



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 53829/21

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

DATE: 13 June 2025

SIGNATURE OF JUDGE: [REDACTED]

In the matter between:

SIPHO MILA PITYANA

APPLICANT

and

PRUDENTIAL AUTHORITY

FIRST RESPONDENT

ABSA GROUP LIMITED

SECOND RESPONDENT

ABSA BANK LIMITED

THIRD RESPONDENT

ORDER

(i) It is declared that:

1. The First Respondent acted unlawfully and in excess of its power per the Banks Act 94 of 1990 by engaging in an informal process with the Second and Third Respondents in connection with the nomination of the Applicant as chairperson of the Second and Third Respondent's board of directors, and in particular by notifying the Second and Third Respondents of its objection, alternative intention to object to the Applicant's nomination.
2. The First, Second and Third Respondents are ordered to pay the Applicants' costs, which costs shall include the costs of two counsel.

JUDGMENT

FLATELA J

Introduction

[1] The Applicant, Mr. Sipho Mila Pityana, seeks a declaratory order that the Prudential Authority acted *ultra vires* when it adopted an informal process in considering his nomination as Chairperson of the Absa Board, thereby circumventing the procedures set out in section 60(5)(c)¹ and 60(6)(d) to (k)² of the Banks Act 94 of

¹ Section 60(5)(c)

The Authority may object to the proposed appointment by means of a written notice, stating the grounds for the objection, given to the chairperson of the board of directors of the bank and to the nominee, within 20 working days of receipt of the notice referred to in paragraph (b).

² Section 60(6)(d)-(k)

(d) Any notified party shall be entitled, but not obliged, to make written representations to the Authority's written notice within 14 working days of receipt of the Authority's notice, or within such longer period as the Authority may, upon written application by the affected party concerned, allow.

(e) The Authority shall, within 14 working days of receipt of a written representation referred to in paragraph (d)-

(i) consider the representation;

(ii) decide whether or not the appointment of the chief executive officer, director or executive officer concerned should be terminated for the reasons contemplated in paragraph (a); and

(iii) give notice to the affected parties of his or her decision in writing.

1990 (Banks Act) denying him the right to be heard and to challenge its objection to his nomination.

[2] The Applicant was appointed to the Absa board on 1 May 2019 and subsequently assumed the role of Lead Independent Director in June 2020. Prior to his tenure on the Absa Board, the Applicant joined the board of AngloGold Ashanti Limited (AGA) in January 2007 as a director. He served as Chairperson of the AGA Board from February 2014 until his resignation in December 2020.

[3] In anticipation of Ms. Wendy Lucas-Bull's (Ms Lucas-Bull) impending retirement as Chairperson, scheduled for 31 March 2022, the Absa board established a Succession Subcommittee, chaired by independent non-executive director Mr. Alex Darko (Mr Darko), to identify, vet, and recommend a successor for the Chairperson role in collaboration with Drayton Glendower, a designated executive search firm, to implement a thorough search strategy that would evaluate both internal and external candidates for the Chairperson position.

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- (f) If, after having considered any written representation in respect of the chief executive officer, director or executive officer concerned, the Authority remains of the view that such officer's appointment should be terminated, or if no written representation is submitted to the Authority within the period allowed under paragraph (d), the Authority shall refer the matter to the Arbitration Foundation of South Africa or its successor-in-law, or any other body designated by the Authority by means of a notice in the *Gazette* (hereinafter referred to as the 'Arbitrator') for arbitration.
 - (g) The Authority shall make the request for arbitration referred to in paragraph (f)-
 - (i) in writing; and
 - (ii) within three working days after the expiry of the 14-day period referred to in paragraph (e) or, if the affected parties do not submit any written representations to the Authority within the period allowed under paragraph (d), within three working days after the expiry of that period.
 - (h) The Arbitrator shall determine whether or not adequate reasons exist for the termination, by the Authority, of the appointment of the chief executive officer, director or executive officer concerned.
 - (i) If under paragraph (h) the Arbitrator decides that adequate reasons exist for the termination, the Arbitrator shall confirm the termination of the appointment in writing addressed to the Authority and the chief executive officer, director or executive officer concerned, whereupon the termination shall immediately take effect.
 - (j) If under paragraph (h) the Arbitrator determines that adequate reasons do not exist for the termination, the Arbitrator shall reject the termination by written notice to the Authority and to the chief executive officer, director or executive officer concerned, whereupon the appointment of the person in question shall continue with full force and effect.
 - (k) A termination in terms of this section shall be final and binding and shall not be subject to review as envisaged in section 9.

[4] On 26 April 2021, during a special meeting of the Absa board, the Succession Subcommittee presented its findings regarding the candidates. The Succession Subcommittee narrowed the list of potential candidates from 68 to a shortlist of two candidates (one internal and one external). The Applicant was the only board member who expressed an interest in the position (internal candidate). The Succession Subcommittee had identified the Applicant as the preferred internal candidate, while Mr. Moloko was recommended as the preferred external candidate. It was resolved that the First Respondent be informed of the shortlisted candidates.

[5] In a virtual meeting held on 28 April 2021, Mr. Darko updated the First Respondent on the recruitment process and the shortlisted candidates. The First Respondent undertook to conduct a detailed due diligence on the candidates.

[6] On 3 May 2021, the Absa Board held a special meeting to evaluate candidates for the chairpersonship. During this meeting, the profiles of both candidates were presented for consideration. The Absa Board agreed that, for continuity in leadership, an internal candidate should be preferred over an external one, subject to verification of the Applicant. Subsequently, on 4 May 2021, the search firm tasked with the candidate search sought a reference for the Applicant from AGA, which confirmed the Applicant's tenure with the organisation.

[7] The Succession Subcommittee conducted a series of informal engagements with the First Respondent to assess candidates for the Chairperson position at Absa Group Limited. The Prudential Authority scrutinised the circumstances surrounding the Applicant's resignation as Chairperson of AGA. Following the informal interactions, which included a meeting of Governors and consideration of documents received from Absa, the First Respondent expressed concerns regarding the Applicant's resignation from AGA, highlighting the contradictory reasons conveyed to the First Respondent by AGA Chairperson, Ms Maria Ramos (Ms Ramos), and those provided by the Applicant to Absa. The First Respondent underscored the reputational risks for Absa should the Applicant be nominated for the Chairperson position. Consequently, the Succession Subcommittee resolved not to recommend the Applicant for nomination to the Absa board. Absa resolved not to proceed with the formal nomination process for the Applicant and did not provide reasons for this decision.

[8] The Applicant asserts that as a result of its actions, the First Respondent has:

- (i) denied him the right to be heard and the right to challenge the First Respondent's decision to object to his appointment by way of the procedural safeguards built into section 60 of the Banks Act; and
- (ii) acted *ultra vires* and in an unreasonable and non-transparent manner, a manner that has had the consequences that the Applicant has been condemned as an unfit and improper person to hold the office of a chairperson, and thus materially prejudiced, without being heard on the grounds for the objection.

[9] The First Respondent opposes the application on the grounds that the provisions outlined in section 60 of the Banks Act were not triggered due to Absa board's failure to nominate the Applicant as Chairperson. The First Respondent argues that the informal procedures employed did not constitute a circumvention of the statutory process specified in section 60 of the Banks Act and maintains that Absa provided the Applicant with the opportunity for a fair hearing (*audi*). Furthermore, the First Respondent contends that the declaratory relief sought is moot and should therefore be dismissed.

[10] No relief is sought against the Second and Third Respondents, except for costs if they oppose the application. The Applicant accepts that section 60 of the Banks Act imposes duties solely on the First Respondent. Therefore, the declaratory order he seeks in these proceedings concerns only the First Respondent.

[11] Absa opposes the relief sought by the Applicant and has filed a comprehensive answering affidavit presenting additional material before the Court, which it considers relevant to determining the relief sought by the Applicant. Absa contends that the grounds for opposing the relief sought against the First Respondent are that it is far-reaching and, if granted, would have significant consequences for itself, as well as for its reputation and that of the Absa Board. Absa asserts that the effect of the declarator is not only that the First Respondent acted unlawfully but also that Absa (through the Absa Board) acted unlawfully by participating in the same "informal process" of which

the Applicant complains, because the “process required the involvement of two parties.”

[12] With the context established, I will begin by describing the relevant parties involved. Given the comprehensive factual background, I will first outline the statutory framework governing the nomination process for directors at the Bank. Subsequently, I will analyse the pertinent facts and their legal implications regarding the potential outcomes of this application.

Parties

[13] The First Respondent, the Prudential Authority, is a juristic entity established in terms of section 32 of the Financial Sector Regulation Act 9 of 2017³ and operates within the administration of the Reserve Bank. Its mandate includes the prudential and regulatory oversight of financial institutions that offer financial products, securities services, and market infrastructure, in accordance with the prevailing financial sector legislation. The First Respondent opposes the application.

[14] The Second Respondent is ABSA Group Limited, a public company with limited liability. The Third Respondent is ABSA Bank Limited, a public company wholly owned by the Second Respondent. For brevity, the Second and Third Respondents will be collectively referred to as “Absa”.

[15] The Applicant's complaint against the First Respondent is twofold. Firstly, he argues that the First Respondent *acted ultra vires* by employing an informal process to evaluate his nomination as Chairperson of the Absa Board, thereby contravening the procedural requirements outlined in sections 60(5)(c) and 60(5)(d) to (k) of the Banks Act. He claims this denied him a fair hearing and the opportunity to contest the objections raised against him. Secondly, the Applicant asserts that the First

³ Section 32(1)-(3)

(1) An authority called the Prudential Authority is hereby established.

(2) The Prudential Authority is a juristic person operating within the administration of the Reserve Bank.

(3) The Prudential Authority is not a public entity in terms of the Public Finance Management Act.

Respondent's unlawful actions have harmed his reputation without affording him a chance to challenge these objections or to have the matter referred to an impartial arbitrator. He contends that this has discouraged the Absa Board from nominating him, adversely affecting his professional standing.

[16] I now deal with the statutory framework for appointing directors to banks and outline the First Respondent's role in this process.

The Statutory Framework

Financial Sector Regulation Act

[17] The Prudential Authority is established in terms of Chapter 3 of the FSRA. Section 32 provides for the establishment of the Prudential Authority in the following terms:

"Establishment

- (1) An authority called the Prudential Authority is hereby established.
- (2) The Prudential Authority is a juristic person operating within the administration of the Reserve Bank.
- (3) The Prudential Authority is not a public entity in terms of the Public Finance Management Act."

1. Under section 33 of the FSRA, the objective of the Authority is to:

- "(a) promote and enhance the safety and soundness of financial institutions that provide financial products and securities services;
- (b) promote and enhance the safety and soundness of market infrastructures;
- (c) protect financial customers against the risk that those financial institutions may fail to meet their obligations; and
- (d) Assist in maintaining financial stability."

2. The functions of the Authority in terms of section 34 of the FSRA are as follows:

- "(1) In order to achieve its objective, the Prudential Authority must-
 - (a) regulate and supervise, in accordance with the financial sector laws-

- (i) financial institutions that provide financial products or securities services; and
 - (ii) market infrastructures;
 - (b) Co-operate with and assist the Reserve Bank, the Financial Stability Oversight Committee, the Financial Sector Conduct Authority, the National Credit Regulator and the Financial Intelligence Centre, as required in terms of this Act;
 - (c) co-operate with the Council for Medical Schemes in the handling of matters of mutual interest;
 - (d) support sustainable competition in the provision of financial products and financial services, including through co-operating and collaborating with the Competition Commission;
 - (e) support financial inclusion;
 - (f) regularly review the perimeter and scope of financial sector regulation, and take steps to mitigate risks identified to the achievement of its objective or the effective performance of its functions; and
 - (g) conduct and publish research relevant to its objective.
- (2) The Prudential Authority must also perform any other function conferred on it in terms of any other provision of this Act or other legislation.
- (3) The Prudential Authority may do anything else reasonably necessary to achieve its objective, including-
- (a) co-operating with its counterparts in other jurisdictions; and
 - (b) participating in relevant international regulatory, supervisory, financial stability and standard setting bodies.
- (4) When performing its functions, the Prudential Authority must -
- (a) *Please* take into account the need for a primarily pre-emptive, outcomes-focused and risk-based approach, and prioritise the use of its resources in accordance with the significance of risks to the achievement of its objective; and

- (b) to the extent practicable, have regard to international regulatory and supervisory standards set by bodies referred to in subsection (3)(b), and circumstances in the Republic.
- (5) The Prudential Authority must perform its functions without fear, favour or prejudice.

Banks Act

[18] Sections 60(5) to (8) of the Banks Act provide as follows

- “(5) (a) Every bank shall give the Authority written notice of the nomination of any person for appointment as a chief executive officer, director or executive officer by furnishing the Authority with the prescribed information in respect of the nominee: Provided that the Authority may return the written notice to the bank concerned on the grounds that it is incomplete or that it contains an error, in which case the requirement for the Authority to object to the appointment within a period of 20 working days is stayed.
- (b) The notice shall reach the Authority at least 30 days prior to the proposed date of appointment.
- (c) The Authority may object to the proposed appointment by means of a written notice, stating the grounds for the objection, given to the chairperson of the board of directors of the bank and to the nominee, within 20 working days of receipt of the notice referred to in paragraph (b).
- (d) If the Authority objects to the proposed appointment as envisaged in paragraph (c), the bank shall not appoint the nominee and any purported appointment shall have no legal effect: Provided that the bank or nominee may dispute the Authority's objection, in which case the provisions of subsection (6) (d) to (k), shall apply *mutatis mutandis*.
- (e) For the purpose of this subsection the term '**every bank**' shall mean the chief executive officer of such bank, or in the case where it concerns the appointment of the chief executive officer, such member of the board of directors of such bank as may be designated by the board of directors of such bank.
- (6) (a) Without derogating from any law, the Authority may object to the

appointment or continued employment of a chief executive officer, director or executive officer of a bank if the Authority reasonably believes that the chief executive officer, director or executive officer concerned is not, or is no longer, a fit and proper person to hold that appointment, or if it is not in the public interest that such chief executive officer, director or executive officer holds or continues to hold such appointment.

(b) If the Authority wishes to terminate the appointment or the continued employment of a chief executive officer, director or executive officer of a bank, the Authority shall notify the following affected parties in writing of his or her intention and of the grounds for the proposed termination:

- (i) The chief executive officer, director or executive officer concerned;
- (ii) The chairperson of the board of directors of that bank (except if the chairperson of the board is the person whose appointment the Authority wishes to terminate, in which case each director of the bank concerned shall be notified); and
- (iii) The chief executive officer of that bank, (except if the chief executive officer is the person whose appointment the Authority wishes to terminate, in which case the deputy chief executive officer shall be notified).

(c) The written notice referred to in paragraph (b) shall notify such parties that they are entitled to submit written representations to the Authority in response to that notice.

(d) Any notified party shall be entitled, but not obliged, to make written representations to the Authority's written notice within 14 working days of receipt of the Authority's notice, or within such longer period as the Authority may, upon written application by the affected party concerned, allow.

(e) The Authority shall, within 14 working days of receipt of a written representation referred to in paragraph (d)-

- (i) consider the representation;
- (ii) decide whether or not the appointment of the chief executive officer, director or executive officer concerned should be terminated for the reasons contemplated in paragraph (a); and

- (iii) give notice to the affected parties of his or her decision in writing.
- (f) If, after having considered any written representation in respect of the chief executive officer, director or executive officer concerned, the Authority remains of the view that such officer's appointment should be terminated, or if no written representation is submitted to the Authority within the period allowed under paragraph (d), the Authority shall refer the matter to the Arbitration Foundation of South Africa or its successor-in-law, or any other body designated by the Authority by means of a notice in the *Gazette* (hereinafter referred to as the 'Arbitrator') for arbitration.
- (g) The Authority shall make the request for arbitration referred to in paragraph (f)-
 - (i) in writing; and
 - (ii) within three working days after the expiry of the 14-day period referred to in paragraph (e) or, if the affected parties do not submit any written representations to the Authority within the period allowed under paragraph (d), within three working days after the expiry of that period.
- (h) The Arbitrator shall determine whether or not adequate reasons exist for the termination, by the Authority, of the appointment of the chief executive officer, director or executive officer concerned.
- (i) If under paragraph (h) the Arbitrator decides that adequate reasons exist for the termination, the Arbitrator shall confirm the termination of the appointment in writing addressed to the Authority and the chief executive officer, director or executive officer concerned, whereupon the termination shall immediately take effect.
- (j) If under paragraph (h) the Arbitrator determines that adequate reasons do not exist for the termination, the Arbitrator shall reject the termination by written notice to the Authority and to the chief executive officer, director or executive officer concerned, whereupon the appointment of the person in question shall continue with full force and effect.

- (k) A termination in terms of this section shall be final and binding and shall not be subject to review as envisaged in section 9.

[19] Section 60 of the Banks Act establishes two critical protections for the rights of nominees. Firstly, it enshrines the principle of *audi alteram partem*, ensuring that nominees can present their case before any final decision regarding their nomination is made. Secondly, it guarantees that if the Prudential Authority maintains its objection after reviewing the nominee's response, the merits of the objection will be assessed by an independent arbitrator. Collectively, these provisions uphold the integrity of the nomination process.

[20] Having outlined the legal framework governing the nomination of directors within financial institutions and the role of the First Respondent in that process, I will now focus on the factual basis upon which the Applicant bases the relief that he is seeking.

Factual Background

[21] The facts are mainly a common cause. In March 2022, Ms. Lucas-Bull concluded her nearly nine-year tenure on the Absa Board. She communicated her intention to assume the role of chairperson for the Shoprite-Checkers Board, seeking the necessary approval from the Prudential Authority for this appointment. Mr. Kuben Naidoo, the Deputy Governor of the South African Reserve Bank and the Chief Executive Officer of the Prudential Authority, inquired about Absa's succession planning. Ms. Lucas-Bull advised that the Absa Board had established a Succession Subcommittee, led by Mr. Darko, a board member assigned specifically to identify her successor.

[22] On 16 September 2020, during the Absa board meeting, Mr Darko presented a detailed "roadmap for the chairman succession." This roadmap involved engaging with the First Respondent, as it must consider the shortlisted candidates identified by the Succession Subcommittee. Mr Darko reported to the Absa Board that he had already met with Mr Kuben Naidoo (Mr Naidoo) to inform him about the recruitment process. Mr Naidoo suggested that Absa could share a shortlist of candidates with the First Respondent, which would provide a "*comment or caution on the candidates to ensure*

that Absa did not go too far into the process before identifying a potential problem” (the informal process). The Absa board raised no concerns or objections regarding the proposed roadmap. It is worth noting that the informal process appears to be a norm in the banking industry.⁴

[23] During December 2020, the board members were invited to make themselves available for the position. At that time, the Applicant was still serving as AGA Chairperson and a board member. On 2 December 2020, the Applicant met with Ms Lucas-Bull and disclosed to her in confidence that he might resign from AGA due to divisions on the board. He also revealed the sexual misconduct complaint against him, which was under investigation. He cautioned Ms Lucas-Bull about developments in AGA in the event that the allegations surfaced in the media. After the meeting, the Applicant further informed Ms Lucas-Bull that the preliminary report on the sexual misconduct investigation had been presented and that he had responded to the preliminary findings.

[24] On 21 October 2020, the AGA board appointed Adv Heidi SC to investigate a complaint of sexual harassment against the Applicant. On 30 November 2020, Ms Barnes issued her preliminary investigation report. The Applicant’s attorneys responded to the report. The Applicant claims that the AGA board proposed a settlement, whereby he would resign from the AGA board ,and the contents of the Barnes Report would be kept confidential.

[25] On 4 December 2020, the Applicant resigned from the AGA board. On 5 December 2020, Ms Ramos was appointed as the AGA Chairperson. On 8 December 2020, the AGA Stock Exchange News Service (SENS) announced Ms Ramos's appointment and reported the Applicant’s resignation as Chairperson and non-executive director, providing no reasons for the resignation. The Applicant says that the rationale for the non-disclosure is that the Applicant, through his attorneys and AGA, had agreed to a non-disclosure agreement.

⁴ Paragraph 61.4 of the FA.

[26] On 10 December 2020, the Applicant received the Final Barnes report regarding the allegations of sexual misconduct

[27] In January 2021, the Applicant expressed an interest in the position to the search agency. He was the only member of the Absa board who expressed interest and made himself available for this appointment.

[28] On 8 April 2021, the Succession Subcommittee interviewed the Applicant; he was invited to disclose, *inter-alia*, “*anything regarding his leaving the board of AGA that the Succession Committee should be worried about.*” The Applicant disclosed that he has a non-disparagement agreement regarding his reasons for exit. He also stated that nothing about his exit would prevent him from putting his name forward for the position of Absa Board chairperson.

[29] On 26 April 2021, during a special meeting of the board, the Succession Subcommittee presented its findings regarding leadership candidates. The Succession Subcommittee identified the Applicant as the preferred internal candidate for succession, while Mr. Moloko was recommended as the preferred external candidate.

[30] On 28 April 2021, Mr. Darko and Mr. Denzel Bostander, Head of the Financial Conglomerate Supervision Department at the First Respondent and responsible for supervising Absa, updated the First Respondent about the recruitment process and the shortlisted candidates. Mr. Naidoo shared his preliminary thoughts on the shortlisted candidates and Absa’s recruitment strategy with the Succession Subcommittee, and he undertook to conduct detailed due diligence.

[31] On 3 May 2021, the Absa Board held a special meeting to evaluate candidates for the Chairperson position. During this meeting, profiles of both candidates were presented for consideration. The Absa Board agreed that the internal candidate must be favoured over the external candidate, reasoning that this would promote continuity in leadership while awaiting further verification of the Applicant. Subsequently, on 4 May 2021, the search firm tasked with the candidate search sought a reference for the

Applicant from AGA, which responded by confirming the Applicant's tenure with the organisation.

The Prudential Authority's investigations

[32] The First Respondent commenced its preliminary assessment of the two candidates to evaluate their suitability and qualifications for the position, concentrating specifically on identifying any potential red flags. Mr. Naidoo engaged with the Governor of SARB and two Deputy Governors to gather their perspectives on the candidates. Notably, Mr. Naidoo highlighted that the Governors recommended an investigation of the circumstances surrounding the Applicant's immediate resignation from the AGA Board, as these unusual factors warranted additional scrutiny in the evaluation process.

[33] Mr. Naidoo contacted Ms. Ramos, the Chairperson of the AGA Board, who succeeded the Applicant, to enquire about the circumstances surrounding the Applicant's immediate resignation. Ms. Ramos conveyed to Mr. Naidoo that there were issues regarding the Applicant's resignation and disclosed that there were investigation reports that she felt she could not share with him. She advised Mr. Naidoo to submit a formal written request for the information regarding Pityana and the investigation report, which she would then forward to AGA's legal team for consideration. This interaction with Ms. Ramos implied that Mr. Naidoo's inquiry was of a high-level investigative nature.

[34] Mr. Naidoo decided not to write to Ms. Ramos; instead, he called Ms. Lucas-Bull and advised her that there were concerns regarding the Applicant's immediate resignation from the position of Chairperson of the AGA Board. Mr. Naidoo informed her about his interactions with Ms. Ramos, highlighting an investigation report that the First Respondent had not seen. He emphasised the necessity for Absa to conduct a thorough investigation into the circumstances surrounding the Applicant's immediate resignation from the AGA Board. Mr. Naidoo also reached out to Mr. Darko to convey the same concerns.

[35] On 22 May 2021, Ms Lucas-Bull contacted the Applicant to request a detailed explanation regarding the circumstances surrounding his resignation. The Applicant indicated that he was constrained by confidentiality and non-disparagement agreements, which limited his ability to discuss the specifics of his departure from AGA. Nevertheless, he referenced the existence of a preliminary report on sexual conduct allegations against him with which he disagreed and had provided counterarguments. He confirmed that AGA had opted not to pursue the matter further. He resigned thereafter. Ms Lucas-Bull says the confirmation was consistent to what the Applicant told him in December 2020.

[36] On 24 May 2021, following a discussion with the Applicant, Ms Lucas-Bull contacted Ms Ramos. During this conversation, Ms Ramos indicated that a serious issue had arisen prior to the Applicant's resignation, and she inquired from Ms Lucas-Bull about what the Applicant had disclosed to her. Ms Lucas-Bull noted that the Applicant had made limited disclosures due to confidentiality agreements. In response, Ms Ramos suggested that she would consult AGA's legal department to clarify the confidentiality concerns associated with the matter. Ms Ramos reverted to Ms Lucas-Bull on 25 May 2021, confirming that there was no restriction or limitation on the Applicant disclosing to Absa or the First Respondent the circumstances that preceded his departure from AGA. To the extent that he considered himself bound by the confidentiality agreement, AGA would waive it. Ms Lucas-Bull relayed this information to the Applicant.

[37] On 27 May 2021, the Applicant met with the Succession Subcommittee to discuss the context surrounding his resignation from AGA. He clarified that, despite facing allegations of sexual misconduct, these claims were not the primary reason for his departure. Among other factors, he cited ongoing divisions within the AGA Board as a significant concern. Furthermore, he informed the committee that he had responded to the preliminary report and raised concerns about it; however, the Board had chosen not to pursue the matter. The Applicant had with him the preliminary report and his response.

[38] The Succession Subcommittee resolved to submit relevant documents for an independent legal opinion concerning the sexual misconduct allegations. The

Applicant's previous attorneys provided a complete set, including Barnes' preliminary report, the Applicant's response and Barnes' Final report to the Secretary of the Absa Board. The Succession Subcommittee sought legal counsel regarding the Barnes Final Report to guide its decisions. Mr. Peter Harris (Mr Harris), a senior attorney, was appointed on 15 June 2021 to review the report and assess the reasonableness of the findings, considering the facts presented by the Applicant.

[39] On 2 June 2021, the Absa board held a meeting during which Darko presented on the chairman succession process. Darko indicated that the Subcommittee had received feedback from the Authority regarding the external candidate, and there were no issues arising. However, concerning the Applicant, significant concerns were raised about the circumstances of his departure from AGA.

[40] On 8 July 2021, Mr Harris provided Absa with the legal opinion. In his opinion, Mr Harris identified several flaws within Barnes' Final Report. He concluded that the final report on the matter had not considered all the evidence and forcefully argued that reliance should not be placed on it, as doing so would be unfair to the Applicant.

[41] On 16 July 2021, the Succession Subcommittee presented its findings to the Absa Board regarding the AGA matter and the legal opinion from Mr Harris. The Absa Board reached a consensus to continue supporting the Applicant as the preferred candidate; however, three members expressed dissenting opinions on the decision.

[42] On 23 July 2021, Ms. Lucas-Bull and Mr Darko presented an update to Mr. Naidoo regarding the latest resolution from the Absa Board, which encompassed the deliberations of the Succession Subcommittee related to the AGA matter. They requested that the First Respondent evaluate the AGA issue alongside all relevant documents, including Harris's legal opinion. During the meeting, the First Respondent provided feedback on its preliminary assessment of the two candidates under consideration. Notably, the First Respondent raised concerns about the reputational risks linked to the Applicant's candidacy for the Chairperson position. Despite concerns previously articulated by Mr. Naidoo on behalf of the First Respondent, the Succession Subcommittee maintained its endorsement of the Applicant as a viable candidate. Following this meeting, Absa's secretary furnished Mr. Naidoo with a report

from Barnes' Final Report, along with a legal opinion authored by Mr. Harris, requesting his consideration of these documents.

[43] On 2 August 2021, Mr. Naidoo contacted Ms. Lucas-Bull to discuss the governors' deliberations regarding a sexual misconduct allegation against the Applicant. The outcome of this meeting raised significant concerns rather than providing endorsement. These concerns stemmed from three main issues highlighted during the discussion, namely

- a. Firstly, there was a factual dispute regarding the Applicant's resignation from AGA. AGA's position (conveyed to him by Ms Ramos) was that AGA would have pursued the matter further had the Applicant not resigned. In contrast, the Applicant cited different reasons for his resignation.
- b. Secondly, the sexual misconduct allegation and the existence of the final report posed a potential reputational issue for Absa; and
- c. Thirdly, Mr Naidoo questioned why Mr Harris had not discussed the reasons for not interviewing the security detail with Advocate Barnes SC, given that this was one of the First Respondent's main complaints regarding Advocate Barnes's final report.

[44] In response, Ms Lucas-Bull indicated that the Applicant advised her that AGA had agreed not to pursue the matter further following Advocate Barnes's final report. However, Mr Naidoo expressed concerns about the reputational risks of nominating the Applicant for the Chairperson position. Ms Lucas-Bull conveyed Mr Naidoo's concerns to the Applicant.

[45] On 3 August 2021, the Succession Subcommittee convened and resolved not to support the Applicant's nomination as Chairperson of the Absa board; consequently, it did not recommend him to the Absa board.

[46] Ms. Lucas-Bull informed the Applicant of the First Respondent's views regarding this entire sexual harassment saga. The Applicant thanked Ms. Lucas-Bull and responded to inquiries from the South African Reserve Bank (SARB) in a letter

addressed to her, emphasising that confidentiality agreements restrict his ability to provide further commentary on the matter.

[47] On 6 August 2021, Ms. Lucas-Bull forwarded the correspondence to the First Respondent. The reason for transmitting this correspondence, which was addressed to her, remains unclear, particularly given the Succession Subcommittee's earlier decision not to endorse the Applicant's nomination.

[48] Mr Naidoo responded by email on the same day, stating that there was no further purpose in engaging informally with the matter. He added that Absa should submit the BA020 form, which would be processed according to the normal procedure. Ms Lucas-Bull states that Mr Naidoo concluded that following the meeting of governors, if Absa proceeded to submit the BA020 form, the First Respondent would likely object to a formal application.

[49] On 10 August 2021, the Absa Board convened a meeting. During this meeting, Ms. Lucas-Bull informed the board of the concerns raised by the First Respondent regarding the Applicant.

[50] On 11 August 2021, Ms Lucas-Bull informed the Applicant of the Absa Board's concerns regarding his nomination for the Chairperson position. The Applicant indicated that he would write to the First Respondent to query the basis of its decision. Ms Lucas-Bull requested that he not do so, and Absa's company secretary similarly asked him not to do so.

[51] The Applicant instructed his attorneys to investigate the reasons behind the First Respondent's decision and to arrange a meeting to prevent litigation. The First Respondent responded, stating that it had not made any decision and that Absa did not nominate the Applicant for the chairperson position.

[52] Absa states that the confrontational nature of the correspondence between the Applicant and the First Respondent made the Absa Board uneasy. Attorneys were consulted, and senior counsel's opinion was sought regarding the Barnes Final Report. The senior counsel advised against probing the Barnes report, but noted they

were obliged to investigate whether the Applicant had originally made full, frank, and timely disclosure concerning the sexual harassment allegations. Absa chose to invite the Applicant once more to address them on the issue of sexual misconduct allegations.

[53] On 3 September 2021, the Applicant responded to the query with his speaking notes. He was recused from the meeting, and the Absa Board unanimously decided against nominating him for the Chairperson position. Subsequently, the Absa Board resolved not to proceed with the formal nomination of the Applicant to its board, opting instead to nominate Mr Moloko for the position due to positive feedback regarding his candidacy, his experience in financial services, and his excellent financial track record. No reasons were provided to the Applicant for the decision not to nominate him formally.

[54] On 25 October 2021, the Applicant launched these proceedings seeking the following relief:

- (i) Declaring that the First Respondent acted unlawfully and in excess of its powers and of the Banks Act 94 of 1990 by engaging in an informal process with the Second and Third Respondents in connection with the nomination of the Applicant as Chairperson of the Second and Third Respondent's board of directors, and in particular by notifying the Second and Third Respondent of its objection, alternative intention to object to the Applicant's nomination.
- (ii) Costs of the application, save that no costs are sought against the Second and Third Respondents unless they oppose this application.
- (iii) Further or alternative relief

Issues

[55] The following issues arise in this matter:

- a. Whether the Applicant has identified any right (existing, future or contingent) on the basis of which a declaratory order can be sought?
- b. If so, should the Court exercise its discretion in favour of the Applicant?
and
- c. Whether the informal interactions between the First Respondent and the Absa Board circumvented the provisions of the Banks Act, at sections 60(5) and 60(6)
- d. Whether the First Respondent is explicitly or impliedly authorised by the FSRA and the Banks Act to be consulted or to offer informal advice to the banks.

Applicant's pleaded case

[56] The Applicant asserts that he was nominated as Chairperson of the Absa board. He claims that the First Respondent acted unlawfully and beyond its powers by following an informal process regarding his nomination. Furthermore, he contends that although the First Respondent asserts it is not acting under the Banks Act, its communication to the Absa Board constituted a clear objection to his nomination. The argument extends to claim that the First Respondent communicated *a fait accompli* through its objection to his nomination.

[57] According to the Applicant, the interaction between Ms Ramos and the First Respondent regarding the circumstances of his departure from AGA was never disclosed to him, and the First Respondent made no effort to provide the Applicant with an opportunity to seek clarification or respond directly; additionally, a request made by the Applicant's attorneys was disregarded. The Applicant appears to be contending that Ms Ramos's portrayal of the incidents at AGA to the First Respondent was fraught with *mala fides*. The Applicant asserts that this is due, among other reasons, to Ms Ramos' unhindered access to the Governors of the Reserve Bank and the First Respondent concerning the issues surrounding his appointment. Simultaneously, his engagement with the First Respondent was facilitated through Ms Lucas-Bull.

[58] According to the Applicant, by adopting the informal process, the First Respondent unlawfully thwarted or circumvented the procedure governing the appointment of directors under section 60 of the Banks Act, thus exceeding its powers.

[59] The Applicant asserts that, since Absa has already nominated another candidate, a right it holds as a private organisation, he does not seek to interdict that nomination but instead seeks declaratory relief. The Applicant pursues this relief because this Court may, at the request of an interested party, inquire into any existing, future, or contingent right or obligation, even though the Applicant does not claim consequential relief in the proceedings.

[60] The Applicant further contends that he has an interest in the rights granted under section 60 of the Banks Act, which are afforded to a person who has been nominated and whose nomination is obstructed by the unlawful actions of the regulators. Consequently, the Applicant seeks to secure a declaratory order against the First Respondent as a precursor to taking further action, including a potential claim for damages resulting from its unlawful conduct.

Summary of the First Respondent's pleaded case

[61] The First Respondent contends that section 60 of the Banks Act does not address any alleged thwarting of a person's potential nomination. Furthermore, the First Respondent asserts that the procedural mechanisms outlined in section 60 are unavailable to the Applicant, as Absa did not nominate him.

[62] The First Respondent contends that the Applicant's rights were not breached under section 60 of the Banks Act because the remedies would only be triggered if Absa had officially submitted the Applicant's nomination to the First Respondent, as specified in section 60(5)(a) of the Banks Act. According to the First Respondent, the Applicant incorrectly assumes that his nomination was a *fait accompli*, as though the Absa Board had taken a final resolution on the matter.⁵

⁵ Paragraph 12 of the Respondent's Answering Affidavit.

[63] The First Respondent argued that the Applicant had exercised his right to be heard regarding Absa's potential nomination. The First Respondent maintains that the Applicant exercised his rights to be heard internally within Absa and has no recourse under section 60 of the Banks Act.

[64] Regarding the informal engagements between the First Respondent and the Absa, the First Respondent asserts that financial institutions often consult it prior to nominating directors or senior executives. The First Respondent contends that this informal process is standard practice and is not precluded by section 60 of the Banks Act. Furthermore, the First Respondent claims that interactions between it and the banks occur routinely; therefore, the Applicant's rights under section 60 of the Banks Act were not violated.

[65] The First Respondent avers that the "engagements" with banks are supported by Principle 13 of the Basel Committee Guidelines on Corporate Governance for Banks, which states that *"supervisors should provide guidance for and supervise corporate governance at banks, including through comprehensive evaluations and regular interaction with boards and senior and senior management, should require improvement and remedial action as necessary, and should share information on corporate governance with other supervisors."*⁶

[66] The First Respondent also avers that Principle 13 of the Guidelines on Corporate Governance encourages banks to engage authorities on issues such as succession.

[67] The First Respondent contends that the relief sought is incompetent, as it amounts to a declaration of abstract, academic, or hypothetical questions and provides no tangible benefit to the Applicant. The First Respondent argues that the Applicant has not established any legally cognisable interest in an existing, future, or contingent right or obligation relevant to the relief sought, which is pertinent to the matter at hand. Furthermore, the First Respondent asserts that the Applicant began seeking a

⁶ Paragraph 23 of the Respondent's Answering Affidavit.

declaratory order to assist him with his damages claim; however, he has no damages claim against it. The First Respondent argues that the declarator is moot.

[68] The First Respondent further states that this is not an appropriate case for the exercise of the court's discretion in granting the declaratory relief sought and that the application should be dismissed with costs.

Second and Third Respondents' pleaded case.

[69] Absa avers that the Applicant's case is legally unsustainable in that:

- a. Firstly, the Applicant did not have any right or entitlement to be nominated by Absa for the position of chairperson under section 60(5) of the Banks Act. The Applicant was not nominated for the role but was merely identified as one of the two potential candidates for such nomination.
- b. Secondly, Absa contends that the process of objections and responses to the same under section 60(6) of the Banks Act is only triggered pursuant to a nomination under section 60(5) of the Banks Act. This means, argues Absa, that absent a formal nomination under section 60(5) of the Banks Act, remedies provided for under section 60(6) of the Banks Act do not become operative.
- c. Thirdly, the proper form of relief to be sought can only be by way of judicial review.
- d. Finally, the declaratory order is incompetent in that the Applicant is seeking the court's legal opinion on the prospect of success of his contemplated but yet unformulated future legal action against the First Respondent.

Dispute of facts

[70] The First Respondent contends that there is a factual dispute between it and the Applicant concerning whether it raised concerns that Absa could address in a formal notice of objection or articulated a firm intention to object to the Applicant's nomination if a formal nomination was submitted under section 60 of the Banks Act.

[71] The First Respondent invited the court to decide on its version of the matter under the *Plascon-Evans rule*. It was argued on behalf of the First Respondent that it expressed concerns, which it made clear that Absa could address in a formal nomination. It did not decide to object to the fitness or otherwise of the Applicant under section 60 of the Banks Act.

[72] In her version of the conversation with Mr Naidoo, Ms. Lucas-Bull explains in paragraph 155 of Absa's answering affidavit as follows

*"As indicated above, Mr Naidoo concluded that following the meeting of the Governors, if Absa went ahead and submitted the BA02 form, the Authority would likely object to a formal application."*⁷

[73] In my view, the presented facts do not reveal a substantive factual dispute. The First Respondent and Absa have provided conflicting interpretations regarding their comprehension of the matter at issue. It is reasonable for the Applicant to infer that there exists an understanding between the parties: if the First Respondent endorses the candidate, the procedures outlined in section 60 of the Banks Act will be enacted; conversely, if the First Respondent withholds support, section 60 will not be invoked. In their answering affidavit, Absa asserts that "the Absa Board would obviously never propose a person for appointment as chairman who might elicit an objection from the Authority."

[74] To the extent that the First Respondent wishes to raise a dispute of fact, it has failed to show that the dispute is genuine.

The Legal principles governing declaratory orders

[75] The prerequisites for issuing a declaratory order are well-established. The core principles governing declaratory orders are outlined in Section 21(1)(c) of the Superior Courts Act 10 of 2013. It states:

⁷ Paragraph 155 of the Second and Third Respondents' Answering Affidavit.

Persons over whom and matters in relation to which Divisions have jurisdiction

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law, take cognisance, and has the power –

(a)

(b)

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.’

[76] The respondents contest the granting of the declarator on several grounds, including that the declaration is incompetent as there exists no actual dispute between the parties involved, rendering it moot.

[77] The courts had on numerous occasions dealt with the contention that there must exist an actual dispute between the parties for the court to grant a declaration. More than sixty years ago, in *Ex Parte Nell*.⁸, the Appellate Division held in particular to section 19(1)(a)(c) of the Supreme Court Act 59 of 1959(the predecessor of section 21 (1)(c) of the Superior Courts Act:

‘For the granting of a declaration of rights in terms of the provisions of section 19 (1) (c) of the Supreme Court Act, an existing dispute is not a prerequisite to the jurisdiction under this section. There must, however, be interested parties in order that the declaratory order should be binding’.⁹

[78] In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*,¹⁰ Jafta JA, writing for the unanimous court, held as follows:

‘Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the court that he/she is a person

⁸ 1963 (1) SA 754 (A).

⁹ Ibid at p754.

¹⁰ [2006] 1 All SA 103 (SCA).

interested in an “existing, future or contingent right or obligation” and nothing more is required (*Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam* 1995 (4) SA 1 (A) at 14F). In *Durban City Council v Association of Building Societies* 1942 AD 27 Watermeyer JA with reference to a section worded in identical terms said at 32:

“The question whether or not an order should be made under this section has to be examined in two stages. First the court must be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation’, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.”¹¹

[79] Also, Basson AJ writing in *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another*¹² approved the principle as laid down in *Ex Parte Nell* :

‘The absence of a live dispute may militate against the granting of a declaratory order. This is, however, not a hard and fast rule. In *Ex Parte Nell*, the Appellate Division held that an existing dispute was not a prerequisite for the granting of a declaratory order. This, however, does not mean that the court does not retain its discretion to refuse to grant a declaratory order in the absence of a live dispute. In *Oakbay*, the High Court followed a similar approach and pointed out that a court is not precluded from granting a declaratory order where there exists uncertainty about a legal question and where it is more practical for a court to decide the issue “without there being an already existing dispute’.¹³

[80] In their heads of argument, the respondents contended that the Applicant has not demonstrated the existence of any right, whether it be existing, future, or contingent. They argued that the Applicant does not possess the right to be heard until he is officially nominated. I disagree. The Applicant has shown that he is an interested party and that the First Respondent, being a juristic person responsible for supervisory

¹¹ Ibid at para 16.

¹² 2019 (3) SA 1 (CC).

¹³ Ibid para 82.

and regulatory functions in the financial sector, will be bound by the decision of this Court.

[81] In *Cordiant*, the learned judge held at paragraph 17 that:

‘It seems to me that once the applicant has satisfied the court that he/she is interested in an “existing, future or contingent right or obligation”, the court is obliged by the subsection to exercise its discretion. This does not, however, mean that the court is bound to grant a declarator but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors. In my view, the statement in the above dictum, to the effect that once satisfied that the applicant is an interested person, “the Court must decide whether the case is a proper one for the exercise of the discretion” should be read in its proper context. Watermeyer JA could not have meant that in spite of the applicant establishing, to the satisfaction of the court, the prerequisite factors for the exercise of the discretion the court could still be required to determine whether it was competent to exercise it. What the learned Judge meant is further clarified by the opening words in the dictum which indicate clearly that the enquiry was directed at determining whether to grant a declaratory order or not, something which would constitute the exercise of a discretion as envisaged in the subsection (cf *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 93A-E).’

[82] In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*¹⁴, the court held as follows:

‘It is quite clear that before it makes a declaratory order, a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.’¹⁵

¹⁴ 2005 (2) SA 359 (CC).

¹⁵ Ibid para 107.

[83] Both respondents argue that section 60 of the Banks Act was not triggered; as a result, Section 60 is not available to the Applicant. The First Respondent is mandated in terms of section 60(5) of the Banks Act, upon receipt of a written notice of the nomination of any person for appointment as a chief executive officer, director or executive officer by a bank, to, should it deem that the appropriate, object to the proposed appointment by means of a written notice, stating the grounds for the objection, given to the chairperson of the board of directors of the bank and the nominee, within 20 working days of receipt of the notice. According to the provisions set forth in the Banks Act, the First Respondent will issue its response to the nomination only after receiving formal written communication of the nomination from the bank.

[84] In this case, the First Respondent's very robust and exceptional investigation into the circumstances surrounding the Applicant's resignation from the AGA board has resulted in an inability to consider the Applicant for nomination. Absa determined that there was no practical benefit in nominating the Applicant, given the clear or implied indication from the First Respondent of its non-support for the Applicant if he were to be nominated.

[85] It does not avail to the First Respondent to argue that their activism before the triggering of the section 60 process in the Banks Act is supported by the provisions of Principle 13 of the Basel Committee Guidelines on Corporate Governance for Banks, requiring the First Respondent to exercise oversight of governance within the banks they regulate. Such an injunction cannot be argued to override and circumvent the provisions located within the Banks Act and, in particular, section 60 of such Act.

[86] I am of the considered view that the First Respondent by its conduct created a barrier for the Applicant's nomination to serve before it where, within the processes of section 60 of the Banks Act, the First Respondent could have examined the suitability or otherwise of the Applicant for the position to which Absa sought to nominate him.

[87] The submission by Absa that the Applicant had not been nominated for the Chairperson position but was merely identified as one of the two potential candidates

for such nomination is, in the light of all the evidence before me, correct even if somewhat contrived. It is overwhelmingly evident that two names were on the verge of recommendation to the First Respondent: namely, that of the Applicant and Mr Moloko. And for laudable considerations, the Applicant was the preferred candidate for the chairperson position. However, for the investigation that the First Respondent initiated before the formal notification of the Applicant's nomination, the name of the Applicant would have gone through the section 60 process.

[88] I conclude that the Applicant was poised to be nominated for the Chairperson position of Absa. There does not appear to be any credible evidence before me to gainsay this position.

[89] The Applicant asserts that he serves as a director of Absa and holds positions on several other boards. He contends that not only have his prospects of being appointed as Chairperson been thwarted, but his reputation has also suffered significantly. As a result, he seeks a declaratory order against the authority *“as a prelude to taking further actions against it, including a potential claim for damages as a consequence of its unlawful conduct”*.

[90] The Applicant further claims that the First Respondent's conduct and the Applicant's exercise of the right to challenge such conduct ultimately culminated in his removal from the Absa Board. The legality of this removal is currently challenged through separate review proceedings in this court.

[91] The Applicant emphasises the critical role of regulators, specifically the First Respondent and the SARB, in maintaining financial stability. Their primary objective is to ensure the safety and soundness of financial institutions, market infrastructures, and the protection of financial consumers. However, the Applicant argues that the regulators' involvement in governance matters concerning independent private entities must be measured and justifiable within the scope of their regulatory mandates. Balancing oversight with the autonomy of these institutions is essential to uphold both regulatory objectives and the integrity of the private sector.

[92] The Applicant avers that the regulators must operate strictly within the confines of the authority granted by section 60 of the Banks Act, ensuring that they do not infringe upon the rights of individuals or entities. Their actions must remain aligned with their statutory mandate, refraining from any unauthorised activities or inefficiencies that fall outside the parameters established by the legislature. As public institutions, they must be required to act in an accountable and transparent manner.

[93] The respondents assert that the declaratory order is incompetent in that it would have no practical effect, other than serving as an advisory on the Applicant's prospects of success in a future claim for damages. The matter is moot between the parties; therefore, the court should refuse to grant the declaratory relief.

[94] In *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs*¹⁶, the court held:

'The general principle is that a matter is moot when a court's judgment will have no practical effect on the parties. This usually occurs where there is no longer an existing or live controversy between the parties. A court should refrain from making rulings on such matters, as the court's decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical and have no direct effect; one of the reasons for that rule being that a court's purpose is to adjudicate existing legal disputes and its scarce resources should not be wasted away on abstract questions of law. In *President of the Republic of South Africa v Democratic Alliance*, the Constitutional Court cautioned that 'courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision, now'.

However, this principle is not an absolute bar against deciding moot matters. An appeal court has a discretion to decide a matter even if it has become academic or moot in circumstances where 'the interests of justice require that it be decided'. In *Independent Electoral Commission v Langeberg Municipality*, the Constitutional Court held as follows:

¹⁶(104/2022) [2023] ZASCA 35.

“This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.”

It is so that the courts, in a number of cases, have dealt with the merits of an appeal, notwithstanding the mootness of the dispute between the parties. Those cases involved legal issues ‘of public importance . . . that would affect matters in the future and on which the adjudication of this court was required’.¹⁷

[95] Goliath J dealing with mootness in *Tlouamma and Others v Speaker of the National Assembly of the Parliament*¹⁸ expressed herself as follows:

‘Section 21(1)(c) of the Superior Courts Act No. 10 of 2013, provides that a Division of the High Court has the power “*in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*”. The question of mootness is relevant to a court in exercising its discretion to grant a declaratory order. In the exercise of its discretion, the applicable legal principles are as follows: Mootness is not an absolute bar in deciding an issue, and the question is whether the interests of justice require that it be decided. The general principle is that a court may decline to issue a declaratory order for the purpose of answering a hypothetical, abstract or academic question. Furthermore, a relevant consideration is whether the order that the court may make will have any practical effect on the parties or others.’¹⁹

¹⁷ Ibid para 12 to 14.

¹⁸ *Tlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another* [2016] 1 All SA 235 (WCC); 2016 (2) BCLR 242 (WCC).

¹⁹ Ibid para 101.

[96] In *Agribee Beef Fund Ltd and Another v Eastern Cape Rural Development Agency and Another*²⁰, the Constitutional Court held that:

'a matter is moot 'where the issues are of such a nature that the decisions sought will have no practical effect or result. The factors that bear consideration when determining whether it is in the interest of justice to hear a moot matter include whether any order which it may make will have some practical effect either on the parties or on others, the nature and extent of the practical effect that any possible order might have, the importance of the issue, the complexity of the issue, the fullness or otherwise of the arguments advanced, and resolving disputes between different courts'²¹

[97] I am of the view that this matter raises a discrete legal issue of public importance that would affect matters in the future and requires the adjudication of this court, notwithstanding the mootness of the issues between the parties. The relief sought by the applicant is justified.

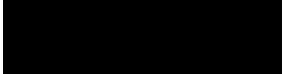
[98] In the results, the following order is granted:

a. It is declared that:

1. The First Respondent acted unlawfully and in excess of its powers per the Banks Act 94 of 1990 by engaging in an informal process with the Second and Third Respondents in connection with the nomination of the Applicant as Chairperson of the Second and Third Respondents' board of directors, and in particular by notifying the Second and Third Respondents of its objection, alternative intention to object to the Applicant's nomination.
2. The First, Second and Third Respondents shall pay the applicants' costs, such costs to include the costs of two counsel.

²⁰ 2023 (6) SA 639 (CC).

²¹ Ibid para 24.



FLATELA LULEKA

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the handed down is deemed to be 10h00 on 13 June 2025

APPEARANCES:

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Milovanovic-Bitter

Instructed by Webber Wenzel Attorneys:

Date of the Hearing: 14 October 2024

Date of the Judgement: 13 June 2025