REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 33482/2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

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In the matter between:

RAMESH SINGH	1st APPLICANT
LAHLENI LAKES (PTY) LIMITED	2nd APPLICANT
FINISHING TOUCH TRADING 304 (PTY) LTD	3rd APPLICANT
ONE VISION INVESTMENTS 344 (PTY) LTD	4th APPLICANT

and

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	1st RESPONDENT
MR R VOLLER N.0	2nd RESPONDENT
RALSTON EMMANUEL SMITH	3rd RESPONDENT

JUDGMENT

<u>AC BASSON, J</u>

[1] On 18 February 2016 the third respondent (Mr. Ralston Emmanuel Smith – "Smith") filed two complaints with the first respondent (the Companies and Intellectual Property Commission – "CIPC") in terms of section 169 of the Companies Act[1] ("the Act").

[2] In terms of this complaint, Smith alleged that his resignation as a director of the second applicant ("Lahleni Lakes (Pty) Ltd – "Lahleni") and the third applicant (Finishing Touch Trading 304 (Pty) Ltd – "Finishing Touch") had been fraudulently effected. Smith submitted that the conduct which is the subject of the complaints is continuing. Smith provided CIPC with a forensic report that concluded that the signatures used to effect his resignation as a director of Finishing Touch were "*without doubt not authentic writing but a forgery*". Smith further provided CIPC with an affidavit stating that the signatures used to effect his resignation as a director of Lehleni were likewise forgeries. A criminal case of fraud had also been opened at Middleburg SAPS.

[3] In his complaint, Smith requested CIPC to intervene. CIPC recommended on 23 February 2016 that the complaints regarding Finishing Touch and Lahleni be investigated. Subsequently, Singh was requested in his capacity as a director to appear before CIPC and also to furnish certain information to CIPC in respect of the two entities.

[4] When Singh failed to appear and to comply with the request, summons was served on him by way of e-mail on 5 April 2015. Subsequently, the attorneys acting on behalf of Singh objected to, *inter alia*, the service of the summons by means of e-mail. In this letter the attorneys also pointed out, with reference to of section 219(1) of the Act, that a complaint in terms of the Act may not be initiated by, or made to CIPC, more than three years after the act that is the cause of the complaint. Therefore, according to the attorneys, the

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[1] Act 71 of 2008.

complaint was made *after* the expiry of the period contemplated in section 219(1) of the Act. The attorneys consequently requested that Singh be excused from appearing before the senior investigator as directed by the summons. On 7 April 2016 CIPC contacted the state attorney to effect service of the summons via the office of the sheriff. According to Smith, in doing so, CIPC cured any defect as to the manner in which the summons was served.

[5] CIPC responded to the letter on 18 April 2016 stating that the investigation has not been terminated and that Singh was not excused from appearing as directed by the summons.

[6] The applicants thereafter and on 21 April 2018 launched this review application.

<u>Relief sought by the applicant</u>

[7] Singh approaches this court for relief on three alternative bases: In <u>Part A</u> Singh seeks an order to review and set aside the decisions (i) to accept the complaints; (ii) to investigate the complaints; and (iii) to authorise summonses in terms of which Singh was requested to appear and provide information to CIPC in his capacity as director of Lahleni and Finishing Touch. In the alternative, for a declaration that the directions, summonses and investigations are *ultra vires* in terms of the Act (prayers 1 – 6). In <u>Part B</u> (in the alternative to Part A), Singh seeks an order to set aside (i) the directions to investigate the complaints; and (ii) setting aside the summonses. In the alternative, a declaration that the directions, summonses and investigations are *ultra vires* and therefore invalid and unenforceable (prayers 7 – 11). In <u>Part C</u> (in the alternative to Parts A and B) Singh seeks an order to suspend (i) the investigations of the complaints and (ii) the operation of the summonses pending the determination of the action under case number 76711/14 (prayers 1 – 3).

[8] Singh brings this review application in terms of section 6(2)(a), (b), (c), (d), (e), (f), (h) and or (i) of the promotion of Administrative Justice Act[2] ("PAJA") in respect of prayers 1 – 3 and in terms of legality in respect of prayers 4 and 7 -9.

Pending action proceedings

[9] At the time of the hearing of this application, an action was pending in this court between the fourth applicant (One Vision Investments 344 (Pty) Ltd) and various defendants, *inter alia* Smith who is the first defendant in the pending action (case number: 76711/14. Lahleni is not a defendant in the pending action. Finishing Touch is the eight defendant. CIPS is also not a party to the pending action. Singh is the twelfth defendant in the pending action although no relief is claimed against him - he is merely cited as a party by virtue of his direct and substantial interest in the action. From paragraph 16 of the declaration it appears that the following relief is sought against the various defendants:

> "In the premises, the plaintiff is entitled to an order:
> 16.1 for the rectification of the MOU;
> 16.2 for specific performance of the MOI and the Sale of Equity;
> 16.3 in the alternative to the order for specific performance, declaring the MOI, the Sale of Equity and the Cession valid and binding upon the parties thereto;
> 16.4 to the extent necessary, joining Mr. Sing as the twelfth defendant in the action."

[10] On 30 June 2017 a practice note was filed on behalf of the applicants to which a draft order is attached. In terms of the draft order the applicants in this matter sought an order that the notice of motion, excluding Parts A and B, stand as a simple summons. That Parts A and B of the notice of motion be postponed *sine die* and that a declaration be filed within 20 days of the proposed draft order. Furthermore, an order is sought that the Uniform Rules of Court dealing with pleadings and the conduct of trails would apply; that the

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[2] Act 3 of 2000.

action be consolidated with the action under case number 76711/14; that the applicants' application to strike out allegations in the respondents' answering affidavit be postponed *sine die* and that costs be reserved.

[11] The basis for this application is set out in the practice note: It is submitted, *inter alia,* that the issues in this application are on all fours with the material issues in the action that has already been enrolled and may become academic once the trail court pronounce on these issue. According to the applicants, the issue about whether Smith has resigned as a director of Lahleni and Finishing Touch is a material issue in the pending action. Also material, according to the applicants, is whether Singh became the sole director of both Lahleni and Finishing Touch.

[12] I interpose here to point out that the issue about whether Smith had resigned is not a new issue. In his founding affidavit deposed to as far back as 21 April 2016, Singh has expressly stated that one of the issues to be decided in the pending action proceedings is the question whether Smith has resigned as a director of both Lahleni and Finishing Touch as contemplated in the MOI and Sale of Equity. This begs the question: why did Singh then launch this review application when he was acutely aware of the fact that one of the "*material issues"* between the parties is whether Smith has resigned as a director of both Lahleni and Finishing Touch. It is in my view, disingenuous to now argue that this application cannot proceed in light of this dispute of fact. Our courts also take a dim view of the practice of instituting an application knowing of the existence of a dispute of fact only to later raise the very point of a dispute of fact. See in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*:[3]

> **"**But where no real dispute of fact exists, there is no reason for the incurrence of the delay and expense involved in a trial action and motion proceedings are generally recognised as permissible.
> It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as is indicated infra) the

[3] 1949 (3) SA 1155 (T).

Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling viva voce evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings, or with a direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. *It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action*."[4]

[13] I should also point out that Smith pertinently denies in his answering affidavit that it is a material issue in the pending action namely whether he had resigned as a director of Finishing Touch in light of the fact that his resignation as a director of Finishing Touch was not a condition precedent in either the MOU or the sale agreement nor is any relief sought in the action in respect of such resignation. Furthermore, Smith denies that the dispute in respect of his alleged resignation as a director of Finishing Touch is relevant for purposes of the relief sought by One Vision in the pending action and accordingly denies that the trial court will be obliged to determine such dispute. According to Smith, the sole purpose of his complaint to CIPC is for CIPC's records to be remedied to reflect the fact that he did not resign as a director of Lahleni and Finishing Touch and that he still is a director of both companies. Furthermore, the purpose of CIPC's investigation is to establish whether the evidence that have been submitted to CIPC and that which is still to be submitted upon the continuation of the investigation, proves Smith's contention which will then result in the amendment of CIPC's records to reflect the correct position.

[14] Are there disputes of fact that warrant this matter to be referred to trail? It is well established law that the mere existence of factual disputes on the

[4] My emphasis.

papers does not necessarily prevent a court from deciding a matter in motion proceedings. (See in this regard: *Room Hire Co (Pty) Ltd v Jeppe Street Motions (Pty) Ltd*).[5] The dispute has always been about whether Smith had resigned as a director of Lahleni and Finishing Touch. The question is whether this dispute is relevant to what is before this court in this application? The relief sought in this application relates to the question whether CIPC was precluded from investigating a complaint under section 219(1) of the Act; whether complete information served before CIPC when the investigation was initiated and whether the method of service of the summons was permissible. This court is not called upon to decide whether or not Smith had resigned and/or whether his signatures were forged on the documents that effected his alleged resignation. Therefore, the dispute in so far as it exists, is not pertinently relevant in these proceedings. What is relevant is whether or not this court should review any decisions made by CIPC in respect of the complaint lodged by Smith.

[15] The declaration in the pending action was filed on 1 December 2015. This application was filed on 21 April 2016. Despite having always been aware of the fact that there exists a dispute between them as to whether Smith had resigned or not, Singh nonetheless proceeded by way of motion.

[16] I am therefore in light of these facts not persuaded that the matter be referred to trail. The application is therefore dismissed with costs.

Complaint filed

[17] In terms of section 186(1)(b) of the Act, CIPIC has a statutory obligation to maintain *"accurate, up-to-date and relevant information concerning companies"*. Acting in terms of this obligation, CIPS initiated an investigation into the complaint lodged by Smith. Singh was summoned in his capacity as a director of Lahleni and Finishing Touch to appear before CIPS and to provide information.

[5] *Supra.*

[18] As already pointed out, Singh was not prepared to appear before the commission and instead opted to launch, together with the fourth respondent (One Vision Investments 344 (Pty)) the present review application to set aside various decisions by CIPC and its Commissioner.

[19] Singh's issue with the investigation is therefore: (i) the investigation provided for in section 219(1) of the Act is time barred; (ii) CIPC failed to taken into account all relevant facts when deciding to investigate; and (iii) the summonses were incorrectly served and therefore the summonses stand to be set aside.

[20] On behalf of Smith it was submitted that the relief sought by the applicant is unsustainable for the following reasons:

(i) Firstly, CIPS is not time-barred from investigating the complaints in terms of section 219(1) of the Act in that the fraudulent removal of Smith as a director of Lahleni and Finishing Touch constitutes a *"continuing wrong*". CIPC bears a public duty to maintain "*accurate, up-to-date and relevant information concerning companies*" and as such CIPC must remedy a wrong where it continues to exist.

(ii) Secondly, there is no merit in the complaint that the information that was placed before CIPC is allegedly incomplete as Singh has not made out a case in support of this allegation.

(iii) Thirdly, in respect of the allegation that CIPC has incorrectly served the summons, it is submitted that even where this was the case, the defect was cured by subsequently serving the summonses correctly.

<u>Review under the Promotion of Administrative Justice Act ("PAJA") – Prayers 1 - 3</u>

[21] For a decision to be reviewed under PAJA it must amount to "administrative action". Section 1 of PAJA reads as follows:

> "'<u>administrative action'</u> means any decision taken, or any failure to take a decision, by-
>
> *(a)* an organ of state, when-

> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or ….
> which adversely affects the rights of any person and which has a direct, external legal effect…"

[22] Does the action of the CIPC by accepting and investigating a complaint constitutes administrative action as defined? On behalf of Smith it was submitted that it does not, simply because the decision is not one *"which adversely affects the rights of any person and which has a direct, external legal effect…"*

[23] In this regard the court was referred to the decision in *Viking Pony Africa Pumps (Pty) ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd*[6] where the Constitutional Court remarked that the administrative justice requirement of procedural fairness does not arise from the mere institution of an investigation:

> "<u>The applicability of PAJA</u>
> [37] PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect. This includes 'action that has the capacity to affect legal rights'. Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.
> [38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of State decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. *It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could*

[6] 2011 (1) SA 327 (CC).

> *itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.*[7]
>
> [39] If the City were about to pronounce on the culpability or otherwise of Viking, Hidro-Tech and Viking would have to be afforded the opportunity, in terms of PAJA, to make whatever representations they may wish to make. Similarly, if Viking were found guilty, then the relevant provisions of PAJA would have to be invoked before an appropriate sanction is considered and imposed by the City. This case has not, however, reached that stage yet. The need to give some guidance is accentuated by the apparent lack of clarity and direction displayed by the City and the DTI. The next question relates to the adequacy of the steps taken by the City."

Similarly, in *The Companies and intellectual Property Commission v Moola & others*[8] the court held that the decision of the commissioner of CIPC to accept a report from two inspectors is not reviewable as they do not constitute administrative action:

> "[29] But if in fullness of time the decision proves in fact not to have the qualities that make the grade under *"administrative action"*, and the respondents were then to approach a court for a review under s.6, the application will be unsuccessful; PAJA would not be applicable. The point is, the mere fact that an applicant is entitled to fair process under PAJA along the way to a decision being taken, does not mean that the decision ultimately and actually taken is reviewable under PAJA; it would not avail the respondents to argue that although in fact the decision might not qualify as *"administrative action"*, at some earlier stage it potentially did."

See also *Langa v Hlope*[9] where the court held that even where a judge is accused of serious misconduct, he does not have a right to be heard before the complaint was referred to the Judicial Service Commission for investigation:

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[7] My emphasis.
[8] [2017] ZAGPJHC 102 (30 March 2017).
[9] 2009 (4) SA 382 (SCA).

"[40] It nonetheless became clear early in argument that, whatever the source of the alleged right might be, the respondent does not assert a right on the part of a judge to be heard by complainants generally before they lay complaints before the JSC, and that is undoubtedly correct (*Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) (2004 (10) BCLR 1009) in paras 83 - 84; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) ([2009] ZASCA 1) at paras 35 - 36; *Wiseman and Another v Borneman and Others* [1971] AC 297 (HL) ([1969] 3 All ER 275) at 308E - F (AC) and 277I - 278A (All ER); *Brooks v Director of Public Prosecutions of Jamaica and Another* [1994] 2 All ER 231 (PC) at 239*g-j*). While a judge is obviously entitled to be heard in the course of the investigation of a complaint (as appears from the various cases and protocols referred to by the High Court and referred to in the heads of argument) that is not what we are concerned with in this appeal. We are concerned instead with the act that initiates such an enquiry (the 'trigger'), which is the decision to lay a complaint. In that respect there is no authority to which we were referred or of which we are aware - whether in decided cases or in judicial protocols anywhere in the world - that obliges a complainant to invite a judge to be heard before laying the complaint. Indeed, the authorities all say the opposite (*Meyer v Law Society, Transvaal* 1978 (2) SA 209 (T) at 214F - H; *Meyer v Prokureursorde van Transvaal* 1979 (1) SA 849 (T) at 855G - 856E; *Moran v Lloyd's (a statutory body)* [1981] 1 Lloyd's Rep 423 (CA) at 427) and a rule to that effect would be absurd, because it would altogether undermine the process of investigating complaints."

[24] In *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another*[10] the Supreme Court of Appeal held that the decision by the Competition Commission to refer a complaint concerning prohibited practices to the Competition Tribunal is not subject of review save in cases of "*ill-faith, oppression, vexation or the like*".

[25] It follows in my view that, if the decision to investigate does not constitute administrative action, then the various constructive steps required to carry out the investigation – including the issuing of the summons also do not

[10] 2003 (3) SA 64 (SCA) ad paragraph [17].

constitute administrative action and are consequently likewise not reviewable and PAJA (I will return to this issue of the service of the summons and the time-bar argument).

[26] In light of the foregoing I am in agreement with the submission on behalf of Smith that the decision of CIPC with regard to the receipt, summons or referral of the complaint or sought to be reviewed in prayers 1,2 and 3 of Part A falls to be dismissed on the basis that such decisions do not constitute administrative action subject to a review under PAJA.

Time barred investigations (legality)

[27] It was also submitted on behalf of the applicants that the directions, summonses and investigations issued by CIPS are *ultra vires* in terms of the Act because CIPS was time-barred in terms of section 219(1) of the Act. This was disputed and it was submitted on behalf of Smith that this section contemplates that *"in the case of a course of conduct or continuing practice"* the time-bar only starts running *"from the date that the conduct or practice ceased*".

[28] Although section 219(1) employs the words "*continuing practice"* and not "*continuing wrong*", the Supreme Court of Appeal in *Barnett v Minister of Land Affairs*[11] had occasion to consider what is meant by the wording "continuous wrong":

> "[20] In considering the special plea of prescription, the postulation is, of course, that the allegations underpinning the government's claim had in fact been established. Broadly stated, it must therefore be accepted for the prescription issue that the defendants' occupation of their sites constitutes a contravention of both the Decree and the common law. Departing from this premise, the answer to the prescription defence is, in my view, to be found in the concept which has become well-recognised in the context of prescription, namely that of a continuous wrong. In accordance with this concept, a distinction is drawn between a single, completed wrongful act - with or without

[11] 2007 (6) SA 313 (SCA).

continuing injurious effects, such as a blow against the head - on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures (see eg *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A); *Mbuyisa v Minister of Police, Transkei* 1995 (2) SA 362 (Tk) (1995 (9) BCLR 1099); *Unilever Bestfoods* E *Robertsons (Pty) Ltd and Others v Soomar and Another* 2007 (2) SA 347 (SCA) in para [15]).

[21] In *Slomowitz* (at 331F - G) this Court accepted the description of a continuous wrong as one which 'is still in the course of being committed and is not wholly past'. In applying this description, the defendants' wrongful conduct relied upon by the government must, in my view, be classified as a continuous wrong, in contrast with a single wrongful act. For their contention to the contrary, the defendants sought to rely mainly on the decision in *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 803D - 804G. I believe, however, that *Radebe* is distinguishable on its facts. What *Radebe* claimed was the setting aside of an alleged wrongful expropriation and the consequent transfer of his immovable property to the government, which was the defendant in that case. What the Court held was that a deprivation of ownership based on a single act of expropriation did not constitute a continuous wrong and that, because the single wrongful act that *Radebe* relied upon had occurred more than three years ago, his claim had become prescribed. Where the present case differs from *Radebe*, as I see it, is that the government's claim is not for the setting aside of a single act of deprivation of possession which happened wholly in the past, but effectively for an order terminating wrongful conduct which is still in the course of depriving it of the possession of its property. Thus understood, the government's position is, in my view, no different from that of the plaintiff in *South African Railways & Harbours v Fisher's Estate*1954 (1) SA 337 (A) which was succinctly described as follows by Centlivres CJ at 342B - C:

> 'The plaintiff's case is not that the defendant wrongfully entered upon the land but that the defendant was at the time of service of the summons (not at any time prior to that date) in wrongful possession of land of which it is the registered owner. That is all it has to prove in

> order to succeed in its action. As far as its claim is concerned, what occurred in the past is irrelevant. . .'."

Of particular importance is the court's reference to the matter in *Slomowitz v Vereeniging Town Council*[12] where the court pointed out that a "*continues wrong is one that is still in the court of being committed and not wholly past*".

[29] The Court in *Makate v Vodacom Ltd*[13] the Court expanded on what is mean with a continuing wrong:

> "[192] In the case of a continuing wrong there can be no question of prescription, even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that while the original wrongful act may have occurred in a time past, the wrong itself continues for so long as it is not abated. But the running of prescription in respect of any financial claim arising from the same wrong will not be postponed. Accordingly, if financial loss was occasioned by the original wrongful act, the debt in relation to that loss would become due and prescription would commence to run when the original wrongful act occurred and loss was suffered. The result is that the impact of prescription on claims having their source in the same right may differ, depending on the nature of the claim."

[30] On behalf of Smith it was submitted that the fact that the records continue to reflect that he is not a director of Lahleni and Finish Touch, it constitutes a continuous practice. I am in agreement. In terms of section 187(4) of the Act, CIPC has a statutory obligation to maintain in the prescribed manner and term the companies register and to ensure that it reflects "*accurate, up-to-date and relevant information concerning companies, foreign companies and other juristic persons contemplated in subsection (1) (a) (ii) [of section 186 of the Act], and concerning intellectual property rights, and the provision of that*

[12] 1966 (3) SA 317 (A).
[13] 2016 (4) SA 121 (CC).

information to the public and to other organs of state" (section 186(b) of the Act). (See also section 187 of the Act.[14])

[31] Where the companies register reflects an error or a falsification, CIPC is statutorily obliged to perform any function reasonably necessary to carry out its assigned registry function – including correcting such an error or falsification. In this regard the court in *Chegodi v Commissioner for the Companies and Intellectual Property Commission*[15] held that where forged documents are used to effect changes to the Company's Register, such amendments should be regarded as a nullity.

[32] In this regard I am in agreement with the submission that it is in the public interest that the companies register accurately reflects the details of directors of a company.

[33] I am further in agreement that, should Smith be successful in his claim that he is still a director, this practice has continuous injurious effects in that it continues to reflect information that is not correct.

<u>Alleged incomplete information (legality)</u>

[34] Singh alleges that certain documents were not placed before CIPC at the time when it decided to investigate the complaints and issue summons. On behalf of Smith it was submitted that this complaint cannot form the basis of the present review. In this regard reference was made to sections 168(1)(b) and 169(1)(a) of the Act where it is merely required that a complaint must be filed in writing using the prescribed form. It is further required that the complainant must allege that "*a person has acted in a manner inconsistent with [the] Act, or that the complainant's rights under this Act, or under a company's Memorandum of Incorporation or rules, have been infringed*". In respect of the nature of the complaint, it is merely required that the

[14] "(4) The Commission must-
(a) establish and maintain in the prescribed manner and form-
(i) a companies register; and…
(e) perform any related functions assigned to it by legislation, or reasonably necessary to carry out its assigned registry functions."

[15] Case nr: 42929/2016. 27 June 2016.

complainant provides a concise statement of the conduct that is the subject of the complaint.[16]

[35] I have perused the complaint form submitted by Smith and I cannot come to the conclusion that there has been non-compliance with these requirements. The allegation is also not made by the applicants that there has been non-compliance with these statutory requirements. There is therefore no merit in this allegation.

Service of the summons (legality)

[36] In terms of section 176(2) of the Act –

> "(1) At any time during an investigation being conducted by it, the Commission, or the Panel, as the case may be, may issue a summons to any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject to-
>
> *(a)* appear before the Commission or Panel, or before an inspector or independent investigator, to be questioned at a time and place specified in the summons; or
>
> *(b)* deliver or produce to the Commission or Panel, or to an inspector or independent investigator, any book, document or other object referred to in paragraph *(a)* at a time and place specified in the summons."

A summons contemplated in this section *"(b) may be served in the same manner as a subpoena in a criminal case issued by the magistrate's court."*[17] I have already referred to the facts pertaining to the service of the summons.

[37] It is common cause that CIPC served the summons by way of an e-mail on 5 April 2016. The summons was however thereafter correctly served on 7 April 2016 by way of the Sheriff. I am in agreement with the submission that there was proper service of the summons: The mere fact that it was served

[16] See Regulation 135 of the Act. A complainant must fill in Form C of 135.
[17] Section 176(2) of the Act.

incorrectly the first time does not, in my view, warrant that the summonses be set aside or suspended. There is therefore no merit in this complaint.

Part C of the Notice of Motion (Inherent jurisdiction of the Court)

[38] In Part C of the Notice of Motion, the applicants seek an order that the investigations of the complaints and the operation of the summonses be suspended pending the determination of the action. Although this Court has, in terms of section 173 of the Constitution of the Republic of South Africa[18] "*the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice*", this court cannot merely - particularly in the absence of a statutory power to do so - suspend an investigation of CIPS in exercising a statutory power conferred on it by the Act. I have already indicated that CIPC has a statutory duty to maintain the companies register in the prescribed manner and form. The investigative powers conferred upon CIPC are central to the statutory duty to maintain the companies register. I am further in agreement with the submission that it would be absurd to suspend the investigative powers of CIPC in exercising its statutory duties merely because an affected party has instituted proceedings into other matters relating to the investigation regardless of whether the statutory regulator (such as CIPC) is a party to those proceedings. Moreover, there is no reason, in my view, why the investigation conducted by the CIPC (which is a statutory obligation) cannot run concurrently to action proceedings instituted by a party to the investigation process. Lastly, if regard is had to the relief sought in the action proceedings, it is apparent that no relief is claimed with regard to the correction of the companies register maintained by CIPC. The trail court is also not called upon to decide whether Smith had resigned as a director of Finishing Touch or not.

Applications to strike out

[39] Singh brought two applications to strike out various allegations in the affidavit filed on behalf of CIPC and the one on behalf of Smith.

[18] Act 108 of 1996.

[40] In terms of Rule 6(15) of the Uniform Rules of Court, a court may on application order that any matter which is scandalous, vexatious or irrelevant be struck out.[19]

Affidavit by Smith

[41] In respect of the affidavit by Smith, it was submitted with reference to paragraphs 17, 18 and 20 of Smith's answering affidavit, that this court should strike out those sentences in these paragraphs that are argumentative and hence irrelevant in terms of Rule 23(2) of the Uniform Rules.

[42] In these three paragraphs Smith either denies or notes the responding paragraphs whilst adding either that he is advised that Singh and One Vision have failed to make out a case for the relief sought; that Singh and One Vision do not rely on the provisions of PAJA; or that One Vision is not entitled to the relief sought in the action. It is further alleged that the applicants would be prejudiced in that the decision of the court could be influence by the argumentative material contained in these three paragraphs.

Affidavit by CIPC

[43] In respect of the affidavit by CIPC, it is alleged with reference to numerous paragraphs that the allegations in some paragraphs constitute argument, alternative inadmissible hearsay evidence, and further alternatively that the allegations are irrelevant. Apart from merely listing various paragraphs, Singh makes no effort to explain why he would suffer prejudice if these paragraphs remain and further makes no attempt to properly motivate the various aspects of the application to strike out.

[19] See in general: *Vaatz v Law Society of Namibia* 1991 (3) SA 536 (Nm) at 566C – E.

[44] I agree with the general principle that affidavits should refrain from being argumentative particularly in respect to those issues that fall to be decided by the court hearing the application or the pending action. See in general: *Vaatz v Law Society of Namibia*:[20]

> "[16] A statement appeared in the introductory paragraphs of the answering affidavit made by Cleverlad's director that where he made legal submissions, he did so on the strength of legal advice having been obtained by him on behalf of Cleverlad from its legal representatives in the application. A statement of such nature in motion proceedings has become increasingly popular in practice in the last few years. Its apparent purpose is to disclaim responsibility of the deponent for later argumentative matter which serves to inflate the papers and of which the deponent has no comprehension. However impressive this might be to a lay client in justifying a legal representative's fee for voluminous affidavits, I find this practice disturbing in at least four respects. First, by their very nature these submissions have neither evidential content nor probative value; as argumentative matter they have no place in affidavits. It is not for nothing that rule 6(1) of the uniform rules of court provides for an application to be supported by an affidavit "as to the facts". Secondly, the argumentative submissions that follow are expressly admitted hearsay and, as such, inadmissible. Thirdly, the submissions amount to legal opinions on matters upon which the court is required to decide. Even expert legal opinion on matters of domestic law is neither necessary nor admissible; *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 237 C – F and *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at 188 para 43…"

[45] Having regard to the affidavit of Smith, I am not persuaded that Smith ventured into the territory cautioned against by the Court in *Vaatz.*[21] I am further not persuaded that that Singh would be prejudiced in conducting his defence nor that a court would be influenced by the statements of a legal nature contained in this paragraph. In respect of the affidavit of CIPC, I can

[20] [1991] 2 All SA 30 (NM).
[21] *Supra*.

likewise find no reason to grant the application to strike out for the reasons alluded to paragraph [41].[22]

[46] In the event, the two applications to strike out certain portions of the affidavit on behalf of CIPC and by Smith are dismissed with costs.

Costs

[47] On behalf of Smith it was submitted that the application should be dismissed on an attorney and client scale and that Singh and One Vision should pay the costs. No order as to costs is sought against Lahleni or Finishing Touch. On behalf of the applicants it was submitted that there exists no basis for a costs order against (some) of the applicants. I do not agree. I have referred to the fact that CIPC has certain statutory duties - one of which is to investigate complaints that are referred to it. In this matter, Singh has, throughout the process, displayed a dismissive and non-cooperative attitude. Furthermore, what is supposed to have been a simple matter before this court, has developed into a court record running into hundreds of pages. Lastly, Singh has launched this application as far back 21 April 2016, yet waited until the eleventh hour to bring an application that this matter be referred to trail. Under the circumstances I am therefore satisfied that a punitive costs order is warranted.

Order

1. The application to refer the matter to trail is dismissed with costs.

2. The application to strike out portions of the affidavit on behalf of the first respondent is dismissed with costs.

3. The application to strike out portions of the affidavit deposed to by the third respondent is dismissed with costs.

4. The application for an order in terms of Part A, alternatively Part B, alternatively Part C is dismissed on an attorney and client scale, such costs to include the costs of senior counsel where so employed.

[22] *Ibid*.

JUDGE AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:	Adv. DG van Loggerenberg SC
	Adv. J Malan
Instructed by:	Hogan Lovells (South Africa) Inc.
For the 1st and 2nd Respondent:	Adv. HF Oosthuizen
	Adv. D Smit
Instructed by:	Rudman Attorneys
For the 3rd Respondent:	
Instructed by:	Veneziano Attorneys