



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 266/24

In the matter between:

**FAMOUS IDEA TRADING 4 (PTY) LIMITED  
t/a DELY ROAD COURIER PHARMACY**

Applicant

and

**GOVERNMENT EMPLOYEES MEDICAL SCHEME**

First Respondent

**CHAIRPERSON OF THE BOARD OF TRUSTEES  
OF THE GOVERNMENT EMPLOYEES  
MEDICAL SCHEME**

Second Respondent

**BOARD OF TRUSTEES OF THE GOVERNMENT  
EMPLOYEES MEDICAL SCHEME**

Third Respondent

**MARARA PHARMACY (PTY) LIMITED  
t/a MEDIPOST PHARMACY**

Fourth Respondent

**PHARMACY DIRECT (PTY) LIMITED**

Fifth Respondent

**HH DURRHEIM (PTY) LIMITED  
t/a MEDIPOST PHARMACY**

Sixth Respondent

**Neutral citation:** *Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Courier Pharmacy  
v Government Employees Medical Scheme and Others* [2026]  
ZACC 5

**Coram:** Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J,  
Musi AJ, Rogers J, Savage AJ, Theron J and Tshiqi J

**Judgment:** Musi AJ (unanimous)

**Heard on:** 28 August 2025

**Decided on:** 11 February 2026

**Summary:** Rule 53 record — review jurisdiction — reviewability of tender award — government employees medical scheme — exercise of private power — review of commercial contract

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## **ORDER**

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On application for leave to appeal against the order and judgment of the High Court of South Africa, Gauteng Division, Pretoria:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel where so employed.

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## **JUDGMENT**

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MUSI AJ (Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Savage AJ, Theron J and Tshiqi J concurring):

### *Introduction*

[1] This is an application for leave to appeal against a judgment and order of the High Court of South Africa, Gauteng Division, Pretoria (High Court), in which it dismissed two applications: a review application and an application to compel the first respondent, the Government Employees Medical Scheme, to produce a record in terms

of rule 53 of the Uniform Rules of Court (rule 53).<sup>1</sup> The genesis of the matter is the reviewability of a decision by the first respondent not to award a tender to render courier pharmacy services (tender) to the applicant.

### *Parties*

[2] The applicant is Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Courier Pharmacy (Famous Idea), a private company incorporated in accordance with the laws of South Africa. The first respondent is the Government Employees Medical Scheme, a medical scheme registered in terms of section 24(1) of the Medical Schemes Act<sup>2</sup> (MSA). The second respondent is the chairperson of the first respondent's board of trustees. The third respondent is the board of trustees of the first respondent. I shall henceforth refer to these three respondents collectively as GEMS.

[3] The fourth respondent is Marara Pharmacy (Pty) Ltd t/a Medipost Pharmacy (Marara); the fifth respondent is Pharmacy Direct (Pty) Ltd (Pharmacy Direct); and the sixth respondent is HH Durrheim (Pty) Ltd t/a Medipost Pharmacy (Medipost). These respondents are private companies incorporated in terms of the company laws of South Africa. No relief is sought against Medipost.

### *Factual background*

[4] During 2022, GEMS issued an invitation for tender applications for the appointment of a service provider who would render courier pharmacy services. Famous Idea was among the entities that submitted a tender in response to this invitation. Marara and Pharmacy Direct formed a joint venture (JV) and submitted a joint tender, while Famous Idea and Medipost submitted their respective tenders independently.

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<sup>1</sup> *Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Courier Pharmacy v Government Employees Medical Scheme*, unreported judgment of the Gauteng High Court, Pretoria, Case No B1205/2023 (5 February 2024) (High Court judgment).

<sup>2</sup> 131 of 1998.

[5] The JV and Medipost were ultimately appointed by GEMS and Famous Idea's tender was rejected. Aggrieved by the outcome, Famous Idea decided to litigate.

### *Litigation history*

[6] On 9 March 2023, Famous Idea launched a review application, in terms of rule 53,<sup>3</sup> in which it sought to challenge GEMS' decisions to reject its bid and to award the tender to the JV. Additionally, it sought an order that it be awarded the tender. In the alternative, it sought an order compelling GEMS to conclude a contract with it; and failing that, it sought an award of compensation and/or damages.

[7] In its founding affidavit, Famous Idea averred that it sought the setting aside of the impugned decisions in terms of the Promotion of Administrative Justice Act<sup>4</sup> (PAJA), or legality, or the common law. GEMS refused to file the record in terms of rule 53. Instead, it filed a rule 6(5)(d)(iii)<sup>5</sup> notice in which it raised two questions of law. First, it contended that the impugned decisions were not susceptible to judicial

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<sup>3</sup> Rule 53(1) reads:

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

- (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
- (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so.”

<sup>4</sup> 3 of 2000.

<sup>5</sup> Rule 6(5)(d) provides:

“Any person opposing the grant of an order sought in the notice of motion shall—

...

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

review on any of the bases advanced by Famous Idea. Second, it contended that some of the relief sought was incompetent. For present purposes, only the first contention is relevant.

[8] Dissatisfied with GEMS' refusal to produce the record, Famous Idea filed a notice in terms of rule 30A seeking to compel GEMS to do so. GEMS delivered a notice, in terms of rule 30, alternatively rule 30A, contending that Famous Idea's notice to compel constituted an irregular step. This was followed by an application by GEMS to set aside Famous Idea's application to compel because it constituted an irregular step. Famous Idea then launched its own rule 30A application seeking to compel GEMS to disclose the record. The application to compel was opposed by GEMS and the JV.

[9] Pursuant to a case management meeting, the parties agreed to file a joint practice note. In that note, they requested the High Court to determine the first issue raised in GEMS' notice in terms of rule 6(5)(d)(iii), Famous Idea's application to compel and GEMS' application to set aside Famous Idea's notice and application to compel. GEMS submitted that the rule 6(5)(d)(iii) issue should be argued first as its resolution would be dispositive of the other interlocutory applications. GEMS further contended that the rule 6(5)(d)(iii) notice raised a jurisdictional objection which had to be determined at the outset. Famous Idea disagreed and contended that the alleged jurisdictional issue was in substance a defence on the merits of the review application and should be adjudicated as part of the merits.

### *High Court*

[10] GEMS argued that the High Court lacked jurisdiction to adjudicate the matter, on the basis that GEMS' decisions were not reviewable on any of the grounds advanced by Famous Idea. This argument was based on GEMS' contention that it was not obliged to provide a record, as it was neither an organ of state, nor exercising public power when making the impugned decision, which thus was not reviewable. In support of its

contention, GEMS relied on the judgment of Supreme Court of Appeal in *GEMS v Public Protector*.<sup>6</sup>

[11] Although Famous Idea pleaded that its review is based on the PAJA, legality or the common law, it submitted that the matter could be decided as a common law review, without regard to the public law grounds and stated that it was unnecessary for the High Court to decide whether the decisions are reviewable under public law (i.e. the PAJA or legality), because (so the applicant contended) GEMS was obliged to deliver the rule 53 record even if the decisions are reviewable under common law. It contended further that the *GEMS v Public Protector* decision was irrelevant at this stage, as reviewability under the PAJA, the legality principle, or common law was a question on the merits of the main application. It invoked *Computicket*,<sup>7</sup> *Standard Bank*<sup>8</sup> and *Richards Bay*<sup>9</sup> in support of that submission. Famous Idea argued that once a rule 53 application was launched, disclosure of the record is triggered under the same rule and further triggered by the court having jurisdiction to hear the application. Famous Idea further contended that the rule 6(5)(d)(iii) notice was incompetent because it may not be utilised in rule 53 proceedings.

[12] The High Court stated that the issue to be decided was whether GEMS was obliged (and should be ordered) to produce the record in terms of rule 53. The High Court rejected Famous Idea's contention that GEMS' use of rule 6(5)(d)(iii) was incompetent. It held that GEMS was entitled to show cause why its decisions ought not to be reviewed. It reasoned that the entitlement to show cause was not circumscribed and did not preclude a respondent's right to show cause by virtue of a dispositive legal question which is the very purpose of rule 6(5)(d)(iii).

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<sup>6</sup> *Government Employees Medical Scheme v Public Protector of the Republic of South Africa* [2020] ZASCA 111; [2020] 4 All SA 629 (SCA); 2021 (2) SA 114 (SCA) (*GEMS v Public Protector*).

<sup>7</sup> *Competition Commission v Computicket* [2014] ZASCA 185 at para 20.

<sup>8</sup> *Competition Commission v Standard Bank of South Africa Ltd* [2020] ZACC 2; 2020 (4) BCLR 429 (CC) at paras 120-1.

<sup>9</sup> *Commissioner for the South African Revenue Service v Richards Bay Coal Terminal (Pty) Ltd* [2023] ZASCA 39 at para 28.

[13] After considering whether GEMS was exercising a public power or performing a public function, the High Court concluded that “quintessentially, the impugned decision is simply a commercial decision relating to the procurement of services by a medical scheme”.<sup>10</sup>

[14] The High Court considered *POLMED HC*,<sup>11</sup> and distinguished it from the present matter on the basis that the Court in *POLMED HC* ordered production of the record without first determining whether it had jurisdiction in the review. It found that it is unnecessary to have regard to the merits of the main application in order to resolve the jurisdictional challenge.

[15] With regard to the common law reviewability of GEMS’ decisions, the High Court held that “[a] dangerous precedent would be set if it were to be held that the decisions taken by private parties to appoint service providers are capable of being reviewed”.<sup>12</sup> It further held that there is a difference between the situation of private parties inviting tenders for services from a public procurement process, where parties know beforehand that their information will be disclosed should a decision be reviewed. It concluded that the impugned decisions were not reviewable in terms of the common law. It consequently held that there was no basis to compel GEMS to produce the record and that GEMS’ rule 6(5)(d)(iii) point should be upheld with costs and that Famous Idea’s application to compel should be dismissed. The High Court subsequently dismissed Famous Idea’s application for leave to appeal with costs due to lack of reasonable prospects of success, and an application for leave to appeal to the Supreme Court of Appeal suffered the same fate.

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<sup>10</sup> High Court judgment above n 1 at para 18.

<sup>11</sup> *Metropolitan Health Corporate (Pty) Ltd and Others v South African Police Service Medical Scheme and Another*, unreported judgment of the Gauteng High Court, Pretoria, Case No 60445/2021 (9 May 2023).

<sup>12</sup> High Court judgment above n 1 at para 27.

*In this Court*

[16] Famous Idea seeks leave to appeal the judgment of the High Court. It further seeks condonation for the late filing of its application for leave to appeal and for leave to file a replying affidavit.

[17] Famous Idea challenges the High Court's judgment on various grounds, including that the Court erred in not finding that Famous Idea had demonstrated that the Court's jurisdiction was engaged. It contends that the jurisdictional question ought properly to have been determined during the adjudication of the merits, once the record was produced. It relies on *Murray*<sup>13</sup> and *POLMED FC*<sup>14</sup> in support of these submissions. It points out that it had set out a factual basis to sustain its assertion that the impugned decisions are reviewable. Additionally, it submits that its case was not confined to the common law grounds of review, but also included public law review grounds. Procedurally, it argues that GEMS' rule 6(5)(d)(iii) notice was incompetent. It disavows any reliance on section 27 of the Constitution.<sup>15</sup>

[18] GEMS contends that this Court's constitutional jurisdiction is not engaged. However, it concedes that this Court's general jurisdiction might be engaged due to the existence of divergent judgments in *Murray* and *POLMED FC* on the one hand and the High Court's judgment in the present matter, on the other. The JV did not budge from its contention that neither our constitutional nor general jurisdiction is engaged.

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<sup>13</sup> *Murray v Ntombela* [2024] ZASCA 24; [2024] 2 All SA 342 (SCA); 2024 (4) SA 95 (SCA).

<sup>14</sup> *South African Police Service Medical Scheme ("POLMED") v Metropolitan Health Corporate (Pty) Ltd*, unreported judgment of the Gauteng High Court, Pretoria, Case No A288/2023 (6 February 2025). In this case, a Full Court dismissed an appeal against *POLMED HC*.

<sup>15</sup> Section 27, headed "Health care, food, water and social security" reads:

“(1) Everyone has the right to have access to—  
(a) health care services, including reproductive health care.”

*Directions*

[19] This Court issued directions for the parties to file written submissions on the following question: whether, if the High Court was entitled to determine prior to the production of the record in terms of rule 53(1)(b) that GEMS was not exercising a public power subject to review in terms of rule 53, it was correct in its determination that GEMS was not exercising a power subject to review in terms of rule 53.

*Issues*

[20] The issues that fall to be decided are—

- (a) whether condonation ought to be granted for the late filing of the application for leave to appeal;
- (b) whether leave should be granted to file a replying affidavit;
- (c) whether this Court has jurisdiction to entertain the matter and, if so, whether leave to appeal should be granted and the related question of mootness;
- (d) whether rule 6(5)(d)(iii) is applicable in the context of review proceedings instituted in terms of rule 53;
- (e) whether the decisions taken by GEMS constitute administrative action;
- (f) whether GEMS exercised a public power or function when procuring goods and services;
- (g) if not, whether GEMS' decision is reviewable under private law; and
- (h) whether rule 53 is applicable to private law reviews.

*Condonation*

[21] The application for leave to appeal was filed one day late. Famous Idea states that the application was filed on 4 September 2024, but was rejected by the Registrar because it was not served on Medipost. Famous Idea was under the impression that it need not serve the application on Medipost, because the latter had not participated in the proceedings before the High Court and the Supreme Court of Appeal. On 5 September 2024, the application was served on Medipost and duly filed.

[22] The condonation application is unopposed. The explanation is adequate and the delay is not long. There is no prejudice to the respondents. It is in the interests of justice that the application be granted. Accordingly, condonation is granted.

*Leave to file a replying affidavit*

[23] Famous Idea applies for leave to file a replying affidavit. Rule 19 of this Court's Rules does not make provision for the filing of a replying affidavit and a party is therefore not entitled, as of right, to file a replying affidavit. The application is strenuously opposed. Famous Idea contends that the replying affidavit is necessary primarily because the mootness issue raised by GEMS and the JV was not raised in the High Court, when the application for leave to appeal was argued during May 2024, which was months after GEMS alleges the contract lapsed. In addition, Famous Idea seeks to address other matters raised in the answering affidavit filed by GEMS and the JV.

[24] GEMS and the JV point out that the mootness issue was expressly mentioned in their opposing papers in the Supreme Court of Appeal. They contend that Famous Idea was therefore aware of the issue and should have dealt with it in its founding affidavit in this Court. They further contend that Famous Idea followed an incorrect process by incorporating the purported replying affidavit in its application to have it admitted. They argue that Famous Idea should have sought the permission of this Court first before filing the purported replying affidavit.

[25] My conclusion on the issue renders it unnecessary to pronounce on the process issue raised by GEMS and the JV. The applicant was less than candid in asserting that it was unaware of the mootness issue. This issue was directly mentioned in GEMS' and the JV's answering affidavits in the Supreme Court of Appeal. The applicant also sought to address issues beyond the mootness issue. This would be prejudicial to GEMS and the JV, because they had already filed answers to the founding affidavit and would

not get a chance to respond to the replying affidavit. Leave to file the proposed replying affidavit is refused with costs.

*Submissions on jurisdiction*

[26] Famous Idea contends that this Court’s constitutional and general jurisdiction are engaged.<sup>16</sup> It submits that this Court’s constitutional jurisdiction is engaged because its right to administrative action that is lawful, reasonable and procedurally fair, in terms of section 33(1) of the Constitution, has been infringed. It further argues that by dismissing the review and interlocutory applications, without giving Famous Idea an opportunity to consider the rule 53 record and supplement its founding affidavit if required, the High Court deprived it of its section 34 right to have its dispute resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.<sup>17</sup>

[27] In respect of general jurisdiction, it contends that the matter raises an arguable point of law. It submits that *Murray* was a split decision and that in *POLMED FC*, it was found that the High Court’s decision in this matter was incorrect. Furthermore, the question whether the Court should entertain a rule 6(5)(d)(iii) notice challenging its jurisdiction when the record has not been produced must be definitively decided by this Court. It urges the Court to consider its application favourably in the interests of justice, citing, amongst others, its prospects of success on the appeal. It submits that it is

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<sup>16</sup> Section 167(3) of the Constitution reads as follows:

“The Constitutional Court—

...

(b) may decide—

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.”

<sup>17</sup> Section 34 of the Constitution reads:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

currently hamstrung as it cannot prosecute its review due to the dismissal of the main application. It contends that if the High Court’s decision is left unchallenged, many review applications in terms of rule 53 would be frustrated by rule 6(5)(d)(iii) notices. Further, it argues that the question whether GEMS was insulated from any review, including on the basis of the common law, raises an important legal issue.

*Jurisdiction and leave to appeal*

[28] As to the section 33(1) argument, Famous Idea alleges that its application is grounded in the PAJA. It may not rely directly on section 33, in terms of the principle of subsidiarity. This Court stated in *New Clicks*<sup>18</sup> that section 33 entrenches the right to administrative action that is lawful, reasonable and procedurally fair. The PAJA was enacted to give effect to the rights contained in section 33.<sup>19</sup> This Court held—

“[a] litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect to by means of national legislation.”<sup>20</sup>

[29] This principle was echoed in *My Vote Counts*<sup>21</sup> where this Court held:

“Subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail.”<sup>22</sup>

[30] This Court further held:

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<sup>18</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC).

<sup>19</sup> *Id* at para 95.

<sup>20</sup> *Id* at para 96.

<sup>21</sup> *My Vote Counts v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC).

<sup>22</sup> *Id* at para 46.

“These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution’s embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.”<sup>23</sup>

[31] As to section 34, the right to have a dispute determined by a court or tribunal is indispensable for the promotion and advancement of access to justice. In *Barkhuizen*,<sup>24</sup> Ngcobo J said:

“Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court.”<sup>25</sup>

[32] This Court has said that access to court—

“ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. . . . As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.”<sup>26</sup>

[33] The rule of law envisages access for all to a competent and impartial court or tribunal that intends to ensure effective access to a fair hearing. The question whether Famous Idea is entitled to the rule 53 record raises constitutional issues. It implicates

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<sup>23</sup> Id at para 53.

<sup>24</sup> *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

<sup>25</sup> Id at para 31.

<sup>26</sup> *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC) at para 22.

the right to access to court.<sup>27</sup> The question whether GEMS was exercising a public power also engages our constitutional jurisdiction because “the definition of administrative action under PAJA must be ‘construed consistently’ with the right to administrative justice in section 33 of the Constitution”.<sup>28</sup>

[34] In *Paulsen*,<sup>29</sup> Madlanga J provided a comprehensive exposition of the circumstances under which this Court’s general jurisdiction is engaged. GEMS’ concession that this Court’s general jurisdiction is engaged is well-founded. The issue whether decisions which are neither administrative action nor the exercise of a public power or the performance of a public function are reviewable in terms of the common law is an arguable point of law of general public importance, which ought to be considered by this Court, as is the question of whether rule 53 is applicable to the common law review of the decisions of private bodies. The arguments raised on the issue have a measure of plausibility and there are sufficient prospects of success. In the circumstances, it is in the interests of justice that leave to appeal be granted.

### *Mootness*

[35] GEMS and the JV argue that the matter is moot. They contend that the agreement entered into as a result of the impugned decision was for a period of one year, commencing on 1 January 2023, and subject to annual renewal. Accordingly, so the argument goes, the initial agreement constituting the subject-matter of the relief claimed by Famous Idea expired on 31 December 2023. They submit that the matter is moot because it no longer presents an existing or live controversy and will have no immediate practical effect.

[36] This Court has held:

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<sup>27</sup> *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at para 10.

<sup>28</sup> *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) (*Motau*) at para 35 and *New Clicks* above n 18 at para 100.

<sup>29</sup> *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

“A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court’s decision or which would be resolved by a court’s decision. A case is also moot when a court’s decision would be of academic interest only.”<sup>30</sup>

[37] Mootness is not an absolute bar to the justiciability of an issue. This Court has discretion and may entertain a moot appeal, where the interests of justice so require.<sup>31</sup>

[38] The contract reads:

“18.1 The contract term shall be for a period of 12 months (the Initial Period). The contract shall commence on 1 January 2023 or any other date agreed in writing between the parties during negotiations.

18.2 Prior to the expiration of the initial period, GEMS may elect to renew this Agreement for a further one (1) year period by giving the Service Provider at least 3 months prior notice thereof in writing, failing which this Agreement shall automatically expire at the end of the term. This Agreement shall be capable of renewal for a maximum of four (4) successive periods of one (1) year each.”

[39] It is common cause that the contract was renewed in terms of its stipulations. Any subsequent contract derives its legal force from the initial contract. It is evident that the parties agreed that *this* agreement may be renewed. The parties’ rights and obligations were still governed by the terms of the initial contract. The matter is not moot.

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<sup>30</sup> *Minister of Tourism v Afriforum NPC* [2023] ZACC 7; 2023 (6) SA 752 (CC) at para 23.

<sup>31</sup> *Police and Prisons Civil Rights Union v South African Correctional Services Workers’ Union* [2018] ZACC 24; 2018 (11) BCLR 1411 (CC); 2019 (1) SA 73 (CC) at para 44 and *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum and Exploitation (SOC) Ltd* [2020] ZACC 5; 2020 (4) SA 409 (CC) at paras 47-8.

*Is rule 6(5)(d)(iii) a competent procedure in rule 53 applications?*

[40] Famous Idea argues that a rule 6(5)(d)(iii) notice is an incompetent procedure in rule 53 applications before the record has been produced. It avers that many reviews in terms of rule 53 would be frustrated if rule 6(5)(d)(iii) notices were allowed before the record is produced.

[41] Rule 6 governs all applications including those under rule 53. Rule 53 does not proscribe the filing of a rule 6(5)(d)(iii) notice. In fact, rule 53(1)(a) enjoins a respondent to show cause why a decision or proceedings should not be reviewed. A legal point raised in a rule 6(5)(d)(iii) notice constitutes a legitimate mechanism through which a respondent may discharge the obligation. I agree with the High Court that—

“[a] contrary interpretation would, bizarrely, entail that a respondent would never be entitled to oppose a review in terms of Rule 53 by virtue of a dispositive anterior legal question, be it in terms of rule 6(5)(d)(iii) or otherwise.”<sup>32</sup>

[42] A rule 6(5)(d)(iii) notice is a procedural mechanism available to a respondent to resist an application that is devoid of legal grounds. The respondent may raise the legal point *in limine* (preliminary legal objection) at the outset. The court does not have to consider the merits. It will consider the allegations in the founding affidavit as established facts. This is a potent procedural right as it enables the early disposal of applications without requiring the respondent to file an answering affidavit. It is also a cost-effective procedure. Serving a rule 6(5)(d)(iii) notice before the record has been produced in rule 53 proceedings is competent and was correctly invoked in this matter.

[43] I agree with the minority judgment in *Murray* that:

“A respondent in motion proceedings is entitled to file a notice under rule 6(5)(d)(iii) that she intends to raise a specified question of law. The rule requires this notice to be filed within 15 days of notifying the applicant of her intention to oppose. Under

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<sup>32</sup> High Court judgment above n 1 at para 24.

rule 53(4), an applicant in review proceedings may file an amended notice of motion and supplemented founding affidavit within ten days of being given access to the record of the impugned decision. These comparative time periods demonstrate that the rules presuppose that a notice under rule 6(5)(d)(iii) will precede any supplemented founding affidavit filed by an applicant for review under rule 53.”<sup>33</sup>

*Joint practice note*

[44] The matter was submitted for adjudication by the High Court on the basis of the joint practice note. The respondents allege that during oral argument and in its written submissions in the High Court, the applicant submitted that the matter could be decided as a common law review, without regard to the public law grounds. According to GEMS and the JV, the High Court consequently decided the matter based on the common law ground only. In its written submissions in the High Court, Famous Idea argued that “GEMS is obliged to deliver the rule 53 record even if the decisions are reviewable under the common law”. It further stated that “[t]he only issue before this Court (in this interlocutory application) is whether GEMS is obliged (and should be ordered) to deliver the rule 53 record”. Famous Idea was of the view that GEMS should be compelled to submit the record even if its review application was brought in terms of the common law. It did not contend that the reviewability or jurisdiction issue be adjudicated exclusively on the common law ground.

[45] In this Court too, in oral argument, Famous Idea submits that the issue of the production of the record can be determined without regard to the public law review grounds. It appears to me that Famous Idea is referring to the determination of its application for the production of the record and not the anterior question raised by GEMS: whether the court’s jurisdiction to adjudicate the case as a review was established by Famous Idea.

[46] Insofar as Famous Idea asserts that the only issue submitted for determination by the High Court was whether GEMS is obliged to deliver the rule 53 record, it is wrong.

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<sup>33</sup> *Murray* above n 13 at para 64.

In terms of the joint practice note, the parties agreed that the issue whether the Court had jurisdiction to adjudicate the review was in dispute and that the High Court would be requested to determine it, since it might be dispositive of the entire issue.<sup>34</sup> Famous Idea is bound by that agreement.

[47] Although GEMS and the JV argue that the High Court disposed of the matter on the common law review grounds only, the judgment reflects that the High Court considered the public law grounds when it dealt with the jurisdictional issue, and concluded that GEMS' decision is a commercial decision (and therefore not an administrative one). It is only thereafter that it dealt with the common law grounds.

### *Reviewability*

[48] GEMS and the JV contend that the impugned decisions do not constitute administrative action, and when GEMS took the decisions it was not exercising a public power or performing a public function. They further contend that GEMS' decision amounts to the exercise of private power and is not reviewable under the common law. Therefore, the High Court did not have jurisdiction to adjudicate the matter on review.

[49] Famous Idea contends that GEMS was exercising a public power, *inter alia* (among other things), because it operates in terms of the MSA, it was formed by and is controlled by the government and it receives approximately 75% of its finances from the government. It further argues that the jurisdiction issue is an issue that should be considered with the merits of the review and not at the stage when the production of the record is sought. Additionally, it argues that, in any event, it established that the High Court had territorial jurisdiction to determine the dispute.

[50] In *Standard Bank*,<sup>35</sup> this Court had to decide whether the Competition Appeal Court, as a court of first instance, could order the production of the

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<sup>34</sup> *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC) at paras 58-62.

<sup>35</sup> *Standard Bank* above n 8.

rule 53 record when its jurisdiction to determine the review was challenged. In a minority judgment, Theron J said:

“The question then is whether Boqwana JA could have ordered the production of the record before deciding whether the Competition Appeal Court had jurisdiction to hear the review application. The answer must be no. Although the information contained in the record might later be relevant to determining jurisdiction once Standard Bank has supplemented its founding papers, Boqwana JA should have first decided the question of jurisdiction on the founding papers before her. Her failure to do so could result in the order which she issued being a nullity should the Competition Appeal Court find that it is incompetent to hear the review application as a court of first instance. This would have irrevocable implications in the context of this case. Compliance with the Boqwana JA order would have required the Commission to disclose the record of its investigation, giving Standard Bank the information which it sought. No subsequent court order could have changed that outcome.”<sup>36</sup>

[51] The majority agreed with this exposition:

“As mentioned, we agree with the first judgment that the appeal should succeed. Where the jurisdiction of the court before which a review application is brought is contested, a ruling on this issue must precede all other orders. This is because a court must be competent to make whatever orders it issues. If a court lacks authority to make an order it grants, that order constitutes a nullity. Scarce judicial resources should not be wasted by engaging in fruitless exercises like making orders which cannot be enforced.”<sup>37</sup>

[52] In *Richards Bay*,<sup>38</sup> this Court, relying on the reasoning in *Standard Bank*, found that when a court exercises its discretion not to entertain a review, the review is not to be considered. This Court reasoned:

“Where review jurisdiction is not exercised, the right to a rule 53 record falls away. This negates the need for the rule 53 record, since the purpose of the record is to assist

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<sup>36</sup> Id at para 118.

<sup>37</sup> Id at para 201.

<sup>38</sup> *Commissioner, South African Revenue Service v Richards Bay Coal Terminal (Pty) Ltd* [2025] ZACC 3; 2025 (5) SA 617 (CC); 2025 (6) BCLR 639 (CC).

a party in advancing its prosecution of the review and to assist a court in performing its constitutionally entrenched review function. Therefore, a party is not entitled to the production of a rule 53 record if a court has refused to exercise its review jurisdiction.”<sup>39</sup>

[53] In *Murray*, the first and second respondents, who were husband and wife, bought an immovable property from a company. Despite the full purchase price being paid by the respondents, the property was not transferred into their names. A few years later the company was put in liquidation. The applicants, who were appointed as liquidators, refused to register the property in the names of the respondents, instead they decided to sell it at auction. The respondents instituted review proceedings in terms of rule 53. The liquidators delivered a rule 6(5)(d)(iii) notice asserting that their decision is not reviewable, because they had neither exercised a public power nor performed a public function when they made the decision. They refused to produce a rule 53 record, and alternatively they stated further that in any event there is no record to produce.

[54] The respondents filed an application in terms of rule 30 alternatively 30A, seeking to set aside the rule 6(5)(d)(iii) notice as an irregular step and also sought an order compelling the liquidators to produce a record of the impugned decision. Although the liquidators initially relied on this Court’s judgment in *Standard Bank*, they subsequently disavowed reliance on it. The majority (Petse DP, Mabindla-Boqwana and Molefe JJA) (main judgment) correctly stated, with reference to *Standard Bank*, that rule 53 provides for a procedure that follows as a matter of course after the issuance and service of a review application except in limited circumstances where the court’s jurisdiction to hear the review has to be determined first. The main judgment held that the fact that the review application may be doomed to fail, because the relief sought therein is legally untenable matters not at the stage before the production of the record. The issue of jurisdiction, so it reasoned, will only be ripe when the substantive merits of the review are considered. Nonetheless, it accepted that where the jurisdiction of the

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<sup>39</sup> Id at para 154. See also *United Manganese of Kalahari (Pty) Ltd v Commissioner of the South African Revenue Service and four other cases* [2025] ZACC 2; 2025 (5) BCLR 530 (CC) at paras 53-5.

court is challenged it must determine that issue upfront. It stated that it had jurisdiction to determine the review by dint of section 169 of the Constitution.<sup>40</sup>

[55] The main judgment concluded that requiring the Court to enter into the substantive merits of the review prior to the production of the record would have the potential to disarm applicants in review proceedings, and would likely frustrate their pursuit of a review against the impugned decision. It distinguished *Standard Bank* on the facts and concluded that its jurisdiction had been accepted without question. It opined that the fact that the liquidators requested it to adjudicate its rule 6(5)(d)(iii) notice setting out the points of law attested to the fact that its jurisdiction was not contested.

[56] The minority, per Kathree-Setiloane and Keightley AJJA (second judgment), disagreed with the main judgment insofar as the main judgment found that the only exception to the general rule, namely, that an applicant is entitled as of right to the record of the impugned decision, is when the jurisdiction of the reviewing court is called into question. It opined that the main judgment's approach was too narrow. It held that the rule 6(5)(d)(iii) notice should be considered as a preliminary point which does not

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<sup>40</sup> Section 169 reads:

- “(1) The High Court of South Africa may decide—
  - (a) any constitutional matter except a matter that—
    - (i) the Constitutional Court has agreed to hear directly in terms of section 167 (6)(a); or
    - (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
  - (b) any other matter not assigned to another court by an Act of Parliament.
- (2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for—
  - (a) the establishing of Divisions, with one or more seats in a Division; and
  - (b) the assigning of jurisdiction to a Division or a seat within a Division.
- (3) Each Division of the High Court of South Africa—
  - (a) has a Judge President;
  - (b) may have one or more Deputy Judges President; and
  - (c) has the number of other judges determined in terms of national legislation.”

require the court to enter into the merits of the review. In its view the main judgment erred in characterising the liquidator's case as an attempt to subvert the general principle.

[57] The second judgment made plain that the liquidators were not asking the court to determine whether on the facts of the case the respondents had justifiable grounds to sustain a review of their decision under the PAJA. Instead, the question was whether the liquidators' decision to resile from an executory agreement, rather than elect to enforce it, constituted administrative action and was therefore reviewable. The minority judgment held that if the legal question were determined in the liquidators' favour, it would follow that the rule 53 procedure had no application, and the respondents would have no right to insist on access to the record.

[58] The *POLMED* matter similarly concerned a decision taken by a medical scheme which had refused to produce a rule 53 record of its decision. The High Court<sup>41</sup> directed it to produce the record. Dissatisfied with the High Court's ruling, POLMED appealed to the Full Court. POLMED argued that its decision was not reviewable in terms of the PAJA. It contended that the issue of the reviewability of the impugned decision affected the jurisdiction of the High Court to adjudicate the review application.

[59] The Full Court<sup>42</sup> held that *Murray* was authority for the proposition that the nature of a specific defence raised constitutes an enquiry into the merits and that the High Court had jurisdiction under the circumstances. It opined that an enquiry into whether POLMED was an organ of state or whether its decision constituted administrative action would be premature before the record was produced. Since the review application had been instituted in a High Court with territorial jurisdiction as well as jurisdiction over the person, so the Full Court reasoned, the filing of the record should follow as a matter of course. It concluded that the High Court's judgment in the

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<sup>41</sup> *POLMED HC* above n 11.

<sup>42</sup> *POLMED FC* above n 14.

present case (*Famous Idea*) had been wrongly decided. It thus dismissed POLMED's appeal.

[60] *POLMED FC* and the majority judgment in *Murray* misunderstood this Court's judgments. In *Standard Bank*, Theron J said that a review court must be able to assert its jurisdiction based on the founding papers.<sup>43</sup> Where no facts are alleged in the founding papers upon which review jurisdiction could be established, the applicant is not entitled to the production of the record in the hope that it will clothe the court with the necessary jurisdiction.<sup>44</sup> The purpose of examining the case made out in the founding papers is to determine whether the alleged facts, in law, clothe the court with review jurisdiction. It is not about whether the review is good or bad on the merits, but whether it is properly a review case at all.

[61] In the majority judgment in *Standard Bank* it was stated:

“Therefore, the rule enables an applicant to raise relevant grounds of review, and the court adjudicating the matter to properly perform its review function. However, for a court to perform this function, it must have the necessary authority. It is not prudent for a court whose authority to adjudicate a review application is challenged to proceed to enforce rule 53 and order that disclosure should be made, before the issue of jurisdiction is settled. The object of rule 53 may not be achieved in a court that lacks jurisdiction.”<sup>45</sup>

[62] A “ground” or “relevant ground” is a legal basis used to validate a claim.<sup>46</sup> Any ground must be supported by relevant factual material. Litigants who seek to review a decision have to identify both the facts upon which they base their cause of action, and the legal basis of their cause of action.<sup>47</sup> If litigants allege that a decision is reviewable

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<sup>43</sup> *Standard Bank* above n 8 at para 119.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at para 203.

<sup>46</sup> *Richards Bay* above n 38 at para 111.

<sup>47</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 27.

based on the PAJA, legality or the common law, they should clearly set out the factual basis for each review ground.

[63] If a party does not establish in its founding affidavit that the court has review jurisdiction to adjudicate the subject matter of the controversy, it is not entitled to a “review” record. If a party wants to review a decision based on the PAJA, it must allege that the decision constitutes administrative action and why it says so. If a party fails to lay a factual basis for the review ground, it will have failed to engage the court’s review jurisdiction. Jurisdiction as used in *Standard Bank* and *Richards Bay* encapsulates territorial, personal and subject-matter jurisdiction. The challenge to a court’s jurisdiction may be made in terms of rule 6(5)(d)(iii) and that issue must be determined upfront before the record is produced.

[64] In *Gcaba*, this Court accepted the definition of jurisdiction as the “power or competence of a court to hear and determine an issue between parties”.<sup>48</sup> It pointed out that jurisdiction is determined on the pleadings and not the substantive merits of the case. This Court held:

“In the event of the court’s jurisdiction being challenged at the outset (*in limine*), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court.”<sup>49</sup>

[65] The jurisdictional challenge raised in *Murray*, *POLMED* and the present matter concerned the court’s jurisdiction to adjudicate the subject matter of the application on

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<sup>48</sup> *Gcaba v Minister of Safety and Security* [2009] ZACC 26; 2010 (1) BCLR 35 (CC); 2010 (1) SA 238 (CC) at para 74.

<sup>49</sup> *Id* at para 75.

review, rather than its constitutional jurisdiction to entertain and determine review applications generally. In my view, the majority judgment in *Murray* was incorrectly decided. The correct approach is that adopted in the minority judgment. Consequently, *POLMED*, which followed *Murray*, must be regarded as having been wrongly decided. I now turn to consider whether there is merit in the jurisdictional challenge in this matter.

[66] Decisions are reviewable under the PAJA if they fall within the definition of “administrative action”. Administrative action is defined in the PAJA as follows:

“‘administrative action’ means any decision taken, or any failure to take a decision, by—

- (a) an organ of state, when—
  - (i) exercising a power in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect.”<sup>50</sup>

[67] In *Motau*, this Court said the concept of “administrative action” is the threshold requirement for engaging in administrative law review.<sup>51</sup> It went on to say:

“The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that

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<sup>50</sup> Section 1(i) of the PAJA.

<sup>51</sup> *Motau* above n 28 at para 33.

has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.”<sup>52</sup>

[68] In terms of section 239 of the Constitution “organ of state” means—

- “(a) Any department of state or administration in the national, provincial or local sphere of government; or
- (b) Any other functionary or institution—
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”

[69] GEMS is not an organ of state; it is a medical scheme established in terms of the MSA. It is a restricted medical scheme open only to certain persons who qualify for membership in terms of its rules. Does GEMS exercise a public power or perform a public function?

[70] In *Calibre Clinical Consultants*,<sup>53</sup> which involved a procurement decision by a bargaining council, the Supreme Court of Appeal surveyed some common law jurisdictions in order to discern the characteristics of a body exercising a public power. It concluded that a bargaining council is a voluntary association created for the benefit of its members and expressed reservations as to whether such a body can be said to be publicly accountable for procurement of services for the benefit of its members.<sup>54</sup> It accordingly held:

“I do not find in the implementation of such a project any of the features that have been identified in the cases as signifying that it is subject to judicial review. When implementing such a project a bargaining council is not performing a function that is

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<sup>52</sup> Id.

<sup>53</sup> *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* [2010] ZASCA 94; [2010] 4 All SA 561 (SCA); 2010 (5) SA 457 (SCA).

<sup>54</sup> Id at para 41.

‘woven into a system of governmental control’ or ‘integrated into a system of statutory regulation’. Government does not ‘regulate, supervise and inspect the performance of the function’, the task is not one for which ‘the public has assumed responsibility’, it is not ‘linked to the functions and powers of government’, it is not ‘a privatisation of the business of government itself’, there is not ‘potentially a governmental interest in the decision-making power in question’, the council is not ‘taking the place of central government or local authorities’, and most important, it involves no public money. It is true that a government might itself undertake a similar project on behalf of the public at large – just as it might provide medical services generally and pensions and training schemes to the public at large – but the council is not substituting for government when it provides such services to employees with whom it is in a special relationship.”<sup>55</sup>

[71] Although *GEMS v Public Protector*<sup>56</sup> involved a complaint lodged by one of GEMS’ members with the Public Protector and therefore the relationship between the member and GEMS, the court had to decide whether GEMS performed a public function. This was a jurisdictional fact to vest the Public Protector with jurisdiction to investigate the complaint. Whilst the facts of this case are distinguishable from those in *GEMS v Public Protector*, I am of the view that both in principle and precedent that case is applicable and instructive. It is persuasive and of assistance in determining the function performed by GEMS in this case. This is so because it is the function, rather than the functionary, that is important in assessing the nature of the action.<sup>57</sup>

[72] The Supreme Court of Appeal made pertinent unassailable findings of a general nature with regard to GEMS’ powers and functions. It found that the business of a medical scheme does not appear to encompass the performance of a public or government function or the exercise of public power. It held—

- (a) GEMS is a restricted medical scheme and only employees qualifying to be registered as members and their dependants may be registered as beneficiaries of the scheme;

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<sup>55</sup> Id at para 42.

<sup>56</sup> *GEMS v Public Protector* above n 6.

<sup>57</sup> *Motau* above n 28 at para 36.

- (b) the rules of the scheme are not of general application as they only apply to a restricted class of persons;
- (c) although membership is restricted to government employees, such membership is not compulsory – qualifying government employees may therefore join other medical schemes;
- (d) GEMS operates as a health insurance provider, it is a body corporate, it is managed by a board of 12 trustees – the fact that 50% of the trustees are appointed by the Minister does not mean that the government exercises control over GEMS; and
- (e) GEMS' rules may be changed by the trustees without regard to the Minister.<sup>58</sup>

[73] To all of these should be added that the government contributes to GEMS *qua* (in the capacity of) employer. If an employee joins any other medical scheme the government will pay such scheme as part of its contribution on behalf of the member. In any event, state funding is not a determinative indicator that a body or its functions are public. Many indisputably private bodies such as cultural bodies receive state funding; this does not make them governmental in nature.<sup>59</sup> GEMS must compete with other medical schemes to attract members from the public sector. There is no warrant to subject GEMS to greater scrutiny just because its members are government employees. For these reasons, GEMS' decision to procure services for the benefit of its members is not administrative action; it did not exercise a public power or perform a public function when it procured the services of a courier. The PAJA and legality would thus not be applicable and the High Court had no review jurisdiction in terms of these pathways.

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<sup>58</sup> *GEMS v Public Protector* above n 6 at paras 22-3.

<sup>59</sup> *Mullins v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin); [2006] ISLR, SLR-30; (2006) ACD 2 at para 35.

*Private law review*

[74] While there is no bright line between public and private law, courts in the United Kingdom have generally been reluctant to interfere in the affairs of private bodies. Courts have understandably been reluctant to adopt the fully developed rigour of the principles of judicial review of administrative action in a contractual context.<sup>60</sup> Nonetheless, in the context of domestic tribunals based on contractual relationships, courts can and do interfere when the tribunal has disregarded its own rules or the fundamental principles of justice.<sup>61</sup>

[75] In *Turner*,<sup>62</sup> a matter concerning a disciplinary tribunal of a voluntary association, the Court said:

“In the case of a statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment, while in the case of a tribunal created by contract, the obligation derives from the expressed or implied terms of the agreement between the persons affected. The test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term in a contract. . . . The test is, of course, always subject to the expressed terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified.”<sup>63</sup>

[76] In *Aga*,<sup>64</sup> the Supreme Court of Canada held that jurisdiction to intervene in the affairs of a voluntary association depends on the existence of a legal right which the court is asked to vindicate.<sup>65</sup> Legal rights which can ground jurisdiction include private (law) rights – rights in property, contract, tort or unjust enrichment – and statutory

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<sup>60</sup> *Braganza v BP Shipping Limited* [2015] UKSC 17; [2015] 4 All ER 639 (*Braganza*) at para 20.

<sup>61</sup> *Jockey Club of South Africa v Feldman* 1942 A.D. 340 at 350-1.

<sup>62</sup> *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A).

<sup>63</sup> *Id* at 645H-646A.

<sup>64</sup> *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga* 2021 SCC 22; [2021] 1 SCR 868.

<sup>65</sup> *Id* at para 3.

causes of action.<sup>66</sup> Where a party alleges that a contract exists, they would have to show that there was an intention to form contractual relations.<sup>67</sup>

[77] Despite their reluctance to interfere in the affairs of private entities, courts do sometimes intervene in private contracts where one of the parties exercises decision-making or adjudicative powers. They emphasise that a decision-maker does not have an unfettered discretion to subject the other party to its whims and fancies without observing “certain fundamental principles of fairness which underlie our system of law”.<sup>68</sup> In *Product Star (II)*, it was stated:

“For purposes of judicial review, the court is concerned to judge whether a decision-making body has exceeded its powers, and in this context whether a particular decision is so perverse that no reasonable body, properly directing itself as to the applicable law, could have reached such a decision. But the exercise of judicial control of administrative action is an analogy which must be applied with caution to the assessment of whether a contractual discretion has been properly exercised. The essential question always is whether the relevant power has been abused. Where A and B contract with each other to confer a discretion on A, that does not render B subject to A’s uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary inquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application.”<sup>69</sup>

[78] In *Thandroyen*,<sup>70</sup> the Court found that the principles of natural justice will apply, in the realm of contract, only if the parties have imported them into their contract. Parties will not be held to have done so unless the contract has set up something in the

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<sup>66</sup> Id at para 29.

<sup>67</sup> Id at para 34.

<sup>68</sup> *Turner* above n 62 at 636.

<sup>69</sup> *Abu Dhabi National Tanker Co v Product Star Shipping Ltd* [1993] 1 Lloyd’s Rep 397 at 404.

<sup>70</sup> *Thandroyen v Sister Annuncia* 1959 (4) SA 632 (N).

nature of a tribunal (which may be a tribunal of one) to decide matters affecting them. The Court held that such a tribunal will be bound by the principles of natural justice, unless the parties have in their contract provided otherwise, but if the contract does not set up such a tribunal, there will be no room for the application of the principles of natural justice, whether on the ground of public policy or otherwise.<sup>71</sup>

[79] In *Damsell*,<sup>72</sup> the common law principles were summarised as follows:

“Where in a contract a right or benefit that may accrue to one party is made dependent upon the holding of a particular opinion by the other party, it is implied that such opinion must be both honestly and reasonably formed.

It does not follow *ex lege* [(by virtue of law)] in every such case that the subordinate party is entitled to invoke the rules of natural justice and to be heard or that he has the remedy of a judicial review in the event of a dispute.

It is only when on a proper construction of the contract one party is set up as a tribunal or adjudicator with decision-making powers in regard to the rights of another party, that the rules of natural justice or fundamental fairness apply.

This will be the implication if the relevant contractual terms, properly interpreted, appear to postulate a decision to be made upon an examination and consideration of facts, circumstances or other objective or subjective factors, some of which may be potentially in dispute.

Such an implication will follow unless there are clear indications in the contract that the parties intended to vest the arbiter with an absolute and unfettered discretion.

However, the employment of words like ‘in the opinion of’ as opposed to words such as ‘determination’ or ‘decision’, is not such a contrary indication, for the word ‘opinion’ does not necessarily connote an absolute and unfettered discretion: it may also mean a judgment, conclusion or belief founded on factual evidence and circumstances or probabilities.

Generally, the test for determining whether the rules of fundamental fairness are to be implied as having been tacitly agreed between the parties is the usual test for implying

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<sup>71</sup> Id at 639H-640A.

<sup>72</sup> *Damsell v The Southern Life Association Ltd* (1992) 13 ILJ 533 (C).

a term as laid down in *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A) and *Van den Berg v Tenner*.<sup>73</sup>

[80] The courts have sought to ensure that the decision-maker's contractual powers are not abused.<sup>74</sup> This is done by limiting the decision-maker's discretion to ensure that it is exercised honestly, and in good faith, but having regard to the terms of the contract, it must not be exercised arbitrarily, capriciously or unreasonably.<sup>75</sup> In *Socimer*,<sup>76</sup> it was stated that the discretion will be limited as a matter of necessary implication, by concepts of honesty, good faith and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality.<sup>77</sup> Generally, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it.<sup>78</sup> The courts will, depending on the contractual terms, imply a term that the principles of natural justice should be observed by the decision-maker.

[81] The Supreme Court of the United Kingdom explained the principle thus:

“Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such

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<sup>73</sup> Id at 539. *Van den Berg v Tenner* is reported at 1975 (2) SA 268 (A).

<sup>74</sup> *Braganza* above n 60 at para 18.

<sup>75</sup> *Product Star (II)* above n 69 at 404.

<sup>76</sup> *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116; [2008] 1 Lloyd's Rep 558.

<sup>77</sup> Id at para 66.

<sup>78</sup> *British Telecommunications Plc v Telefonica O2 UK Ltd* [2014] UKSC 42; [2014] 4 All ER 907 at para 37.

powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.”<sup>79</sup>

[82] When tender conditions pursuant to a public invitation for the procurement of goods and services by private entities, like GEMS, stipulate that the acceptance of those conditions constitute a contract between the procurer and the tenderer, the latter may subsequently claim, depending on the contractual terms, that the rules of natural justice should be implied as a term of their contract. However, for such a case to deserve judicial intervention the aggrieved party will have to prove the existence of a contract.

[83] In *Aga*, it was held that there is no free-standing right to procedural fairness.<sup>80</sup> Natural justice is not a source of jurisdiction. Rather, where there is a legal right at issue, such as a contractual right, natural justice may be relevant to whether that legal right was violated.<sup>81</sup>

### *Conclusion*

[84] GEMS exercised an adjudicatory function when it decided to grant the contract to the JV. The Supreme Court of Appeal has accepted that the tender conditions may in certain circumstances constitute a contract when they are accepted by a tenderer.<sup>82</sup> Famous Idea did not plead that a contract came into being between it and GEMS. It did not plead that the tender conditions constituted a contract between it and GEMS, thereby triggering GEMS’ duty to act honestly, fairly, rationally and not capriciously or arbitrarily. Rather, it sought to review the decision not to award the contract to it. There was therefore no case made out for a quasi-review based on a contractual relationship between Famous Idea and GEMS.

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<sup>79</sup> *Braganza* above n 60 at para 18.

<sup>80</sup> *Aga* above n 64 at para 30.

<sup>81</sup> *Id.*

<sup>82</sup> *Logbro Properties CC v Bedderson N.O.* [2002] ZASCA 135; [2003] 1 All SA 424 (SCA); 2003 (2) SA 460 (SCA) at para 11.

[85] Famous Idea’s reliance on *Bae Estates*<sup>83</sup> is misplaced. In *Bae Estates*, the Court found that Bae Estates, an estate agency, had a legitimate expectation to natural justice because the body corporate had allowed it to do business, undisturbed for over a year, in the scheme. Famous Idea did not plead that GEMS created any expectation.

[86] I disagree with the High Court that the position of private parties inviting tenders for service is different from a public procurement process where parties know beforehand that their information will be disclosed should a decision be reviewed.<sup>84</sup> The same considerations apply in both instances, because a party to a private law tender process ought to foresee that its information might be disclosed in the event of a review. It is always open to such a party to request the court to order that certain sensitive information should not be disclosed. In my view, however, the High Court was nevertheless correct in finding that it did not have jurisdiction to adjudicate the dispute, because Famous Idea did not make out a proper case for determination under the public law or the common law grounds.

[87] Because Famous Idea failed in its founding papers to make out a case that GEMS had exercised a power that was subject to review at common law, it is unnecessary to consider whether – if such a case had been made out – rule 53 would be applicable. This would depend on whether GEMS’ decision was a “decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions” within the meaning of rule 53(1).

[88] The applicant has shown prospects of success. It would be in the interests of justice to grant leave to appeal; however, the appeal ought to be dismissed. There is no reason why costs should not follow the result.

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<sup>83</sup>*Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd* [2021] ZASCA 157; [2022] 1 All SA 138 (SCA); 2022 (1) SA 424 (SCA).

<sup>84</sup> High Court judgment above n 1 at para 28.

*Order*

[89] I therefore make the following order:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel where so employed.

For the Applicant:

S Tshikila, T Kgomo and P Vabaza  
instructed by Malatji and Company  
Attorneys

For the First, Second and Third  
Respondents:

A Bava SC and J W Schabort instructed  
by Geldenhuys Malatji Incorporated  
Attorneys

For the Fourth and Fifth Respondents:

E Kromhout and H P Wessels instructed  
by Van der Merwe and Associates