



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 1980/2015
Date Heard: 28 / 06 / 2018
Date Available: 07 / 08 / 2018

In the matter between:-

MEC FOR ROADS AND PUBLIC WORKS,

NORTHERN CAPE ECONOMIC DEVELOPMENT

FIRST APPLICANT

TRADE AND INVESTMENT PROMOTION AGENCY

SECOND APPLICANT

MEC FOR FINANCE, ECONOMIC DEVELOPMENT

AND TOURISM

THIRD APPLICANT

and

UMFANA BUSINESS ENTERPRISE CC AND

SILVER SOLUTIONS CC JV

FIRST RESPONDENT

INTERNATIONAL CONVENTION SOLUTIONS CC

SECOND RESPONDENT

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

STANTON, AJ

INTRODUCTION:-

[1] The respondents in the main application filed an application for leave to appeal to the Full Bench of the Northern Cape Division against the whole of my judgment handed down on 23 February 2018, in terms of which I made the following orders:-

1. The agreement between the parties is cancelled;
2. The cancellation of the service level agreement, concluded on 02 May 2012 between the Northern Cape Economic Development, Trade and Investment Promotion Agency and Umfana Business Enterprises CC and Silver Solutions 1069 CC trading as International Conventions Solutions JV, dated 28 July 2012, is valid;
3. The respondents, Umfana Business Enterprise CC and Silver Solutions CC JV and International Convention Solutions CC, are evicted from the second applicant's premises situated at Mittah Seperepere International Convention Centre 10 West Circular Road, Kimberley, Northern Cape;
4. The respondents shall vacate the Mittah Seperepere International Convention Centre, 10 West Circular Road, Kimberley, Northern Cape, within 30 (thirty) calendar days of the granting of this order;
5. The respondents are ordered to furnish the applicants with a statement and a debatement of account in respect of the respondents' management of the Convention Centre, within 30 (thirty) calendar days of the granting of this order;
6. The respondents shall grant the applicants access to information on the revenues generated and venue hire of the Convention Centre and related expenses by the Convention Centre for auditing by the Auditor-General, within 30 (thirty) calendar days of the granting of this order;

7. The respondents shall submit their financial books for auditing by the Auditor-General to the second applicant, within 30 (thirty) calendar days of the granting of this order; and
8. The respondents shall pay the costs of the application on a party and party scale.

[2] For ease of reference, I shall refer to the parties as in the main application.

GROUND FOR APPEAL:-

[3] The grounds for appeal appear from the notice of application for leave to appeal.

[4] The grounds for appeal may be distilled into four main issues, to wit:-

- 4.1 That there is a reasonable apprehension that I failed to bring an impartial mind to bear upon the adjudication of the matter due to the fact that I, as counsel, postponed a similar application issued under case number 1832/2014 on 24 July 2015;
- 4.2 I incorrectly exercised my discretion by granting condonation to the applicant for their failure to effect the amendment by delivering an amended notice of motion;
- 4.3 I erred in granting an order for account and debatement in circumstances where no *prima facie* case was made out by the respondents for such relief; and
- 4.4 I erred in confirming the cancellation of the agreement between the parties where I found that the convention centre was not occupied in terms of an agreement and that I had granted an eviction order of both respondents in circumstances where the applicants failed to make

out a case for the second respondent's eviction.

AD APPLICATION FOR LEAVE TO INTERVENE:

- [5] After judgment was handed down and prior to the hearing of the application for leave to appeal, the Auditor General of South Africa ("the AGSA") filed an application for leave to intervene in the proceedings. The applicants opposed this application.
- [6] The arguments in respect of the application for leave to intervene were heard prior to the application for leave to appeal.
- [7] Mr Govender, on behalf of the AGSA, submitted that leave is sought to intervene in respect of orders 6 and 7 of my judgment. He added that the AGSA cannot be compelled to perform either any private audit functions or audit the books of a private company and that orders 6 and 7 will accordingly exceed the AGSA's legislative mandate. He stated that the AGSA has a direct and substantial interest in respect of these 2 orders, if properly interpreted. He argued that, should the Court interpret that these 2 orders do not compel the AGSA to perform any functions on the respondents' books, it will be the end of the matter in so far as the AGSA is concerned. He, with reference to the judgment on **EURO BLITZ 21 (PTY) LTD v SECENA AIRCRAFT INVESTMENTS CC**¹, submitted that these 2 orders, however, do not allow for such an interpretation and in fact compels the AGSA to audit the respondents' books. In conclusion, he argued that the word "audit" is defined as the official examination of business and financial statements and that the only meaning of the orders, if properly interpreted, is that the AGSA is required to officially examine the books of the respondents. He submitted that the AGSA should therefore have been joined as a party to the main application.
- [8] Mr Ngcangisa, on behalf of the applicants, stated that the Court is only

¹ 2015 ZASCA 21 CASE NUMBER 102/2014

required to interpret the proper meaning if there is an ambiguity in the language that requires interpretation. He argued that orders 6 and 7 are not vague as it only directs the respondents to hand over the respondents' books and accordingly does not compel the AGSA to perform an audit function.

- [9] In the matter of **KPMG CHARTERED ACCOUNTANTS (SA) v SECUREFIN AND ANOTHER**², Harms DP summarised the principles of interpretation as follows:-

"First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning. Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question. Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent. Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible" The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances".

- [10] In the matter of **NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI**, Wallis JA (Farlam, Van Heerden, Cachalia And Leach JA concurring)³, confirmed that:-

"[17] The trial judge said that the general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. He referred to authorities that stress the importance of context in the process of interpretation and concluded that: A court must interpret the words in issue according to their ordinary meaning in the context of the Regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the Rules."

[18] ...The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a

² 2009(4) SA 399 (SCA) AT PARA 39

³ 2012 (4) 593 (SCA) AT PARAS 17 and 18

whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used."

[11] I was persuaded that the proper interpretation of orders 6 and 7, on the plain language thereof, might compel the AGSA to perform an audit function. That conclusion convinced me that the AGSA should be granted leave to intervene.

[12] I accordingly granted the AGSA's application for leave to intervene with costs.

LEAVE TO APPEAL:-

[13] The test of what needs to be established in order to be granted the necessary leave to appeal is now set out in section 17(1) of the Superior Courts Act, the relevant provisions of which read as follows:-

"17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration,"

[14] In **S v SMITH**⁴ Plasket AJA stressed:-

"[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the

⁴ 2012 (1) SACR 567 (SCA) PARA 7

trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[15] As reiterated by Leach JA in **S v KRUGER**,⁵ the Courts should follow the aforementioned test scrupulously in the interests of justice.

FIRST GROUND OF APPEAL - PERCEPTION OF BIAS:-

[16] Prior to hearing arguments in respect of this ground of appeal, I placed the following facts on record:-

16.1 I attended to the postponement of the application issued under case number 1832/2014 on the unopposed motion court roll to the opposed roll, as counsel acting for the applicants was not available;

16.2 The application was postponed by agreement on 24 July 2015;

16.3 I did not consult with the applicants nor did I draft any papers in case number 1832/2014;

16.4 My brief in the application (case number 1832/2014) did not contain any affidavits; and

16.5 Another counsel acted for the applicants in the drafting and the argument of the matter on 22 October 2014.

[17] Mr van Aswegen, on behalf of the respondents, submitted that the respondents contend that in view of the fact that I appeared as counsel for the applicants on 24 July 2015 in a matter where the first respondent and

⁵ 2014 (1) SACR 647 (SCA) AT 649D (PARA 3)

International Convention Solutions were the respondents there may be an appearance of bias based on the face value of the court order granted. With reference to the judgment in the matter of **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS**⁶, he argued that the test for recusal is whether there is a reasonable apprehension of bias in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court. In conclusion he submitted that a perception may exist that I failed to bring an impartial mind to bear on the adjudication of the matter.

- [18] Mr Ngcangisa submitted that both the applicants and the respondents were aware of my appearance on 24 July 2015 when the main proceedings commenced on 09 February 2018, but that the respondents elected not to bring an application for a recusal. He argued that the accepted procedure in the event of an application for recusal, as set out in the judgment of **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS**, *supra*⁷, in these circumstances are:-

"[50] The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in Chambers with the Judge or Judges in the presence of her or his opponent. The grounds for recusal are put to the Judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the Judge the applicant would, if so advised, move the application in open Court. In this case the procedure adopted by the fourth respondent departs radically from the accepted practice."

- [19] Mr Ngcangisa argued that the respondents had the obligation to inform the Court of the apprehension of bias to enable me to deal with this apprehension by explaining my involvement in the postponement. With reference to the judgment of Sedley LJ in the matter of **STEADMAN-BYRNE v AMJAD AND OTHERS**⁸, he added that by raising the issue of apprehension of bias after

⁶ 1999 (4) SA 147 (CC) PARA 48

⁷ PARA 50

⁸ [2007] EWCA CIV 625 (27 JUNE 2007) AT PARA [17]

the adverse judgment, the respondents is litigation maneuvering on their part and have accordingly waived their right to object. Sedley LJ stated that *"The law of waiver is not simple, but appellate and reviewing courts tend not to look favourably on complainants of vitiating bias made only after the complainant has taken his chance on the outcome and found it unwelcome."*

- [20] In the matter of **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS**, *supra*⁹, the Court formulated the proper approach to an application for recusal and said:-

"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

What must be stressed here is that which this Court has stressed before: the presumption of impartiality and the double-requirement of reasonableness. The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer. This presumption must be understood in the context of the oath of office that judicial officers are required to take as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law "impartially and without fear, favour or prejudice." Their oath of office requires them to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law." And the requirement of impartiality is also implicit, if not explicit, in section 34 of the Constitution which guarantees the right to have disputes decided "in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." This presumption therefore flows directly from the Constitution.

⁹ 1999 (4) SA 147 (CC) PARA 50

The other aspect to emphasise is the double-requirement of reasonableness that the application of the test imports. Both the person who apprehends bias and the apprehension itself must be reasonable. As we pointed out in SACCWU, "the two-fold emphasis . . . serve[s] to underscore the weight of the burden resting on a person alleging judicial bias or its appearance." This double-requirement of reasonableness also "highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased — even a strongly and honestly felt anxiety — is not enough." The court must carefully scrutinise the apprehension to determine whether it is, in all the circumstances, a reasonable one.

The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, "[j]udges do not choose their cases; and litigants do not choose their judges." An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias.

It thus seems to me that, in our law, the controlling principle is the interests of justice. It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties to litigation to live with the uncertainty that after the outcome of the case is known, there is a possibility that litigation may be commenced afresh because of a late application for recusal which could and should have been brought earlier. To do otherwise would undermine the administration of justice.

- [21] In my view, the respondents, if correctly informed, could not have been under the apprehension that I would be biased against them or could not reasonably apprehend that I would not bring an impartial mind to bear on the issues. I accordingly find that no other Court would reasonably come to a different conclusion in respect of this ground of appeal.

SECOND GROUND OF APPEAL – CONDONATION IN RESPECT OF AMENDMENT:-

- [22] Mr van Aswegen submitted that I was not entitled to condone the non-service of the amended notice of motion and that the amendment was accordingly

not effected. He argued that in International Convention Solutions CC (the second respondent) was therefore not a party to the application and that no orders could be granted against it. He stressed that in the absence of the delivery of the amended notice of motion, the Court could not grant condonation for a non-existent amendment to be effected. He argued that where a party exercises the right to amend pursuant to no objection and a deemed consent, but does so outside the time period stipulated in Rule 28(5), such a step may constitute an irregular step. He added that the applicants could therefore not rely on the judgment of **BECKER v MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF ECONOMIC DEVELOPMENT AND ENVIRONMENTAL AFFAIRS AND OTHERS**¹⁰ where Goosen J held that:-

"... the failure by a litigant to act in accordance with its intention to amend pleadings within the stipulated time period does not ipso facto preclude such party from thereafter filing its amendment. All that may be said is that a litigant who conducts himself in that manner exposes himself or herself to the possibility that a party may object on the basis that such constitutes an irregular step. Where there is no such objection, there can, in principle, be no objection to the Court dealing with the matter on the basis of the amended pleadings. Furthermore, Rule 28(7) confers upon the Court a discretion to permit the filing of an amendment outside of the time periods provided for in the rules."

[23] Mr Ngcangisa argued that Ndlovane, AJ had granted the applicants' application for amendment on 22 September 2017 after hearing arguments and that the failure by the applicants to deliver the amended pages does not preclude them from filing the amendment. He submitted that a refusal to condone would have elevated form over substance. He contended that, if condonation was not granted, it would have resulted in a postponement which would have been neither in the interest of justice nor in the interest of securing the inexpensive and expeditious completion of the litigation.

[24] Uniform Rule 28(5) provides:-

"If no objection is delivered as contemplated in sub-rule (4), every party who

¹⁰ [2014] JOL 31969 (ECP) PAGE 8 AT PARA 21

received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in sub-rule (2), effect the amendment as contemplated in sub-rule (7).

[25] The party amending must therefore deliver the amended pages within ten days of the expiry of that period. If he fails to do so, the proposed amendment falls away,¹¹ unless condonation for the late filing is sought.¹²

[26] In the matter of **EKE v PARSONS**,¹³ it was held that the Court may depart from a stringent observance of the rules where the interest of justice requires same. Madlanga J stated that:-

"[39] Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said "[i]t is trite that the rules exist for the Courts, and not the Courts for the rules".¹⁴

[40] Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing.¹⁵ The second is to "secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice".¹⁶ I have already touched on the inherent jurisdiction vested in the superior courts in South Africa.¹⁷ In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the uniform rules, and generally ensuring the efficient administration of the courts' judicial functions.¹⁸

[27] In view of the fact that the respondents did not appeal the order granted by Ndlovane AJ, I remain persuaded that I exercised my discretion correctly and that another Court would not reasonably come to a different conclusion.

¹¹ VAN HEERDEN V VAN HEERDEN 1977 (3) SA 455 (W); MINISTER VAN WET EN ORDE V JACOBS 1999 (1) SA 944 (O) 951

¹² NEDCOR INVESTMENT BANK LTD V VISSER NO 2002 (4) SA 588 (T)

¹³ [2016] JOL 34112 (CC) AT PARA 39 AND 40

¹⁴ ARENDSNES SWEETSPOR CC V BOTHA 2013 (5) SA 399 (SCA) (AT PARA [18])

¹⁵ ARENDSNES ID AT PARA [19]

¹⁶ KGOBANE AND ANOTHER V MINISTER OF JUSTICE AND ANOTHER 1969 (3) SA 365 (A)

¹⁷ DE WET AND OTHERS V WESTERN BANK LTD 1977 (2) SA 1033 (W)

¹⁸ ARENDSNES ABOVE FN 55 AT PARA [19]; ABSA BANK LIMITED V LEKUKU [2014] ZAGPJHC 274 AT PARA [22]

THIRD GROUND OF APPEAL – DEBATEMENT OF ACCOUNT:-

- [29] Mr van Aswegen submitted that the duty to render an account is dependent upon either a fiduciary relationship, a contractual obligation or a statutory duty. He argued that the applicants failed to make out a case that the respondents were contractually obligated to render an account. He added that the respondents only made an oblique reference to the Public Management Finance Act ("the PFMA")¹⁹, but that the PFMA finds no application to the respondents by virtue of the fact that the PFMA regulates the general responsibilities for public entities.
- [30] Mr Ngcangisa argued that section 51 of the PFMA enjoins the AGSA to take effective and appropriate steps to collect all revenues due to the public entity concerned and is responsible for the revenue, expenditure and liabilities of the public entity. He added that, in addition, the respondents agreed to be bound by the provisions of the PFMA in terms of clause 3.2.8 of the service level agreement and in terms of clause 3.8 undertook to provide a full account and report on the management of the convention centre on a monthly basis in accordance with the agreement. He added that the respondents agreed to render accounts on the revenue after the service level agreement terminated.
- [31] Mr Govender submitted that orders 6 and 7 must either be clarified or rescinded in terms of Uniform Rule 42.
- [32] Uniform Rule 42(1) provides as follows:-
- "The court may, in addition to any other powers it may have mero motu or upon the application of any party affected, rescind or vary—*
- (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
 - (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;"*

¹⁹ ACT 1 OF 1999

- [33] In applying this provision it should always be borne in mind that the Court cannot sit as a court of appeal on its own judgment and that it cannot review it. The sub-rule applies typically to *ex parte* applications or other cases where an affected party is absent, to bring the true facts to the Court's attention.²⁰
- [34] An applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish *locus standi*, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted.
- [35] Southwood J, in the matter of **NAIDOO AND ANOTHER v MATLALA NO AND OTHERS**²¹ summarised as follows:-

"[6] *In general terms, a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment – see Nyingwa v Moolman NO 1993 (2) SA 508 (Tk GD) at 510D-G; Herbstein & Van Winsen Vol 1 931. It follows that if material facts are not disclosed in an ex parte application – see Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348C-349E; National Director of Public Prosecutions v Basson 2001 (2) SACR 712 (SCA) para 21; United Diamond Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 410 (C) at 414F-415C – or if a fraud is committed (i.e. the facts are deliberately misrepresented to the court) the order will be erroneously granted. It has been held that an order granted in an application brought ex parte without notice to a party who has a direct and substantial interest in the matter is an order erroneously granted – see Clegg v Priestly 1985 (3) SA 950 (W) at 953I-954I."*

- [36] In my view the AGSA had a direct and substantial interest in the outcome of the main application, specifically with reference to the wording of prayers 5, 5.1, and 6 of the notice of motion. If the AGSA had been joined in the application, it could have opposed the application and shown, at the very least, why orders 6 and 7 should have been worded differently. In view of the request that I should either rescind or clarify the orders, I am persuaded that

²⁰ EX PARTE JOOSTE 1968 (4) SA 437 (O)

²¹ 2012 (1) SA 143 (GNP) AT PARA 5

the orders should be clarified to read as follows:-

- "6. *The respondents shall grant the applicants access to information on the revenues generated and venue hire of the Convention Centre and related expenses by the Convention Centre within 30 (thirty) calendar days of the granting of this order;*
7. *The respondents shall submit their financial books to the second applicant, within 30 (thirty) calendar days of the granting of this order;"*

[37] In view of the clarification of orders 6 and 7, the respondents' third ground of appeal falls away.

AD FOURTH GROUND OF APPEAL – FACTUAL DISPUTE:-

[38] Mr van Aswegen argued that the second respondent was never before the Court, as the amendment could not have been effected. He submitted that I could accordingly not grant an order against the second respondent. In view of my findings on the amendment, I consider this submission unmeritorious.

[39] According to Mr van Aswegen a dispute of fact exists as to which entity is in occupation of the Convention Centre and which party should therefore have been evicted. He argued that it was the applicant's case that the Convention Centre was occupied by the contractual joint venture. According to him I erred in granting an order that the lease agreement is cancelled, where I found that no tacit agreement came into existence.

[40] Mr Ngangisa argued that once the amendment was allowed, there could not be any doubt as to who the parties to any agreement was or who was in occupation of the Convention Centre. He added that there is no proof that the applicants intended unequivocally to allow any of the respondents to occupy the Convention Centre.

[41] In my view, no other Court would find that a factual dispute existed. Order 1 as it currently reads does not correctly reflect the purport of my judgment. I

will clarify order 1 by replacing it with the following new order "Confirmation of the cancellation of the agreement;"

[42] I am not persuaded that another court would come to a different conclusion with regard to whether either or both the respondents have a right to occupy the Convention Centre. In my view, another court will not find that the respondents are entitled to occupation of the Convention Centre.

[43] In these circumstances, I am satisfied that the respondents have no reasonable prospects of success on appeal and the application stands to fail.

WHEREFORE I MAKE THE FOLLOWING ORDERS:-

1. THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED WITH COSTS.

2. ORDER 1 IS REPLACED WITH THE FOLLOWING NEW ORDER 1:-

"CONFIRMATION OF THE CANCELLATION OF THE AGREEMENT;"

3. PRAYER 6 IS AMENDED AS FOLLOWS:-

"6. THE RESPONDENTS SHALL GRANT THE APPLICANTS ACCESS TO INFORMATION ON THE REVENUES GENERATED AND VENUE HIRE OF THE CONVENTION CENTRE AND RELATED EXPENSES BY THE CONVENTION CENTRE WITHIN 30 (THIRTY) CALENDAR DAYS OF THE GRANTING OF THIS ORDER;

4. PRAYER 7 IS AMENDED AS FOLLOWS:-

"7. THE RESPONDENTS SHALL SUBMIT THEIR FINANCIAL BOOKS TO THE SECOND APPLICANT, WITHIN 30 (THIRTY) CALENDAR DAYS OF THE GRANTING OF THIS ORDER;"



A STANTON
ACTING JUDGE

<u>Obo the Applicants:</u>	Adv. WA van Aswegen (oio Duncan & Rothman Inc)
<u>Obo the Respondents:</u>	Adv. N. Ngcangisa (oio State Attorney)
<u>Obo the AGSA:</u>	Adv. Govender (oio The AGSA)