court to enter the merits of the review. The appellants, in their notice, ask the general question whether the exercise of a liquidator's discretion to resile from an executory agreement is administrative action and thus subject to review. That question is purely legal in nature. It does not turn on how and why the appellants in this case took their decision.

[70] To put it differently, in their rule 6(5)*(d)*(iii) notice, the appellants do not ask the court to determine whether on the facts of this case the respondents have justifiable grounds to sustain a review of their decision under PAJA. Obviously, that is a question that goes to the merits of this review; it asks whether the review is sustainable on the merits. The rule 6(5)*(d)*(iii) asks a different question which is this: does a decision by any liquidator to resile from an executory agreement, rather than to elect to enforce it, constitute administrative action – and thus, is it reviewable at all? It is a question directed at the inherent legal nature of the discretion afforded all liquidators to resile from an executory agreement. It will be determined by examining the relevant statutory framework regulating insolvency, companies, the powers of liquidators and PAJA.

[71] That question is distinct from, and antecedent to, the court entering the merits of the review. If it is determined that the exercise of a liquidator's discretion is not reviewable, the court simply will not embark on the merits. More fundamentally, if the legal question raised in the rule 6(5)*(d)*(iii) notice is determined in favour of the appellants, it would follow that the rule 53 procedure has no application, and the respondents would have no right to insist on access to the record. It is for this reason that the high court could not competently grant the relief sought in prayer 2 of the respondents' interlocutory application, without first engaging with, and determining the legal issue raised in the appellants' notice. In our view, the high court erred in holding that it was not called upon to enter that inquiry and in directing the appellants to give access to the record based on the assumption that the respondents were entitled to it.

[72] For these reasons, we do not agree with the view expressed in the main judgment that the appellants seek to subvert the general principle that an applicant in review proceedings is as of right entitled to the record. In this case, the appellants were entitled to use rule 6(5)*(d)*(iii) to question, as an *in limine* point, whether judicial review is a competent remedy as a matter of legal principle, and hence, whether the respondents are entitled to the benefits of the rule 53 procedure. Until a determination is made on that issue, it cannot be said that the respondents have been deprived of their right to the record and that the appellants case amounts to a subversion of the general principle.

[73] We would have ordered that the appeal succeed with costs and that the order of the high court be set aside. We would have also remitted the legal question raised in paragraphs 1 to 4 of the appellants' rule 6(5)*(d)*(iii) notice to the high court for determination as a point *in limine*.

F KATHREE-SETILOANE
ACTING JUDGE
SUPREME COURT OF APPEAL

R M KEIGHTLEY
ACTING JUDGE
SUPREME COURT OF APPEAL

Appearances

For the appellants:	J E Smit
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For the first and second respondents:	J G Rautenbach SC
Instructed by:	Motlatsi Seleke Attorneys, Krugersdorp
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