**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case Number: 17/20474

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED: **YES**

28/01/2020
**DATE**

**SIGNATURE**

In the matter between:

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| **4 AFRICA EXCHANGE (PTY) LIMITED** | Applicant |
| and | |
| **THE FINANCIAL SECTOR CONDUCT AUTHORITY** | First Respondent |
| **ZAR X (PTY) LIMITED** | Second Respondent |
| **L.T.C. HARMS N.O.** | Third Respondent |
| **JSE LIMITED** | Fourth Respondent |
| **AFRIFOCUS SECURITIES (PTY) LIMITED** | Fifth Respondent |
| **ANCHOR SECURITIES STOCKBROKERS (PTY) LIMITED** | Sixth Respondent |
| **INDEPENDENT SECURITIES (PTY) LIMITED** | Seventh Respondent |
| **SAXO CAPITAL MARKETS SOUTH AFRICA (PTY) LIMITED** | Eighth Respondent |
| **SENWES LIMITED** | Ninth Respondent |

**SENWESBEL LIMITED** Tenth Respondent

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**JUDGMENT**

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**MOLEFE J**

[1] The Johannesburg Stock Exchange Limited ('JSE') had for many decades had a *de facto* monopoly when it came to providing a securities exchange in South Africa. The position changed on 31 August 2016, when the first respondent, the Financial Sector Conduct Authority (then the Registrar of Securities Services ('the Registrar')), made a decision to grant exchange licences to the applicant ('4AX') and to the second respondent ('ZARX'), in terms of the Financial Markets Act[1] ('the FM Act'). The grant of these licences heralded a new world involving competition for the provision of securities exchange. Companies now have a choice of exchanges when it comes to listing their securities.

[2] 4AX simultaneously applies to review and set aside two decisions constituting 'administrative action' as defined in terms of section 1 of the *Promotion of Administrative Justice Act* ('PAJA').[2] It is mainly and fundamentally directed at a decision by the Registrar published on 31 August 2016, to award ZARX an exchange licence ('the decision'). Five review grounds are raised against the decision.

[3] The secondary challenge is directed at a judgment dated 9 February 2017, by the Appeal Board of the Financial Services Board ('the FSB Appeal Board'), which confirmed the decision and dismissed internal administrative appeals against

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[1] Act 19 of 2012.
[2] Act 3 of 2000.

the decision brought by 4AX and by the fourth respondent, the JSE ('the FSB Appeal Board judgment').

[4] 4AX has also brought an interlocutory application in terms of Rule 6(5)(*g*) and Rule 35(13)[3], for an order directing the referral of certain matters to oral evidence and cross-examination, and an order compelling the respondents to make discovery on those factual disputes. The respondents oppose the interlocutory application. The interlocutory application was heard at the outset of the hearing of this matter.

**The Interlocutory Application**

[5] The order sought in the interlocutory application is attached to the applicant's heads of argument, marked 'X', and the issues sought to be referred to oral evidence are attached to its heads marked 'X1'. 4AX applies for the following interlocutory relief:

5.1 An order in terms of Rule 6(5)(*g*) that the disputes of fact (described below) be referred to oral evidence, alternatively to cross-examination of the deponents of the answering affidavits filed in these proceedings.

5.2 An order in terms of Rule 35, including an order declaring in terms of Rule 35(13), that the rules of discovery shall apply to these proceedings, and directing the Registrar and ZARX to make discovery on the issues referred to oral evidence.

[3] Uniform Rules of Court

[6] Uniform rule 6(11)[4] provides that interlocutory applications 'may be brought on notice supported by such affidavits as the case may require'. The first respondent submits that the interlocutory application is irregular in that 4AX did not file a notice of application indicating the relief to be sought in the interlocutory application, i.e. it failed to give proper notice of the relief sought. Instead, 4AX stated that a 'draft order' would in due course accompany its heads of argument[5]. The first occasion on which the respondents saw the relief claimed by 4AX is when a draft order was attached to 4AX's heads of argument. It is also argued that the draft order seeks relief in terms that are different to the relief foreshadowed in the supplementary affidavit:

6.1 Paragraph 1 of the draft order annexure 'X.1' asks for a referral to oral evidence in relation to 'the manner, consideration and circumstances in which [the Registrar] arrived at his decision to grant an exchange licence to [ZARX] on 31 August 2016'. This according to ZARX is so broad as to cover every issue in the review application;

6.2 Paragraph 1 of annexure 'X.1' lists 'the material disputes of fact', but does not explain whether it is intended to limit the breadth of the draft order itself;

6.3 Paragraph 3 of annexure 'X.1' lists issues in respect of which 4AX 'further' seeks leave to cross-examine, and describes them as 'more specific issues that arise under these disputes of fact'. ZARX argues that again it is not apparent whether this is intended to limit the breadth of the draft order.

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[4] Uniform Rules of Court.
[5] Supplementary affidavit, p1768, para 8.

[7] Counsel for the first respondent submitted that the result of all of this is that the respondents do not know whether 4AX seeks a referral to oral evidence in relation to the issues referred to in paragraph 1 of the draft order, or in relation to the issues referred to in paragraph 2 of annexure 'X.1'. Counsel contends that on this ground alone, the interlocutory application is irregular and should be dismissed.

[8] It is correct that Rule 6(11) does not require a notice of motion, but it is well established that 'the elimination of these formalities has not dispensed with the necessity to give proper notice to the respondent'.[6] *In casu*, 4AX failed to give proper notice, and on this basis alone, the interlocutory application should be dismissed.

[9] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,[7] the Constitutional Court affirmed the trite principle that 'an application will be referred to oral evidence only if there is a genuine dispute of fact, the resolution of which is material to the determination of the case' (Court's emphasis).

[10] In line with this principle, before a court will exercise its discretion to order referral to oral evidence in terms of Rule 6(5)(*g*), it must be satisfied of at least two things:

10.1 First, the court must be satisfied that the matters to be referred to oral evidence are relevant to a pleaded issue.[8] A referral to oral evidence

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[6] *Hendricks v Santam Insurance Company Limited* 1973 (1) SA 45 (C) at 47C.
[7] 2000 (1) SA 1 (CC) para 235.
[8] *AECI Limited v Strand Municipality* 1991 (4) SA 688 (C) at 700C-D.

is, intended to resolve a dispute of fact 'on the papers', and it 'should not enlarge the scope of the inquiry'.[9]

10.2 Second, the court must be satisfied that the referral does not amount to a 'fishing excursion' that has been launched in the hope that the persons to be cross-examined may make admissions helpful to the applicant.[10] This means that the referral must seek to determine only those issues that raise genuine disputes of fact; it cannot traverse all those issues in respect of which the applicant has failed to make out a case.

[11] According to ZARX, special or exceptional circumstances are required to justify 4AX's referral to oral evidence. It says discovery is rare and unusual in application proceedings.[11] The Registrar resists the interlocutory application and that this court's discretion is not to be exercised in favour of 4AX, because he discharges a wide range of duties, and that his attendance at court would take him out of the office, and would not allow him to discharge the duties.[12]

[12] Counsel for 4AX submitted that it (4AX) bears the ordinary civil *onus* to establish its main case on review and that Rule 6(5)(*g*), Rule 35 and are designed to assist an applicant in 4AX's position. In review proceedings, where the administrative 'action concerned depends for its legality upon the existence of a "jurisdictional fact" peculiarly within the knowledge of the public authority', it has been held that the *onus* to prove that jurisdictional fact rests on the public authority.[13]

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[9] *Wepener v Norton* 1949 (1) SA 657 (W) at 658-659.
[10] *Hoff v Pretoria City Council* 1947 (2) SA 752 (T) at 768.
[11] Supplementary affidavit, p1775, para 24.
[12] Registrar's supplementary answering affidavit, p13, para 16.
[13] *Theron NO v UIF (Wester Cape)* 1984 (2) SA 532 (C) (Full Bench).

[13] It is further submitted that, the Registrar derived his discretionary power to grant an exchange licence from section 9 of the FM Act. That provision sets out several prerequisites for the valid exercise of that power, including the existence of the following jurisdictional facts:

13.1 Whether as the Registrar claims, he in fact considered ZARX's licence application in August 2016 'afresh', duly or at all, before exercising his power under section 9 to grant ZARX a licence, or whether instead (as 4AX contends under the first review ground), he had prematurely committed himself to grant ZARX a licence;

13.2 Whether or not in April 2016, the Registrar considered and applied his mind honestly, duly or at all, to ensure that ZARX's proposed exchange rules complied with section 17 and met the objects of section 9 of the FM Act, (4AX's *fourth review ground*);

13.3 Whether or not, as section 9 further requires, the Registrar in August 2016, in fact considered and applied his mind honestly, duly or at all to truly 'satisfy' himself that ZARX, as an applicant for an exchange licence, met each of the financial adequacy requirements of section 8(1)(*a*) of the FM Act as at August 2016 (*fifth review ground*).

[14] It is argued that the existence or otherwise of those facts lie peculiarly within the knowledge of the Registrar and his office, and this applies to the true motives and state of mind of the Registrar himself and of his senior officials, especially in relation to the *bona fides* of the vital steps and decisions taken by Mr Chanetsa.

[15] 4AX contends that it invokes Rule 6(5)(*g*) and Rule 35(13) to assist it and to give effect to its rights under sections 31(1) and 33(2) of the Constitution, to

administrative action that it lawful, reasonable and procedurally fair. If the interlocutory application is successful, it will ensure a fair and thorough examination and determination of the vital questions of fact on which the decision depends for its legality. Without such exposure, these issues are likely to remain unresolved and impede the court in its endeavour to make a just and equitable order under somewhat complex circumstances of this matter.

**The disputes of fact**

[16] The dispute of facts on which 4AX asks for leave to cross-examine the respondents' deponents are as follows:

16.1 whether Mr Chanetsa, acting under false pretenses, circumvented the critical public objection process prescribed by section 7(4) of the FM Act for an unlawful purpose;

16.2 whether he deliberately prevented 4AX, an objector to ZARX's original licence application, and the public at large, from examining or objecting to ZARX's actually proposed (i.e. amended) exchange rules and listing requirements;

16.3 whether he intended to mislead the public and 4AX to believe that the exchange rules and listing requirements which ZARX had submitted for approval by the Registrar, were those originally submitted for approval; and

16.4 whether he did so in part to ensure that ZARX would be granted a licence by 31 August 2016, and whether the decision to award it a licence had been predetermined.

[17] 4AX further asks for leave to cross-examine the respondent's deponents on the following more specific issues that arise under these dispute of facts:

17.1 was ZARX improperly given access to confidential official information concerning the decision in advance of the decision;

17.2 did ZARX convey or use such information or otherwise derive any material benefit from it, including by giving reliable assurances to issuers and others to secure commitments from them in advance of the decision;

17.3 did the Registrar decide not to issue a notice in terms of section 7(4) to curtail the application process, or for any other improper reason, including to avoid objections, delays or public scrutiny of ZARX's application;

17.4 did the Registrar decide to dispense with section 7(4) process in relation to ZARX's 'fresh' licence application under false pretenses;

17.5 did the Registrar consider or reconsider every relevant aspect of the ZARX licence application and all objections received to the licence applications, including the objections to the exchange rules of ZARX, at any relevant time after the alleged renunciation by ZARX, and before the alleged decision was taken on 31 August 2016;

17.6 did the Registrar at any relevant time after 5 August 2016 and before the decision not to issue a notice under section 7(4) was taken, in fact examine whether there was any material change introduced to ZARX's originally proposed exchange rules;

17.7 if so, did the Registrar conclude and hold an honest view at any such relevant time before the decision was allegedly taken, that there were no such material changes; and

17.8 if so, for which reason(s) did the Registrar come to such conclusion in relation to each such amendments.

[18] It was submitted that under the fifth review ground, the following further material dispute of facts arise:

18.1 whether or not the Registrar in good faith considered and/or concluded that ZARX, as at August 2016, met all the relevant financial adequacy requirements of the FM Act;

18.2 whether the Registrar was in fact 'satisfied' (and did he honestly conclude) in March 2016, based on the evidence and information before him at that time, that ZARX met the relevant financial adequacy requirements under the FM Act;

18.3 was the Registrar in fact 'satisfied' (and did he honestly conclude) in August 2016 that the evidence submitted in support of the March licence, was a rational basis on which to conclude that ZARX met all relevant financial adequacy requirements of section 8(1)(*a*) of the FM Act and of Board Notice 104; and

18.4 did the Registrar and/or ZARX at any relevant time intend to mislead 4AX or any other members of the public at large over the fact that it had submitted amended exchange rules for approval by the Registrar.

[19] 4AX's case under the first review ground, is that the decision was unlawful because the evidence shows that the Registrar did not at any relevant time in August 2016, consider ZARX's licence application, whether in good faith or at all.

[20] Although with no thread of evidence, 4AX made serious allegations that in all probabilities, 'the available evidence' shows the following: the Registrar made the decision without considering the information or merits of ZARX's application; instead he had already made up his mind to grant ZARX an exchange licence well before 31 August 2016, on which date he claims to have made the decision. 4AX alleged that not only did the Registrar decide to grant ZARX a licence, but he had decided that he would do so by an acknowledged or agreed predetermined deadline of 31 August 2016, and that he or someone with inside knowledge had assured ZARX of his intentions, nearly a month before the decision was published; and that the Registrar had decided and committed to ZARX that he would do so for the improper and unlawful purpose of enabling ZARX to become operational by 1 September 2016.

[21] Counsel for 4AX submitted that this dispute also involves (and may depend on) ZARX's knowledge and state of mind, particularly whether its senior officials (the deponents to its answering affidavit), knew or had reason to expect that ZARX would be granted a licence before the decision was made and published. Counsel contends that on this central question, partly based on unambiguous public statements by ZARX several weeks before the Registrar published the decision, that the Registrar had in all probability, already assured ZARX that it would be granted a licence, and that the Registrar would publish his decision by the 'deadline' of 31 August 2016. It is argued that discovery and cross-examination of the relevant

deponents to the answering affidavits are likely to be decisive on these issues, and therefore potentially dispositive of the entire first review ground.

[22] It is further submitted that the Registrar claims in his answering affidavit, (not his reasons) that he took the decision not to publish a notice under section 7(4), and therefore not to conduct a public objection process after he in fact considered ZARX's amended exchange rules in August 2016. He then compared them to its original proposed exchange rules, and that he then concluded that the amended version did not in any material way amend the original.

[23] Under its first review ground, 4AX rejects this explanation as manifestly contrived, inherently improbable and untrue. It is argued that there is no evidence from the record, or in the Registrar's answering affidavit, to show that any such (detailed and laborious) comparative exercise was performed at any relevant time in August 2016, before he took the decision. 4AX therefore contends that the inference is warranted that the Registrar bypassed this essential process under a false and contrived pretext to serve the ulterior purpose of expediting ZARX's application for a licence, and so to ensure that ZARX would be granted a licence by 31 August 2016, and ultimately enable ZARX to 'go live' on 1 September 2016.

[24] It is again argued that discovery and cross-examination are likely to reveal the truth, and assist the court in determining the true motivations for Mr Chanetsa's and ZARX's actions and statements at that time, and that the Registrar did so to avoid the multiple public objections and the substantial delays which a section 7(4) notice would inevitably had triggered.

[25] Similar issues of fact arise under the fifth ground of review. A central issue under the fifth ground of review is whether the evidence from the record provides a

rational basis for the Registrar's claim that he was 'satisfied' that ZARX as at August 2016, met the requirements for an applicant for an exchange licence in terms of section 8(1)(*a*), read with Board Notice 104.

[26] 4AX's primary submission under the fifth review ground is that the Registrar could not rationally have concluded that ZARX met the financial adequacy requirements of section 8(1)(*a*). Its case is further that the evidence instead strongly suggests that the Registrar as a fact, did not believe (did not hold a *bona fide* view) that ZARX had satisfied these financial adequacy requirements. This is based on the submission that the version advanced during the first appeal (JSE appeal) directly contradicts the version proffered by the Registrar in his answering affidavit on these issues, specifically at paragraphs 106 to 111. These contradictions would be put to him in cross-examination.

[27] Counsel for 4AX argued that ZARX's own state of mind is equally pertinent to the question over the Registrar's state of mind and true motives. ZARX's own actions and public statements in early August 2016, long before the decision was published, unambiguously proclaimed ZARX's confidence not only that it would be granted a licence, but that it would be granted one by 1 September 2016. All this support the inference that the Registrar did not in good faith consider ZARX's application as the FM Act required, and that the granting of a licence to ZARX had in fact been a foregone conclusion.

[28] 4AX asks in the alternative, that if the court were to consider it undesirable or unnecessary to refer the matter to oral evidence for cross-examination, to direct the relevant disputes of fact to be decided in favour of 4AX on the papers as they stand.

[29] Counsel for 4AX in this regard relied on *Johannesburg City Council v The Administrator, Transvaal and Another*[14], where Marais J remarked:

> '. . . This zeal not to put all the cards on the table will have to be taken into consideration as far as it is relevant in deciding the ultimate issue, namely whether the Administrator-in-Executive – Committee in coming to the decision under review, acted reasonably, which in my view includes "honestly", or rather more correctly put, that they came to a decision which is correctly put, that they came to a decision which is not indicatable on the ground that no reasonable man would have come to that conclusion; "reasonable" in that sense as I understand it includes "honest"'.

[30] It was submitted that these remarks apply with equal force to the attitudes of the respondents in this matter, and warrant a similar approach in the assessment of their evidence, both in their affidavits, and in the final adjudication of the review, whether or not orders for discovery and for leave to cross-examine their deponents are made.

**Issues not relevant to the pleaded review grounds**

[31] The first respondent's main contentions is that the Court should refuse to refer any matters to oral evidence and cross-examination because: (i) the issues sought to be referred by 4AX are not relevant to any of the pleaded issues or necessary for the determination of the review and; (ii) to do so would unjustifiably expand the scope of the enquiry and would be a fishing expedition.

[32] Counsel for the first respondent submitted that the issues to be referred to oral evidence are irrelevant to the pleaded review grounds. 4AX seeks a referral to oral evidence in relation to the first and fifth review ground. The fifth review ground is that it was irrational for the Registrar to conclude that ZARX complied with

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[14] 1970 (2) SA 89 (T) at 90F-90H.

sections 8(1)(*a*), (*b*), (*c*), (*d*) and (*e*) of the FM Act. 4AX seeks a referral to oral evidence in order to test 'the honesty' and motives of Mr Chanetsa, the Deputy Registrar.

[33] Notably absent from the pleaded review grounds are bad faith, bias or ulterior purpose or motive. There is no mention of sections 6(2)(*a*)(iii), 6(2)(*e*)(ii) or 6(2)(*e*)(v) of PAJA in the review grounds in paragraph 111 of the founding affidavit.

[34] I agree with the first respondent's argument that even if ulterior purpose, bias or bad faith were pleaded grounds for review, 4AX has failed to make out even a *prima facie* case for these claims. Moreover, 4AX's speculation of bad faith on the part of Mr Chanetsa is irrelevant to the lawfulness of the decision of the Registrar, Mr Tshidi, to grant ZARX an exchange licence.

[35] As regards the **first** review ground, it is common cause that the Registrar did not publish a fresh section 7(4) notice after ZARX renounced its conditional licence. The Registrar indicated that he would issue a fresh section 7(4) notice only if ZARX's proposed exchange rules and listing requirements differed materially from those in its original application[15].

[36] 4AX wishes to cross-examine the Registrar in relation to <u>why</u> he did not follow the section 7(4) procedure; whether he in fact held certain views regarding section 7(4); and whether his views were 'honestly held'.

[37] Whether or not the Registrar contravened section 7(4) of the FM Act depends on two questions, namely:

37.1 a proper interpretation of section 7(4); and

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[15] Founding affidavit, p49, para 77; 'FA21', p934.

37.2 whether the amendments to ZARX's proposed exchange rules and listing requirements were material.

[38] The first question is a pure question of law. The second question requires a comparison of the first set of rules and listing requirements on the one hand, and the second set of rules and listing requirements on the other hand.

[39] 4AX asks the Court to draw inferences of bad faith and improper purpose. Neither the determination of the question of law nor the factual verification of any material changes to ZARX's exchange rules and listing requirements require oral evidence or cross-examination. Both matters may appropriately be resolved on the papers. These two questions are dispositive of the first ground of review. If on proper interpretation of section 7(4), and having regard to the materiality of the amendments, the Registrar was not required to publish fresh notices, then that is the end of the enquiry.

[40] Counsel for the first respondent submitted that an additional reason why 4AX seeks to refer issues to oral evidence is that:

> 'an important part of [its case under the first review ground is that the decision was unlawful because the evidence shows that [the Registrar] did not -- as he claims he did and as section 9(1) of the Act required of him – at any relevant time in August 2016 in fact consider ZARX's licence application, whether in good faith or at all'.[16]

Counsel argued that there is no basis in the pleadings for 4AX's extraordinary statement that 'the available evidence . . . shows on the probabilities' that the Registrar did not consider the merits of ZARX's application before taking the decision. I agree with this argument.

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[16] 4AX's Heads of argument, p56, para 127.

[41] Every question in paragraph 1 of annexure 'X1' relates to 4AX's speculation of wrongdoing by Mr Chanetsa. In my view, this speculation is irrelevant because, even if it were well-founded, it would have no impact on the lawfulness of Mr Tshidi's decision to grant ZARX an exchange licence.

[42] As regards the fifth review ground, the disputes listed in paragraph 3 of annexure 'X1' to the draft order, deal with whether the Registrar was in fact satisfied that ZARX satisfied the financial adequacy requirements in section 8(1)(*a*) of the FM Act, and if so, whether his satisfaction was 'honest' (Court's emphasis).

[43] The first respondent contends that this is not a question that arises on the pleaded grounds of review. The founding affidavit makes it plain that 4AX does not contend that the Registrar was not satisfied of these matters; it contends that the Registrar acted irrationally in being satisfied of these matters (Court's emphasis).There is no dispute on the papers that the Registrar was indeed satisfied of these matters.[17]

[44] In my view, whether the Registrar acted irrationally in reaching his conclusion is an objective enquiry that does not require referral to oral evidence. The Constitutional Court held that:

> 'The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in

[17] The Registrar has stated that he was satisfied in relation to requirements (a) and (b), and that he exercised his discretion to grant an exchange licence to ZARX (Registrar's reasons, p334, para 190).

good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle'.[18]

[45] I have noted that 4AX accepts that the fifth review ground entails an objective enquiry:

45.1 Mr Swart states in his supporting affidavit that the question for purposes of the fifth review ground, 'is not whether, as an "objective fact", ZARX at the relevant times had the required financial resources in terms of section 8(1)(a)'; the question is 'instead, whether the Registrar's assertion that he was satisfied that ("as an objective fact"), ZARX had the required financial resources in terms of section 8(1)(a) is rational, having regard to the evidence in the record';[19]

45.2 4AX also recognise in its heads of argument that a rationality enquiry turns on whether the rule 53 record and the Registrar's reasons support the Registrar's decision.[20] 4AX refers to it as 'objective reasonableness' enquiry.[21]

[46] It is therefore obvious that cross-examination of the Registrar is of no relevance to an assessment of 'objective reasonableness'. Whether or not the Registrar's decision was objectively rational must be determined with reference to the information forming part of the rule 53 record. I therefore agree that for all these reasons, the issues to be referred to oral evidence are not relevant to the pleaded case.

**A fishing expedition**

[18] *Pharmaceutical Manufacturers Association of South Africa and Another In Re: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 para 86.
[19] Swart's affidavit, p383, para 19.
[20] Founding affidavit, p207, para 395.
[21] 4AX's Heads of argument, p132, para 289.

[47] Before a Court grants a referral to oral evidence, it must be satisfied that the party seeking the referral has made allegations that are not vague, insubstantial or otherwise insufficient to create a dispute of fact.[22]

[48] 4AX says the dispute of fact concern "allegations of dishonesty, improper motives or purposes and other serious impropriety against state officials". In particular, 4AX's supplementary affidavit accuses the former Deputy Registrar of Securities Services (Mr Chanetsa) and ZARX of being complicit in dishonesty, bad faith and other impropriety. Instead, it asks the Court to infer these conclusions from a set of utterly benign circumstances.

[49] A Court will not infer dishonesty, bad faith and impropriety lightly. Bad faith has been described as 'a strong allegation not lightly to be alleged and which is difficult to prove'.[23] Mr Chanetsa has gone on affidavit to deny specifically, all allegations of improper conduct levelled against him and the personnel who worked under his supervision. 4AX has not put up any evidential basis to impugn Mr Chanetsa's version of events, and has therefore not made out a prima facie case to cast doubt on Mr Chanetsa's version.

[50] The allegations giving rise to these so-called disputes of fact are speculative in the extreme. 4AX suggests that, because ZARX made public pronouncements a few weeks before the Registrar made his decision on 31 August 2016, provides 'preliminary evidence' and that 'from the inferences' it seems he has unfairly, improperly and unlawfully been given insider knowledge. Similarly, the allegation that the Registrar acted for ulterior purposes, is that the outcome of his failure to

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[22] *King Williams Town Transitional Local Council v Border Alliance Taxi Association* 2002 (4) SA 152 (E) at 156I-J.

[23] *Golden Arrow Bus Services (Pty) Ltd v City of Cape Town* 2013 JDR 828 (WCC) para 39.

issue a fresh section 7(4) notice was to avoid public scrutiny, and so that ZARX was able to 'go live' by 1 September 2016.

[51] These allegations are entirely circumstantial, and the inference is without any basis of fact. To draw such an inference would be absurd. A party is not entitled to make unsubstantiated allegations and then seek a referral to oral evidence in the hope that the persons to be cross-examined may make helpful admissions. This would amount to a fishing expedition. Whatever 4AX might mean by 'preliminary evidence', has put up no evidence capable of giving rise to a genuine dispute of fact on these issues, in circumstances where the Registrar has provided a detailed, specific and logical explanation.

[52] I am therefore unable to draw from the facts, the inference which I have been asked to draw, that there was dishonesty, bad faith and impropriety on ZARX and Mr Chanetsa. I am accordingly not prepared to accede to the application as this is not a proper basis for referral to oral evidence.

**Exercise of discretion**

[53] This Court is vested with a discretion in terms of Rule 6(5)(*g*) of the Rules of Court. In addition to 4AR's failure to satisfy the requirements as set out above, there are three additional reasons why the Court should exercise its discretion to decline to refer issues to oral evidence under Rule 6(5)(*g*).

[54] Firstly, as a general principle, courts are reluctant to require administrators to attend Court to give oral evidence in review proceedings. In the pre-constitutional relic, our Courts have long held that subjecting such functionaries to cross-

examination is undesirable.[24] This principle is reinforced by the Constitution. The Constitution embodies the separation of powers, which requires Courts to recognise their institutional role, and show appropriate respect to the role played by other branches. Section 195(1) of the Constitution requires that the public administration must promote 'efficient, economic and effective use of resources'. Requiring high-ranking public officials to routinely defend their decisions in person would infringe both of these constitutional principles. This was indeed the view of the Constitutional Court in *SARFU*.[25] The same principles apply *in casu*. It implicates high-ranking public officials in the administrative arm of the State, and requiring them to routinely give oral evidence would undermine the efficiency of the public administration and result in the highly uneconomical spending of public resources.

[55] Secondly, the Court should give due weight to the need for finality in this matter. The Registrar took the impugned decision in August 2016. The review application is heard on 19 August 2019, three years later. If the referral to oral evidence is granted, the main application will have to be postponed, resulting in further delays. Meanwhile, ZARX is a functioning exchange, at risk of having its licence revoked, years after the commencement of its operations.

[56] In *Masethla*,[26] the Constitutional Court refused an application for referral to oral evidence on the basis that the dispute (concerning the President's alleged improper motive) was marginal in the scheme of the case, and it accordingly did not weigh heavier than the need for finality.

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[24] *Danish and Another v Osrin and Another* 1950 (2) SA 343 (C) at 345 and *Clairwood Motor Transport Co Ltd v Pillai and Others* 1958 (1) SA 245 (N) at 251D.
[25] *SARFU* supra para 234.
[26] *Masethla v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) para 95.

[57] Thirdly, review proceedings are referred to oral evidence only in exceptional circumstances.[27] I agree with the first respondent's submission that 4AX has raised no such exceptional circumstances. If I were to grant the referral to oral evidence, it would have a perverse effect of encouraging review applicants to make unfounded and speculative claims of impropriety against public officials, in the hope that they would thereby have the opportunity to cross-examine them.

**Discovery**

[58] 4AX asks for an order compelling the Registrar to make a discovery in terms of Rule 35(13). This order is parasitic on the referral to evidence. If the factual disputes are not referred to oral evidence, then the request for discovery would fall away.

[59] 4AX states that 'the express wording of . . . Rule 35(13) require [sic] no exceptional or special circumstances for orders of this kind'.[28] However, this ignores the principle that has been established for many decades, namely that:

> 'in application proceedings we know that discovery is a very, very rare and unusual procedure to be used and I have no doubt that this is a very sound practice and it is only in exceptional circumstances, in my view, that discovery should be ordered in application proceedings'.[29]

4AX also seems to suggest that the exceptional circumstances requirement imposed in *Moulded Components* is a pre-constitutional relic, which should be discarded.

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[27] *Abagibeli Insurance Administrators (Pty) Ltd v The SA Rail Commuter Corp Ltd* 2007 JDR 0440 paras 72-74.
[28] 4AX's Heads of argument, p36, para 84.
[29] *Moulded Components and Rotomouldings South Africa (Pty) Ltd v Coucourakis* 1972 (2) SA 457 (W) at 470D-E.

[60] I do not agree with this suggestion. The exceptional circumstances requirement was recently endorsed by this Court, placing reliance squarely on the *Moulded Components* judgment.[30] There can be no dispute that exceptional circumstances are required as a matter of law. Far from being exceptional, these proceedings are those in which discovery ought not to be granted. These are review proceedings, launched in terms of Rule 53. 4AX contends that, because it had no option but to proceed by way of motion, the Court should not lightly deprive it of benefits associated with action proceedings.[31] However, what 4AX ignores is that rule 53 also provides it with significant procedural advantages. The Registrar has delivered a substantial record of proceedings as required by Rule 53.

[61] Given that each of the alleged disputes of fact in annexure X.1 relates to the decision sought to be reviewed, I agree with the first respondent's submission that there are no relevant documents that 4AX can hope to obtain by means of discovery, which did not form part of the Rule 53 record. If 4AX believed that the Rule 53 record was inadequate, its remedy is simple: it should have applied in terms of Rule 30A to compel the production of those documents it contended were missing. It failed to do so.

[62] Counsel for the first respondent submitted that 4AX's interlocutory application amounts to an abuse of process. It is contended that the application is based on speculation couched in inexplicably intemperate language, and it constitutes an impermissible fishing expedition, and this justifies a punitive cost order against 4AX.

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[30] *FirstRand Bank Ltd t/a Wesbank v Manhatten Operations (Pty) Ltd and Others* 2013 (5) SA 238 (GSJ) para 17-18.

[31] 4AX's Heads of argument, p42, para 99.

[63] In the circumstances, 4AX's interlocutory application is dismissed with costs.

**The Main Review Application**

[64] The main application seeks to review and set aside a decision that was taken by the Registrar to grant an exchange licence to ZARX ("the decision of the Registrar"), and a judgment of the FSB Appeal Board dismissing an appeal against the decision of the registrar ("the judgment of the FSB Appeal Board"). The judgment of the FSB Appeal Board was handed down on 9 February 2017.

**Unreasonable delay**

[65] The first respondent submitted that the application should be dismissed for unreasonable delay. Counsel for the first respondent argued that the applicant waited four months before launching its review on 9 June 2017, despite knowing that ZARX had commenced trading in reliance on its licence shortly after the judgment of the FSB Appeal Board was delivered. 4AX did not bring an interim interdict application, or even caution ZARX against commencing its operations, to prevent prejudice to ZARX and the multiple stakeholders that relied on its licence to invest in and commence trading on the ZARX exchange.

[66] Although the first respondent accepts that the review application was launched within the 180-day period referred to in section 7(1) of PAJA[32], the submission is nevertheless that 4AX delayed unreasonably before launching the

[32] Section 7(1) of PAJA provides that any proceedings for judicial review 'must be instituted without unreasonable delay and not later than 180 days after the date' on which any internal appeal has been concluded.

review. It is argued that 4AX has failed to provide an adequate explanation for the delay, and the prejudice that has resulted from the delay is such that the delay ought not to be overlooked or condoned.

[67] Counsel for the first respondent relied on *OUTA v SANRAL,*[33] wherein Brand JA explained that the effects of section 7(1) of PAJA is that a delay exceeding 180 days is determined to be *per se* unreasonable, but a delay of less than 180 days may also be unreasonable and require condonation.

[68] Brand JA reiterated the importance of the delay rule in judicial review as described by Nugent JA in *Gqwetha v Transkei Development Corporation Ltd*[34]:

> '[22] It is important for the efficient functioning of public bodies . . . that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that long rule . . . is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the administrative functions . . .
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> [23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight'.

[69] In its supplementary affidavit of 5 October 2017, ZARX detailed the steps that had already been taken in reliance on the licence issued to ZARX – by ZARX, its

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[33] *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) para 26.

[34] 2006 (2) SA 603 (SCA) at paras 22-23.

shareholders, employees and funders; by the issuers of securities on the ZARX exchange; and by the investors and the authorised users of the ZARX exchange.[35] ZARX explained the following:

69.1 ZARX and its shareholders have spent a considerable amount of time and large sums of money, establishing and operating the exchange (including on software and IT structure, lease agreement, professional consulting fees, marketing and website development);

69.2 ZARX has also spent considerable time, money and effort negotiating a significant B-BBEE transaction to meet the FSB's requirement for its licence;

69.3 The issuers of securities listed on the ZARX exchange have spent considerable time and several millions of rands listing on the ZARX exchange. This entailed obtaining the requisite board and shareholder approvals, revising company documents and financials, concluding agreements with ZARX and meeting its administrative requirements; dematerialising shares and regularising share registers, and marketing the listing of their shares on the ZARX to potential investors;

69.4 Investors too have relied on the licence issued to ZARX. They include individual investors and large corporates. By 5 October 2017, the ZARX listings already had in aggregate more than 7500 individual shareholders.

[70] In a subsequent affidavit dated 25 April 2018, ZARX explained that the listings processes were continuing, with more entities applying for listings, and

[35] ZARX's Supplementary affidavit, Additional documents, pp223-232, paras 9-24.

transactions being concluded on the ZARX exchange. Moreover, by then the Government Employees Pension Fund had acquired a 25% stake in ZARX.

[71] Counsel for ZARX submitted that setting aside the Registrar's decision at this late stage would cause serious prejudice to all the stakeholders concerned and to South Africa's economy at large in that:

71.1 ZARX's financial liability and sustainability would be placed in jeopardy, and the reputational damage would be irreparable;

71.2 The issuers on the ZARX exchange would suffer considerable prejudice and expense, as they would have to delist or transfer to another licence exchange. These processes would take several months and entail millions of rands in wasted costs;

71.3 The investors in companies listed on the ZARX exchange would also suffer financial loss and inconvenience if they were required to sell their shared in a forced sale;

71.4 Instability and a loss of public confidence in South Africa's financial markets and its regulatory authority would result. South Africa's reputation as a safe and secure place to invest would inevitably be compromised.

[72] 4AX's explanation for its delay is essentially two-fold. It says:

72.1 that the review application is 'complex and voluminous' and involves 'novel' issues; and

72.2 that preparation of the review was hampered by the confidentiality obligations which ZARX imposed on it by non-disclosure agreements.

[73] 4AX correctly accepts that proceedings for judicial review must be instituted without unreasonable delay, and that circumstances may require the review to be launched sooner than within 180 days, but argue that these are both independent requirements in the sense that 180 days is the outer-limit. 4AX contends that the fact that it brought its review two months earlier than the 180 day outer-limit, alone would suggest that 4AX acted reasonably and not for the improper reasons attributed to it.

[74] The first respondent's counsel on the other hand argued that neither of these explanations withstands scrutiny in that:

74.1 4AX managed to institute its appeal against the licencing decision within 30 days stipulated in the FM Act;

74.2 the issues raised in the review (and the appeal) are not especially complex, but have been made to appear so by the convoluted pleadings of 4AX;

74.3 the issues in the review are not novel for 4AX or its legal representatives. The grounds of review overlap significantly with the grounds of appeal traversed by 4AX,[36] and the record is the very same record as furnished in the appeal. 4AX was represented in the appeal by the same attorneys (Mr Swart of Cliffe Dekker Hofmeyr Inc), and the same senior and junior counsel as in the review application; and

74.4 the confidentiality agreement did not restrict 4AX in bringing its review application. 4AX already had full access to the confidential parts of the

[36] 4AX's Notice of appeal and Grounds of appeal, pp983-1023, 'FA30' to 'FA32'.

record through its legal representatives during the appeal process in November 2016.[37]

[75] Maintaining stability and public confidence in South Africa's financial markets are key objects of the FM Act.[38] It is therefore unsurprising that given these objects, any appeal against a decision taken under the FM Act must be lodged expeditiously – within 30 days of the person becoming aware of the decision – and that decision taken under the FM Act may be suspended by the FSB Appeal Board Chair, pending appeal.[39]

[76] I have noted that when the JSE appealed against the Registrar's decision to award ZARX an exchange licence, it applied for the suspension of the Registrar's decision to grant ZARX an exchange licence, pending the appeal, and this order was granted by the FSB Appeal Board.[40] This decision should have alerted 4AX of the importance of acting expeditiously in reviewing ZARX's exchange licence, to avoid instability and disruption in the financial markets and the obvious prejudice to those acting in reliance on the licence.

[77] A review must always be brought within a reasonable time, which might well in the circumstances of the case, require it to be brought sooner than the outer-limit. This is to avoid prejudice to the respondents, and to promote the public interest in reaching finality on the status of administrative acts, on grounds of pragmatism and practicality.[41]

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[37] Founding affidavit, p18, para 10; p57, para 97.
[38] Section 2(*b*).
[39] Section 26(2) and section 26(3)
[40] Page 921 'FA15'.
[41] *Chairperson STC v JFE Sapela Electronics* 2008 (2) SA 638 (SCA) 650D-E.

[78] Finding that there has been unreasonable delay alone does not require a dismissal of the review. The court has a wide discretion to condone the delay. In exercising that discretion, prejudice to a respondent is an important consideration, amongst others, including the values of the Constitution.[42]

[79] The reasonableness of 4AX's explanation for its four-month delay must be assessed in light of ZARX's above context and considerations – all of which would have been appreciated by 4AX as an exchange licence operator itself.

[80] In these circumstances, and given the obvious widespread prejudice that would be caused by any delay, in my view, 4AX's institution of the review application was plainly unreasonable and is not in the interest of justice. 4AX has failed to provide a satisfactory explanation for its delay, and it ought to according not be condoned. On this ground alone, the review application should be dismissed.

[81] However, I still find it necessary to address the merits of the main application.

[82] 4AX specifies its PAJA review grounds in paragraph 111 of the founding affidavit[43].

**First Review Ground**

[83] 4AX's first review ground is that "the process was patently irregular and manipulated to serve foregone conclusions".

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[42] *Khumalo and Another v MEC for Education, Kwa-Zulu Natal* 2014 (5) SA 570 (CC) para 44.
[43] Page 64, para 111.1-111.7.

[84] Counsel for 4AX submitted that the *prima facie* evidence presented to date reveals that neither the first nor the second prerequisite identified above for the valid grant of a licence contemplated by section 9(1) existed. The Registrar was required in terms of section 7(4) to publish the fact that ZARX had renounced its first licence, and had applied for a second licence by the prescribed notice, invited objections to the application, and considered the objections received. This, it is argued, *prima facie* indicates that instead of complying with each of the critical requirements, Mr Chanetsa circumvented them, including by putting up a manifestly false excuse for not complying with them.

[85] 4AX contends that the process that culminated in the Registrar's decision concerned the following two phases:

85.1 The first phase is from March 2015, when ZARX first applied for an exchange licence, ending on 8 March 2016 when the Registrar first granted ZARX an exchange licence. That was a final decision and was confirmed by the Appeal Board's 26 July 2016 judgment. The Registrar thereby discharged his discretionary powers in terms of section 9(1).

85.2 The second phase spanned the six-month period immediately thereafter, from 8 March 2016 until 31 August 2016 when ZARX was awarded its second licence. The second phase itself involved two distinct periods. The first from March 2016 to about the first week in August 2016 when ZARX claimed it renounced the first licence. The second ran from that time until 31 August 2016, about three weeks later.

[86] The Registrar claims he 'considered' ZARX's application 'afresh' in terms of section 9(1) of the FM Act, during this period after the renunciation and before the decision. The Registrar contends that ZARX only submitted a single licence application, involving a single process commencing in March 2015 and ending on 31 August 2016. The Registrar argues that he did not have to publish the fact that ZARX, now in August 2016, once again applied for a (second) licence, or issue a new section 7(4)(*a*) notice calling for new objections in respect of that 'revived' application.

[87] 4AX argued that no such process or power is contemplated by the FM Act, and that by doing so, the Registrar acted without lawful authority, and his decision should be set aside for this reason alone.

[88] 4AX avers that the Registrar had decided well before he claims to have 'considered' the application for a second licence 'afresh', that he would grant ZARX another licence, and that he would do so by not later than 31 August 2016, as a predetermined deadline.

[89] The first respondent's counsel argued that 4AX's allegations are irrelevant to the pleaded grounds of review. At the time when the decision was made, Mr Tshidi was the Registrar and Mr Chanetsa was the Deputy Registrar. The allegations of impropriety are directed at Mr Chanetsa and not Mr Tshidi.

[90] The power to grant an exchange licence in terms of section 9 of the FM Act was vested on Mr Tshidi, *qua* Registrar. He explains in his supplementary affidavit:

> '14.2 As stated in paragraph 3 of my answering affidavit, I was the person who took the decision to grant an exchange licence to ZARX. That decision was <u>not</u> taken by Mr Chanetsa.

14.3 I state categorically that in making that decision, I exercised an independent judgment after having prepared and attended the meeting of the Licencing Committee of the FSB on 23 August 2016 and after being briefed by Mr Keetse with the relevant information and documentation concerning ZARX's exchange licence application . . .'[44]

[91] In its heads of argument, 4AX says that Mr Tshidi's allegation that he made the decision is "inherently improbable"[45]. 4AX does not however explain why it is "inherently improbable" that Mr Tshidi made the very decision that the FM Act required him to take. There is no factual basis on the papers for 4AX's contention that the Registrar himself, Mr Tshidi, took the decision after he had 'already committed himself . . . to granting ZARX an exchange licence'.[46]

[92] I agree with this submission made by the first respondent that all of the allegations regarding the alleged 'improper purpose' of Mr Chanetsa are therefore irrelevant. Even if the allegations were correct, it would not vitiate the decision of Mr Tshidi to award an exchange licence to ZARX. That should be the end on the first review ground.

[93] In my view, 4AX misdirected itself in the review by attacking the motives of Mr Chanetsa, who was not the decision-maker. The Registrar, Mr Tshidi, took the decision sought to be reviewed.

**Second Review Ground**

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[44] Mr Tshidi's supplementary affidavit, p1686, paras 14.2 and 14.3 (Mr Tshidi's emphasis).
[45] 4AX's Heads of argument, p13, para 20.
[46] 4AX's Heads of argument, p13, para 21.

[94] 4AX's second review ground is that 'the process was patently irregular [because] the Registrar did not comply with sections 7(4) and 9(1) of the FM Act'. This review ground goes to *vires* since it contends that the Registrar did not comply with the FM Act.

*Contravention of section 7(4) of the FM Act*

[95] 4AX contends that because the Registrar did not invite comments on the November 2015 version of the ZARX rules, 'this violated 4AX's right under section 7(4) to make comment on and to object to the November 2015 version',[47] and that the Registrar's failure to issue a fresh notice in terms of section 7(4) reduced the licencing process to 'a pointless charade'.[48]

[96] Section 7(4) requires the Registrar to publish 'a notice of an application for an exchange licence'; the notice is required to indicate where the proposed exchange rules and listing requirements may be inspected. I agree with the submission by the first respondent's counsel that section 7(4) does not impose on the Registrar, a rolling obligation to make available for inspection the exchange rules and listing requirements on every occasion on which they are amended during the course of the application process.

[97] 4AX complains that it was unfairly deprived of the opportunity to consider, comment and object to the amended ZARX rules. 4AX had the opportunity to complain about the amended rules before the FSB Appeal Board, but it elected not to do so. The inference to be drawn therefore is that 4AX had nothing to add to its

[47] Founding affidavit, p141, para 262
[48] Founding affidavit, p141, para 263

complaints that were directed at the original rules of ZARX. The FSB Appeal Board drew this very inference, and 4AX's founding affidavit confirms that the inference was correct.[49]

[98] Therefore, in my view, the Registrar did not contravene section 7(4) of the FM Act by failing to publish the amended rules of ZARX.

*Contravention of section 9(1) of the FM Act*

[99] 4AX complains that the Registrar contravened section 9(1) by not considering its objections dated 31 July 2015.[50] 4AX submitted that the Registrar claims in his reasons that he had 'overlooked' 4AX's objections and did not consider them at the time when the licence was granted to ZARX in March 2016 due to some clerical error. Although 4AX's contention is that the July 2015 ZARX exchange rules were materially amended by the November 2015 amendment, the Registrar argued in his reasons that this was of no consequence because he had considered similar objections raised by others during the process.

[100] The factual background to this complaint is as follows:

100.1 On 31 July 2015, Norton Rose Fulbright submitted "Comments to the proposed ZARX Listing Requirements and Exchange Rules" on behalf of 4AX.[51]

100.2 Unbeknown to the Registrar at the time, on the same day 4AX submitted a document that was intended to "supplement" the Norton Rose Comments ("the 4AX objections").[52]

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[49] Founding affidavit, p111, para 203.
[50] Founding affidavit, p143, paras 264-270.
[51] Rule 53 record, Part B, p606.
[52] Rule 53 record, Part B, p704.

100.3 In a letter dated 18 September 2015, ZARX responded to Norton Rose's comments.[53]

100.4 The analysis of the comments by Norton Rose was compiled in the form of a matrix that was finalised on 29 September 2015. These comments were considered by the Registrar as part of the process of evaluating ZARX's application for an exchange licence.[54] The analysis is set out in a spreadsheet annexed to the Registrar's answering affidavit.[55]

100.5 The 4AX objections were received on 31 July 2015, but due to a *bona fide* oversight, were not distributed by the administrative personnel to the team within the Capital Markets department tasked with ZARX's application. As a result, the 4AX objections were not considered at the time when the licence was granted to ZARX. The oversight has been fully explained in the Registrar's affidavit.[56]

[101] Notwithstanding the oversight, the Registrar in his reasons, submitted that some of the objections overlapped with the comments of other objectors, and some of the objections were indirectly considered as part of the overall analysis of the application (in particular the Registrar's own assessment of ZARX's listing requirements and exchange rules). The content and substance of each objection was considered because the same comments had been made by other objectors.[57]

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[53] Rule 53 record, Part B, p800.
[54] Mr Tshidi's answering affidavit, p1254, para 66.4.
[55] Annexure 'DPT5', p1383.
[56] Registrar's reasons, pp309-310, para 160: Mr Tshidi's answering affidavit, p1255, paras 66.5-66.6.
[57] Mr Tshidi's answering affidavit, pp1256-1261, paras 67-73.6 read with Annexure 'DPT5', pp1383-1389.

[102] Section 9(1) of the FM Act required the Registrar to 'consider any objection received'. In assessing whether the Registrar complied with this requirement, the following test must be applied:[58]

> '[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.
>
> [29] . . .
>
> [30] . . . Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court, O'Regan J succinctly put the question in ACDP v Electoral Commission as being "whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose"'.

[103] The fact of the matter is that 4AX's objections were in effect considered by the Registrar. In my view, factually no irregularity occurred, and there was proper compliance with section 9(1) of the FM Act.

**Third Review Ground**

[104] 4AX's third review ground is that the Registrar was *functus officio* when he granted an exchange licence to ZARX on 31 August 2016.

[105] The essence of 4AX's contention is that the Registrar was *functus officio* because his earlier decision to grant a 'conditional' license to ZARX has not been set aside on review by a court. 4AX contends that 'unless and until that licence is

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[58] *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of South African Social Security Agency* 2014 (1) SA 604 (CC).

lawfully set aside, the Registrar's powers to grant the licence under the Act will remain discharged, in law precluding him from doing so again'.[59]

[106] Counsel for 4AX relied on *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd,*[60] wherein the principle was affirmed. Under an extension of this principle, public officials cannot disregard a final administrative act, once taken, and assume it to be invalid – even if in law it is invalid. To do so without a court or other competent tribunal first setting it aside would amount to the official taking the law into his own hands.

[107] Counsel argued that the 8 March 2016 decision, despite the renunciation by ZARX, remained in place as a legal bar precluding the Registrar from granting ZARX its second licence, and the *Kirkland* principle therefore applies to the present case. Once this argument is accepted, then the ordinary principles of the *functus officio* doctrine apply. According to this doctrine, once an administrative functionary has made a decision (subject) to any right of appeal to a superior body or functionary), it is final and conclusive.

[108] One of the common law qualifications to the general rule of *functus officio* is that a final decision may be revoked with the consent of the person who benefited from the decision, and whose rights will be adversely affected by the revocation. Wessels CJ gave expression to this qualification in *Cape Coast Exploration Ltd v Scholtz*[61]:

> 'It is therefore quite clear that if the Civil Commissioner has been satisfied that there are diamonds in payable quantities at the place of discovery and if he grants a certificate, he is

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[59] 4AX's Heads of argument, p92, para 206.
[60] 2014 (3) SA 481 (C) paras 66, 76 and 104.
[61] 1933 AD 56 at 65. The reasoning in this passage was followed in *Vries v Du Plessis* 1967 (4) SA 469 (SWA) at 484D-E.

> *functus officio*, and will have no right *mero motu* to cancel or withdraw the certificate, for there is no provision in the Act entitling him to do so. If however, the owner of the certificate wishes to renounce his privilege or rights, is there anything in the Act or in the common law which prevents him from doing so? There is certainly nothing in the Act, and by the common law there is nothing to prevent the owner of a statutory right or privilege from renouncing or abandoning such right or privilege to which he is entitled . . .'

[109] On 7 August 2016, ZARX gave notice that it "unequivocally renounces the Registrar's conditional approval of its licence application".[62] The Registrar accepted the renunciation. It follows from *Scholtz* that the Registrar was not *functus officio* when he considered ZARX's application afresh, and decided to grant an exchange licence. This was the view also taken by the FSB Appeal Board.[63]

[110] In its heads of argument, 4AX argues that *Scholtz* is distinguishable from this case, and argues that there are three reasons why *Scholtz* cannot apply. It contends, first, that 'in the constitutional dispensation, the common law has been developed to include the *Kirkland* principle'. Second, that 'critical considerations of public policy are at issue and go to the core of this case'; and third, that 'third parties and the public at large' have a direct and enormous stake in the grant and invalidation (or setting aside) of an exchange licence'.[64]

[111] In my view, none of these reasons renders the rationale in *Scholtz* inapplicable.

[112] Counsel for the first respondent contends that the principle applied in *Kirkland* does not displace that in *Scholtz*, and the two principles are not mutually exclusive, and it is the principles in *Scholtz* that find application in this case:

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[62] Annexure 'FA17', p924.
[63] FSB Appeal Board judgment, p348, paras 20-26.
[64] 4AX Heads of argument, pp97-98, paras 213-216.

112.1 *Kirkland* did not establish a new "constitutional principle" as 4AX suggests. It applied the common law principle articulated in *Oudekraal Estates*,[65] although it affirmed that the reasons for the principle also "spring deep within the Constitution's scrutiny of power".[66]

112.2 The principle stated in *Oudekraal Estates* is that an administrative act exists in fact, and has legal consequences until it is set aside by a court in proceedings for judicial review.

112.3 As Cameron J explained in *Kirkland* (writing for the majority), the effect of this principle is that, generally, state officials cannot simply ignore or withdraw administrative decisions that have been communicated to the subject and acted upon.

112.4 A crucial aspect of the *Oudekraal* principle, as applied in *Kirkland*, is the rule-of-law concern to prevent prejudice to subjects of official decisions who act in reliance on those decisions. That concern does not arise in cases such as the present (or in *Scholtz*), where the very subject of the right afforded by the decision itself renounces the decision.

112.5 It is not inconsistent on the one hand to allow officials to revoke a decision, if the persons subject to the decision have renounced their rights flowing form the decision, and no third parties are affected by the decision, and on the other hand, to require officials to apply to court to set aside their own decisions if such

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[65] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2006 (6) SA 222 (SCA) para 26H.

[66] *Kirkland* footnote 38.

renunciation has not been, or is not capable of being, given in the circumstances (as in *Kirkland*).

112.6 The FSB Appeal Board was thus correct to find that *Kirkland* does not apply in this case. Judge Harms reasoned that *Kirkland* (and the other cases 4AX invoked, which have applied the *Oudekraal* principle) –

> 'dealt with instances where an official granted rights and then applying self-help, sought to recall the rights on the ground that the grant was void. That these cases held, is not possible. They do not deal with an instance where the subject forgoes the "right", whether valid or invalid'.[67]

[113] In determining whether the Registrar's conditional licence decision is capable of renunciation and 'mutual cancellation', as contemplated in *Scholtz*, the critical question is whether any third party had already acted in reliance on the decision, and would thus have been affected by its renunciation.

[114] In this case, the Registrar's decision had not yet been implemented, and no third party had acted in reliance on the decision before it was renounced. The Registrar's decision to grant ZARX the exchange licence in March 2016 was granted conditionally, subject to compliance by ZARX with two suspensive conditions. As a result of these suspensive conditions, the ZARX exchange licence had yet to be implemented when ZARX and the Registrar agreed to the renunciation of the licence.

[115] While there can be no doubt that the Registrar's decision to grant ZARX a licence will have a public impact when it is implemented, the critical fact is that the Registrar's decision was yet to be implemented when the decision was renounced.

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[67] FSB Appeal Board decision, p351, para24.

As a result, the renunciation did not prejudice third parties or have a knock-on impact on public policy.

[116] For all these reasons, there is no merit in the third review ground.

**Fourth Review Ground**

[117] 4AX's fourth review ground is that ZARX's exchange rules do not comply with section 17 of the FM Act, and they subvert its objects.

[118] The primary complaint by 4AX is that 'ZARX's exchange rules permit ZARX to evade or abdicate its most elementary regulatory duties and functions . . . by transforming these duties . . . from itself onto its own admitted authorised users, leaving it to them members [sic] to "monitor" itself'.[68] Therefore, ZARX's rules 'betray an overriding intention on the part of ZARX, to shed or evade its own regulatory oversight and compliance duties'.[69] 4AX contends that this means that the ZARX rules do not comply with a battery of provisions in the FM Act: sections 10(1), 10(2), 17(1) and 17(2), read with sections 8(1)(*d*), 7(3)(*b*), and 7(3)(*c*)(i).

*The attack on rule 2030*

[119] Rule 2030[70] provides as follows:

> 'ZARX may relieve any person or class of person from the obligation to comply with a provision (other than an indemnity or a disclaimer provision) of these Rules, either generally or in a particular case or category, and either conditionally or subject to such conditions as

[68] Founding affidavit, p155, para 279.
[69] Founding affidavit, p155, para 266.
[70] Rule 2030 of ZARX Rules and Regulations

ZARX thinks fit. If any conditions on a waiver are imposed, all of the conditions must be complied with for the waiver to be effective. ZARX may withdraw a waiver at any time'.[71]

[120] 4AX contends that Rule 2030 enables ZARX as an exchange to evade its own duties under sections 10(2)(*c*), (*d*) and (*e*), and contravenes section 10(2)(*b*), (*c*) and (*e*), which requires that exchange rules comply with the FM Act. The rule runs counter to and invites a subversion of the duty on an exchange.

[121] Rule 2030 does not provide that ZARX may relieve a person from the obligations to comply with the FM Act, and ZARX has no power to do so in law. These contentions are manifestly incorrect.

*The attack on rule 1030*

[122] Rule 1030[72] provides:

'Notwithstanding the requirements for admission set out in Rules 1010 and 1020, where an applicant:

(a) holds a Qualifying Advisory Licence or Qualifying Discretionary Management Licence; or

(b) is authorised by a Licence Exchange other than ZARX;

The requirements set out in Rules 1010(c) to 1010(h), Rule 1010(k) and Rule 1020 are waivered'.[73]

[123] 4AX contends that rule 1030 is irreconcilable with the requirements of section 17(2) of the FM Act, whereby an exchange is to have a rule determining the capital adequacy, guarantee and risk management requirements with which an authorised user may provide one or more securities services. It is further argued that rule 1030 is irreconcilable with the functions and corresponding duties of an exchange in terms of the provisions of section 10 of the FM Act.

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[71] Founding affidavit, Annexure 'FA10', p787.
[72] ZARX Rules and Regulations
[73] Founding affidavit, Annexure 'FA10', p783.

[124] In my opinion, there is no merit in this contention, for the following reasons:

124.1 Rule 1030 waives the requirements of rules 1010(c) to (h), rule 1010(k) and rule 1020. All these rules have to do with the requirements for eligibility to be admitted as a Market Participant.

124.2 Rule 1030 has nothing to do with the obligation of ZARX to engage in ongoing monitoring of market participants. It only finds application at the time when a person is applying to be admitted as a Market Participant, and has no application thereafter.

*The attack on rule 5014 and rules 6000 to 6003*

[125] Rule 5014 provides:

'5014 Subject to Rule 5015, if:

(a) ZARX is entitled to exercise its powers against a Market Participant under Rules 5010 to 5012 in respect of particular circumstances; and

(b) another Licenced Exchange has similar powers under its operating rules and is entitled to exercise those powers against the same Market Participants in respect of the same or similar circumstances'.[74]

[126] 4AX complains that rule 5014(b) and rules 6000 to 6003 enable ZARX to evade regulatory and supervisory duties under section 10(2)(*c*), (*d*) and (*e*) of the FM Act and contends that 'these rules . . . affirm that ZARX has no duty to monitor compliance over its admitted authorised users'.[75]

[127] The correct readings of rules 5014 and 6000 to 6003, do not involve any 'evasion' by ZARX of its monitoring obligations, due to the following:

127.1 Market Participants are obliged to comply with various provisions of the FM Act, including the provisions relating to market abuse.

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[74] Founding affidavit, Annexure 'FA10', pp797-800.
[75] 4AX's Heads of argument, p114, para 249.

127.2 Rule 5014 provides that ZARX may elect to exercise its powers against a Market Participant together with another Licenced Exchange. It does not mean that ZARX will decline to exercise those powers. It means that ZARX may exercise its powers along with another Licenced Exchange in terms of a co-operation agreement between the two.

127.3 Rules 6000 to 6003 impose an obligation on Market Participants to take steps to ensure that there is no contravention of the market abuse provisions in sections 77 to 81 of the FM Act. In my view these rules do not shift responsibility for surveillance from ZARX onto the Market Participant. These rules do not place all compliance monitoring obligations which the FM Act requires ZARX to undertake onto Market Participants or authorised users, as contended by 4AX.

*The attack on rule 1220*

[128] Rule 1220[76] provides:

'Direct Market Access

1220 A Market Participant may apply for and ZARX may give to a Market Participant, Trading Permission to provide Direct Market Access ('DMA') if ZARX considers it appropriate to give the Trading Permission and is satisfied that the Market Participant will have in place and maintain the required standards to exercise the Trading Permission and is satisfied that the Market Participant will have in place and maintain the required standards to exercise the Trading Permission and will meet any other requirements set out in the procedures. Any

[76] ZARX Rules and Regulations

> Trading Messages submitted pursuant to the Trading Permission are considered to be submitted by the Market Participant'.

[129] 4AX complains that rule 1220 enables ZARX and its members to evade the critical duties assigned to them by sections 17(1), 17(2) and 17(7) of the FM Act. It is argued that the direct market access rules effectively allow several classes of quasi-authorised users, potentially acting as intermediaries for and on behalf of investors, without requiring any of them to comply with any of the rules, or with the Act, and without their conduct being monitored or regulated in any way.

[130] There is no merit in this complaint, because the FM Act does not prohibit Direct Market Access. In terms of the definition of Direct Market Access,[77] clients will only be permitted to send trading messages without the intervention of an Authorised Trader; they will not be permitted to perform any other securities services. Rule 1220 provides that ZARX may give a market participant trading permission to provide Direct Market Access if the Market Participant will maintain the required standards to exercise the trading permission. Significantly, any trading messages submitted pursuant to this trading permission 'are considered to be submitted by the Market Participant'. In terms of section 17(7)(v) of the FM Act, the rules are binding on the clients of authorised users.

*The attack on rule 7031*

[131] Rule 7031[78], read with rule 7032, provides;

> '7031 If it is determined that the registered owner or beneficial owner of a ZARX Restricted Security does not fulfil the requirements of an Eligible Purchaser in respect of such ZARX Restricted Security, ZARX, acting on the instructions of the issuer may correct the purchase transaction of the Restricted Purchase Security.

[77] Page 776.
[78] ZARX Rules and Regulations.

7032 Where a purchase transaction in a Restricted ZARX Security is corrected by ZARX

(a) ZARX will instruct the CSDP to transfer the Restricted ZARX Security in question to the issuer or the issuer's nominee for the consideration provided for in that issuer's founding documents.

(b) the registered owner will be obliged to accept the consideration provided for in that issuer's founding documents and will be obliged to dispose of the Restricted ZARX Security to the issuer or the issuer's nominee'.[79]

[132] 4AX contends that rule 7031 (read with rule 7032) is unconstitutional, because it permits spoliation or the unlawful expropriation of property of a registered or beneficial owner, with no procedural protection afforded to the owner of the securities.

[133] ZARX's submission is that some of the securities listed by ZARX may only be purchased by Eligible Purchasers. They are referred to in the rules as 'Restricted ZARX Securities', meaning that they 'may only be purchased or sold by an Eligible Purchaser'. An Eligible Purchaser is defined as a purchaser who has been verified by the issuer as complying with the beneficial ownership requirements prescribed by the issuer.

[134] Rule 7031 provides that, if it is determined that the owner of a ZARX Restricted Security does not comply with the requirements to qualify as an Eligible Purchaser, 'ZARX acting on instructions of the issuer may correct the purchase transaction of the Restricted ZARX Security'. This will be done by the mechanism provided for in rule 7032.

[135] Rule 7031 is consistent with section 17(2)(*h*) of the FM Act, which provides that subject to the provisions of section 38(3) and section 41, exchange rules must

[79] Founding Affidavit, Annexure 'FA10', p801.

provide for 'the circumstances in which a transaction in listed securities may be declared void by the exchange'.

[136] In my view, Rule 7031 is rationally connected to a legitimate purpose. It therefore does not permit arbitrary deprivation of property.

*The attack on Rule 4080*

[137] Rule 4080 provides:

> 'Off Book Orders
>
> 4080 A transaction listed in the Procedures does not have to be executed through the Central Order Book of the ZARX Trading Platform and may be entered into the ZARX Trading Platform as an Off Book Order'.[80]

[138] 4AX contends that Rule 4080 'allows a form of trade that is irreconcilable with the notion of an exchange as defined in the Act and that it allows trade in securities beyond the terms and conditions of an exchange licence'.[76]

[139] ZARX argues that there is no merit in this complaint for the following reasons:

139.1 Trades under Rule 4080 will be off-book (i.e. not on the Central Order Book); they will not be off the exchange ('OTC'). The definition of 'Off Book Order' in the exchange rules makes it plain that such an order is 'manually submitted into the ZARX Trading Platform'. It would not be possible to conclude OTC transactions as all transactions will be required to go through the exchange's trading platform.

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[80] Founding affidavit, Annexure 'FA10', p796.
[76] 4AX's Heads of argument, p123, para 274.

139.2 ZARX's licence conditions provide that the ZARX exchange is restricted to listing and trading of the four types of securities listed in paragraph 3. In other words, only listed securities may be traded on the ZARX exchange. These securities could only be traded through the ZARX trading platform and could never be traded OTC.

*Reading down in terms of rule 2010*

[140] Rule 2010 of ZARX's Rules provides that 'if there is any inconsistency between the Rules and the FM Act, these Rules will be read down to the extent of the inconsistency'. It is submitted that the ZARX rules are not inconsistent with the FM Act, but if the Court were to take a different view of the matter, then the Rules must be read down to avoid inconsistency. This means that the review cannot succeed on the basis that ZARX's rules are inconsistent with the FM Act.

**Fifth review ground**

[141] 4AX's fifth review ground is that it was 'irrational' or 'manifestly unreasonable' for the Registrar to have concluded that ZARX complied with sections 8(1)(*a*), (*b*), (*c*), (*d*) and (*e*) read with section 10 of the FM Act.[81] Although in its affidavits 4AX does not complain that that the Registrar was not satisfied of these matters, it however advances an entirely different complaint in its heads of argument that the Registrar did not satisfy himself of these matters at all, and acted in bad faith.[82]

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[81] Founding affidavit, p2016, para 392-402.
[82] 4AX's Heads of argument, p124, para 272; and pp139-144, paras 303-312.

[142] Section 8(1)(a) requires that the applicant for an exchange licence 'subject to the requirements prescribed by the Minister [to] have assets and resources in the Republic, which resources include financial, management and human resources with appropriate experience, to perform its functions as set out in this Act'.

[143] 4AX contends that the Registrar acted irrationally and unreasonably in concluding that ZARX met the financial adequacy requirements of section 8(1)(*a*). It contends that ZARX did not sufficiently prove that it had the required assets itself at the time the application was made; that these assets were in the Republic; and that they were adequate. 4AX further contends that it was irrational or unreasonable for the Registrar to accept the ZARX's claim (confirmed by SAED[83] in a letter), that the SAED had guaranteed an amount of R25 million 'in the absence of tangible or verifiable evidence in the record' of this guarantee.[84]

[144] 4AX argues that the 'SAED guarantee on which the Registrar relied substantially, was nothing more than a letter by an unknown entity, SAED, whose status, domicile or own financial substance was apparently unknown and left unexamined'.[85] It is argued that the Registrar did not ask for or receive any verification or perform even the most superficial enquiry about who or what SAED itself was.

[145] Section 8(2)(*a*) of the FM Act affords the Registrar discretionary power to obtain independent verification of information supplied by an applicant. It does not however, oblige him to do so. The SAED guarantee was by its nature a security that money will be advanced when it is demanded – that is the purpose of a guarantee.

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[83] SAED – South African Enterprise Development (Pty) Ltd, a specialised investment company focused on providing growth capital to small and medium sized companies.
[84] 4AX's Heads of argument, pp126-128, para 280-282.
[85] 4AX's Heads of argument, p130, para 284.

The Registrar was satisfied with the guarantee, and 4AX has not produced any evidence that it was (or is) not in order.

[146] Furthermore, in taking the March 2016 decision, long before the SAED guarantee arose, the Registrar considered the ZARX's financial adequacy and concluded that the company was solvent, and had sufficient resources within the Republic to operate the functions of an exchange. The introduction of the SAED guarantee after the renunciation of the March 2016 conditional licence merely fortified the Registrar's conclusion that ZARX had adequate financial resources.[86]

[147] The respondents (both the Registrar and ZARX) submitted that 4AX does not persist in its heads of argument with challenging the Registrar's decision that ZARX met the further requirements under sections 8(1)(*b*) to 8(1)(*e*). They accordingly did not address these requirements further, save to say that the considerations that informed the Registrar's decision (in respect of each of the requirements) are set out in the Registrar's reasons.[87]

[148] These reasons were never discussed by 4AX, nor did 4AX attempt to explain why the Registrar's reasoning on these requirements was flawed, let alone irrational or unreasonable. 4AX must therefore be taken to accept that the Registrar's reasoning on these requirements was sound and reasonable.

**Punitive Costs Order**

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[86] See "FA3": Memorandum of Licensing committee of February 2016, at pp1042-1055 (section headed 'Adequacy of Financial Resources'). Also see Tshidi's answering affidavit, pp1270-1272, paras 105-111.

[87] Registrar's reasons, pp262-288.

[149] The respondents seek that the review application be dismissed on the merits with costs on a punitive scale.

[150] It is submitted that 4AX in its affidavits, attacked the Registrar in circumstances where there was no proper basis for doing so. The attack was ratcheted up even further in 4AX's heads of argument, with contains allegations of impropriety not supported by 4AX's own affidavits. For example, 4AX accuse Mr Chanetsa of 'rank dishonesty',[88] even though no charge of 'dishonesty' is made in the affidavits. 4AX also accuse the Registrar and ZARX of 'joint recourse to the unreasonable delay of defence' as part of 'an ongoing attempt to prevent judicial scrutiny',[89] in circumstances where the accusation was never made in the affidavits.

[151] The Registrar accordingly asks that 4AX be directed to pay costs on a scale of attorney and own client. In support of this, counsel relied on the recent admonition of the Supreme Court of Namibia:[90]

> 'In light of the appellants' unsupported allegations of improper conduct on the part of the PG during the court proceedings, the High Court considered that the circumstance deserved a special costs order. I fully agree that the various epithets gratuitously used in the appellant's principle answering affidavit to cast aspersions on the PG and to ridicule her application such as "malicious prosecution", "dishonourable conduct", "conspiracy", "fraud", "nonsense" or even "foolishness" are not supported by any evidence. They appear to have been raised *ad hominem*, so as to discredit the PG or the officials seized with the conduct of the application personally for only exercising their public functions. Conducting the defence of a client in such a highly antagonistic and personal fashion is patently contrary to the high standards of practice to which all counsel must be committed. I therefore

[88] 4AX's Heads of argument, p9, para 13.
[89] 4AX's Heads of argument, p71, para 162.
[90] *New Africa Dimensions CC v Prosecutor General* (SA22/2016) para 57.

endorse the forceful admonition proffered by Smuts J in *Prosecutor General v Xinping* [Case No. POCA 4/2013 [2013] NAHCMD 300 delivered on 24 October 2013] and strongly urge legal practitioners to heed the learned judge's wise counsel. Smuts cautioned:

". . . Unsupported allegations of abuse of process and of engaging in vexatious activities directed at a repository of public functions in exercising public powers itself in my view constitute an abuse and warrant censure. They are to be discouraged by appropriate costs orders when this form of abuse occurs. All too often I encounter a resort to unsupported and unwarranted allegations of dishonesty or moral turpitude or abuse by a deponent in affidavits when dealing with the approach taken or allegations made by a public official. These unfounded attacks upon integrity are to be discouraged and, in my view, warrant a special order as to costs".

In future if similar conduct persists, it might call for a stern warning that courts will have to consider personal costs orders against legal practitioners. Regular costs orders affect the pocket of clients who should not be held to account for what may amount to unprofessional or dishonourable or unworthy conduct on the p art of their legal practitioners'.

[152] Counsel for 4AX submitted that each party should bear their own costs in any application in which 4AX is unsuccessful. Counsel contends that in both the main review and the interlocutory application, 4AX asserts the constitutional rights[91] to administrative justice that is lawful, reasonable and procedurally fair, to have their dispute decided by a fair public hearing, and to be granted appropriate relief in accordance with section 38 of the Constitution.[92]

[153] I agree that the form of litigation where unwarranted allegations of dishonesty and unfounded attacks on the integrity of public officials should not be countenanced. However, the primary consideration in constitutional litigation is the

[91] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).
[92] The Constitution of the Republic of South Africa, 1996.

way in which a costs order would hinder or promote the advancement of constitutional justice.[93]

[154] In my view, 4AX has failed to establish any grounds for review. In assessing all of the review grounds, judicial deference is required, as the Registrar's licensing decision under section 9(1) of the FM Act entails the exercise of an expert discretion and complex, polycentric decision-making. As was emphasised by the SCA, 'above all it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; no to cross over from review to appeal'.[94]

[155] In the circumstances, I make the following order:

1. *The interlocutory application is dismissed with costs.*

2. *The application to review and set aside a decision by the first respondent taken under section 9(1) of the Financial Markets Act 19 of 2012, on 31 August 2016, to award the second respondent a security exchange licence is dismissed with costs (including costs of three counsel for the first respondent and including costs of two counsel for the second respondent).*

**D S MOLEFE**
Judge of the High Court of South Africa
Gauteng Division
Pretoria

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[93] *Biowatch* para 16.
[94] *Logbro Properties CC v Bedderson NO* 2003(2) SA 460 SCA paras 21-22.

**Appearances:**

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|---|---|
| **Counsel for the applicant:** | Adv Martin Kriegler SC<br>Adv J N van der Walt<br>Adv O K Motlhasedi |
| **Instructed by:** | Cliffe Dekker Hofmeyer Inc |
| **Counsel for the first respondent:** | Adv Alfred Cockrell SC<br>Adv J Bleazard<br>Adv M Mbikiwa |
| **Instructed by:** | Mothle Jooma Sabdia Inc |
| **Counsel for the second respondent:** | Adv Leonard Harris SC<br>Adv K Hopkins |
| **Instructed by:** | Dentons South Africa Inc as Kapditwala Inc |
| **Date of hearing:** | 19, 20 and 21 August 2019 |
| **Date of judgement:** | 28 February 2020 |