



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 272/23

In the matter between:

JACOLIEN BARNARD N.O. First Applicant

BEATRICE LINDA MILLS N.O. Second Applicant

and

NATIONAL CONSUMER TRIBUNAL First Respondent

NATIONAL CREDIT REGULATOR Second Respondent

Neutral citation: *Barnard N.O. and Another v National Consumer Tribunal and Another* [2026] ZACC 23

Coram: Madlanga ADCJ, Dambuza J, Goosen AJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J and Theron J

Judgments: Opperman AJ (minority): [1] to [168]
Kollapen J (majority): [169] to [231]

Heard on: 15 May 2025

Decided on: 3 June 2026

Summary: National Credit Act 34 of 2005 — section 148(2)(b) — hearing — participants in a hearing

ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. Each party is to pay its own costs in this Court.

JUDGMENT

OPPERMAN AJ (Dambuza J and Goosen AJ concurring):

Introduction

[1] The applicants, Jacolien Barnard N.O. and Beatrice Linda Mills N.O. (liquidators), are the joint liquidators of CMR Group (Pty) Limited (CMR). CMR was found by the National Consumer Tribunal (Tribunal) to have engaged in conduct prohibited by the National Credit Act¹ (NCA). Both the High Court of South Africa, Gauteng Division, Pretoria (High Court) and the majority of the Supreme Court of Appeal concluded that they lacked jurisdiction to entertain the appeal, as the liquidators had not participated, either personally or through a representative, in the part of the proceedings when oral argument was presented before the Tribunal. This is an application for leave to appeal the order of the Supreme Court of Appeal in which it struck the matter off the roll for lack of jurisdiction.

¹ 34 of 2005.

[2] The National Credit Regulator (NCR) had referred CMR's conduct to the Tribunal prior to its liquidation. Its sole director had deposed to an answering affidavit setting out certain defences, all of which were considered but rejected by the Tribunal at a hearing where the liquidators were absent due to an incorrect diary entry of the set down date by the liquidators. A host of orders were granted against CMR by the Tribunal in the absence of the liquidators. The orders related to liability and remedy. The liquidators did not take issue with the liability orders but noted an appeal in terms of section 148(2)(b) of the NCA² against the remedial orders, contending, amongst other things, that the Tribunal's remedial orders impermissibly altered the vested rights of the creditors in the liquidation.

[3] The key issue in this application is whether the liquidators, despite their physical absence on the day of the final Tribunal hearing, being the day on which the parties were to appear before the Tribunal, may be considered to have been "a participant in the hearing" before the Tribunal. This is critical because, in terms of section 148(2)(b), it is only participants in a hearing who may appeal to the High Court. Both the High Court and the majority of the Supreme Court of Appeal held that actual physical presence by either the litigant or their representative on such day is required to fall within the meaning of the term "participant in a hearing" in the section.³ This was said to constitute a jurisdictional requirement for the noting of an appeal.⁴ The Supreme Court of Appeal held that, given the liquidators' absence when oral argument was presented, they were not participants in the hearing. As such, the only route open to the liquidators was to apply for a rescission of the Tribunal's orders.⁵ It also held that the NCA does not afford a choice of remedy to a party who has failed to participate in the hearing.⁶

² The section is quoted at [56] below.

³ *Barnard v National Consumer Tribunal* [2023] ZASCA 121; [2023] (4) All SA 277 (SCA); 2024 (2) SA 329 (SCA) (SCA judgment) at para 24 and *Barnard N.O. v National Credit Regulator*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No A351/2019 (22 December 2020) (High Court judgment) at para 31.

⁴ *Id.*

⁵ SCA judgment *id* at para 30.

⁶ *Id* at para 29.

Factual background

[4] On 11 January 2017, CMR was registered as a credit provider. CMR conducted a business colloquially known as the “pawn your car and still drive it” scheme. Under the scheme, CMR advanced funds to a consumer against the security of the consumer’s fully paid-off motor vehicle, pursuant to an agreement in terms of which the consumer handed over the registration documents of the vehicle to CMR. CMR registered the vehicle in its name, and the consumer rented the vehicle back from CMR.

[5] In terms of the scheme, a consumer could borrow an amount of up to 50% of the vehicle’s retail value (principal debt) from CMR. The rental payments did not reduce the principal debt. The consumer “pawned” the vehicle for an amount equivalent to the principal debt and CMR “purchased” the vehicle for the principal debt plus a “fee”. In the event that the consumer failed to comply with any of the terms of the agreement, they would forfeit the vehicle to CMR. If the consumer complied with the scheme, the vehicle would, upon payment of the full amount due to CMR, be re-registered back into the consumer’s name.

[6] On 10 March 2017, the NCR initiated an investigation into the business practices of CMR. The investigation focused on agreements relating to its core business, being the aforementioned scheme. The NCR investigated whether the transactions were simulated secured loan agreements under the guise of so-called pawn transactions. In such transactions, possession of the item constituting the security is retained by the customer but the registration of the vehicle was transferred into the name of CMR until the end of the terms of the credit agreement. The NCR alleged that the agreements had cloaked what was effectively interest by referring to it as a monthly rental fee. The NCR alleged that the scheme was in contravention of—

- (a) section 101(1)(d) of the NCA,⁷ read with regulation 42(1) of the NCA Regulations,⁸ in that it charged an excessive amount of interest;
- (b) section 81(2) of the NCA⁹ read with regulation 23A¹⁰ of the NCA Regulations, and section 81(3)¹¹ of the NCA read with section 80(1)(a) of the NCA, in that it failed to conduct affordability assessments and thus granted credit recklessly; and
- (c) section 100(1)(a)¹² read with section 101(1) of the NCA, in that it imposed a prohibited charge.

⁷ Section 101(1) provides:

“A credit agreement must not require payment by the consumer of any money or other consideration, except—

...

- (d) interest, which—
 - (i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and
 - (ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105.”

⁸ Regulations made in terms of the National Credit Act, 2005 GN R489 GG 28864, 31 May 2006 (NCA Regulations). Regulation 42 of the NCA Regulations pertains to the registration requirements for credit providers. It outlines the criteria and procedures for credit providers to register with the NCR, ensuring compliance with the NCA’s provisions.

⁹ Section 81 provides:

- “(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess—
- (a) the proposed consumer’s—
 - (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
 - (ii) debt re-payment history as a consumer under credit agreements;
 - (iii) existing financial means, prospects and obligations; and
 - (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.”

¹⁰ NCA Regulations above n 8. Regulation 23A deals with criteria for affordability assessments.

¹¹ Section 81(3) provides:

“A credit provider must not enter into a reckless credit agreement with a prospective consumer.”

¹² Section 100(1)(a) provides:

“A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of a credit fee or charge prohibited by this Act.”

[7] In November 2018, and in terms of section 57(1)¹³ of the NCA, the NCR referred an application to the Tribunal. The NCR sought the following relief:

- (a) declaring CMR to be in repeated contravention of section 81(2) of the NCA read with regulation 23A of the NCA Regulations; section 81(3) read with section 80(1)(a) of the NCA;¹⁴ section 101(1)(d) read with regulation 42(1) of the NCA Regulations; and section 100(1)(a) read with section 101(1) of the NCA;
- (b) declaring the conduct of CMR in contravention of these sections as prohibited conduct pursuant to section 150(a)¹⁵ of the NCA;
- (c) interdicting CMR from further contraventions of the NCA;

¹³ Section 57 provides:

“Cancellation of registration—

- (1) Subject to subsection (2), a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant repeatedly—
 - (a) fails to comply with any condition of its registration;
 - (b) fails to meet a commitment contemplated in section 48(1); or
 - (c) contravenes this Act.”

¹⁴ Section 80 provides:

“Reckless credit—

- (1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)—
 - (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or
 - (b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that—
 - (i) the consumer did not generally understand or appreciate the consumer’s risks, costs or obligations under the proposed credit agreement; or
 - (ii) entering into that credit agreement would make the consumer over-indebted.”

¹⁵ Section 150 provides:

“Orders of Tribunal—

In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including—

- (a) declaring conduct to be prohibited in terms of this Act.”

- (d) ordering CMR to be audited by an independent auditor to determine the names of the consumers that have to be repaid and the amounts to be repaid;
- (e) the cancellation of CMR's registration as a credit provider; and
- (f) the imposition of a fine.

[8] CMR opposed NCR's application, raising a number of defences¹⁶ in its answering affidavit, the exact nature of which is not relevant to these proceedings. A replying affidavit was filed and thereafter, on 14 February 2019, CMR was voluntarily wound up. The Tribunal hearing was set down for 16 April 2019 and on the same day CMR's attorneys of record withdrew, informing the Tribunal of CMR's liquidation. The matter was postponed on 16 April 2019 to enable the NCR to obtain further information regarding the liquidation.

[9] A copy of the notice of set down for the hearing on 30 July 2019 was sent by email to CMR and one of the court-appointed liquidators, Ms Barnard. On 24 July 2019, Ms Barnard responded to the email. She indicated that she had been

¹⁶ The defences included:

- (a) First, upon a proper interpretation of the transactions and the applicable statutory provisions, the transactions constituted pawn transactions and not simulated transactions of secured loans.
- (b) Second, in the event that the alleged failures or contraventions of CMR were found to be simulated transactions of secured loans and the conduct of CMR was found to constitute "prohibited conduct" as defined in section 1 of the NCA, CMR stated that it, at all material times, dealt openly and honestly with the NCR and conducted its business in a lawful manner.
- (c) Third, CMR stated that the NCR "negligently and in breach of its statutory mandate and the duty of care" to CMR and the public, represented to CMR that its business model was lawful.
- (d) Fourth, CMR alleged that the NCR denied or alternatively infringed its right to just administrative action by its initial decision to register CMR and its subsequent decision to institute the proceedings in that—
 - (i) the NCR failed in its statutory mandate to prevent and detect prohibited conduct at the time when CMR applied for registration as a credit provider;
 - (ii) the administrator within the NCR failed to apply their mind to CMR's application for registration in circumstances where they knew, or reasonably ought to have known, that the business which CMR sought to have registered was unlawful, yet the NCR sought to cancel CMR's registration and impose an excessive fine on CMR; and
 - (iii) the NCR sought to cancel CMR's registration as a credit provider and sought the imposition of excessive and unjust administrative penalties in circumstances where the NCR knew of the prohibited conduct and not only failed to take action, but renewed CMR's registration, thereby leading to further contraventions of the NCA.

appointed as the final liquidator and would appear on 30 July 2019. However, she did not appear on this date and the Tribunal held that the proceedings would, pursuant to rule 24(1)(b)(i) of the Tribunal's Rules¹⁷ (Rules), proceed. It transpired that Ms Barnard had erroneously diarised the date for 31 July 2019 and was thus absent on 30 July 2019.

Litigation history

The Tribunal

[10] On 30 July 2019, the matter proceeded in the absence of the liquidators in accordance with rule 24. The Tribunal, satisfied that CMR had been properly notified of the date, time and venue of the hearing, decided to continue with the hearing in the absence of CMR or its liquidators.

[11] The Tribunal considered the liquidation status of CMR and requested the NCR, which was represented at the hearing by two employees, to make submissions on two questions: (a) whether the application against CMR could continue before the Tribunal by virtue of its change of status; and (b) whether the liquidators needed to be joined as parties to the application. After considering the submissions of the employees of the NCR present at the hearing, the Tribunal ruled on the only two questions raised and held that (a) the matter could proceed and (b) no joinder was required. It reserved its decision on the merits.

[12] The Tribunal delivered its decision on 12 August 2019. In comprehensive reasons, the Tribunal considered all of the evidence contained in the affidavits filed, including the answering affidavit which had been deposed to by the sole director of CMR prior to its winding up. The reasoned decision reveals that on 30 July 2019, the NCR had been represented by two of its employees and there was no representative for CMR. No further witnesses had been subpoenaed or requested to be present. The

¹⁷ Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters Before the National Consumer Tribunal, GN 789 GG 30225, 28 August 2007. Rule 24 is quoted at [106] below.

answering affidavit contained numerous, lengthy arguments regarding the lawfulness of CMR's conduct and whether prohibited conduct took place. These arguments were considered by the Tribunal in its reasoned decision. It even labelled two arguments as points *in limine* (preliminary legal objection) which it disposed of prior to dealing with the merits. The Tribunal based its findings on facts that it found were not in dispute. The Tribunal then granted the following order against CMR (in liquidation):

- (a) CMR's registration as a credit provider was cancelled as of the date of the Tribunal's decision.
- (b) CMR was interdicted from entering into any further credit transactions with consumers or operating as a credit provider.
- (c) All the credit agreements entered into between consumers and CMR were declared reckless. All the consumers' obligations in terms of the scheme agreements were set aside. All the consumers were to be reimbursed with all fees and the charges paid to CMR in terms of those agreements.
- (d) CMR was interdicted from proceeding with any current civil proceedings against consumers under the credit agreements and was to rescind any judgments obtained against any consumers.
- (e) CMR was ordered to appoint an independent auditor at its own cost. The auditor was to determine all the amounts paid by the consumers under the credit agreements with CMR. All the amounts paid were to be reimbursed to the consumers. The auditor was to provide a comprehensive report, regarding the consumers identified and the refunded amounts, to the NCR within 90 days of the Tribunal's decision.

High Court

[13] Following the Tribunal's decision and order, the liquidators appealed to the High Court in terms of section 148(2)(b) of the NCA. They were content with parts of the order in paragraphs 69.1, 69.2 (letters (a) and (b) of the above paragraph) and the first sentence of paragraph 69.3 (letter (c) of the above paragraph) (liability orders). They sought the setting aside of paragraphs 69.4 and 69.5 (letters (d) and (e) of the above paragraph), and paragraph 69.3 save for the sentence, "[a]ll the credit agreements

entered into between consumers and CMR are declared reckless” (remedial orders). The liquidators appealed against the remedial orders only on the grounds that they impermissibly interfered with their statutory and common law rights and obligations to the creditors of CMR. They contended that the Tribunal had misconstrued the orders it could issue against an insolvent company.

[14] Before the High Court, the NCR argued that CMR’s acquiescence in the order was fatal to the appeal. The High Court held that the liquidators did not seek to withdraw any concessions but sought to raise new legal points that were not raised before, nor considered by the Tribunal. The High Court thus concluded that the Tribunal could not have misdirected itself on issues that were never raised or canvassed during the hearing.

[15] The High Court further held that the liquidators ought to have brought their application by way of a variation or rescission application pursuant to rule 24A¹⁸ of the Rules, and not by way of an appeal. This is because an appeal deals with issues fully canvassed before the body a quo, in this instance the Tribunal.

[16] Despite the fact that both parties argued the merits of the appeal before the High Court, it based its judgment on an issue that was never raised by the parties. They were also not called upon to make submissions on the issue. The point related to the jurisdiction of the High Court. The High Court ruled that section 148(2)(b) of the NCA, which regulates the right of appeal of participants in a hearing before the full panel of

¹⁸ Rule 24A provides:

“Variation or rescission of Tribunal orders

- (1) An application for the variation or rescission of a Tribunal order must be made within 20 days of the date on which the applicant became aware of—
 - (a) the Tribunal order which was granted in the absence of the applicant;
 - (b) the ambiguity, error or omission; or
 - (c) a mistake common to the parties to the proceedings; or
 - (d) within such longer period as permitted by the Tribunal.
- (2) An application for rescission or variation in terms of section 165 must be made by way of Form TI.165.”

the Tribunal, was not complied with. The High Court held that being a “participant in the hearing” before the Tribunal is a jurisdictional requirement for the noting of an appeal in terms of section 148(2)(b) of the NCA.¹⁹ No reasons were provided for this conclusion.

[17] The High Court refused leave to appeal. The liquidators applied to the Supreme Court of Appeal for leave to appeal and for condonation for the late filing of that application. The Supreme Court of Appeal directed that the applications be enrolled for oral argument in terms of section 17(2)(d) of the Superior Courts Act.²⁰

Supreme Court of Appeal

The majority judgment

[18] The Supreme Court of Appeal held that “a participant”, as used in section 148(2)(b) of the NCA, denoted physical participation in the hearing, either personally or through a legal representative.²¹ It further held that being a participant did not contemplate merely the consideration of an answering affidavit by the Tribunal in the absence of a party (or its representative) at the hearing before the Tribunal.²²

[19] The Supreme Court of Appeal also held that a party who did not participate in the sense contemplated by it had a remedy in terms of section 165²³ of the NCA, which provides for the rescission or variation of orders granted by the Tribunal that are,

¹⁹ High Court judgment above n 3 at para 31.

²⁰ 10 of 2013.

²¹ SCA judgment above n 3 at para 21.

²² Id at para 24.

²³ Section 165 provides:

“The Tribunal, acting of its own accord or on application by a person affected by a decision or order, may vary or rescind its decision or order—

- (a) erroneously sought or granted in the absence of a party affected by it;
- (b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
- (c) made or granted as a result of a mistake common to all the parties to the proceedings.”

amongst other things, erroneously sought or granted in the absence of a party. It further held that the liquidators should have applied to rescind the order of the Tribunal under section 165 of the NCA, as opposed to appealing it in terms of section 148(2)(b). Additionally, it stated that the fact that the Tribunal decided the matter on the merits would not have precluded the liquidators from seeking to rescind the order pursuant to section 165 on the grounds that it was erroneously granted in their absence. It found that the liquidators had misconstrued their remedy under the NCA, and that the NCA did not give a party a choice on the remedy to adopt in the event of its failure to participate in the hearing.

[20] The Supreme Court of Appeal found further that the liquidators never raised the issue of their non-joinder in the application before the Supreme Court of Appeal, as they clearly considered themselves to be parties before the Tribunal by virtue of having received notice from the Tribunal. The Supreme Court of Appeal concluded that there was no need on the part of the NCR to have formally joined the liquidators to the proceedings, as the High Court had no jurisdiction to entertain the appeal. The Supreme Court of Appeal thus granted condonation but struck the application for leave to appeal from the roll, with the liquidators to pay the costs, including the costs of two counsel.

The minority judgment

[21] The minority held that the liquidation of CMR impacted materially on the future conduct of the proceedings before the Tribunal and that the point of departure was not one of jurisdiction under section 148(2)(b) of the NCA. It found that the High Court had erred in declining to entertain the appeal on the grounds of a lack of jurisdiction under section 148(2)(b) of the NCA. It held that a necessary anterior enquiry arose that ought to have occupied the attention of the High Court, being whether the status of CMR had changed when it was placed under the legal disability of a winding-up order. It concluded that this impacted in a direct and substantial way on its status. It had thus not been open to the Tribunal to proceed as if the liquidation order had not been issued. It therefore concluded that the liquidators were necessary parties to the proceedings before the Tribunal and that their non-joinder was fatal to the NCR's case. In addition,

it found that several of the Tribunal's orders were invalid because they violated the liquidators' rights and duties.

In this Court

Liquidators' submissions

Jurisdiction

[22] The liquidators argue that this matter raises constitutional issues and an arguable point of law of general public importance. For one, section 148(2)(b) of the NCA implicates a party's right of access to courts which, if narrowly interpreted, is infringed. In this regard, they rely on *Spilhaus*,²⁴ where this Court held that a constitutional matter will be raised if it involves the interpretation of a statute which restricts access to courts.²⁵ So, too, they rely on *National Coalition*²⁶ for the proposition that interpreting whether legislation complies with the Bill of Rights is a constitutional matter.

[23] In addition to this Court's jurisdiction being engaged because of the need to interpret section 148(2)(b) of the NCA, the liquidators submit that the NCA is an Act that affects the public, and any restrictive interpretation of the aforementioned provision would restrict the public's access to courts under section 34 of the Constitution. Lastly, they contend that the Supreme Court of Appeal failed to interpret section 148(2) of the NCA through the prism of sections 34 and 39(2) of the Constitution.

[24] The liquidators submit that an arguable point of law that is of general public importance has been raised and it is in the interests of justice to grant leave to appeal for the following reasons. First, this matter involves intersecting laws, being the NCA, the law of insolvency, as well as orders of the Tribunal. Second, the liquidation of CMR would affect future proceedings before the Tribunal. Third, the legal question before

²⁴ *Spilhaus Property Holdings (Pty) Ltd v Mobile Telephone Networks (Pty) Ltd* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC).

²⁵ *Id* at para 15.

²⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC).

this Court is arguable, as is clear from the existence of the majority and minority views of the Supreme Court of Appeal. Last, the general public is significantly impacted by this matter.

[25] The liquidators argue that it is in the interests of justice to grant leave to appeal because, first, no other court has pronounced on these issues. Second, the Supreme Court of Appeal majority judgment restricts access to the High Court on appeal from the Tribunal. Third, many people will be affected by a decision on this issue because insolvent entities will litigate before the Tribunal in future. Fourth, the liquidators argue that there are strong prospects of success on appeal in this Court.

Interpretation of section 148(2)(b) of the NCA

[26] The liquidators argue that the High Court and the Supreme Court of Appeal majority's interpretation of section 148(2)(b) of the NCA violates sections 34 and 166(a)-(c) of the Constitution, as it restricts a party's right of appeal. Similarly, they argue, the High Court and the Supreme Court of Appeal's interpretation of "participant" in section 148(2)(b) of the NCA breaches a person's right of appeal.

[27] The liquidators argue that both the High Court and the Supreme Court of Appeal majority failed to interpret section 148(2)(b) of the NCA constitutionally, and instead applied a textual interpretation devoid of context. They contend that the correct interpretation of "participant" must consider its legislative definition. This specifically deals with the so-called quasi-judicial setting of this matter, as well as the right to appeal to a superior court. Further, the correct interpretation should have regard to section 39(2) of the Constitution, as well as the context within which "participant" fits into the NCA. On such basis, the Supreme Court of Appeal majority's interpretation of "participant", requiring physical presence at a hearing in order to appeal a matter, is flawed. So, too, is the Supreme Court of Appeal majority's reliance on *Lewis*²⁷

²⁷ *National Credit Regulator v Lewis Stores (Pty) Ltd* [2019] ZASCA 190; [2020] 2 All SA 31 (SCA); 2020 (2) SA 390 (SCA).

misplaced for its interpretation of “participant”, as that matter never dealt with such interpretation.

[28] The liquidators argue that the Supreme Court of Appeal was wrong to impose a jurisdictional condition whereby there must be physical participation at the oral argument stage of the proceedings before the Tribunal, notwithstanding delivery of an answering affidavit to the Tribunal and a fully reasoned decision of the Tribunal on the merits.

[29] The Supreme Court of Appeal held that the liquidators had argued that their “participation in the hearing before the Tribunal can be discerned from the notification that Ms Barnard provided to the Tribunal, after CMR filed its answering affidavit, where she indicated that she would attend the proceedings”.²⁸ The liquidators submit that this is simply incorrect. Instead, the liquidators’ contention is that evidence is adduced either by way of affidavit or orally, and that the evidence presented by CMR in this matter was presented to the Tribunal through its director’s answering affidavit. That, they argue, renders CMR a participant in the Tribunal hearing.

[30] Most importantly, they emphasise, such evidence was considered by the Tribunal in rendering its decision and there was thus participation by CMR in the hearing. Section 148(2)(b) of the NCA does not draw a distinction between different modes of proceedings and the Tribunal could receive evidence by way of affidavit or orally. Although section 148(2)(b) of the NCA does not draw a distinction, the liquidators submit that the Tribunal must provide for the two methods of receiving evidence in order to be constitutionally compliant. The liquidators contend that such different processes, and the concomitant effects thereof, were never considered by the Supreme Court of Appeal.

²⁸ SCA judgment above n 4 at para 23.

[31] The liquidators support their arguments by averring that oral argument in motion proceedings does not form part of the record in a court of law and is thus irrelevant to any appeal procedure. Therefore, physical presence at the hearing stage of the proceedings before the Tribunal cannot be a prerequisite for an appeal.

[32] As to the Supreme Court of Appeal's finding that a rescission of the order should have been sought, the liquidators contend that this argument cannot stand as the Rules constitute subordinate legislation that cannot be used to interpret the NCA itself. The liquidators argue that all of the evidence was considered and it was not a situation akin to a default judgment. The liquidators argue that the NCR's reliance on *Katritsis*²⁹ is misplaced. That case, they submit, is distinguishable as it dealt with a default judgment in action proceedings arising from a failure to file a plea, rather than proceedings in which evidence, whether oral or by affidavit, was considered.

[33] The liquidators also rely on *Zuma*³⁰ for the proposition that "participation" should be understood in the context of ensuring that proper procedure is followed, and accordingly submit that the Supreme Court of Appeal majority erred in finding that the liquidators ought to have sought rescission. The liquidators argue that they could not have applied for rescission because the Tribunal relied on CMR's answering affidavit to make its decision on the merits. Therefore, the liquidators could clearly never have been considered truly absent. Moreover, they point out that there is no provision in the NCA that prohibits a party from having an election between a rescission or an appeal if both are competent and available.

²⁹ *Katritsis v De Macedo* 1966 (1) SA 613 (A).

³⁰ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC).

*The NCR's submissions**Jurisdiction*

[34] The NCR submits that the liquidators have sought to characterise this matter as a constitutional issue in circumstances where they never characterised it as one in any of the proceedings leading up to this Court. The NCR submits that the liquidators' affidavits indicate that they merely take issue with the question whether the High Court and the Supreme Court of Appeal interpreted the NCA correctly. It submits that the liquidators' contentions reveal a dispute about the interpretation of the NCA and nothing more. It argues that the mere fact that the dispute involves the interpretation of legislation does not automatically make it a constitutional issue.

[35] The NCR further submits that, even if the liquidators were entitled to invoke section 34 of the Constitution in this Court despite not having raised it previously, section 34 does not take the matter any further. This is so because it does not include the choice of procedure or forum in which access to courts is to be exercised. The NCR argues that the liquidators' complaints do not constitute a limitation of the right of access to courts, but is merely an insistence on following a specific process in order to exercise the right. In other words, the NCR contends that the liquidators are entitled to challenge the Tribunal's orders through section 165 of the NCA but instead incorrectly insist on invoking section 148(2)(b), which, they submit, does not find application in this matter. Further, the NCR argues that the liquidators have failed to establish a constitutional issue.

[36] The NCR also contends that this appeal does not raise an arguable point of law of general public importance, and that the principles of statutory interpretation and of a *concursum creditorum* (gathering of creditors) are all settled in our law. The NCR submits that the true question is whether it is in the interests of justice for leave to appeal to be granted by this Court, and contends that it is not.

[37] The NCR submits that this matter does not raise any issues of public interest or an important issue of principle. It contends that this appeal is solely motivated by the liquidators' objective of avoiding the need to redress the injustice and harm that was caused to the consumers by CMR's conduct. It argues that the liquidators advance their own interests to hold on to unlawful proceeds arising from simulated transactions.

Interpretation of section 148(2)(b) of the NCA

[38] The NCR submits that the purpose of the NCA is, amongst other things, to promote and advance the social and economic welfare of South Africans; to promote a fair, transparent and responsible credit market industry; and to protect consumers. The NCR submits that the NCA must be interpreted in a manner that gives effect to the objectives set out in section 3 of the NCA.

[39] The NCR submits that there is no merit to the liquidators' argument that they participated in the hearing by virtue of CMR having filed an answering affidavit. It submits that default judgment is not confined to the failure to file the necessary documents but also includes a failure to attend the hearing stage of the matter. The NCR submits that the reasons why a rescission application ought to be brought by a party against whom an order was granted in their absence are: first, that such party gets an opportunity to present its submissions on the issues in dispute; and second, the Tribunal is afforded an opportunity to "properly consider the issues and deliver a reasoned judgment in respect of each issue".

[40] The NCR argues that the requirement for actual "participation" in a "hearing" is further indicated by the detailed procedures that are stipulated in the Rules. It submits that to hold that the liquidators participated in the Tribunal's proceedings by virtue of CMR having filed an answering affidavit is to ignore the words used by the Legislature that the party who files an appeal must have participated in the "hearing before the full panel".

[41] The NCR further argues that the constitutional right of access to courts does not and cannot change the meaning of the words used by the Legislature. This is so because section 148(2)(b) of the NCA does not prevent the liquidators from approaching courts and having their disputes determined. The NCR argues that it simply requires the liquidators to use the rescission procedure as opposed to appeal procedure. There is accordingly no limitation of rights, but simply a regulation of how those rights are to be exercised.

The issues for determination

[42] There are three issues that this Court must determine:

- (a) whether this Court has jurisdiction;
- (b) whether it is in the interests of justice that leave to appeal be granted; and
- (c) the meaning of the phrase “participant in a hearing” in section 148(2)(b) of the NCA.

[43] Although arguments on the merits and the competency of the remedial orders granted by the Tribunal against CMR were presented in this Court, this judgment is limited to the anterior issue – the interpretation of the term “participant in a hearing” as it appears in section 148(2)(b) of the NCA. This is because counsel for the liquidators conceded during argument that if this Court were to reach the conclusion that the High Court and the Supreme Court of Appeal erred in their interpretation of “participant in a hearing”, remittal to the Supreme Court of Appeal for a determination on the merits of the appeal would be proper. This concession was correctly made, as it is undesirable for this Court to determine the merits of an appeal as a court of first and last instance, and because no exceptional circumstances exist for this Court to do so.

*Analysis**Jurisdiction*

[44] Recently, in *Sunwest*,³¹ this Court formulated that the threshold question to be answered in every matter where this Court's jurisdiction is sought to be invoked under section 167(3)(b)(i) through section 39(2) of the Constitution is "whether there is a plausible case for supposing that a proper consideration of constitutional factors could lead to a different outcome".³² This Court observed that, in assessing whether its constitutional jurisdiction is engaged, it has on a number of occasions been concerned with the interpretation of the NCA and has similarly considered the link between the NCA and the constitutional objectives which the NCA seeks to achieve.³³ It was concluded in those cases that the principle to be distilled is that, in light of the important constitutional purposes of the NCA, the interpretation of its provisions plausibly brushes up against the normative framework of the Constitution. Thus, it is arguable that the Constitution has to be taken into account. So, although the interpretation in those cases did not ultimately turn on specific constitutional rights or principles, for jurisdictional purposes it was sufficient that the normative framework of the Constitution plausibly had something to say about how the disputed interpretation ought to be resolved. It thus follows from this principle that this Court has constitutional jurisdiction to entertain this application.

[45] *Sunwest* was delivered after this matter was heard. The parties in this matter approached the issue of constitutional jurisdiction on the basis that not all statutory interpretation qualifies as a constitutional matter, which is of course correct, but is now viewed through the test distilled in *Sunwest*. That case explains how statutory interpretation is to be approached and builds on the previous judgments of this Court.

³¹ *Sunwest International (Pty) Ltd v Western Cape Gambling and Racing Board* [2025] ZACC 18; 2025 (11) BCLR 1322 (CC); 2026 (2) SA 9 (CC).

³² *Id* at para 32.

³³ *Id* at para 38. See also *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*) at para 36; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 16; and *Nkata v Firstrand Bank Limited* [2016] ZACC 12; 2016 (4) SA 257 (CC); 2016 (6) BCLR 794 (CC) at paras 94-6.

[46] The liquidators rely on *Chagi*³⁴ for the proposition that not all statutory interpretation qualifies as a constitutional matter, while the NCR relies on the concurring minority judgment of Froneman J in *Mankayi*³⁵ in support of the same principle.³⁶ In *Chagi*, the principle was enunciated that the correct interpretation and effect of a statutory provision is not ordinarily a constitutional matter, but where a debate results in a provision being interpreted so as to give rise to two reasonable constructions (the one being more constitutionally compliant than the other) a constitutional issue is raised.³⁷ In this case there can be no doubt that there are two reasonable constructions, and there is a plausible basis to consider that one of those interpretations is more constitutionally compliant than the other.

[47] In *Mankayi*, this Court held that the proper interpretation of a statute that is alleged to extinguish a common law right of action that gives effect to a constitutional right raises a constitutional issue. In a concurring judgment relied on by the NCR, Froneman J held:

“I respectfully concur in the judgment of Khampepe J, except that my reasons for granting leave and hearing the appeal are slightly different to hers. In my respectful view, the mere fact that the present case concerns the interpretation of a statute is sufficient to bring it within this court’s jurisdiction.”³⁸

[48] So, the NCR incorrectly relies on the concurring judgment of Froneman J in *Mankayi* in support of the *Chagi* principle because Froneman J differs. He suggested that legislative interpretation inevitably engages this Court’s constitutional jurisdiction. He said:

³⁴ *Chagi v Special Investigating Unit* [2008] ZACC 22; 2009 (1) SACR 339 (CC); 2009 (2) SA 1 (CC); 2009 (3) BCLR 227 (CC).

³⁵ *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC); [2011] 6 BLLR 527 (CC).

³⁶ *Id* at paras 119-20.

³⁷ *Chagi* above n 34 at para 14.

³⁸ *Id* at para 117.

“In terms of the provisions of section 39(2) of the Constitution, a court must, when interpreting any legislation, promote the spirit, purport and objects of the Bill of Rights. This constitutional injunction makes it impossible to interpret any legislation other than through the prism of the Bill of Rights. Statutory interpretation is thus inevitably a constitutional matter. It is a legal issue which necessarily involves the evaluation of social and policy choices reflected in legislation.”³⁹ (Footnote omitted.)

[49] He suggested, however, that the real issue that falls for consideration is whether it is in the interests of justice to grant leave, which he expressed in the following terms:

“It is with considerable hesitation and respect that I also suggest that general consideration should be given to whether the time has not arrived to shift the question of whether to grant leave to appeal, in matters where questions of law are involved, more to a debate on *what kind* of constitutional matters this court should hear, rather than on whether these issues of law are constitutional matters in the jurisdictional sense.”⁴⁰ (Emphasis added.)

[50] In *Paulsen*,⁴¹ this Court determined the full scope of its new extended general jurisdiction. In that matter, the interpretation of the NCA was implicated, although the primary focus was the application of the *in duplum* rule.⁴² This Court held:

“At first glance it would seem obvious to base this Court’s jurisdiction on the claim that this matter raises a constitutional issue. That is so because this court has previously found that the interpretation of the NCA implicates constitutional issues.”⁴³

³⁹ Id at para 118.

⁴⁰ Id at para 122.

⁴¹ *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

⁴² In terms of the *in duplum* rule, unpaid interest stops running when it reaches the amount of the unpaid capital.

⁴³ *Paulsen* above n 41 at para 14.

[51] This Court embarked on an interpretation of the general jurisdiction clause. In this matter it is different, because the liquidators have pleaded both constitutional and general jurisdiction.

[52] Nothing in this judgment should be construed as suggesting that the right to access the court system (as distinct from some other independent and impartial forum or tribunal) for the first time and the right to appeal form part of the content of the section 34 right, which is what the liquidators have argued. This is not the basis upon which I have concluded that this Court has constitutional jurisdiction. I have deliberately avoided venturing into that terrain and, although this argument was raised by the liquidators, it is left open.

[53] The question of who is a “participant in a hearing” for purposes of section 148(2)(b) of the NCA is also an arguable point of law with wide public impact beyond the parties’ interests. I reach this conclusion mindful of the fact that the test is bifurcated, being that a point of law must be identified and such point must be arguable.⁴⁴

Leave to appeal

[54] It is in the interests of justice to grant leave to appeal. The question is an important one, since it raises issues about the limits of the High Court’s jurisdiction and the function of the Tribunal created by the NCA. Lastly, the liquidators enjoy reasonable prospects of success, as will shortly unfold.

Interpretative exercise

[55] I cannot do any better than echo the sentiments of Nicholls AJA in *Du Bruyn*⁴⁵ to emphasise how the imperfections of the NCA continue to torment those tasked with interpreting its provisions. She said:

⁴⁴ Id at para 20.

⁴⁵ *Du Bruyn N.O. v Karsten* [2018] ZASCA 143; 2019 (1) SA 403 (SCA).

“That the [NCA] is not a model of clarity, has been bemoaned by the High Court, [the Supreme Court of Appeal] and the Constitutional Court on a number of occasions.”⁴⁶

[56] Section 148 of the NCA reads:

“Appeals and reviews—

- (1) *A participant* in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal.
- (2) Subject to the rules of the High Court, *a participant* in a hearing before a full panel of the Tribunal may—
 - (a) apply to the High Court to review the decision of the Tribunal in that matter; or
 - (b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138 or section 69(2)(b) or 73 of the Consumer Protection Act, 2008, as the case may be.”
 (Emphasis added.)

[57] The majority of the Supreme Court of Appeal effectively held that physical appearance before the Tribunal, even when an affidavit has been delivered and a reasoned decision on the merits ensued, is a jurisdictional prerequisite or condition to confer jurisdiction on the High Court and Supreme Court of Appeal to hear an appeal (the Supreme Court of Appeal’s interpretation). I disagree and conclude that other forms of conduct during the proceedings, but not necessarily at the appearance stage of the proceedings, may constitute participation in a hearing.

[58] In a different context, Sachs J concurred:

“This case illustrates the need for our constitutional jurisprudence to find the space in appropriate cases to move away from unduly rigid compartmentalisation so as to allow

⁴⁶ Id at para 1.

judicial reasoning to embrace fluid concepts of hybridity and permeability in those matters.”⁴⁷

[59] In my view, proceedings before a Tribunal include the appearance stage (the hearing stage ring-fenced in the judgment of my Colleague, Kollapen J (second judgment)). To interpret section 148(2)(b) of the NCA so that “participant in a hearing” is to be assessed with reference to physical presence or absence at the oral argument stage negates the nature and purpose of the Tribunal, curtails its powers and undermines the objects, background and purpose of the NCA.

[60] The second judgment concludes that “[t]here is a need to acknowledge that the Legislature made a choice in confining a right of appeal to a participant in a hearing before a panel of the Tribunal”.⁴⁸ I agree. However, I disagree that the Legislature restricted such participation to physical presence at the hearing (which, in this case, was the oral argument stage only). In my view, such an interpretation impermissibly strains the language of the provision, having regard to the text, context and purpose of the NCA.

[61] The second judgment appears to interpret this judgment as authorising the parties or the Tribunal to dispense with a public hearing. There is no such suggestion. Once again, I agree with the proposition in the second judgment that “[i]t is through this mechanism that the Tribunal is able to fulfil its function of protecting the public from unscrupulous conduct, and doing so publicly serves the important objectives of accountability and fairness which the [NCA] seeks to advance”.⁴⁹ Requiring a physical presence on behalf of the participants at the oral argument stage of the proceedings (as that is all it was in this case) adds a formalistic hurdle, which is inconsistent with the Tribunal’s informal nature and object of expedition. The second judgment’s approach

⁴⁷ *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 142.

⁴⁸ See the second judgment at [229].

⁴⁹ *Id* at [188].

risks undermining this legislative design by re-introducing, through interpretation, precisely the kind of formal procedural threshold that the NCA seeks to relax.

The focal point — the text

[62] Both the High Court and the Supreme Court of Appeal made the focal point of their enquiries the text of section 148(2)(b) of the NCA. It should immediately be noted that the High Court simply quoted section 148(2)(b) and then pronounced, without any reasons, that being a “participant” in the hearing before the Tribunal is a jurisdictional requirement for the noting of an appeal.⁵⁰ Without saying so expressly, the High Court effectively found that physical presence at the stage of the proceedings when oral argument is presented is necessary to afford a party standing for the noting of an appeal.

[63] The Supreme Court of Appeal, although it paid lip service to the so-called interpretative triad (text, context and purpose) and referred to *Endumeni*,⁵¹ applied a restrictive approach in the interpretation process, focussing almost exclusively on a standard definition of the term “participant” according to FindLaw Legal Dictionary.⁵²

[64] In *South African Nursing Council*,⁵³ the Supreme Court of Appeal itself cautioned against the unquestioning use of dictionaries and their limitations in the following terms:

“There is no straightforward attribution of a dictionary meaning of a word as the word’s ordinary meaning so as to construe a statute, subordinate legislation or a contract. The dictionary meaning of a word will often give rise to further questions: for whom is this the ordinary meaning, as used in which community? And the different shades of meaning with which a word has been used, over time, quite often lead to selectivity bias. That is to say, the interpreter chooses the dictionary meaning

⁵⁰ High Court judgment above n 3 at paras 30-1.

⁵¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

⁵² SCA judgment above n 4 at paras 20-1.

⁵³ *South African Nursing Council v Khanyisa Nursing School (Pty) Ltd* [2023] ZASCA 86; 2024 (1) SA 103 (SCA).

that best suits the preferred outcome of the case, rather than the meaning that shows the greatest fidelity to the meaning that best fits what has been written, given what we know as to the institutional originator of the words, what the words are used for, and the larger design of the instrument we are called upon to interpret.”⁵⁴

[65] In the seminal judgment of *Sebola*, this Court considered the objects, background and purpose of the NCA, emphasising provisions which “signal strongly that the legislation must be interpreted without disregarding or minimising the interests of credit providers”.⁵⁵ This Court remarked that the NCA also has a significant impact on aspects of public law, introducing new forms of protection for consumers and expanding on the obligations of the NCR. Significantly, this Court noted that the NCA vests the Tribunal with jurisdiction and that “[a]n appeal lies to the High Court against the Tribunal’s orders”.⁵⁶

[66] Viewing either of the words “participant” or “hearing” as they appear in section 148(2)(b) in isolation leads to a selection of the meaning ascribed by the majority of the Supreme Court of Appeal, not only due to the “selectivity bias” cautioned against in *South African Nursing Council*,⁵⁷ but also because no regard is had to the functioning and powers of the Tribunal, or the context and extent of its powers. No contextual analysis was undertaken, purposive reading applied or consideration given to constitutional values.⁵⁸ While the dictionary meaning of a text is a valuable form of interpretation, it lacks a full contextual and constitutional lens. There is no purposive analysis aligned with the NCA’s objectives, no clear contextualisation within the broader framework of access to justice and no direct application of section 39(2) of the Constitution in a simple dictionary approach.

⁵⁴ Id at para 15.

⁵⁵ *Sebola* above n 33 at para 40.

⁵⁶ Id at para 42.

⁵⁷ *South African Nursing Council* above n 53 at para 15.

⁵⁸ See *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) and *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[67] The liquidators argue that CMR *had participated* in the hearing through the submission of evidence, specifically by filing an answering affidavit, and that this affidavit was considered by the Tribunal in reaching its decision. Therefore, they argue that there was substantive participation, even though there was no physical attendance at the oral argument stage of the proceedings. The argument is thus that CMR presented evidence that was not only received but also considered and evaluated by the Tribunal to conclude that CMR had engaged in prohibited conduct, which makes them a “participant” as contemplated in section 148(2)(b) of the NCA.

What is a hearing?

[68] Section 141(4) provides that the Tribunal should conduct “a hearing” in accordance with the requirements of the NCA. Section 142(1) in turn provides as follows:

“The Tribunal must conduct its *hearings* in public—

- (a) in an inquisitorial manner;
- (b) as expeditiously as possible;
- (c) as informally as possible; and
- (d) in accordance with the principles of natural justice.” (Emphasis added.)

[69] The term “hearing” is not defined in the NCA. In its interpretive exercise, the Supreme Court of Appeal considered only the definition of “participant” and not the definition of the word “hearing”. In their submissions before this Court, the liquidators submitted that—

“a ‘hearing’ in the context of a case before the Tribunal being decided on evidence presented in affidavits, must be interpreted to refer to the ‘hearing of the evidence’, irrespective if a person appeared and presented legal argument.”

[70] The NCR makes no direct submissions on how “hearing” should be defined, but links the concept of a hearing to attendance.

[71] In sum, the NCA, the judgments of the courts a quo and the parties' submissions are unhelpful in arriving at a definition of "hearing". In this denotative vacuum, a useful starting point, though not necessarily determinative, is the literal dictionary meaning of the word:

- (a) The Cambridge Dictionary provides various definitions of the noun "hearing", including "a meeting of a group of people, for example judges or politicians, to hear the facts relating to a legal problem or subject of public interest before they make a decision about it".⁵⁹
- (b) Encyclopaedia Britannica defines "hearing" as "the formal examination of a cause, civil or criminal, before a judge according to the laws of a particular jurisdiction. In common usage, a hearing also refers to any formal proceeding before a court."⁶⁰
- (c) Merriam-Webster Dictionary defines "hearing" in multiple ways as: "opportunity to be heard, to present one's side of a case, or to be generally known or appreciated"; "an act or instance of listening to arguments"; and also as "a proceeding of relative formality at which evidence and arguments may be presented on the matter at issue to be decided by a person or body having authority".⁶¹

It is clear that dictionary definitions can pull either way, and that "hearing" can mean either, or both, a formal proceeding or simply an opportunity to be heard.

[72] The effect of the Supreme Court of Appeal's restrictive interpretation of "participant" in section 148(2)(b) of the NCA is that section 142(1) of the NCA would exclude evidence received prior to the hearing. It also confines the requirements for a "hearing" listed in section 142(1) of the NCA to the final hearing (in this case, the oral argument stage of the proceedings). These requirements stipulate that the hearing

⁵⁹ Cambridge Dictionary "Hearing", available at <https://dictionary.cambridge.org/dictionary/english/hearing>.

⁶⁰ Encyclopaedia Britannica "Hearing", available at <https://www.britannica.com/topic/hearing-law>.

⁶¹ Merriam-Webster Dictionary "Hearing", available at <https://www.merriam-webster.com/dictionary/hearing>.

should occur in an inquisitorial manner, as expeditiously as possible, as informally as possible and in accordance with the principles of natural justice. The requirements listed in section 142(1) of the NCA, in my view, must apply to the entire proceedings from the moment the Chairperson assigns a matter to a member of the Tribunal or to a panel composed of any three members of the Tribunal,⁶² until conclusion of the hearing when written reasons for its decision are issued⁶³ (prior and post phases of the hearing). To suggest that the requirements listed in section 142(1) of the NCA have no application to the phases prior to and after a hearing or that such phases (prior and post) should be conducted in a different manner (that is, accusatorially, formally, at a court of law pace and without the application of the principles of natural justice) would undermine the way the Tribunal is supposed to function, the NCA's structured processes, its sequencing and the purpose of the NCA.

[73] The second judgment proceeds from the premise that a participant in a hearing before a full panel of the Tribunal necessarily entails a hearing at which parties are physically or virtually present. On this view, where a matter is disposed of on affidavits and written submissions alone, there is said to be no hearing at all and, consequently, no "participants in a hearing". While that understanding may reflect a conventional conception of court proceedings, it does not accurately reflect South African appellate practice, nor the broader constitutional and comparative jurisprudence concerning the right to be heard.

⁶² This is done in terms of section 31(1) of the NCA, which provides:

"The Chairperson is responsible to manage the caseload of the Tribunal in terms of this Act or any other legislation, and must assign each application or other matter referred to the Tribunal in terms of this Act or any other legislation to—

- (a) a member of the Tribunal, to the extent that this Act, section 75(5) of the Consumer Protection Act, 2008, or any other legislation provides for a matter to be considered by a single member of the Tribunal; or
- (b) a panel composed of any three members of the Tribunal, in any other case."

⁶³ Section 142(4) of the NCA provides:

"At the conclusion of a hearing, the Tribunal must make an order permitted in the circumstances in terms of this Act, or the Consumer Protection Act, 2008, and must issue written reasons for its decision."

[74] The constitutionality of appellate procedures permitting the disposal of appeals without oral argument was directly considered by this Court in *Shinga*.⁶⁴ The issue concerned (the now repealed) section 309(3A) of the Criminal Procedure Act,⁶⁵ which required criminal appeals to be decided in chambers on written argument unless the High Court considered that the interests of justice required oral argument in open court.

[75] Writing for a unanimous Court, Yacoob J held that the provision was inconsistent with the constitutional right to a fair trial, including the right of appeal, because the default exclusion of open court hearings in criminal appeals undermined public confidence in the administration of criminal justice and detracted from the quality of judicial decision-making in matters of particular gravity. On that basis, the impugned provision was declared unconstitutional and subsequently repealed.

[76] Importantly, however, the Court did not hold that appeals determined on written argument are not “heard” at all. The constitutional infirmity lay in the systemic privileging of paper-based adjudication in criminal appeals, notwithstanding the heightened fair-trial interests at stake. The reasoning presupposed that, prior to its repeal, section 309(3A) lawfully permitted appeals to be disposed of on written submissions alone, subject to a judicial discretion. This confirms that our law historically accepted that appellate adjudication may occur without oral argument, even in criminal matters, and that *viva voce* (oral) submissions were not treated as conceptually indispensable to the existence of an appeal hearing as such.

[77] These authorities underscore that the right to be heard is not inexorably tied to oral advocacy, but may be satisfied through written processes where appropriate.

[78] Our law has also demonstrated that matters may competently be adjudicated without oral argument. During the COVID-19 pandemic, practice directives issued by

⁶⁴ *Shinga v the State; O’Connell v the State* [2007] ZACC 3; 2007 (2) SACR 28 (CC); 2007 (4) SA 611 (CC); 2007 (5) BCLR 474 (CC) at paras 28 and 31.

⁶⁵ 51 of 1977.

the Judge President of the High Court of South Africa, Gauteng Division, provided that appeals and applications would, as a default position, be disposed of on paper, relying solely on written heads of argument, unless a judge directed otherwise. In my view, such practices did not suggest that these matters fell outside the category of hearings.

[79] Against this background, the second judgment's assertion that there is no participation in a hearing where a court considers affidavits and written submissions without oral argument cannot, as a general proposition, be sustained. While oral argument may often enhance adjudication, particularly in complex or constitutionally sensitive matters, our law has consistently recognised that the essence of being "heard" lies in the substantive consideration of a party's case by the adjudicative body, rather than in physical presence or *viva voce* evidence alone.

[80] The existence of participation in a hearing does not depend on the modality through which submissions are advanced, but on whether the dispute is adjudicated on the basis of material placed before the decision-maker. This is especially so when the concept of a hearing is transposed from a court-centric context to that of a specialist tribunal operating under a statutory mandate of informality and expedition. The same principles permeate both, but how they give expression to those principles may permissibly differ in degrees of formality. A formal appearance by a representative may be required in one, but not in the other.

Nature of the Tribunal

[81] Both tribunals and courts of law uphold the principle of open justice by affording parties the opportunity to present evidence and by issuing binding determinations. Significantly, the rulings of the Tribunal carry the same legal force as orders of the High Court,⁶⁶ underscoring both the gravity of its public hearings and their enforceability under our law.

⁶⁶ Section 152(1) of the NCA.

[82] However, an important distinction should be drawn. Administrative tribunals, by their very nature, are more informal dispute resolution mechanisms than courts of law. Tribunals are vested with strong powers to investigate, make factual determinations and attach legal consequences to such factual determinations. Because they are not courts of law,⁶⁷ they do not, in fact, contribute to legal precedent, and their findings of law are not binding on either courts or other tribunals. Tribunals, as dispute resolution bodies, aim to enhance access to justice, enable a greater number of persons to obtain access and enable the realisation of justice over a period of time. Tribunals have fewer stringent formalities (fewer restrictions and exclusions) than courts of law.

[83] In my view, the High Court and the Supreme Court of Appeal have held the Tribunal to the same stringent threshold as a court of law, despite the fact that the Tribunal is not a court of law. While both courts of law and tribunals are dispute resolution mechanisms, their nature, functions and purposes are qualitatively different, and cannot be held to the same standard.

[84] The second judgment expresses concern that recognising the Tribunal's informal and flexible procedures as a basis for interpreting section 148(2)(b) may understate the significance of the Tribunal's adjudicative function and the standards that govern its dispute-resolution processes. It emphasises that the Tribunal is an independent adjudicative body contemplated in section 34 of the Constitution and that its informality should not be understood as detracting from the quality or legitimacy of its adjudicative processes. I do not disagree with that proposition. The question, however, is whether the recognition of the Tribunal's important adjudicative role requires its procedures to be equated with those of courts of law for purposes of determining what constitutes participation in a hearing. In my view it does not. Our courts have repeatedly recognised that tribunals and courts are not subject to identical procedural standards. In *Fernandez*,⁶⁸ the Appellate Division held that an administrative enquiry is not required

⁶⁷ *Ledla Structural Development (Pty) Ltd v Special Investigating Unit* [2023] ZACC 8; 2023 (2) SACR 1 (CC); 2023 (6) BCLR 709 (CC) at para 70.

⁶⁸ *Fernandez v South African Railways* 1926 AD 60.

to be conducted “on precisely the same lines as a judicial trial”.⁶⁹ Similarly, in *Jeewa*,⁷⁰ the Appellate Division cautioned that, in the absence of statutory prescription, “it would be presumptuous for the judiciary to impose its own methods on administrative or executive officers”.⁷¹

[85] Recognising that tribunals and courts perform their adjudicative functions through different procedures does not imply that tribunals provide an inferior form of justice. The distinction relates to institutional design and procedure, not to the quality, legitimacy or fairness of the adjudicative outcome. While section 34 of the Constitution guarantees a fair public hearing before a court or an independent and impartial tribunal or forum, it does not prescribe that such a hearing necessarily requires oral evidence or physical presence. In inquisitorial tribunals, where the enabling statute expressly contemplates informality and relaxed evidentiary rules, the principles of natural justice, in my view, may be achieved through the receipt of evidence on affidavits and written representations.

[86] In *Telkom SA*,⁷² the Supreme Court of Appeal emphasised that competition tribunals do not function as ordinary courts do but, rather, as administrative bodies with adjudicative features, with their procedures being shaped by statute and purpose rather than judicial tradition.⁷³ It therefore follows that one cannot simply transplant court-based meanings of “hearing” and “participation” into a tribunal context.

[87] It therefore follows that the inquisitorial nature of the hearings before the Tribunal emphasises the hybrid nature that the Legislature intended to permit the entirety of the proceedings before the Tribunal to take. In terms of the NCA, hearings

⁶⁹ Id at 68-9.

⁷⁰ *Jeewa v Dönges N.O.* 1950 (3) SA 414 (A).

⁷¹ Id at 422-3.

⁷² *Competition Commission of South Africa v Telkom SA Ltd* [2009] ZASCA 155; [2010] 2 All SA 433 (SCA).

⁷³ Id at para 38.

must be conducted in an inquisitorial manner,⁷⁴ as expeditiously as possible,⁷⁵ as informally as possible⁷⁶ and in accordance with the principles of natural justice.⁷⁷ The Tribunal is not bound by what is placed before it by the parties to the proceedings. That is clearly so, because its duties include making findings on whether conduct is prohibited in terms of the NCA.⁷⁸ Nor is it bound by procedural straitjackets. It is entitled, and indeed obliged, to do more.

[88] By way of example, section 144(a) authorises the Tribunal to direct or summon any person to appear at any specified time and place and, under section 146(3), may compel such person to answer any question, even if it is self-incriminating to do so.⁷⁹ The second judgment seems to suggest that the interpretation in the first judgment would undermine the work of the Tribunal because it would not be in a position to exercise its inquisitorial powers in relation to such party. Such a conclusion ignores the powers of the Tribunal, as well as the entire structure of the NCA. A party such as CMR, which files an affidavit but elects not to be present at the hearing, can be compelled to be present at the hearing and to answer questions, even if incriminating. Experience has shown that tribunal hearings are often postponed and matters are heard piecemeal. The presiding member has the authority to direct which issues will be heard and when that will occur. By way of example, a party who absents itself by choice from a hearing where the joinder of party X is opposed by the NCR can hardly be said not to have been a participant when such party was present at every subsequent hearing after the Tribunal ruled that party X may not be joined. Substance must trump form.

[89] There is nothing in the NCA that precludes the Tribunal from adjudicating issues on affidavits. Requiring the physical presence on behalf of the parties at the hearing, at

⁷⁴ Section 142(1)(a).

⁷⁵ Section 142(1)(b).

⁷⁶ Section 142(1)(c).

⁷⁷ Section 142(1)(d).

⁷⁸ Section 150(a).

⁷⁹ In terms of section 139(5), such answers are inadmissible as evidence against such person in criminal proceedings in any court except in circumstances specified in the section.

all of the occasions that such hearing may be adjourned, at the final stage of the hearing and at the oral argument stage of the proceedings adds a formalistic hurdle inconsistent with the Tribunal's informal nature and object of expedition. The second judgment's approach risks undermining this legislative design by re-introducing, through interpretation, precisely the kind of formal procedural threshold that the NCA seeks to relax.

The interchangeable use of the terms "hearing" and "proceedings"

[90] The NCA's requirement that hearings must be conducted in accordance with the principles of natural justice⁸⁰ reinforces the constitutional hold over the process that ensures that decisions of the Tribunal are taken in a fair public hearing before an independent and impartial tribunal.

[91] The terms "hearing" and "proceedings" are used interchangeably in section 142(2) of the NCA. In the context of the Tribunal, the process involved in a "hearing" may include:

- (a) evidence presented by affidavit;⁸¹
- (b) written submissions;⁸²
- (c) inquisitorial engagement by Tribunal members;⁸³ and
- (d) oral argument where necessary or appropriate.

[92] The second judgment proceeds from the premise that the term "hearing" has acquired a settled meaning in our law, namely a formal convening involving *viva voce*

⁸⁰ Section 142(1)(d), which essentially embodies two key principles, being (a) the right to be heard, and (b) the right to be heard by an impartial decision-maker.

⁸¹ Proceedings before the Tribunal are initiated and joined through applications supported by affidavits, and the Tribunal is a tribunal of record whose decisions must be capable of appeal or review on the written record.

⁸² Our administrative law recognises that the right to be heard does not necessarily entail a right to make oral submissions, and that written representations may suffice to meet the requirements of procedural fairness, depending on context.

⁸³ An inquisitorial procedure entails active engagement by the decision-maker with the material before it, including the clarification of issues, the questioning of parties and the evaluation of evidence and submissions, rather than passive reliance on adversarial presentation alone.

participation before a court or tribunal. On this approach, where a matter is disposed of on affidavits and written submissions, without oral argument, there is said to be no participation in a hearing or no hearing.

[93] The second judgment attempts to reinforce that premise by referring to rules 18(5) and 19(6)(b) of this Court's Rules, which distinguish between matters disposed of "with" or "without" a "hearing", and by observing that this Court frequently decides matters "without a hearing", that is, without hearing oral argument.

[94] However, even within this Court, it is incorrect to suggest that parties are not afforded a hearing merely because no oral argument takes place. When this Court disposes of a matter on affidavits and written submissions, it still hears the dispute. The absence of oral argument does not mean the absence of adjudication, nor does it render the process something other than a hearing in the substantive sense.

[95] Were the notion of hearing to be defined solely as an oral presentation of evidence or argument, then this Court would have denied thousands of applicants a "fair public hearing" as guaranteed by section 34 of the Constitution in matters where no oral hearing was afforded to the applicants. This would also violate section 167(2) of the Constitution, which requires that a matter before this Court be "heard" by at least eight judges.

[96] This Court's Rules regulate how this Court manages its workload; they do not purport to define the substantive content of the right to be heard, nor the meaning of "hearing" in other statutory regimes.

[97] With the above in mind, the position put forward by the second judgment, that the term "hearing" has acquired a settled meaning in our law, does not withstand scrutiny in the statutory and institutional context of the Tribunal, especially when section 148(2)(b) of the NCA is read purposively and contextually, as required.

[98] The second judgment rejects the contention that section 142 is confined to the *viva voce* stage in a manner that renders the earlier procedural stages irrelevant. It reasons that section 142 regulates the conduct of hearings, while the Rules regulate the procedural steps that precede the hearing. Both judgments accept that the hearing contemplated in section 148(2)(b) refers to the set down before the Tribunal at which adjudication takes place. The point of departure lies not in the identification of the hearing, but in what constitutes participation in that hearing. I accept that “hearing” in section 148(2)(b) is the set down date at which adjudication will take place. This does not mean that the Legislature contemplated that participation could occur only through *viva voce* evidence, or that a party who is absent from such a hearing is necessarily not a participant for the purposes of prosecuting an appeal under section 148(2)(b).

[99] I turn to consider whether the same word in a statute can bear different meanings in the context of a specific provision. In *Endumeni*, the Supreme Court of Appeal emphasised the importance of contextual understanding when engaging in interpretation. There, the Supreme Court of Appeal said:

“Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. . . . *[W]hen the provision is read in context, that is the appropriate meaning to give to the language used.* At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. . . . In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. In resolving the problem, *the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.*”⁸⁴ (Emphasis added.)

⁸⁴ *Endumeni* above n 51 at paras 25-6.

[100] The above is authority for rejecting literalism and suggests that words do not carry fixed meanings across a statute irrespective of context. Rather, their meaning may be informed by the provision in which they appear and the role they serve within the statutory scheme. The interpretative approach in *Endumeni* makes plain that words do not possess fixed meanings. It follows that the same word may legitimately bear different meanings in different parts of the same statute where the context and purpose differ.

[101] In *Liesching*,⁸⁵ this Court affirmed that there is a presumption of consistent usage, but there are exceptions. It stated:

“If a defined word or phrase is used more than once in the same statute it must be given the same meaning unless the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply.”⁸⁶

The same logic applies all the more to undefined words, the meanings of which are inherently more dependent on context.

[102] The ability to depart from a meaning of a word in a statute was also, and perhaps most strongly, set out in *Independent Institute of Education*,⁸⁷ where it was held:

“[A] special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, *where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute,*

⁸⁵ *Liesching v S* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC).

⁸⁶ *Id* at para 33.

⁸⁷ *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC).

then the defined meaning would be inappropriate for use and should therefore be ignored.”⁸⁸ (Emphasis added.)

[103] These authorities establish that the presumption that the same word in the same statute bears the same meaning is not absolute. Where context and purpose indicate that a different meaning is required because a uniform meaning would result in an absurdity, the court may ascribe a different meaning to the same word. It further follows that the same words in a statute may serve different functions in different provisions. Where this occurs, their meaning must be calibrated for the purpose of each provision, even if this results in divergent meanings across the statute.

[104] Applying these principles, the term “hearing” in the NCA does not admit of a single fixed meaning across all provisions. In section 142, the term regulates the manner in which proceedings are conducted, and may justifiably refer to the procedural sitting at which the Tribunal engages with the matter. By contrast, in section 148(2)(b), the term is used to define the class of persons entitled to appeal. In that context, a narrow meaning confined to physical attendance at a set down would undermine the right of appeal and produce an unduly restrictive outcome. A uniform meaning would therefore produce the very “incongruity” contemplated in *Liesching*, and must be rejected.

[105] The second judgment draws a distinction between the hearing contemplated in section 142 and the procedural steps that precede it. It holds that section 142 prescribes how hearings are to be conducted, while the Rules regulate the exchange of affidavits and other procedural matters before the hearing stage. If that is so, the only way in which “hearing” in section 148(2)(b) (the physical hearing after set down stage) can be seen as something different to “hearing” in section 142(1) (the entirety of the proceedings), is by accepting that the NCA is not a model of clarity and that the same word “hearing” actually bears different meanings in different sections.

⁸⁸ Id at para 18.

[106] I accept that the Rules regulate the procedural architecture leading to a hearing. The interpretive dispute, however, concerns the relationship between those procedural steps and the hearing ultimately convened by the Tribunal. Nothing in the Rules suggests that participation occurring before the hearing is irrelevant when determining whether a party was a participant in the hearing for purposes of section 148(2)(b). Indeed, the very Rules relied upon by the second judgment demonstrate the close relationship between the procedural stages of a matter and the hearing itself, and do not support the sharp distinction that the second judgment seeks to draw between them. Rule 24 of the Rules provides:

“Non-appearance

- (1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party—
 - (a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling; or
 - (b) is not the applicant, the presiding member may—
 - (i) continue with *the proceedings* in the absence of that party; or
 - (ii) adjourn *the hearing* to a later date.
- (2) The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1).
- (3) The Registrar must send a copy of the ruling to the parties.” (Emphasis added.)

[107] On a plain reading of rule 24(1)(b), there is absolutely no distinction between the proceedings or hearing referred to in rule 24(1)(b)(i) and (ii). The emphasised words could be swapped with one another or the same word could be used in both instances.

[108] What the NCA is crystal clear about is that there is a public hearing that will serve as a vehicle for the Tribunal to exercise its powers and to perform its obligations properly, effectively and efficiently. I accept that, and do not reason otherwise.

Rules regulating the Tribunal's procedure

[109] Subject to the Tribunal's rules of procedure, section 145⁸⁹ permits latitude in respect of the procedure to be adopted for a particular hearing with due regard to, amongst other considerations, the circumstances of the particular case. It follows that it permits proceedings where the evidence is presented on the papers only (affidavits); proceedings where the evidence is presented orally; proceedings where evidence is received both on affidavit and orally; and proceedings where the issues are considered with regard to a stated case, to name but some of the permutations that the informal, hybrid nature of Tribunal proceedings can take and that section 145 of the NCA expressly authorises. Neither the NCA nor its Rules are prescriptive about the manner in which evidence is to be received.

[110] The Rules were promulgated in terms of section 171 of the NCA. Rule 21(1) governs the procedures to be followed at a hearing. It provides:

“A hearing must be informal and follow procedures determined by the presiding member in terms of rule 17(5)(e) or at any time before or during the hearing.”

[111] Conscious of the caution that one should be wary of interpreting the NCA with reference to subordinate legislation, it is not insignificant that rule 21(4) provides that, in a hearing for interim relief, only evidence by affidavit will be admitted. This supports the finding that the procedure and the manner of receiving evidence are not limited to *viva voce* evidence. It also supports the finding that a litigant who files an affidavit in support of interim relief as contemplated in rule 21(4), but who fails to appear at the

⁸⁹ Section 145 provides:

“Rules of procedure—

Subject to the rules of procedure of the Tribunal, the member of the Tribunal presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case and the requirements of the applicable sections of this Act.”

oral argument stage of the proceedings, can hardly be held not to have participated in terms of section 148(2)(b).

[112] Rule 21 provides that the Tribunal itself is the judge of the admissibility of evidence and its probative value.⁹⁰ This means that evidence that might ordinarily be excluded in a court of law, such as hearsay evidence, may be admitted if the Tribunal considers it appropriate, with the weight of such evidence to be determined by the Tribunal. Witnesses may be summoned and required to testify under oath or affirmation, and expert evidence may be called where necessary.

[113] This evidentiary flexibility stands in contrast to the stricter rules applied in ordinary courts under the Law of Evidence Amendment Act.⁹¹ That Act sets out specific conditions for admitting hearsay evidence, such as requiring the court to be satisfied that admission is in the interests of justice and considering factors like the nature of the evidence, the purpose for which it is tendered and the availability of the witness. While courts apply these criteria cautiously to safeguard fairness, the Tribunal's framework allows for a more pragmatic approach, ensuring that consumer disputes can be resolved efficiently and fairly without being hampered by rigid evidentiary rules.

[114] The second judgment deflects the interpretation of section 142(1) of the NCA as being applicable to the entire proceedings before the Tribunal by arguing that “[i]t would be hard to imagine an inquisitorial exchange of pleadings or informal pleadings”.⁹² It then nonetheless ropes in the Rules to justify the application of some of the injunctions contained in section 142(1) of the NCA to the pre-hearing procedures. In my view, this analysis exposes the unsustainability of the reasoning.

⁹⁰ Rule 21(2).

⁹¹ 45 of 1988.

⁹² See the second judgment at [194].

[115] The analysis in the second judgment ignores the provisions of the NCA as well as its Rules. The correct factual sequence of events in this case was as follows:

- (a) The NCR initiated a complaint in terms of section 136(2) of the NCA.
- (b) The Chief Executive Officer of the NCR, in terms of section 25 of the NCA, authorised an investigation into CMR and appointed Mr Mark Whale as an inspector.
- (c) Mr Whale conducted an investigation and compiled a report.
- (d) In terms of section 140(1)(b) and 140(2)(b) of the NCA, the NCR referred the matter to the Tribunal.

[116] Upon the referral in (d) above, the provisions of section 141(4) kicked in. The section specifies clearly:

“The Tribunal must conduct a hearing into any matter referred to it under this Chapter, in accordance with the requirements of this Act.”

[117] Section 31(1) of the NCA, under the header “Tribunal proceedings” located in Part B of Chapter 2 of the NCA, provides that the Chairperson⁹³ must assign each matter referred to it to a single member panel of the Tribunal or a panel composed of any three members of the Tribunal.

[118] Having regard to the correct factual sequence chronicled herein, it is unclear how the second judgment can contend that an affidavit would not suffice to constitute participation.

[119] The suggestion that one could file an affidavit in proceedings, as a cited party to the proceedings, but not be considered a participant even when the content of such version is considered for purposes of making an adverse finding, is difficult to justify. On the day that the affidavit was delivered, the exact date of the hearing or the composition of the Tribunal was unknown. However, one would know that there would

⁹³ Appointed by the President in terms of section 26(3)(a) of the NCA.

definitely be a hearing, because: (a) section 141(4) compels the Tribunal to conduct a hearing pursuant to a referral to it by the NCR; and (b) the NCA compels the Chairperson to assign a matter to an appropriate panel. A hearing was certainly on the radar at the stage that the answering affidavit was filed. CMR was facing a R1 000 000 fine. Everything was done with the final adjudication day in sight. The proceedings were geared towards the hearing day.

[120] The second judgment argues that “[i]t would be hard to imagine an inquisitorial exchange of pleadings or informal pleadings”. I disagree. Rule 17 permits the Tribunal to arrange a pre-hearing conference which can be conducted by telephone. It need not follow any formal procedures and it may be adjourned and re-convened. The presiding member of the Tribunal may “give directions for the clarification or simplification of issues”⁹⁴ and “obtain admissions of facts or documents”.⁹⁵ In so far as affidavits constitute both pleadings and evidence, this unilateral intervention by the Tribunal for the purpose of distilling the issues and procuring admissions of fact or admissions relating to the status of documents has a clear informal tone and an obviously inquisitorial reach, as the presiding member explores and initiates the issues at the pre-hearing conference. No imagination is necessary to see how the requirements of section 142(1) have been incorporated into the pre-hearing procedures.

[121] The proceedings before the Tribunal in the present matter were initiated by the NCR. A representative of the NCR deposed to an affidavit setting out the details of the complaint against CMR and the order it sought. CMR was given notice of the proceedings that had been initiated against it and was afforded an opportunity to respond. CMR did so. The NCR replied. In the present matter, these are the papers that were filed – three sets of affidavits – which is the format of an opposed motion in a court of law. No witnesses were summoned. Neither party gave notice of its intention to call an expert witness. There can be little doubt: CMR participated.

⁹⁴ Rule 17(5)(a).

⁹⁵ Rule 17(5)(b).

[122] The second judgment does not determine the appeal on the basis of joinder. Rather, it proceeds on the footing that the liquidators' participation at the hearing was material to the issues before the Tribunal and that their absence cannot be dismissed as inconsequential. It nevertheless treats the conduct of CMR prior to liquidation and the conduct of the liquidators thereafter as distinct enquiries for purposes of assessing participation under section 148(2)(b). Thus, while accepting that the liquidators assumed control of CMR's affairs upon their appointment, the second judgment reasons that CMR's prior participation cannot be attributed to the liquidators. It is on that basis that it emphasises that the liquidators "filed no affidavit, made no submissions, failed to appear and failed, when they discovered their error, to bring this to the attention of the Tribunal".

[123] This case is about the jurisdictional prerequisites or conditions to confer jurisdiction on the High Court and Supreme Court of Appeal to hear an appeal. The power to consider an appeal only comes into being if the threshold facts are found to have been established. Conducting such a preliminary enquiry to determine whether a physically absent party participated will not create legal uncertainty and will, in my view, not militate against predictability. Courts are involved in such enquiries on a daily basis. Jurisdiction is often disputed and a factual enquiry is necessary to resolve this.

[124] A participant who does not utilise the opportunities created in section 143 by being present at the hearing runs the risk of losing the appeal or having costs awarded against it for having failed to raise issues at the Tribunal and at the hearing. It is for this reason that the concern expressed in the second judgment regarding legal uncertainty and the possibility that parties may preserve appeal rights despite non-attendance at the hearing is, in my view, overstated.

[125] I should make it clear that this judgment does not hold that an affidavit filed by any entity invited to file an affidavit would result in a finding that such an entity is a

participant for purposes of section 148(2)(b) of the NCA. The scope of this appeal is very narrow and relates to a “participant” in the phrase “a participant in a hearing before the full panel of the Tribunal”, as contemplated in section 148(2)(b) in the context of a complaint referred to the Tribunal by the NCR in terms of section 140(1)(b) and (2)(b). It is within this narrow compass that I conclude that the affidavit was sufficient. CMR is a party mentioned in section 143 of the NCA, was called upon to respond to a complaint and had responded in the manner specified in the invitation.

A bird’s eye view of the process

[126] Section 143 deals with a right to participate in a hearing and lists the persons who “may participate in a hearing contemplated in this Part”. The obvious role-players are mentioned, being the NCR, the National Consumer Commission, the applicant or complainant and the respondent (here, CMR).

[127] The deponent to the answering affidavit in the present matter is the sole director of CMR. CMR was afforded the opportunity to respond to the allegations levelled against it, and it responded. To summarise what occurred: the NCR extended an invitation and CMR entered the fray. In short, it chose to participate and did so. On the day of set down for the final adjudication of the matter (the hearing), CMR (in liquidation) failed to appear at the Tribunal. Despite this, the Tribunal considered the evidence of CMR, and the legal arguments it had advanced in its affidavit. The Tribunal granted the liability orders. It did this without receiving oral arguments from either the representatives of the NCR (on the amended relief it ultimately granted), who were present, or Ms Barnard, the liquidator, who was absent.

[128] Section 142(4) provides that “[a]t the conclusion of a hearing, the Tribunal must make an order permitted in the circumstances . . . and must issue written reasons for its decision”. The Tribunal produced a substantive 18-page decision from which it is evident that the answering affidavit was considered in detail.

[129] Section 142(5) provides that “participants and members of the public” must be provided reasonable access to the record of each hearing. The liquidators were given access to the record of the hearing. It is unclear whether this was done with them wearing a “participant” hat, or in their capacities as members of the public. Giving the liquidators’ access to the record in their capacities as “participants” accords with the correct interpretation of section 148. To suggest that they received the record in their capacities as members of the public is absurd. Both liability and remedial orders were made against CMR, with the Tribunal having considered CMR’s version on the merits based on CMR’s answering affidavit. The undue focus on one aspect of participation, namely attendance or presence at the hearing, is flawed.

Further anomalies that arise if the Supreme Court of Appeal’s interpretation is applied

[130] The Tribunal is an independent and impartial tribunal of the kind contemplated in section 34 of the Constitution. It is an administrative body and, as such, its proceedings are subject to judicial review. This is recognised in section 148(2)(a) of the NCA. What is immediately apparent from section 148(2)(a) and (b) is that a right to review and a right to appeal are conferred on a participant in a hearing. Excluded in express terms from the reach of section 148(2)(b) is “a decision in terms of section 138” (a consent order). This exclusion is achieved by the words “other than”, which convey that, but for the express exclusion of section 138, it would have been included in the reach of section 148(2)(b), and section 138 too would have been subject to a right of appeal.

[131] Section 138 governs consent orders made without the hearing of any evidence. The point is this: section 148(2)(b) includes hearings where no evidence was led. Because this is so, exceptions, such as hearings contemplated in section 138 (where no evidence in any form was received), need to be excised from the section 148(2)(b) reach – it can hardly be suggested that a respondent, who has consented to the terms of a consent order, has not participated in the proceedings or in a hearing initiated in terms of Chapter 7 of the NCA. This finding is further supported by the fact that a respondent

who disputes that it granted consent to the terms of the consent order may review such consent order in terms of section 148(2)(a) and will be considered “a participant in a hearing”, as section 138 has not been excised from the reach of section 148(2)(a).

Nature and extent of participation

[132] It is contrary to the injunction favouring informality provided for in section 142(1) to suggest that the liquidators did not participate in the Tribunal’s enquiry (despite CMR having tendered evidence in the form of an answering affidavit) solely on the basis that the liquidators were not in physical attendance at the hearing (in this instance, the oral argument stage of the proceedings). The fact that CMR or the liquidators failed to attend the hearing, despite having received notice, simply meant that the Tribunal was entitled to proceed without them. The Tribunal was thereafter not engaged in granting a default judgment where, typically, no defence material is adduced and is not considered. It was required to do what the NCA obliged it to do: to consider and determine what the participating parties had contributed, such as an answering affidavit or oral argument at the hearing.

[133] There are various degrees of participation. Put differently, the nature and extent of the participation can vary. The restrictive interpretation adopted by the majority of the Supreme Court of Appeal and endorsed in the second judgment requires a party to have appeared in person or through a representative at the hearing before the Tribunal in order to enjoy a right to appeal the decision. In order to demonstrate the dangers of this proposition, various degrees of participation at the hearing should be reviewed. Consider the following postulates:

- (a) The liquidators are present at the oral argument stage of the proceedings (which, for purposes of these postulates, will be referred to as “the hearing”), but make no verbal submissions. They announce their presence but do not argue for or against their position. This level of participation would meet the majority of the Supreme Court of Appeal’s definition and would entitle the liquidators to appeal.

- (b) The liquidators file an affidavit, are present physically at the hearing, but do not announce their presence. They sit quietly in the back seats. Objectively, the liquidators were present and, thus, on the approach endorsed by the Supreme Court of Appeal, should be entitled to appeal the decision in terms of section 148(2)(b).
- (c) The liquidators file an affidavit, arrive at the hearing and hand over heads of argument which contain exactly the same arguments as those contained in the answering affidavit. They do not make any further oral submissions but stay in attendance for the entire duration of the hearing. They would be entitled to appeal the decision. This situation, in substance, is not distinguishable from the situation which currently serves before us.
- (d) The liquidators file an affidavit and present written submissions that repeat the arguments raised in the answering affidavit, as well as additional arguments. They do not make any further oral submissions but stay in attendance for the entire duration of the Tribunal hearing. On that construction, they would be entitled to appeal the decision.

[134] The scenario (not a postulate) that demonstrates convincingly that the liquidators were participants at the Tribunal hearing of 30 July 2019, despite their physical absence, is the application of the Supreme Court of Appeal's interpretation to the position of the NCR in this very matter. A transcript of the oral stage of the proceedings before the Tribunal did not serve before the High Court, the Supreme Court of Appeal or this Court. I accept that in so far as something relevant to the decision-making process occurred on that day, it would have been recorded in the written decision of the Tribunal.

[135] The decision of the Tribunal reveals that it only considered the affidavits, similar to an opposed motion in a court of law. The NCR was represented by two individuals described as "employees" by the Tribunal. The two questions posed by the Tribunal, particularly (a) whether the application against CMR could continue before the Tribunal by virtue of its change of status; and (b) whether the liquidators needed to be joined as

parties to the application, would have yielded the same response from both the NCR and the liquidators. This is not speculative. The matter is now before this Court and we know what the answers are: (a) the application could continue; and (b) the liquidators did not have to be joined.

[136] The Tribunal would then have adjourned to consider its decision. The Tribunal delivered a reasoned decision a couple of weeks later, on 12 August 2019, granting relief different from that which was sought. The relief was conceived between reserving judgment and delivering the decision. The Tribunal did this without the NCR or the liquidators being heard on this amended relief. There can be no question, on the Supreme Court of Appeal's interpretation, that the NCR has standing to appeal the decision. This is so, as the NCR was present at the oral argument stage of the hearing on 30 July 2019. The only distinguishing feature in the present case is that the liquidators were not physically present.

[137] The Tribunal did not canvass the amended relief with the NCR. It adjourned, deliberated and gave a decision relating to the remedial orders not canvassed at the hearing. The point is this: had the liquidators been present (or Ms Barnard only), it would have made no difference to the outcome of the decision, since neither party would have been afforded the opportunity to comment on the Tribunal's decision to amend the relief ultimately granted after deliberation by it. Neither the NCR's employees who were present, nor the liquidators who were absent, were forewarned of the amended relief that was ultimately granted. Only two questions were posed about the change of status, and both the NCR and the liquidators had the same responses to both those questions.

[138] The fact that the NCR was a participant for purposes of section 148(2)(b), and was entitled to raise new legal arguments in respect of the remedial orders on appeal, puts paid to any distinction between the standing of the NCR and the standing of the liquidators. The employees of the NCR present at the hearing did not make legal submissions about the relief ultimately granted against CMR (in liquidation). The NCR

was presented with a decision that it was entitled to appeal (it chose not to). The NCR would, as of right, have been entitled to advance “new” legal arguments on the changed order. If the NCR would have been entitled to note an appeal against the remedial orders, I ask, rhetorically, what principled reason distinguishes it from the liquidators? If the High Court and the Supreme Court of Appeal have jurisdiction to hear an appeal noted by the NCR, they have jurisdiction to hear an appeal noted by CMR and, thus, the liquidators. One asks, what if the NCR had noted an appeal and not the liquidators? Would the liquidators have been entitled to oppose the appeal proceedings? Would they have been entitled to counter appeal? The answer is self-evident.

The availability of section 165

[139] The availability of section 165, which provides for the rescission or variation of an order erroneously sought or granted in the absence of a party, does not limit participation, as used in section 148(2)(b), to only physical presence or attendance at the hearing. The Supreme Court of Appeal’s construction of the concept “participate” operates from the premise that one cannot simultaneously be absent from the part of the proceedings where oral argument is received (the hearing) and be a participant. In my view, the majority in the Supreme Court of Appeal erred when it found:

“The NCA does not give a party a choice on the remedy to adopt in the event of its failure to participate in the hearing.”⁹⁶

[140] No reasons were advanced as to why the NCA cannot be read as giving a party a choice of remedy. There does not appear to be a principled reason for excluding a choice. The Legislature certainly did not expressly preclude choice.

[141] The majority in the Supreme Court of Appeal held that rescission was competent in terms of section 165(a) of the NCA and concluded:

⁹⁶ SCA judgment above n 4 at para 29.

“The High Court correctly found that the ‘rescission of an order granted in the absence of a party, facilitates the rehearing of the matter and affords the absent party an opportunity to present its submissions on an issue in dispute. This, in turn, enables the Tribunal to properly consider the issues and deliver a reasoned judgment in respect of each issue.’ This is a very low threshold to be met by an applicant seeking to rescind an order erroneously sought or granted in its absence. In this regard, I find that the only route open to the applicants was to apply for a rescission of the Tribunal’s order, which was made in default of the applicants at the Tribunal hearing.”⁹⁷

[142] It needs to be pointed out that section 165 (which is almost on all fours with rule 42 of the Uniform Rules of Court, as incorporated into the Rules of this Court by rule 29) requires an applicant to show both that the order sought to be rescinded was granted in her absence and that the order was erroneously sought or granted. Given the judicial interpretation of the well-worn phrase “erroneously sought or granted”, the enquiries here are not in relation to the substantive correctness of the orders granted, but rather whether, procedurally, the Tribunal was entitled to continue with the hearing and whether all the procedural requirements were met – that is, that notice had been given. The Tribunal was procedurally entitled to continue with the hearing without the liquidators being present. Should the restricted meaning be ascribed to “participant”, this would leave the liquidators without an effective remedy. The Legislature could not have intended this consequence.

[143] The jurisprudence dealing with summary judgment proceedings provides a useful analogy in assessing the consequences of a party’s absence at the hearing where that party has already placed evidence before an adjudicative body in the form of affidavits. In several cases such as *Benson*,⁹⁸ *Morris*,⁹⁹ *Verrijdt*¹⁰⁰ and *De Beer*,¹⁰¹ the

⁹⁷ Id at para 30.

⁹⁸ *Benson v Standard Bank of SA Ltd*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 17143/2011 (14 October 2014).

⁹⁹ *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 (W).

¹⁰⁰ *Verrijdt v Honeydew Tractors and Implements (Pty) Ltd* 1981 (1) SA 787 (T).

¹⁰¹ *De Beer v ABSA Bank*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 25071/2012 (6 May 2016).

courts have held that where a litigant has filed an affidavit opposing the relief sought, the court is obliged to consider the affidavit and to make a value judgment on the merits. Any order granted in those circumstances is not “erroneously granted in the absence of a party”, with the consequence that rescission is not the appropriate remedy.¹⁰²

[144] That reasoning is apposite in the context of proceedings before the Tribunal. Where a respondent has participated in the proceedings by filing an answering affidavit, the absence of the respondent at the hearing (in this case, the stage of oral argument only) does not necessarily confine that respondent to the rescission mechanism in section 165 of the NCA. The question is whether the Tribunal adjudicated the matter on the substance of the case placed before it. Where it did so after a hearing, as herein, it cannot be said that the liquidators were not participants in the hearing, and section 165 would not assist them. In these circumstances, an appeal in terms of section 148(2)(b) remains competent.

[145] In principle then, and although it is unlikely that the facts would support both remedies but assuming such facts were to be present, there is no reason why rescission should trump an appeal or a review in the context of the NCA. If the one procedure was obviously the easier and cheaper option, the court’s displeasure could be expressed with an appropriate costs order. Generally, when a court has decided on the merits of a dispute between the parties and produced a definitive judgment, the court is regarded as *functus officio* (having discharged its duty) and rescission would not be available. Under such circumstances, only the appeal procedure would be available.¹⁰³ The Supreme Court of Appeal held that the fact that the Tribunal had decided the matter on the merits did not preclude the liquidators from seeking to rescind the order in terms of section 165 of the NCA on the grounds that it was erroneously granted in their absence. This proposition does not accord with the jurisprudence of this Court in *Zuma*, where it was held that, because this Court had traversed the merits of the submissions which

¹⁰² *Benson* above n 98 at para 12 and *De Beer* id at para 14.

¹⁰³ *Zuma* above n 30 at para 68.

were being made in the rescission application in the contempt judgment, it was unequivocally and irrevocably *functus officio*.

Reliance on Lewis

[146] The majority in the Supreme Court of Appeal concluded that the restrictive interpretation of “participant” that it adopted is consistent with the conclusion of its earlier decision in *Lewis*. I disagree. In *Lewis*, the NCR had applied to the Tribunal for certain declaratory relief but the application was dismissed, as was the subsequent appeal to a Full Bench of the High Court of South Africa, Gauteng Division, Pretoria. The appeal before the Supreme Court of Appeal was with special leave of that Court. Eksteen AJA, in a unanimous judgment, dismissed the appeal on the merits. In a separate unanimous concurring judgment, Wallis JA dealt with a distinct issue: whether a party wishing to appeal such a case from the High Court to the Supreme Court of Appeal should seek ordinary leave to appeal from the High Court in terms of section 16(1)(a) of the Superior Courts Act or special leave to appeal from the Supreme Court of Appeal in terms of section 16(1)(b) of the Superior Courts Act. In *Lewis*, special leave had been sought and granted by the Supreme Court of Appeal under section 16(1)(b).

[147] Wallis JA held that this was wrong and that leave ought to have been sought from the High Court in terms of section 16(1)(a) for a host of reasons, including that the decisions of the Tribunal are administrative decisions and not judgments or orders of court. To apply the stringent test required for special leave to appeal would ignore the fact that such a litigant had entered the judicial system for the first time when it noted an appeal to the High Court. This would be limiting the right of access to a court in terms of section 34 of the Constitution.

[148] In the current matter, after quoting the FindLaw Legal Dictionary’s definition of “participant” and “participation”, the majority of the Supreme Court of Appeal concluded:

“On a proper interpretation of the words ‘participant in a hearing’ in section 148(2) of the NCA, they denote physical participation in the hearing by a party or his or her legal representative. In other words, a party must participate in person (or through a representative) in the hearing before the Tribunal in order for it to note an appeal against its decision, to the High Court, in terms of section 148(2)(b) of the NCA. This interpretation is consistent with the conclusion of this Court in *Lewis* that although the Full Bench sits as the court of first instance in the appeal in terms of section 148(2)(b) of the NCA, this does not mean that the litigant should not first participate in the proceedings before the Tribunal.”¹⁰⁴ (Footnotes omitted.)

[149] It is difficult to understand how the Supreme Court of Appeal could have concluded that this interpretation is consistent with the reasoning behind the interpretation in *Lewis*. The statutory interpretation of the word “participant” did not feature in *Lewis* at all. The main issue, from a statutory interpretation perspective, was the interpretation of the words “supplementary agreement” as dealt with by Eksteen AJA. There is, thus, no support for the Supreme Court of Appeal majority’s interpretation of the *Lewis* judgment.

The interpretation is aligned with the purpose of the NCA

[150] I do not view the interpretation proposed by the liquidators as side-stepping the consumer-friendly and inquisitorial process created by the NCA, nor would it undermine the participatory adjudication mechanism created by it. I certainly do not see my interpretation as favouring those with greater bargaining power. To the contrary, what it does is to place substance above form and emphasises that “participant” in the phrase “a participant in a hearing before the full panel of the Tribunal” in the context of a complaint referred to the Tribunal by the NCR in terms of section 140(1)(b) and (2)(b), refers to a participant who is mentioned in section 143 of the NCA, who was called upon to respond to a complaint and who responded in the manner invited to respond, being in this instance, by affidavit. Attendance at the hearing is not a jurisdictional prerequisite or condition to confer jurisdiction on the High Court and

¹⁰⁴ SCA judgment above n 4 at para 21.

Supreme Court of Appeal to hear an appeal being by affidavit. Such an interpretation favours those with less bargaining power, for example, those who may not have the means to physically attend. This does not mean that parties have a choice whether to file affidavits or attend the hearing. The Tribunal and its Rules dictate how they are to participate. If they fail to attend, they run the risk of, amongst other consequences, having adverse findings made against them. If the Tribunal wants to question them, it has all the tools available to it to ensure attendance and compliance. If they participate in the manner permitted by the Tribunal (in this instance by affidavit), it cannot be said that they did not participate.

[151] The Tribunal is designed to provide a flexible and accessible forum for consumer justice. Section 3, read with section 26(d), of the NCA sets out the Tribunal's powers, requiring it to exercise its functions in a manner that promotes fairness, transparency and the protection of consumers. The provisions under sections 26 and 27 of the NCA underscore the Tribunal's authority to regulate its own processes in line with the interests of justice, ensuring that procedural rigidity does not undermine substantive fairness.

Consideration of the entire process before the Tribunal in the interpretative exercise

[152] What seems to have been overlooked by both the High Court and the Supreme Court of Appeal are these comments by Wallis JA in *Lewis*:

“The first issue in a statutory appeal is to ascertain the nature of the right of appeal conferred by the statute. In determining that question courts follow the taxonomy laid down by Trollip J in *Tikly v Johannes*. Broadly speaking there are three possibilities. The appeal may be a complete rehearing and fresh determination of the subject of the appeal. It may be an appeal in the conventional sense of a rehearing on the merits, but on the same evidence and information as was before the original decision-maker, subject to the limitation inherent in the decision-maker not necessarily being in the same situation as a court of record. Thirdly, the appeal may be a review, involving a limited rehearing, with or without additional information and evidence, to examine not

the merits of the decision, but the manner in which it was arrived at. Unlike appeals within the judicial system therefore statutory appeals may have a widely varying nature and involve different types of hearing.”¹⁰⁵ (Footnote omitted.)

[153] The learned Judge further remarked:

“The fourth point is that it is almost inevitable, as recognised expressly in section 148(2)(a) of the NCA, that the decisions of statutory bodies and officials in these matters will constitute administrative action and be subject to judicial review under the provisions of [the Promotion of Administrative Justice Act]. Such proceedings are conventionally pursued in the High Court before a single judge sitting at first instance. That judge will deal with the question of leave to appeal against the judgment and may direct that it be heard before either a [a Full Court of the High Court or the Supreme Court of Appeal], depending on the nature and complexity of the issues raised. It seems anomalous that, if the dissatisfied party was content to proceed by way of an appeal on the record of the administrative decision-maker, any appeal flowing from the judgment would require special leave to appeal from [the Supreme Court of Appeal], when common experience teaches that there may be considerable overlap between appeal and review grounds.”¹⁰⁶

[154] What has not, as yet, been considered by our courts is what type of appeal is envisaged by section 148(2)(b) of the NCA. Is it a wide appeal where all the evidence can be re-canvassed (akin to a tax appeal) or is it a narrow appeal? In my view, this question should be left open to be canvassed by the High Court, which would ordinarily deal with the merits of such an appeal. The High Court will then also have to decide whether a single Judge is to hear the appeal or two Judges. If, in such a case, the High Court concludes that the NCA envisages a wide appeal, it seems that a single Judge might be more appropriate. However, because the nature of the appeal was not argued before this Court, I have not embarked upon the exercise of deciding this issue. I do not deem it necessary for the interpretational conclusion I reach. In my view, a finding that section 148(2)(b) envisages a narrow appeal would be a neutral factor in

¹⁰⁵ *Lewis* above n 27 at para 52.

¹⁰⁶ *Id* at para 54.

the conclusion that the liquidators were participants in the hearing. A finding to the contrary, that is, that a wide appeal is contemplated would, however, undermine the interpretation ascribed to the phrase by the High Court and the Supreme Court of Appeal. I explain.

[155] Section 26 of the NCA governs the establishment and the constitution of the Tribunal and section 28 of the NCA governs the qualifications of the members of the Tribunal. Section 28(1)(b) and (2)(b) of the NCA require that each member of the Tribunal must have suitable qualifications and experience in economics, law, commerce, industry or consumer affairs and the Tribunal, viewed collectively, must comprise sufficient persons with legal training and experience to satisfy the requirements of section 31(2)(a) of the NCA. The Chairperson is responsible to manage the caseload of the Tribunal and must assign a matter, to the extent that the NCA provides, either to a single member of the Tribunal¹⁰⁷ or to a panel consisting of three members.¹⁰⁸ In the event of a matter being referred to a panel consisting of three members, at least one of them must be a person who has suitable legal qualifications and experience.¹⁰⁹ What is clear from the composition of the Tribunal is that not all of the members are required to be legal practitioners or have legal training, and that a Tribunal consisting of a single member does not need to be a person who has suitable legal qualifications and experience. Equally clear is that in a Tribunal consisting of three members, only one panel member needs to be so qualified.

[156] Section 148(1) provides that an appeal from a single member of the Tribunal lies to a full panel of the Tribunal. The powers of the appeal panel are defined in rule 27,¹¹⁰

¹⁰⁷ Section 31(1)(a).

¹⁰⁸ Section 31(1)(b).

¹⁰⁹ Section 31(2)(a).

¹¹⁰ Rule 27 provides:

“Decisions of the Appeal panel—

- (1) The appeal panel may refer any matter to a panel appointed by the Chairperson for re-consideration or for such action as the appeal panel may decide.

which includes the power to remit the matter for reconsideration and provides expressly that the appeal panel is not restricted to the record of the proceedings before the Tribunal consisting of a single member. The appeal panel is expressly authorised to call for additional documentation and representations from the parties on any matter relevant to the complaint, and may even procure expert evidence and further research. This appeal model appears to have some of the hallmarks of a wide appeal and might well weigh into the ultimate conclusion that an appeal contemplated in section 148(2)(b) is a wide appeal. Be that as it may, the relevance of this to the current interpretational exercise is that one cannot, in my view, interpret the extent of the right of appeal until one has decided what the test will be at the appeal stage, that is, until one has decided what type of appeal the Legislature envisages. The second judgment concludes that it is not open to the applicants to seek to extend the right of appeal through an unduly strained interpretation of section 148. This pronouncement is made without exploring the content of what awaits the bearer of such a right being the “participant” at the appeal stage.

[157] Applying this premise to the current analysis, a wide appeal might entitle the liquidators to have the matter effectively reheard before the appeal body or, at the very least, to advance legal arguments not considered by the Tribunal. Although the liquidators conceded that a formal joinder was not required for them to be heard in the Tribunal, the High Court, the Supreme Court of Appeal or this Court, they did not concede that they were not entitled to be heard at all on the legal consequences of the remedial orders.

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- (2) The appeal panel is not restricted to the record of the proceedings before a single member and may—
 - (a) call for additional documentation and representations from the parties on any matter relevant to the complaint; or
 - (b) procure expert evidence and further research.
 - (3) The appeal panel, in collaboration with the Chairperson, may take any steps as are reasonably necessary for the just and effective determination of the appeal.”

[158] The Tribunal appreciated that it was necessary to consider the effect of the liquidation of CMR on the proceedings. The minority in the Supreme Court of Appeal recognised the importance of the liquidation in the proceedings. It went a step too far in requiring joinder of the liquidators but, in my view, the minority was correct that the liquidation could not simply have been brushed aside after a finding was made that joinder of the liquidators was not required. The question was not simply whether the liquidators ought to have been joined but, crucially, also whether the Tribunal could materially change the relief sought by the NCR without notice to the liquidators that the relief would be amended, and without affording them the opportunity to be heard on the amended relief that was ultimately granted.¹¹¹

[159] One can ask what prevented the Tribunal from requesting the employees of the NCR present at the hearing on 30 July 2019 to attempt to make telephonic contact with Ms Barnard to establish where she was, having notified the Tribunal that she would be present. Similarly, one can ask what prevented the Tribunal from issuing a rule *nisi* (interim order) rather than making a final order, calling on all concerned parties to show cause on a future date as to why the amended relief should not be made final. The Legislature would be acutely conscious of the fact that not all of the panel members have suitable legal training and experience, and that the treatment meted out to a participant in a proceeding by a Tribunal may fall short of that to be expected in a court of law. The answer to addressing this shortcoming may well lie in why the model makes provision for a wide appeal where, potentially, all relevant issues can be revisited before a judge of a court of law.

[160] If all of the issues are going to be revisited on appeal, in whole or in part, it may well be a clear indicator that the restrictive meaning attributed to “participant” was not intended by the Legislature. My interpretation operates from the premise that the appeal envisaged is a narrow one, an assumption that, at worst, is neutral to my interpretation because the liquidators’ position was in any event evaluated (through the High Court,

¹¹¹ Compare the relief sought, summarised in [7], with the relief granted by the Tribunal in [12].

the Supreme Court of Appeal and this Court) as though the appeal is a narrow one. I thus do not need to decide that issue.

Conclusion

[161] When the relevant provisions of the NCA are read purposively, and with due regard to the distinctive nature of tribunal adjudication, it becomes clear that a rigid, court-centric understanding of “a participant in a hearing” (one that equates it exclusively with physical presence and *viva voce* appearance) cannot be sustained. Our law has long recognised that adjudicative processes may validly proceed on the basis of written materials alone, without offending principles of fairness, provided that parties are afforded a meaningful opportunity to place their case before the decision-maker. This, in turn, upholds the *audi alteram partem* (hear the other side) principle.

[162] The absence of oral argument does not, without more, negate the existence of a hearing or the fact that parties have been heard. That position is reinforced, rather than weakened, by the context of a specialist tribunal expressly mandated to operate inquisitorially, informally and expeditiously. Within this context, participation in a hearing must be understood substantively, with reference to engagement with the adjudicative process as a whole, rather than formalistically, by reference to attendance at a particular procedural moment.

[163] I conclude that “participant” in the phrase “a participant in a hearing before the full panel of the Tribunal”, in the context of a complaint referred to the Tribunal by the NCR in terms of section 140(1)(b) and (2)(b), refers to a participant mentioned in section 143 of the NCA, who was called upon to respond to a complaint and who responded in the manner invited to respond, being in this instance, by affidavit. Attendance at the hearing is not a jurisdictional pre-requisite or condition for the High Court and Supreme Court of Appeal to hear an appeal. A participant as contemplated in section 148(2)(b) is accordingly a person or entity mentioned in section 143 of the NCA who exercises the right to participate in a hearing, either by being cited in the proceedings before the Tribunal (and thus being invited to participate)

or by intervening in the proceedings (or asserts a right to do so). If such a person presents evidence in the manner invited by the Tribunal, in terms of its Rules or in terms of its powers of compulsion; if such evidence is considered by the Tribunal; and if a final order is granted that affects that person's rights, such a person has participated for purposes of section 148(2)(b) even though such person was not present at the hearing.

[164] I find that such a person does not have to make an appearance at the public convening of the Tribunal hearing (in this instance the oral argument stage of the proceedings) in order to have a right of appeal as contemplated in section 148(2)(b). That does not mean that such a person ought not to appear at the hearing, nor that an appeal court cannot take such failure into account when making factual findings which ought to have or could have been ventilated at the hearing, or when considering an appropriate order for costs in respect of a legal argument that could have or should have been advanced earlier in the proceedings or at the hearing.

[165] The liquidators conceded that the minority judgment of the Supreme Court of Appeal was incorrect and that insistence on the correctness thereof undermined their standing in this Court. This line of argument in relation to joinder was thus abandoned.

[166] The default remedy following such a finding is for the orders of the High Court and the Supreme Court of Appeal to be set aside. As there has not been any adjudication on the substantive merits of the Tribunal's remedial orders, I would have considered it appropriate to remit the matter for the High Court to adjudicate the liquidators' appeal.

[167] In my view, it follows that the appeal must succeed. The liquidators are entitled to costs in the High Court, the Supreme Court of Appeal and this Court. The complexity of the issues warranted the employment of two counsel.

Order

[168] Had I commanded the majority, I would have made the following order:

1. Leave to appeal is granted.

2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
 - “(a) Leave to appeal is granted.
 - (b) The appeal is upheld.
 - (c) The order of the Gauteng Division of the High Court, Pretoria, is set aside.
 - (d) The appeal against the National Consumer Tribunal’s proceedings is remitted to the High Court for a determination of the merits of the appeal.
 - (e) The second respondent is to pay the appellants’ costs, including the costs of two counsel where so employed, both in the High Court and the Supreme Court of Appeal.”
4. The second respondent is ordered to pay the costs of the applicants in this Court including the costs of two counsel where so employed.

KOLLAPEN J (Madlanga ADCJ, Majiedt J, Mhlantla J, Rogers J and Theron J concurring):

Introduction

[169] I have read the comprehensive judgment by my Colleague, Opperman AJ (first judgment). This case raises the question of the interpretation of section 148(2)(b) of the National Credit Act¹¹² (NCA). While I agree that this Court’s jurisdiction is engaged and leave to appeal should be granted, I would dismiss the appeal. The first judgment provides a useful and accurate overview of the facts and the litigation history.¹¹³ I will only elaborate on certain features of that overview to the extent that this becomes necessary.

¹¹² 34 of 2005.

¹¹³ See the first judgment at [4] to [41].

Issues

[170] This matter involves the proper interpretation to be given to the phrase “participant in a hearing before a full panel of the Tribunal” found in section 148(2)(b) of the NCA, which reads:

“(2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may—

...

(b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138 or section 69(2)(b) or 73 of the Consumer Protection Act, 2008, as the case may be.”

[171] Given that both judgments accept that being a “participant in a hearing before the full panel of the Tribunal” is a jurisdictional requirement to appeal to the High Court,¹¹⁴ the only issue for determination is the correct interpretation of that phrase. The Tribunal referred to in section 148(2)(b) is the National Consumer Tribunal established by section 26 of the NCA.

[172] The first judgment makes clear that it should not be construed as “suggesting that the right to access the court system . . . for the first time and the right to appeal form part of the content of the section 34 right”¹¹⁵ and has left that question open. I accept this framing within which the issue before us is to be determined. In addition, there is no challenge to the constitutionality of section 148(2)(b) in so far as it may be said to limit the right of appeal to the High Court only to a participant in a hearing before a full panel of the Tribunal.

¹¹⁴ Id at [123].

¹¹⁵ Id at [52].

[173] The first judgment accepts that the only substantive issue for determination is the meaning of the phrase “participant in a hearing” in section 148(2)(b) of the NCA. It concludes:

“‘[P]articipant’ in the phrase ‘a participant in a hearing before the full panel of the Tribunal’ as contemplated in section 148(2)(b) in the context of a complaint referred to the Tribunal by the NCR in terms of section 140(1)(b) and 140(2)(b), refers to a participant who is mentioned in section 143 of the NCA, who was called upon to respond to a complaint and who responded in the manner invited to respond, being in this instance, by affidavit. Attendance at the hearing is not a jurisdictional pre-requisite or condition to confer jurisdiction on the High Court and Supreme Court of Appeal to hear an appeal.”¹¹⁶

On this basis, the first judgment takes the view that physical presence at a hearing is not required to render a party a participant in a hearing.¹¹⁷ This conclusion is premised on the view that, as the proceedings of the Tribunal include a hearing, participation in the proceedings of the Tribunal constitutes participation “in a hearing before the full panel of the Tribunal”.

[174] The first judgment’s focus appears to be on the words “participant” and “participation”. While these terms are important, their meaning is to be ascertained from how they are used in the phrase “a participant in a hearing before the full panel of the Tribunal” and not in isolation as is the approach adopted in the first judgment.

[175] I disagree with the conclusions reached in the first judgment and the reasoning advanced in support of these conclusions. The first judgment ignores the basic canons of interpretation laid down by this Court and the carefully structured processes and sequencing in the NCA and how it deals with hearings. In doing so, it arrives at a strained interpretation of words and phrases which are regularly used and that have acquired a common meaning within the judicial and adjudicative system. Finally, it

¹¹⁶ Id at [150].

¹¹⁷ Id.

results in a conclusion that largely ignores the meaning and purpose of the enactment. I explain.

[176] While ordinarily a hearing may well form part of proceedings, not all proceedings result in a hearing. A matter that is settled will unlikely result in a hearing. A hearing, generally speaking, but also in the context of the NCA, forms a distinct and separate part of the proceedings and is governed by dedicated provisions. The suggestion that a party who filed an affidavit may be said to be a participant in a hearing is untenable. Given that the hearing the NCA contemplates is a *viva voce* one, the mere filing of an affidavit cannot render an absent party a participant in such a hearing. It is a proposition beset with difficulties, most of them insurmountable.

[177] With respect to the approach it takes, the first judgment arrives at a conclusion that will create legal uncertainty and militate against predictability. In effect, the first judgment would require an appeal court, charged with a matter in terms of section 148(2)(b) of the NCA, to conduct a preliminary enquiry to determine whether a physically absent party was, nevertheless, a participant in a hearing. It would be compelled to accept that such a party participated simply on account of that party having filed an affidavit and done nothing more in the proceedings.

[178] The first judgment concludes that, in the present matter, the filing of an affidavit satisfies the assessment to render it a participant in the hearing. This, when on the common cause facts, the liquidators (from the time of their appointment) did nothing more than incorrectly diarise the hearing date before the Tribunal. They filed no affidavit, made no submissions, failed to appear and, upon discovering their clerical error, failed to bring this to the attention of the Tribunal. Even on the test proposed in the first judgment, this inaction can hardly qualify as participation. By setting the bar so low, the first judgment signals to errant parties that participation can be satisfied by the bare minimum. This may create an incentive for errant parties to remain physically absent from the hearing while preserving a right of appeal and avoiding finality.

The approach to interpretation

[179] On the proper approach to interpretation, *Cool Ideas* is instructive.¹¹⁸ It reminds us:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.

There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”¹¹⁹ (Footnotes omitted.)

[180] This is a unitary exercise, which was succinctly described thus by the Supreme Court of Appeal in *Capitec*:¹²⁰

“It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined.”¹²¹

[181] Using this formulation, I proceed to examine the phrase whose interpretation is the subject of the dispute before us. Before I do so, I set out the scheme created by the NCA and the meaning of a hearing, a participant and the act of participation as they are

¹¹⁸ *Cool Ideas* above n 58.

¹¹⁹ *Id* at para 28.

¹²⁰ *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

¹²¹ *Id* at para 25.

dealt with in the NCA, mindful of the context within which they appear and the purpose of those provisions.

The scheme of the NCA

[182] The NCA aims, amongst other things, to promote a fair and non-discriminatory marketplace for access to consumer credit and to provide for its general regulation.¹²² It does so in a comprehensive manner which includes requiring a credit provider to conduct an affordability assessment before entering into a credit agreement;¹²³ prohibiting the conclusion of reckless credit agreements;¹²⁴ and prohibiting the charging of fees not provided for in the NCA.¹²⁵ How a complaint is initiated, investigated, referred to the Tribunal and then considered and heard by the Tribunal are all significant features of the dispute resolution mechanism created by the NCA.¹²⁶ In other words, the work of the Tribunal assumes an important role in the overall scheme of the NCA.

[183] In a dissenting judgment in *National Credit Regulator*,¹²⁷ Weiner JA noted the important function of the Tribunal:

“The [Tribunal] was established in terms of section 26 of the [NCA]. It is an independent adjudicative body, deriving its mandate from the [NCA]. Its mandate is to hear and decide on cases involving, *inter alia*, consumers and credit providers. A decision of the Tribunal has the same status as one made by the High Court.”¹²⁸

[184] The powers of a panel of the Tribunal enable it to use its inquisitorial processes to go beyond the confines of the pleadings. It may call and examine witnesses¹²⁹ and

¹²² Preamble of the NCA.

¹²³ Id at section 81.

¹²⁴ Id at section 81(3).

¹²⁵ Id at section 100(1)(a).

¹²⁶ Id at sections 136-48.

¹²⁷ *National Credit Regulator v National Consumer Tribunal* [2023] ZASCA 133; [2024] 1 All SA 67 (SCA).

¹²⁸ Id at para 3 (judgment of Weiner JA).

¹²⁹ Section 146(3) of the NCA.

determine the scope of who may participate.¹³⁰ These powers enable the Tribunal to ensure that all relevant and material facts are considered and ventilated. As said in *National Credit Regulator*:

“As with the Competition Tribunal, the Tribunal has an inquisitorial role to ensure that all relevant and material facts are considered and ventilated. It is the role of the NCR and the Tribunal to protect the public from unscrupulous conduct.”¹³¹

[185] In *Imperial Group*,¹³² the High Court, while dealing with the provisions of the Consumer Protection Act¹³³ (CPA), referred to the dispute resolution mechanism created by the CPA (in which the Tribunal created by section 26 of the NCA also features) and said the following:

“The Legislature has created a statutory framework in adopting the CPA to deal with the rights and obligations of suppliers and consumers to ensure speedy, inexpensive and fair procedures. A specialised framework has been created for consumers and suppliers to resolve disputes. Parties must pursue their claims primarily through these mechanisms.”¹³⁴

[186] In *Makadu*,¹³⁵ the High Court expressed similar sentiments when it said:

“It is plain from the scheme of the CPA set out above, that the CPA contains a comprehensive dispute resolution mechanism to resolve disputes between consumers and suppliers. The legislative intention behind the dispute resolution scheme of the CPA must have been that disputes between consumers and suppliers must, as the first port of call, be resolved through the dispute resolution mechanism provided for in the CPA. It is only in cases where the CPA does not provide a remedy or, after exhausting

¹³⁰ Id at sections 143-6.

¹³¹ *National Credit Regulator* above n 127 at para 23 (judgment of Weiner JA).

¹³² *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government* [2016] ZAFSHC 105; [2016] 3 All SA 794 (FB).

¹³³ 68 of 2008. Section 75 makes provision for referral to the Tribunal in accordance with the applicable provisions of the NCA.

¹³⁴ *Imperial Group* above n 132 at para 19.

¹³⁵ *Makadu v NTT Volkswagen* [2024] ZANHC 52.

all the internal remedies that a consumer will be entitled to approach the civil courts for redress.

Surely, allowing a consumer to approach the civil courts for redress in circumstances where the CPA provides redress, without first resorting to the dispute resolution mechanism in the CPA, will undermine the scheme of the CPA.”¹³⁶

[187] These cases emphasise the importance of the comprehensive and custom-made dispute resolution mechanism created by the NCA and the CPA. It is the first port of call to address disputes, and its processes should be utilised in the form and scope that the Legislature provided for. The first judgment says that while both courts of law and tribunals are dispute resolution mechanisms, their nature, functions and purposes are qualitatively different and cannot be held to the same standard.¹³⁷ This conclusion does not accord with the recognition by our courts of the important role that the Tribunal plays. It is an independent tribunal contemplated in section 34 of the Constitution, and its informal and flexible processes should not suggest a different standard in its adjudicative and dispute resolution processes. On the contrary, the NCA sets the standard for its processes which, in the context of this matter, include a peremptory public hearing of the panel of the Tribunal.

The meaning of a “hearing” in the NCA

[188] Hearings occupy a central place in the scheme of the NCA. Chapter 7, headed “Dispute Settlement Other than Debt Enforcement”, provides a detailed overview of how disputes arising from the application of the NCA are to be dealt with. The heading of Part D of Chapter 7 is “Tribunal consideration of complaints, applications and referrals”. In terms of section 141(4), the Tribunal “must conduct a hearing into any matter referred to it under this Chapter”. The only exceptions to this are in the case of

¹³⁶ Id at paras 38-9.

¹³⁷ See the first judgment at [83].

consent orders¹³⁸ and interim relief.¹³⁹ What is clear is that a hearing before the Tribunal, in the category of disputes evidenced in this matter, is not only peremptory but an important and necessary part of the NCA's dispute resolution mechanism. Neither the parties nor the Tribunal may dispense with a public hearing. It is through this mechanism that the Tribunal is able to fulfil its function of protecting the public from unscrupulous conduct, and doing so publicly serves the important objectives of accountability and fairness which the NCA seeks to advance.

[189] If the Legislature were content that the Tribunal could dispose of these types of matters purely on the basis of the affidavits before it, it would have provided for that option. It did not. The only exceptions to a hearing, as indicated above, are consent orders and interim relief. These exceptions confirm the general scheme of the NCA as requiring a hearing. Otherwise, it would not have been necessary to specify these exceptions. And if the affidavits filed by the parties render them participants in a hearing, it hardly makes sense that there would then still be an insistence on a *viva voce* hearing before a panel in the manner that section 142(1) requires.

[190] In light of the centrality of a hearing, it does not appear to me to be an accident that section 148(2)(b) refers to a participant in a hearing rather than a party to the proceedings. I will seek to show that, in the context of the scheme, a *viva voce* appearance at a hearing is what the Legislature contemplated and that a party who is absent from such a hearing cannot be said to be a participant in such a hearing for the purpose of prosecuting an appeal under section 148(2)(b).

[191] There are many other clear indicators that the Legislature had in mind a *viva voce* appearance before the panel of the Tribunal when reference is made to "a hearing" throughout the NCA.

¹³⁸ Section 138 of the NCA.

¹³⁹ Id at section 149.

[192] Section 142 of the NCA is titled “Hearings before Tribunal”. The section prescribes that hearings of the Tribunal must be conducted in public, as expeditiously and informally as possible and in an inquisitorial manner. Throughout Part D, the provisions contemplate members of the Tribunal “presiding at a hearing”.¹⁴⁰ Section 144 provides for the “Powers of member presiding at hearing”, including the powers to summon people “to appear”,¹⁴¹ “question” them¹⁴² and admit evidence in the hearing.¹⁴³ Section 146 concerns witnesses and contemplates persons giving evidence “at a hearing”¹⁴⁴ and “during a hearing”.¹⁴⁵ It provides that such persons must “answer any relevant question”.¹⁴⁶ Subject to the Tribunal’s Rules¹⁴⁷ (Rules), the presiding member may also determine “any matter of procedure for that hearing”.¹⁴⁸

[193] The first judgment suggests that the section 142 injunction – that hearings before the Tribunal must be conducted as expeditiously and informally as possible and in an inquisitorial manner – is an indication that participation in a hearing may be constituted by participation in some other aspect of the proceedings before the Tribunal.¹⁴⁹ It argues that this must be so because if we limit hearings to mean a *viva voce* appearance before the Tribunal, the import of the section would be that the rest of the proceedings, other than the hearing, must be conducted differently – in an accusatorial manner, formally, non-expeditiously and absent the observance of natural justice principles.¹⁵⁰

¹⁴⁰ See *id* at sections 142(2), 144, 145 and 147(2)(a) and (b).

¹⁴¹ *Id* at section 144(a).

¹⁴² *Id* at section 144(b).

¹⁴³ *Id* at section 144(c)(i).

¹⁴⁴ *Id* at section 146(1).

¹⁴⁵ *Id* at section 146(2).

¹⁴⁶ *Id* at section 146(1).

¹⁴⁷ Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007, GN 789 GG 30225, 28 August 2007.

¹⁴⁸ Section 145 of the NCA.

¹⁴⁹ See the first judgment at [72].

¹⁵⁰ *Id*.

[194] I do not agree with this reasoning. The Legislature has in section 142 indicated how hearings are to be conducted and that they should be expeditious, informal and inquisitorial. These features are in a number of respects hallmarks that apply exclusively to a hearing. It would be hard to imagine an inquisitorial exchange of pleadings or informal pleadings. However, the Rules provide the detail of how the proceedings are to be managed before the hearing stage.¹⁵¹ Provision is made for the exchange of affidavits (opposing and replying), the content of such affidavits and the timelines for filing them. All of this contributes to an expeditious process and observes the rules of natural justice in the proceedings before they reach the hearing stage. There is therefore no merit in the argument that section 142 supports the interpretation advanced by the first judgment.

[195] The Tribunal is also obliged to maintain a record of the hearing and to provide the participants and the public with reasonable access to it.¹⁵² In addition, the NCA provides that a person who “wilfully interrupts the proceedings of a hearing or misbehaves in the place where a hearing is being conducted” commits an offence,¹⁵³ as does someone who fails to “attend a hearing” having been directed or summoned to do so.¹⁵⁴ A member of the Tribunal “presiding at a hearing” may exclude members of the public from attending the proceedings for good reason, amongst others, if “the proper conduct of the hearing requires it”.¹⁵⁵ In the face of such provisions, a physical hearing is the only logical conclusion.

[196] That the language in the NCA clearly refers sometimes to proceedings,¹⁵⁶ and sometimes to a hearing,¹⁵⁷ fortifies the argument that a “participant in a hearing” means

¹⁵¹ Rules 4 to 16A in Part C entitled “Applications”.

¹⁵² Section 142(5) of the NCA.

¹⁵³ *Id* at section 160(2)(f).

¹⁵⁴ *Id* at section 158(a).

¹⁵⁵ *Id* at section 142(2)(b).

¹⁵⁶ See, for example, *id* at sections 26, 31, 142, 149, 160 and 165.

¹⁵⁷ See, for example, *id* at sections 31-2 and 142-7.

just that. If the Legislature meant a participant in “the proceedings” in section 148, it would have used that wording as it does in other sections. On this basis, an intentional differentiation in section 148 is a more reasonable summation of the Legislature’s intention than an accidental conflation of the two.

[197] To further the interpretation that it contends for, the first judgment also turns to the content of the Rules that govern the Tribunal’s proceedings. In particular, it refers to rule 21(4) which provides that, in a hearing for interim relief, only evidence by affidavit may be admitted.¹⁵⁸ The first judgment suggests that this rule supports the position that evidence before the Tribunal is not limited to *viva voce* evidence.¹⁵⁹ It also asserts that, as a matter of logic, anyone who files an affidavit in support of such interim relief must be said to have participated in the proceedings, irrespective of their presence at the appearance stage.¹⁶⁰

[198] This line of argument ignores the ordinary application procedure followed by courts, including this Court, which limits evidence in the proceedings to affidavits but where a hearing is thereafter convened. It therefore simply does not follow that participation in an interim relief proceeding need not be a *viva voce* appearance in the hearing merely because evidence is submitted by affidavit. That physical oral hearings are axiomatically contemplated by rule 21, entitled “Hearings”, is also apparent from rule 21(1) which requires hearings to be informal and follow procedures decided upon by the presiding member at “any time before or during the hearing” and rule 21(3) which states that “hearings of the Tribunal are open to the public”.

[199] With regard to the provisions I have mentioned, it does not appear that when “hearing” is used in the NCA, it is used in a way that is synonymous with the entirety of the proceedings, commencing with the initiation of the complaint. It is clear that following the filing of the pleadings, the hearing before the panel of the Tribunal is the

¹⁵⁸ See the first judgment at [111].

¹⁵⁹ Id.

¹⁶⁰ Id.

most conspicuous and significant part of the dispute resolution process. The proceedings and the hearing cannot simply be conflated into a single process. In other words, the first judgment correctly concludes that the proceedings before the Tribunal do not only include the oral argument stage, being the hearing.¹⁶¹ However, that reasoning cannot be extended to say that confining the word “hearing” to oral argument “negates the nature and purpose of Tribunals, curtails its powers and undermines the objects, background and purpose of the NCA”.¹⁶² In fact, to remove the Tribunal’s oversight of its hearing proceedings, by allowing participation therein on paper, is more likely to negate the active and inquisitorial role of the Tribunal and, thereby, undermine the objects, background and purpose of the NCA.

[200] The references in the NCA to members presiding at the hearing and asking questions, the attendance of those summoned at the hearing and the conduct of the hearing itself are all features of a public, physical hearing that would require a *viva voce* appearance before the panel of the Tribunal. This is considerably more than the single act of filing an affidavit. What these provisions indicate is that a “hearing”, even if ultimately part of the proceedings of the Tribunal, constitutes a distinct and separate component of those proceedings and of the dispute resolution mechanism the NCA creates.

[201] Indeed, the first judgment provides numerous dictionary definitions of the word “hearing”, all of which suggest a formal convening of a process with an opportunity to be heard.¹⁶³ In the context of the work of courts and tribunals, their rules often provide for the disposition of a matter either with or without a hearing. A hearing under those circumstances carries the same meaning that the dictionary references point to – a formal convening of the court or tribunal where the opportunity to be heard orally is a part of the process. It is therefore difficult to contemplate a hearing other than of the

¹⁶¹ Id at [59].

¹⁶² Id.

¹⁶³ Id at [71].

kind described, where no presence or physical participation is provided for, but is one that will still constitute a hearing.

[202] Similarly, the word “hearing” appears hundreds of times in the various rules applicable in the Magistrates’ Courts, High Court, Supreme Court of Appeal, Constitutional Court, Competition Tribunal, Competition Appeal Court, Labour Court, Labour Appeal Court, Tax Boards, Tax Court and Companies Tribunal. In every instance it will be found that the word “hearing” connotes a *viva voce* appearance before the court or tribunal concerned. In this Court, matters are regularly disposed of without a hearing¹⁶⁴ and the fact that the parties’ affidavits and written submissions are considered in the disposition of the matter does not mean that such a form of consideration constitutes a hearing and that the parties were participants in a hearing. Simply put, in such circumstances, there is no hearing and, arising from that, there could be no “participant in a hearing”.

[203] Finally, on this aspect, the first judgment argues that, in interpreting what “a participant in a hearing is”, the High Court and the Supreme Court of Appeal have held the Tribunal to the same stringent threshold that a court of law would be held to, despite the fact that the Tribunal is not a court of law.¹⁶⁵ It says further that “[w]hile both courts of law and tribunals are dispute resolution mechanisms, their nature, functions and purposes are qualitatively different and cannot be held to the same standard”.¹⁶⁶ One must be cautious in attributing different (lower) standards to independent tribunals. They are part of the machinery recognised in section 34 of the Constitution as the means through which access to justice is facilitated and the hallmark of such a tribunal is that it performs its adjudicative function in a “fair public hearing”.

[204] However, and seemingly in contrast to holding the Tribunal to the same standard as a court of law, the first judgment appears to accept that “the rulings of the Tribunal

¹⁶⁴ See rules 18(5) and 19(6)(b) of the Rules of this Court.

¹⁶⁵ See the first judgment at [83] and [84].

¹⁶⁶ Id at [83].

carry the same legal force as orders of the High Court”,¹⁶⁷ underscoring both the gravity of its public hearings and their enforceability of their rulings under South African law. I agree and there is no basis to argue for different thresholds or standards in the ordinary course.

The meaning of “participant” in the NCA

[205] The NCA also provides some insight into what an act of participation would entail. While the Tribunal is obliged to convene a hearing of the panel, no one (other than someone who has been summoned) is obliged to attend or participate in such a hearing. The NCA provides instead for an entitlement to do so. In other words, the NCA creates the right but casts it in permissive terms. If one elects to exercise the right to participate, the NCA provides for how the right is to be exercised. The right to participate “in a hearing” is exercised “in person or through a representative”.¹⁶⁸ This once again denotes a physical presence *in* the hearing in order to exercise the right to participate. It stretches the limits of interpretation to suggest that when a party files an affidavit in the proceedings outside of a hearing, it somehow participates “*in* a hearing” and does so “*in* person or through a representative”.

[206] Participants would, beyond having the right to be present in person or be represented at the hearing, have the right to “put questions to witnesses” and to “inspect” documents “presented at the hearing”.¹⁶⁹ In addition, the attributes ordinarily associated with the deliberative process of a hearing, such as the presentation of oral submissions, responding to opposing submissions, addressing questions from the panel and submitting oneself to the inquisitorial powers of the Tribunal, can only occur in a physical hearing where a party appears. These are incontrovertible indicators that the NCA is concerned with participation through an appearance in a *viva voce* hearing.

¹⁶⁷ Id at [81].

¹⁶⁸ Section 143 of the NCA.

¹⁶⁹ Id.

[207] The NCA sets out the categories of people who may participate in the hearing. While they include the parties and statutory bodies such as the NCR, they also extend to “any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Tribunal, that interest is adequately represented by another participant”.¹⁷⁰ Such a person who is not a party and who would not have filed any affidavits in the proceedings would still, if so allowed, be able to participate in the hearing before the panel of the Tribunal. This is illustrative in that just as the filing of an affidavit in the proceedings is not a prerequisite to being a participant in a hearing, the single act of filing an affidavit, or some other act outside of the physical hearing, cannot elevate that party to a participant in the hearing. More is required to be a participant if regard is had to the provisions of the NCA that govern hearings and participation to which I have referred.

[208] The first judgment has the effect of creating a category of participants who are absent from the hearing. In my view, such a party has elected not to exercise the right to participate in the manner the NCA contemplates. This party is not “in a hearing before a panel” and cannot, therefore, be said to have participated in the hearing, just as the panel is not in a position to exercise its inquisitorial powers in relation to such a party. In these circumstances, the first judgment says that the panel may exercise its powers to summon an absent party in terms of section 144 if it wishes to exercise its inquisitorial powers.¹⁷¹ However, even if that were possible, I disagree that compelling a party to appear is the means to secure their participation.

[209] Section 144 empowers the Tribunal to summon persons before it in a manner which operates similarly to a subpoena. Whilst there is nothing in particular which would prevent reliance on this mechanism against a party to the proceedings, this line of argument is tenuous at best. It is trite that subpoenas are intended to secure attendance and obtain evidence, whether testamentary or documentary, from third

¹⁷⁰ Id at section 143(d).

¹⁷¹ See the first judgment at [88].

parties.¹⁷² It is also apparent from the wording of other surrounding sections in the NCA that section 144 was intended to govern witness, and not party, evidence.¹⁷³ To summon a party to the dispute under the threat of committing an offence, as dictated by section 158 of the NCA, has “fair trial” implications which I do not think have been fully considered by the first judgment and is counterintuitive to section 143 which governs voluntary participation by an applicant or a respondent in a hearing.

[210] Finally, the panel of the Tribunal in public hearings often addresses issues that extend beyond the interests of the parties to the dispute and implicate the credit industry as a whole, thereby having significance for the broader society. A public hearing is both optically, and in substance, an important part of the principles of open justice and public accountability. The suggestion that an absent party is somehow a participant in that hearing undermines those principles.

Objects and purposes of the NCA

[211] The result of the interpretation arrived at in the first judgment is that it would allow a party to the proceedings to sidestep, even deliberately, the hearing before a panel simply by filing an affidavit while still retaining all its rights of appeal. This is in sharp contrast with the purposes of the NCA and the creation of its dispute resolution mechanism. It is evident that the purposes of the NCA are best achieved when its dispute resolution mechanisms, including a hearing, are properly, effectively and efficiently utilised. And while the participation of a party at a hearing may not be mandatory, the NCA appears to encourage such participation, as it allows the proper ventilation of the dispute. It does so in part by reserving the right of appeal only to those who have participated in a hearing.

[212] The stance adopted in the first judgment will not only undermine and render the hearing hollow, but it will allow for the piecemeal adjudication of disputes. A party,

¹⁷² See, for example, *Mogwele Waste (Pty) Ltd v Brynard* [2016] ZALAC 104; (2016) 37 ILJ 2051 (LAC) at para 18.

¹⁷³ See, for example, section 146 of the NCA entitled “Witnesses”.

much like the first applicant seeks to do in this matter, would be allowed to absent itself from the hearing and then be permitted to ventilate new issues on appeal even when those issues should have been raised before and dealt with by the Tribunal. This is antithetical to the consumer-friendly and participatory adjudication mechanism that the NCA creates. It runs the risk of potentially favouring those with greater bargaining power, allowing those with the capacity to appeal in the courts to sit out the participatory process crafted by the NCA in favour of an appeal as effectively a hearing of first instance.

[213] To allow this would be to thwart the legislative intent behind the NCA and to convert what was intended to be an efficient and cost-effective dispute resolution mechanism into a cumbersome, multi-layered, costly and drawn-out process. The history of this matter demonstrates those dangers. CMR's involvement in conduct prohibited by the NCA occurred in early 2017 and a decision by the Tribunal affording relief to consumers prejudiced by that conduct was made in August 2019. Nine years later, those consumers still wait to experience the benefits of the remedy ordered in their favour. This is hardly consistent with a timely and efficient remedy, which the NCA seeks to advance.

[214] That the NCA envisages participation in the hearings of the Tribunal before resort to an appeal accords in large measure with the rationale underpinning the principle of subsidiarity. While this may not be a classic case of subsidiarity, the principle that a dedicated remedy should be utilised and exhausted holds good.¹⁷⁴ The consequence of the applicants' argument is that they can file an affidavit, avoid the hearing before the panel and proceed to prosecute an appeal even on issues not traversed in the affidavit. The dispute resolution mechanism of the NCA we are considering here constitutes a specific remedy which includes a peremptory public hearing of a panel of the Tribunal. There is considerable detail provided in the NCA as to how it is given effect to. In my view, a party who absents itself from such a hearing avoids the remedy

¹⁷⁴ *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2015 (12) BCLR 1407 (CC); 2016 (1) SA 132 (CC) at para 46 (judgment of Cameron J).

created by the NCA and must then accept the consequences that come with such absence. Here, it is the exclusion of such a party from appealing the decision of the Tribunal from which it has absented itself. Such a litigant should know that, unless it was a participant in the hearing before the panel, it does not have a right to prosecute an appeal under section 148(2)(b).

Conclusion on interpretation

[215] I accordingly conclude that the phrase “a participant in a hearing before a full panel of the Tribunal” refers to a participant who is mentioned in section 143 who has a right to appear before the panel, exercises that right and makes a *viva voce* appearance in a hearing before the full panel of the Tribunal in person or through a representative.¹⁷⁵ In the context of the provisions of the NCA, a hearing only occurs when the panel of the Tribunal convenes and where the parties to the dispute are entitled to and make a *viva voce* appearance before the Tribunal. This appearance would in the ordinary course be a physical appearance but it could also conceivably be a virtual convening of the Tribunal. Once that occurs, such an entity is a participant and has the right to participate in the manner the NCA contemplates but also, by its appearance in the hearing before the panel, submits itself to the processes and the powers of the panel. That said, the nature and extent of its participation do not matter for the purposes of defining a participant.

[216] The first judgment offers various scenarios of participants being present but not active at a hearing, for example, being present but not announcing their presence (an unrealistic scenario); or announcing their presence but then remaining passive throughout the hearing (seemingly to illustrate that physical presence is not dispositive). My view is that a participant is someone who has a right to take part in a hearing, attends the hearing and, by doing so, places itself in a position to contribute to the hearing and to respond to the Tribunal when it elects to exercise its inquisitorial powers.

¹⁷⁵ This understanding of “participation in a hearing” would equally apply to section 148(1).

[217] And so, while I agree with the first judgment that there are different levels of participation, it is however a far-reaching proposition to suggest that a party who fails to attend a hearing before a panel of the Tribunal is still a participant in the hearing before the panel. It would unduly strain the text to hold that participation in the pleadings phase of the proceedings on its own constitutes participation in the hearing. It would have the effect of giving the terms “hearing” and “participant”, in the context in which they are carefully and deliberately used in the NCA, an interpretation far removed from their ordinary meaning and the purpose of the NCA. The Supreme Court of Appeal was correct in finding that this approach would render the words “in a hearing” superfluous. It would also, in the context of the provisions of the NCA I have referred to, lead to an absurdity and consequences at odds with the objects and purposes of the NCA.

[218] Simply, by way of example, if the first judgment’s interpretation of “a participant in a hearing before a full panel of the Tribunal” were to prevail, it would be an open invitation to parties litigating before the Tribunal to content themselves with filing an affidavit and then deliberately not attending the hearing (which is convened with considerable human and financial resources). It would be an unwise use of judicial resources to oblige the Tribunal to convene a hearing but then allow the parties to remain absent from such a hearing with no consequences. In such a scenario, the absent party would be secure in the knowledge that even though they did not attend the hearing, their right of appeal would be fully preserved. This is neither a sensible nor a businesslike interpretation.

[219] The fact-specific approach that the first judgment contends for is only possible if one reads “participant in a hearing before a full panel of the Tribunal” as “participant in the proceedings before the Tribunal”. This would not be interpreting but legislating, and would effectively substitute the clear language used by the Legislature with

something different, removed from what the legislative intent signalled. It also runs the grave risk of offending the principle of the separation of powers.¹⁷⁶

There was no participation on a fact-specific basis

[220] The first judgment concludes that because there are various degrees of participation, it is a fact-specific enquiry which necessitates an evaluation of substance rather than form, relative to the procedural format of each case. What this Court is called upon to do is to interpret the provisions of section 148(2)(b) and once it has done so, that interpretation will be the meaning that will be ascribed to the phrase “a participant in a hearing before a panel of the Tribunal” going forward. There can be no separate interpretative exercise as to what section 148(2)(b) means in each case. Of course, each case will involve the factual enquiry whether the facts meet the threshold of the meaning this Court gives to the phrase, but the meaning of the phrase will not vary from case to case.

[221] This is what the Supreme Court of Appeal alluded to in *Telkom*:¹⁷⁷

“[I]t is axiomatic that a statute must apply to all subjects equally and that its interpretation cannot vary from one factual matrix to the next. It is impermissible to apply a particular meaning to legislation, depending upon the factual situation in which it is sought to be applied.”¹⁷⁸

[222] I disagree with the approach adopted by the first judgment as it will mean that this Court offers no definitive answer to what the phrase we are required to interpret means. Indeed, the effect of the first judgment will be that, in every case involving an appeal in terms of section 148(2)(b), a court will have to look to the facts and decide whether a party falls within the meaning of “a participant”. This does not accord with

¹⁷⁶ *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 48.

¹⁷⁷ *Telkom SA SOC Ltd v Commissioner, South African Revenue Service* [2020] ZASCA 19; [2020] 2 All SA 763 (SCA); 2020 (4) SA 480 (SCA).

¹⁷⁸ *Id* at para 15.

the pronouncement in *Telkom*,¹⁷⁹ will inevitably result in legal uncertainty and provides little guidance to other courts on the key interpretative question before us. This case is about the interpretation of section 148(2)(b) and interpretation is what this Court must do. The expansive, and even overly broad, approach to the identification of a participant adopted by the first judgment¹⁸⁰ does not interpret the section as we are called upon to do. Instead, it imposes subjective ideas of fairness onto the meaning of the word “participant” whilst ignoring the overall scheme of the NCA and the use of the word “hearing” in section 148(2)(b).

[223] On the specific facts of this matter, it cannot be said that there was any form of participation in the hearing by CMR, or its liquidators, such as to make them participants for the purposes of section 148(2)(b). In my view, and irrespective of whether CMR filed an affidavit or contributed in some or other way to the proceedings, by failing to attend the hearing, it precluded itself from participating therein. It was unable to make or respond to oral submissions, it was not able to put questions to witnesses or challenge evidence it did not agree with, nor could it inspect documents. And importantly, its absence had the effect of preventing the other party from challenging its evidence and the panel of the Tribunal from properly exercising its inquisitorial powers “to ensure that all relevant and material facts are considered and ventilated”.¹⁸¹

[224] What is even more telling is the fact-specific conduct of CMR and its liquidators. It filed an answering affidavit in December 2018 and played no further part in the proceedings or the hearing until the finalisation of the matter in August 2019. The affidavit it filed did not address two of the issues the panel asked the NCR to address, namely the continuation of the proceedings before the Tribunal, and the joinder of the liquidators following the liquidation of CMR. In other words, there was nothing from CMR or its liquidators on a number of the pertinent issues before the panel. The

¹⁷⁹ *Id.*

¹⁸⁰ See the first judgment at [163].

¹⁸¹ *National Credit Regulator* above n 127 at para 23.

first judgment says that the presence of the liquidators would have made no difference, as the Tribunal would still have granted the relief it did. There can be no basis for such a conclusion. Surely if the liquidators had taken the trouble to prepare for the hearing, and to attend it, they would have had the opportunity to address issues relevant to the remedy sought. There is nothing to support the conclusion that the presence and participation of the liquidators at the hearing would have been academic.

[225] The first applicant also took no steps, when it discovered that the date it diarised was incorrect, to bring this oversight to the attention of the Tribunal – this at a time when the Tribunal was not *functus officio* as it had not yet delivered its judgment. It may have been possible to seek the re-opening of the hearing it had missed. There is nothing in the Tribunal’s flexible methods of operation to suggest that this would not have been possible. However, the first applicant said nothing, did nothing and remained absent. It then chose to assert a right of appeal, insisting it was a participant in the hearing. In their papers, the liquidators only seek to challenge the remedial orders of the Tribunal despite not having put anything before the Tribunal on this score. To suggest that they then participated in the hearing is far-fetched.

[226] It is incumbent upon a party that wishes to exercise an appeal right under section 148(2) to have participated in the hearing by being present at the hearing and submitting themselves to the hearing process. Failure to do so, as demonstrated in the present matter, may result in protracted appeal proceedings in circumstances where the Tribunal, save for the absence of one party, could have brought the matter to finality.

[227] The first judgment says that the consideration of CMR’s affidavit by the panel during the hearing supports its view that there was participation. However, this conclusion is based on a flawed assumption that the affidavit was indeed considered during the hearing. We do not know that and should not assume it. We only know that this affidavit was later considered in the Tribunal’s written decision. In any event, an affidavit is only one party’s evidence and nothing more. The veracity, reliability and evidentiary weight of its contents is what would have been tested during the hearing

and so simply having the affidavit filed is of limited assistance in a hearing. Accordingly, there is simply no merit in the proposition that the liquidators participated in the hearing through the affidavit filed by CMR. A purposive interpretation of section 148(2)(b), read in conjunction with section 165, indicates that, for reasons of simplicity, expediency and cost-effectiveness, the right of appeal under section 148(2)(b) arises only where a party has participated at the hearing of the dispute – this by being physically present and engaged with the hearing.

[228] The remedy of an absent party who did not participate in the hearing is to seek rescission of the order in terms of section 165 of the NCA¹⁸² read with rule 24A.¹⁸³ The first judgment opines that rescission under section 165 would not be available in circumstances such as the present, because although CMR and the liquidators were absent from the hearing, the resultant order was not “erroneously sought or granted”. I express no opinion as to whether an application for rescission would have failed on this basis since the question was not argued. The important point is that section 165 provides its own remedy in the case of a person who was absent from the hearing and thus – on my interpretation – not a participant in the hearing. If section 165 does not cover all contingencies where a person is absent, that may be a legitimate legislative choice or it may be a failing that must be frontally challenged.

Conclusion

[229] It is not open to the applicants to seek to extend the right of appeal through an unduly strained interpretation of section 148, far removed from the language, context and purpose of the NCA. There is a need to acknowledge that the Legislature made a choice in confining a right of appeal to a participant in a hearing before a panel of the Tribunal. If the consequence of this is that a party who fails to attend the hearing does not enjoy a right of appeal, such is the scope of the right of appeal as contemplated by the section. If, however, it is suggested that this is an unconstitutional limitation of a

¹⁸² Quoted in n 23 above.

¹⁸³ Quoted in n 18 above.

right to appeal (on which I express no opinion), then there should be a challenge to the section. That legislative choice is not the subject of any constitutional challenge and the underlying rationale of establishing an efficient and cost-effective dispute resolution mechanism may well accord with that choice.

[230] It is simply untenable for the first applicant to seek to locate itself within section 148 when it has, through its absence, placed itself outside of the scope of that section. It is even more concerning when the first applicant seeks to do so by asking this Court to endorse an interpretation that unduly and impermissibly strains the language of the provision, regard being had to the text, context and purpose of the NCA. What the first applicant in effect seeks is for this Court to rewrite section 148(2)(b) in the manner I have described so that it can enjoy a right of appeal. We must avoid legal uncertainty, unduly extending what was meant to be a cost-effective and timeous process and effectively rewriting section 148(2). It is for these reasons that the appeal is dismissed with no order as to costs.

Order

[231] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. Each party is to pay its own costs in this Court.

For the Applicants:

M Louw and D Hewitt instructed by
Mathys Krog Attorneys

For the Second Respondent:

L Kutumela and M Nguta instructed by
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