IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NUMBER: 132/22

In the matter between:

BLISS BRANDS (PTY) LIMITED Applicant

and

ADVERTISING REGULATORY BOARD NPC First Respondent

COLGATE-PALMOLIVE (PTY) LIMITED Second Respondent

COLGATE-PALMOLIVE COMPANY Third Respondent

APPLICANT'S SUBMISSIONS

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INTRODUCTION

1. At the heart of this matter is the constitutionality of a self-appointed, extra-curial, non-legislative regulatory body, the first respondent ('**the ARB'**), regulating advertising in terms of the Code of Advertising Practice ('**the Code**'), which is not legislation, on the basis of its own Memorandum of Incorporation ('**MoI**'), in a manner which affects advertisers who are not members of the ARB and have not agreed to be bound by the MoI or the Code.

2. Such regulation, which is not directed at preventing advertising which is unlawful but rather advertising (including packaging) which does not meet certain self-created standards, impacts on the

constitutional rights of such advertisers as contemplated by sections 16, 18 and 34 of the Constitution.

3. There is no dispute about the power of the ARB to adjudicate disputes regarding its members'[1] advertising. The dispute is about whether the ARB may lawfully adjudicate complaints that non-members' advertising breaches the Code and then enforce its rulings or decisions by agreements, which bind members, not to accept, or to withdraw, advertising by non-members which is inconsistent with the Code.

4. The crux of the dispute relates to the constitutionality of clause 3.3 of the MoI which, whilst acknowledging that the ARB has no jurisdiction over non-members, seeks to create indirect jurisdiction over non-members by permitting the ARB to consider complaints against advertising by non-members and to direct its members not to accept, or to withdraw, any advertisement found to be in breach of the Code.[2]

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1 Reference to members includes members of its members who have agreed to bind themselves to the jurisdiction of the ARB and the provisions of the Code – see MoI (FA11): Record, Vol 2, p 212, clause 3.2.3

2 see MoI (FA11): Record, Vol 2, p 212, clause 3.3

5. The ARB agrees that it cannot directly enforce its rulings against non-members. But it asserts that it may do so indirectly by requiring its members to refuse to accept advertising which, it has determined, infringes its Code. The core question is whether the ARB can achieve indirectly what it cannot achieve directly. In this regard it is important to appreciate what Colgate[3] managed to accomplish: it had complaints about a competitor's advertising and packaging which had no basis in law – whether statutory or at common law – and consequently would not have been upheld in a court of law. But it succeeded in having its complaints upheld by the ARB, a tribunal which it funds. The practical effect of the ARB's award was to preclude Bliss from continuing to advertise and package its goods in the form complained of. Colgate thus overcame the absence of a legal basis for its complaints by the simple expedient of by-passing the courts.

6. The ARB's exercise of jurisdiction interferes with an advertiser's rights under section 34 of the Constitution to have a dispute decided in a fair public hearing before a court of law; as well as the advertiser's rights to freedom of association, as contemplated by

3 Reference to Colgate is to both the second and third respondents

section 18 of the Constitution. In addition, the imposition of sanctions on an advertiser or the publication of a ruling enforced by the ARB's members and their members interferes with an advertiser's advertising. Such constitutes a limitation or infringement of the advertiser's right to freedom of expression, as contemplated by section 16 of the Constitution.

7. This appeal is also directed at the SCA's approach:

7.1 Firstly, the admonition administered to the High Court for raising a constitutional issue *mero motu*[4] is, we submit, unwarranted; and

7.2 Secondly, the SCA's order implicates relief and matter which was not the subject matter of the appeal.

RELEVANT FACTS

8. The ARB is a non-profit company incorporated in 2018, as its registration number indicates[5].

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4 SCA Judgment: Record, Vol 7, pp 745 – 748, [3] - [10]

5 FA (leave): Record, Vol 7, p 699, para 19

9. The ARB's reach through its members is extensive.[6]

10. In terms of section 15(6)[7] of the Companies Act,[8] the MoI is an agreement between the ARB and each of its members. In terms of the MoI, each of its members is bound by the Code and each member undertakes to bind its members to the Code.[9]

11. In terms of the MoI, the objects of the ARB include addressing and filling the *lacuna* left by the liquidation of the Advertising Standards Authority of South Africa ('**the ASA**').[10] Accordingly, the ARB is not the successor-in-title to the ASA and there is no evidence to

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6 **FA (constitutional review): Record, Vol 4, pp 354 - 355, para 94; ARB AA (constitutional review): Record, Vol 4, p 396, para 64; Second RA (constitutional review): Record, Vol 5, pp 498 – 552, para 17 – 19**

7 ***A company's memorandum of incorporation, and any rules of the company, are binding-***

(a) between the company and each shareholder;

(b) between or among the shareholders of the company; and

(c) between the company and-

(i) each director or prescribed officer of the company; or

(ii) ***any other person serving the company as a member of a committee of the board, in the exercise of their respective functions within the company.***

8 **71 of 2008**

9 **MoI (FA11): Record, Vol 2, p 212, clause 3.2.3 read with p 210, clause 1.2(f)iii**

10 **MoI (FA11): Record, Vol 2, p 211, clause 3.1.3**

suggest that this is the case. [11] Judicial findings on the powers of the ASA do not inure to the benefit of the ARB.

12. In addition to the MoI, the provisions of the Code provide for ways to deal with advertising without the cooperation of the advertiser. [12]

13. Whilst a non-member can ignore a complaint or an ARB ruling or decision, it cannot ignore the effect of that ruling or decision.

14. The adjudicative bodies of the ARB are selected by the ARB's members[13].

15. Colgate is a funder of the ARB.[14]

16. Colgate and Bliss are competitors, relevantly, in relation to the manufacture and sale of soap[15]. In this matter, the relevant brands

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11 See further: ARB AA (leave): Record, Vol , p 828 , para 66

12 Old Code (FA6): Record, Vol 2, p 158, clause 11; Vol 3, p 255, clause 15.4; New Code (FA7): Record, Vol 3, p 258, clause 11; p 305, clause 15.4

13 MoI (FA11): Record, Vol 2, p 223, clause 13.3; p 224, clause 14.5.2

14 FA (constitutional review): Record, Vol 3, pp 350 - 351, para 81; ARB webpage (RA10): Record, Vol 5, p 573. ARB AA (constitutional review): Record, Vol 4, pp 422, para 173; Colgate AA (constitutional review): Record, Vol 5 , p 478, para 41

15 FA (administrative review): Record, Vol 1, p 35, para 11; p 53, para 36.

are Colgate's PROTEX soap and Bliss' SECUREX soap. Colgate is the market leader. Bliss is a relative minnow. [16]

17. Bliss is not a member of the ARB and has not agreed to be bound by the Code.[17] Bliss could not and did not voluntarily submit to the jurisdiction of the ARB.

ARB'S POWERS NOT SOURCED IN LAW

18. In terms of the principle of legality, public power can only be validly exercised if it is clearly sourced in law i.e. in the Constitution or in other legislation.[18]

19. The SCA found that the ARB's exercise of public powers over a non-member is lawful on the basis of the definition of 'empowering

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16 **AAC Decision (FA14): Record, Vol 1, p 8, para 16; FA (administrative review): Record, Vol 1, p 86, para 98.4; p109, para 149; FAC Decision (FA10): Record ,Vol 2, p 200, para 10; p202, para 2; pp 203 -204, para 13; Colgate AA (administrative review): Record, Vol 3, p 316, para 29**

17 **FA (constitutional review): Record, Vol 2, p 330, para 20**

18 ***AAA Investments (Pty) Limited v Macro-Finance Regulatory Council and Another*** **2007 (1) SA 343 (CC) at [68];** ***Minister for Justice and Constitutional Development v Chonco and Others*** **2010 (4) SA 82 (CC) at [27];** ***Roux v Health Professions Council of South Africa and Another*** **[2012] 1 ALL SA 49 (SCA) at [31].**

provision' in PAJA[19];[20] section 55(1) of the ECA[21];[22] *Herbex*[23];[24] and as an incident of the rights to freedom of expression and association[25].

20. Accordingly, save for the ECA, which has limited application, the SCA confirmed that the ARB's powers are not sourced in law (but appears to suggest that this is not necessary).

PAJA

21. The reliance on the definition of empowering provision in PAJA is misplaced.

22. Firstly, the SCA erred in holding that the PAJA confers powers on a contractually established administrative tribunal. It does not. Instead, it regulates the exercise of such powers. The definition of 'empowering provision' serves to define 'administrative action'

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19 Promotion of Administrative Justice Act 3 of 2000

20 SCA Judgment: Record, Vol 7, pp 749 – 750, [15] – [17]

21 Electronic Communications Act 36 of 2005

22 SCA Judgment: Record, Vol 7, pp 751 - 753, [18(d)] – [23]

23 *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 (6) SA 354 (SCA) ('*Herbex'*).

24 SCA Judgment: Record, Vol 7, p 751, [18(c)]; pp 753 - 756 , [25] – [34]

25 SCA Judgment: Record, Vol 7, pp 753, [24]; pp 757 - 762 , [35] – [48]

taken by an entity which is not an 'organ of state'. The definition of administrative action identifies what acts or omissions fall within PAJA's ambit as PAJA only applies to administrative action[26]. It does not, by identifying such acts, render them lawful.

23. Secondly, the application before the High Court constituted what was referred to as a constitutional review and, in the alternative, an administrative review. [27]

24. The main relief sought and granted by the High Court was not directed at decisions taken by the ARB but instead at the ARB's assumption of jurisdiction over non-members, in terms of its MoI. The setting aside of the FAC decisions is consequential relief, in terms of section 172(1)(b) of the Constitution, following on from the declaration of invalidity.

25. The assumption of jurisdiction is not administrative action reviewable in terms of PAJA and consequently PAJA does not apply.

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26 Preamble to the Act; section 6(1) of PAJA

27 FA (constitutional review): Record, Vol 3, pp 324 – 327; para 7 - 12

26. Thirdly, an empowering provision which constitutes a contract can only bind parties to that contract. A contract cannot confer jurisdiction on the ARB where it has none i.e. over non-members, such as Bliss, and their advertising[28].

27. Fourthly, reliance on *Sanparks*[29] is misplaced.[30] *Sanparks* was concerned *inter alia* with whether the relevant decision constituted administrative action subject to review in terms of PAJA[31].

28. Paragraph 50 of *Sanparks* is part of a minority dissenting judgment by Rogers AJA. The learned judge's remarks cannot be relied upon as authority for the proposition adopted by Schippers JA in paragraph 16 of his judgment that PAJA gives persons other than organs of state a larger set of permissible empowering provisions. But, in any event, the passage in question does not support the proposition. Rogers AJA was not dealing with what powers Sanparks possessed. He was dealing instead with whether

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28 ***Herbex (Pty) Ltd v Advertising Standards Authority*** **2016 (5) SA 557 (GJ) ('*Herbex a quo*') at [44]; *Clur v Keil and others* 2012 (3) SA 50 (ECG) ('*Clur*') at [15], [22]-[23]; *Rowles v Jockey Club of SA and Others* 1954 (1) SA 363 (A) at 364D-E; *De Freitas v Society of Advocates of Natal* 2001 (3) SA 750 (SCA) at [5]**

29 ***South African National Parks v MTO Forestry (Pty) Ltd and another*** **2018 (5) SA 177 (SCA)**

30 **SCA Judgment: Record, Vol. 7, p750, [16]**

31 ***Sanparks*** **(*supra*) at [18] –majority judgment**

Sanparks' decision to agree to tree-felling schedule constituted administrative action for the purposes of PAJA.

Section 55 of the ECA[32]

29. The SCA's findings in relation to the ECA[33] are irrelevant since Bliss is not a broadcast service licensee ('**licensee**') nor was the advertising in issue (packaging) broadcast by a licensee. Accordingly, and irrespective of the proper interpretation of the ECA, it did not confer any power on the ARB to adjudicate the complaints brought by Colgate against Bliss.

30. In short, section 55 of the ECA confers no powers on the ARB.

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32 ***(1) All broadcasting services licensees must adhere to the Code of Advertising Practice (in this section referred to as the Code) as from time to time determined and administered by the Advertising Standards Authority of South Africa and to any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships.***

(2) The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licensees who are not members of the Advertising Standards Authority of South Africa, in accordance with section 17C of the ICASA Act, as well as complaints concerning alleged breaches of the advertising regulations.

(3) Where a broadcasting licensee, irrespective of whether or not he or she is a member of the said Advertising Standards Authority of South Africa, is found to have breached the Code or advertising regulations, such broadcasting licensee must be dealt with in accordance with applicable provisions of sections 17A to 17H of the ICASA Act

33 **SCA Judgment: Record, Vol 7, pp 751 - 753, [18(d)] – [23]**

31. Firstly, section 55(1) of the ECA only requires that broadcast service licensees must adhere to the Code. It does not authorise or oblige the ASA to determine breaches of the Code. The fact that reference is made to the ASA is merely to identify the Code.

32. Secondly, the reference in section 55(2) to the Complaints and Compliance Committee ('**the Committee**') is to a committee established by ICASA[34] (itself established by section 3 of the ICASA Act[35]), in terms of section 17A of the ICASA Act.[36] This Committee is not part of the ARB.

33. Section 55(2) requires the Committee to adjudicate complaints against broadcasting service licensees who are not members of the ASA. Section 55(2) does not prevent the Committee from adjudicating complaints against broadcasting service licensees who are members of the ASA[37]. Nor does it oblige or empower the

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34 Independent Communications Authority of South Africa

35 13 of 2000.

36 Section 1 of the ECA: definitions of 'Authority', 'Complaints and Compliance Committee' and 'ICASA Act'.

37 Pertinently, section 17B(a) read with section 1 (definitions of 'Authority', 'underlying statutes' and 'Electronic Communications Act') of the ICASA Act provides that the Committee must investigate, hear if appropriate, and make a finding on all matters referred to it by the Authority; complaints received by it; and allegations of non-compliance with *inter alia* the ECA

ASA to determine complaints against licensees who are members of the ASA.

34. Section 55(2) simply leaves untouched the ASA's contractual power to adjudicate breaches of the Code by licensees who are members of the ASA.

35. Such an interpretation does not render the words '*who are not members of the Advertising Standards Authority of South Africa*' meaningless, as the SCA found. On the interpretation advanced by Bliss, the purpose of the words quoted is to limit the Committee's powers and obligations to broadcast licensees who are not members of the ASA, thus leaving the ASA free to exercise such contractual powers they may have in respect of their members. That interpretation is fully justified by the plain language of the section.

36. Thirdly, section 55(3) of the ECA provides that where a licensee has been found to breach the Code, then regardless of whether the licensee is a member of the ASA, the licensee must be dealt with in terms of sections 17A to 17H of the ICASA Act. This has the effect that sanctions for breaches of the Code must be sourced in

these sections of the ICASA Act and may only be imposed by ICASA. That power is not conferred on the ASA.

37. Fourthly, nothing in section 55 of the ECA empowers the ASA or any other entity to determine and deal with breaches of the Code by any advertiser who is not a licensee, as in this case.

38. Nothing in section 55(1) of the ECA empowers the ARB to consider complaints against any advertisement broadcast by a licensee.[38] Similarly, nothing in section 55 indicates that '*Parliament has determined that any advertiser who wishes to advertise by means of a broadcasting service licensee must comply with the provisions of the Code*.' [39]

39. The ECA does not, therefore, constitute the source of the ARB's exercise of public powers over non-members' advertising broadcast by a licensee.

38 **SCA Judgment: Record, Vol 7, pp 751, [18(d)]**

39 **SCA Judgment: Record, Vol 7, pp 752 – 753, [23]**

40. Accordingly, there is no merit in the SCA's finding that the High Court's order precludes the ARB from performing its statutory duty in terms of section 55 of the ECA[40], since it bears no statutory duty.

Herbex[41]

41. *Herbex a quo*[42] concerned an application for declaratory relief and an interdict against the ASA, a voluntary association incorporated in terms of section 21 of the Companies Act 61 of 1973. Membership of the ASA was[43] voluntary and Herbex was not a member of the ASA.[44] Notwithstanding that it was not a member, Herbex had participated in the ASA's processes for several years and the ASA had issued several rulings in respect of some of Herbex's advertisements.[45] Herbex contended that it was misled into participating in the ASA's procedures.[46]

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40 **SCA Judgment: Record, Vol 7, p 752 - 753, [23]**

41 ***Advertising Standards Authority v Herbex (Pty) Ltd* 2017 (6) SA 354 (SCA) ('*Herbex*').**

42 ***Herbex (Pty) Ltd v Advertising Standards Authority* 2016 (5) SA 557 (GJ)**

43 **The ASA has been finally liquidated – MoI: Record, Vol 2, p 211, clause 3.1.3**

44 ***Herbex a quo* (*supra*) at [1] – [4]**

45 ***Herbex a quo* (*supra*) at [10]**

46 ***Herbex a quo* (*supra*) at [11]**

42. The dispute concerned the ASA's adjudication of complaints against non-members and the issuing of rulings against them, in circumstances in which they did not consider themselves (or wish to be) bound by the MoI, Code or procedural guide. '*The crux of the dispute is whether the respondent has any lawful basis to exercise jurisdiction over persons who are not its members*'.[47]

43. *Herbex a quo* made an order which reads, in relevant part:

> *'[90] In the premises, I make the following order:*
>
> *1. It is declared that the respondent has no jurisdiction over any person or entity who is not a member of the respondent and that the respondent may, in the absence of a submission to its jurisdiction, not require the applicant to participate in its processes, issue any instruction, order or ruling against the applicant or sanction it;*
>
> *2. It is declared that all rulings issued by the respondent against the applicant are void;*
>
> *3. The respondent is interdicted, in the absence of a submission to its jurisdiction, from issuing any further*

47 ***Herbex a quo* (*supra*) at [12]**

rulings or adjudicating any further complaints against the applicant;

4. *The respondent is interdicted, in the absence of a submission to its jurisdiction, from issuing any further rulings or adjudicating any further complaints against the applicant;*

5. *The respondent is directed to include in its standard letters of complaint to non-members a reference to the fact that, in the absence of a submission to its jurisdiction, it has no jurisdiction to adjudicate the complaint and that such non-member is not bound to participate in its processes;*

6. *It is declared that there is no lawful basis for the respondent to unilaterally impose appeal fees on the applicant as a non-member of the respondent in the absence of a contractual service agreement between the applicant and the respondent;"*(our underlining).

44. The parts of the order underlined are orders *in rem*[48] in relation to the powers of the ASA, but not in relation to the ARB.

45. The ASA appealed to the SCA. *Herbex* is the SCA judgment.[49]

46. In *Herbex*, the parties settled the merits and asked the SCA to decide the costs, with the judgment stating, '*They asked this court, having regard to the agreed order and the record of proceedings, to determine liability for costs in the court a quo and in this court*.'[50] (our underlining)

47. *Herbex* went on to state, '*When the hearing resumed the parties presented a draft order which counsel explained and which was finally agreed upon in the form set out in paras 1.1. and 1.2 of the order below. The orders relating to previous rulings and appeal*

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48 **i.e. an order, '*which declares, defines, or otherwise determines the status of a person, or of a thing, that is to say, the jural relation of the person, or thing, to the world generally, and, therefore is conclusive for, or against, everybody, as distinct from those decisions which only purport to determine the jural relation of the parties to one another, and their personal rights and equities inter se, and which, therefore, are commonly termed decisions in personam*.': *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and others* 2019 (5) SA 1 (CC) ('*ACSA*') at [2] referring, in footnote 1, to *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) at 368H, itself quoting Spencer Bower Res Judicata, sec. 209**

49 ***Herbex* (*supra*) at [1]**

50 ***Herbex* (*supra*) at [2]**

fees (paras 90.2, 90.3, 90.6 and 90.7) of the order of the court a quo fell away, by virtue of the order by agreement. Thus the only outstanding issue was costs, on which the parties could not agree.'[51] (our underlining)

48. *Herbex* decided the costs issue as follows:

48.1 in relation to the costs in the court *a quo*, the SCA declined to interfere[52];

48.2 in relation to the costs of appeal, the SCA ordered each party to bear its own costs, stating, *'… the parties agreed to the orders in paras 1.1 and 1.2 below. The substituted order reflects a measure of success achieved by each of the parties*.'[53] (our underlining)

49. As a result of the draft order and its decision in relation to costs, the SCA made the following order:

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51 ***Herbex* (*supra*) at [14]**

52 ***Herbex* (*supra*) at [16]**

53 ***Herbex* (*supra*) at [17]**

'The following order is made:

1. *The parties having agreed thereto, the appeal is upheld to the extent reflected in the substituted orders set out below.*

2. *Save for para 90.8, the order of the court a quo is set aside and substituted as follows:*

   '1. It is declared that:

   1.1 the Advertising Standards Authority of South Africa (the ASA) has no jurisdiction over any person or entity who is not a member of the ASA and that the ASA may not, in the absence of a submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it;

   1.2 the ASA may consider and issue a ruling to its members (which is not binding on non-members) on any advertisement, regardless of by whom it is published, to determine, on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw any advertisement if it has been published.

2 The ASA is directed to include in its standard letter of complaint the contents of para 1 and that a non-member is not obliged to participate in any ASA process, but that should it not participate, the ASA may still consider the complaint, for the purposes set out in para 1.2.'

3. Each party shall bear its own costs of appeal.'[54] (our underlining).

50. Order 1.2 of the substituted order is a qualification of order 1.1, which incorporates order 1 granted by *Herbex a quo.*

51. *Herbex* could not overturn the orders *in rem* made by the High Court[55] and does not constitute precedent binding the High Court.[56]

52. Firstly, the parties in this matter were not parties to *Herbex*. The ARB did not yet exist, having been incorporated in response to the liquidation of the ASA.[57] [58] The SCA did not explain why the orders in *Herbex* applied to the ARB. There was no evidence that the

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54 ***Herbex* (*supra*) at [18]**

55 **SCA Judgment: Record, Vol 7, p 756, [33]**

56 **SCA Judgment: Record, Vol 7, p 756, [34]**

57 **MoI: Record, Vol 2, p 211, clause 3.1.3**

58 **FA (leave): Record, Vol 7, p 699, para 19**

ARB is the successor-in-title to the ASA. Accordingly, *Herbex* cannot bind any court in relation to this dispute since none of the parties in this matter were parties to *Herbex*.

53. The SCA found further that, because, in paragraph 1.2 of the order granted in *Herbex,* the court had declared that the ASA was entitled to consider and issue a ruling to its members on any advertisement "*regardless of by whom it is published*", the order was not confined to the parties before the court.[59] But that conclusion was unwarranted**.** The point is not that, in this case, the findings by the ARB were against Bliss and not Herbex, it is that the declarator related to the powers of the ASA and not the ARB. That declarator cannot operate *in rem* in respect of the ARB, a legally different entity. That was a fundamental error. The SCA did not explain why it thought that the decision in *Herbex* in favour of the ASA operated *in rem* in respect of the ARB, even though Bliss pointed out in argument that the ARB was not the legal successor in title to the ASA.

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59 SCA Judgment: Record, Vol 7, p 756, [33]

54. Secondly, precedent is limited to the *ratio decidendi* of a judgment[60] and to orders *in rem*.

55. The SCA's statement that the court in *Herbex* was '*satisfied on the merits*' (of the orders agreed by the parties) [61] is not supported by the content of the judgment. Indeed, there is no clear explanation in the SCA judgment as to the basis for such finding.

56. As the SCA correctly stated, when a court considers a judgment *in rem* on appeal, it may not simply set that judgment aside by virtue of a settlement agreement between the litigating parties. It must be satisfied that the setting aside is justified by the merits of the appeal.[62] In other words, the appeal court must conclude that the court below erred in granting the order which it did.

57. In the event that an appeal court makes a settlement agreement an order of court without determining the merits, i.e. without

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60 ***Camps Bay Ratepayers' and Residents' Association and another v Harrison and another*** **2011 (4) SA 42 (CC) at [30]**

61 **SCA Judgment: Record, Vol 7, p 756, [32]. The reference to paragraph 17.2 and footnote 14 is puzzling. There is no footnote 14 in *Herbex*, nor any paragraph 17.2. There is a footnote 14 in the SCA Judgment, but that refers to *Herbex a quo*. Paragraph 17 of Herbex does not contain any enquiry into the merits of the orders made in *Herbex a quo*.**

62 **SCA Judgment: Record, Vol 7, p 755, [31]**

determining whether the setting aside or modification of a judgment *in rem* by the court *a quo* is justified by the merits of the appeal, the order does not have the effect of overturning (or, we submit, limiting or qualifying or otherwise modifying) a judgment *in rem* given by the court *a quo*.[63]

58. The SCA appears to have reasoned that because a court should not set aside an order *in rem* on appeal by making a settlement agreement an order of court without satisfying itself as to the merits of the appeal, the mere fact that the court in *Herbex* did so means that it must have satisfied itself as to the merits of the appeal. [64]

59. No authority is given for this proposition which contains, on the face of it, an obvious *non-sequitur*. In any event, such an approach is expressly eschewed in *ACSA,* which indicated that such is not valid legal reasoning.[65]

60. *Herbex* does not engage with the detailed reasoning set out in *Herbex a quo,* explaining the legal basis for the relief granted and

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63 ***ACSA* (*supra*) at [3]**

64 **SCA Judgment: Record, Vol 7, pp 755 – 756, [31] and [32]**

65 ***ACSA* (*supra*) at [59]-[62]**

refuting the arguments advanced by the ASA. The fact that *Herbex* did not engage at all with the reasoning of the court below demonstrates conclusively that the court in *Herbex* did not consider whether the orders agreed to by the parties were justified in law. It is inconceivable that had the SCA intended to pronounce on the merits of the orders it granted by consent, it would not have pointed out the flaws in the reasoning adopted by the court in *Herbex a quo*.

61. Finally, given that the order results from a settlement agreement, as the Court held in *ACSA*, '*a party cannot unilaterally affect the rights of others or change an objective fact – like whether or not an administrative act was unlawful – by giving up its own rights*.'[66]

62. Accordingly, the SCA erred in finding that *Herbex* satisfied itself as to the merits of the relief the parties had agreed on and that, accordingly, *Herbex* constituted binding precedent.

63. Furthermore, *Herbex* is not persuasive.

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66 ***ACSA* (*supra*) at [38]**

64. Neither *Herbex a quo* nor *Herbex* considered whether, or determined that, the exercise of the ASA's powers over non-members was unconstitutional because these powers were not sourced in law; or because these powers limited non-members' rights in terms of section 34 of the Constitution; or constituted the exercise of judicial authority in contravention of section 165 of the Constitution.

65. *Herbex* did not identify any legislation as the source of the public power which the ASA is permitted to wield in terms of order 1.2. It is not clear how *Herbex* renders lawful the exercise of public powers over non-members of the ARB which is not sourced in law and which ousts the jurisdiction of the courts.

66. Accordingly, *Herbex* does not serve as authority for the lawfulness of the ARB's exercise of public powers over non-members. It would be remarkable if *Herbex*, while determining a residual dispute about costs, were held to have determined a far-reaching constitutional issue.

The rights to freedom of expression and association

67. Although the SCA judgment commences its discussion of the topic of 'freedom of expression' at paragraph 35 of its judgment[67], the true starting point is paragraph 24[68], where the SCA holds that the powers of the ARB, set out in paragraphs (a), (b) and (c) of paragraph 18[69] of the judgment, to determine complaints on behalf of members about advertisements of non-members is an incident of the members' constitutional rights to freedom of expression and association.

68. The statement is, with respect, misconceived. Sub-paragraphs (a) and (b) of paragraph 18 deal with advertisements of members, not non-members. As far as advertisements by non-members are concerned (sub-paragraph (c)), the ARB does not consider complaints '*so that its members may make an election whether or not they wish to publish that advertisement*' [70]. Once the ARB has determined that the relevant advertisement offends its Code, its

67 **SCA Judgment: Record, Vol 7, pp 756 – 757, [35]**

68 **SCA Judgment: Record, Vol 7, pp 753, [24]**

69 **SCA Judgment: Record, Vol 7, pp 750 - 751, [18]**

70 **SCA judgment: Record, Vol 7, pp 753, [24]**

members are not put to an election whether to publish the advertisement. They are bound by contract not to.

69. The characterisation of what the ARB does as an exercise by its members of their constitutional right to freedom of expression and association is accordingly fundamentally misconceived.

70. It follows that the SCA's finding that the ARB's members enjoy a right to freedom of expression under section 16 of the Constitution which the judgment of the High Court infringes is misconceived. Their right to freedom of expression is not implicated and no member has come forward to complain that its rights have been infringed. What is implicated is the lawfulness of the exercise by the ARB of collective contractual powers to enforce its decisions against non-members.

71. The SCA relied on *Remuszko*[71], a judgment of the European Court of Human Rights. But this authority is distinguishable as it concerned the lawfulness of a particular newspaper's refusal to publish an advertisement and not the lawfulness of the exercise of

71 ***Remuszko v Poland*** **1562/10 Chamber Judgment [2013] ECHR 689 (16 July 2013)**

public power by a non-statutory body over a non-member of that body. In this case, no member of the ARB has come forward to assert its right to freedom of expression would be infringed if the relief sought by Bliss were granted. That is unsurprising, since the relief sought by Bliss did not threaten the right of freedom of association of any member of the ARB.

72. In short, the ARB cannot claim on behalf of its members that their rights of freedom of association are threatened by the relief granted by the High Court. The ARB has no right of freedom of association which has been infringed by the orders granted by the High Court. Neither does Colgate since it does not provide advertising services. It is simply a competitor of Bliss.

73. The SCA's finding that the relief granted by the High Court infringes the rights of ARB's members to decide which advertisements to accept[72] negates Bliss' right not to associate, because it renders Bliss a *de facto* member of the ARB and bound by the Code regardless of its wish not to be a member of the ARB or to be bound by the Code. Bliss is either compelled to participate in the ARB's

72 **SCA Judgment: Record, Vol 7, pp 761, [47]**

processes to attempt to negate the risk of a negative finding (which can be made regardless of its participation) or a negative finding is made and enforced without its participation.

74. Furthermore, the finding contradicts the principle that the ARB and its members cannot by agreement between themselves confer jurisdiction upon the ARB in respect of a non-member's advertising, attempting to impose a contract, the Code, on an advertiser who has not agreed to be bound by the Code. [73]

75. The finding also ignores a non-member's right to freedom of expression in that the imposition of the ARB's jurisdiction, the Code, and, pertinently, any sanctions interfere with its advertising. Insofar as the sanctions may pertain to packaging, this potentially affects a non-member's rights to trade since in the absence of alternative packaging, it cannot put its goods on the market.

76. The SCA failed to balance the ARB's members' rights with the rights of non-members not to associate and to freedom of expression. The SCA deemed the ARB's members rights to be

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73 ***De Freitas v Society of Advocates of Natal*** **2001 (3) SA 750 (SCA) at [5];** ***Rowles v Jockey Club of SA and others*** **1954 (1) SA 363 (A) at 364C-E**

worthy of protection and those of non-members not to be worthy of protection. It is unclear why this should be the case. The ARB's members are not prevented by the High Court judgment from electing to refuse to publish advertising which they regard as being in breach of the Code. In contrast, non-members have no such choice. Whether they participate in the ARB's processes or not, the ARB will consider any complaint regarding their advertising and make a ruling or decision thus infringing on their right not to associate and their right of freedom of expression.

77. Private bodies such as the ARB have a negative duty not to interfere with a person's constitutional rights. [74]

78. Given that neither the MoI nor the Code constitute an act of general application, neither justifies a limitation of non-members' constitutional rights.

79. The SCA did not indicate how, in the absence of legislation as the source of its public powers over non-members, the ARB could lawfully exercise such powers, since the right to freedom of

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74 ***Governing Body of the Juma Masjid Prinary School and others v Essay NO and others (Centre for Child Law and another as Amici Curiae*) 2011 (8) BCLR 761 (CC) at [58]**

expression and the right to freedom of association cannot constitute the source of these powers over a non-member.

80. In this regard, the SCA erred since the exercise of the rights of freedom of expression and association do not obviate the requirement that the exercise of public powers by a non-statutory body over non-members of that body must be sourced in law.

SECTION 34

81. Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

82. The ARB's imposition of jurisdiction over a non-member's advertising constitutes an infringement of Bliss' (and other non-members') section 34 rights in that:

82.1 firstly, a constraint on the person or property of another may only be exercised by a court.[75] [76] The implication of this is that whenever a person imposes a constraint on the person or property of another without recourse to a court (as contemplated by section 34), section 34 will be violated[77], since an important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law;[78]

82.2 secondly, the ARB's processes oust the jurisdiction of the courts;[79]

82.3 thirdly, the ARB is not an independent tribunal; [80]

82.4 fourthly, the ARB process is unfair. [81]

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75 **FA (constitutional review): Vol 3, pp 331 - 334, para 24 - 30**

76 ***Chief Lesapo v North West Agriculture Bank and Another* 2000 (1) SA 409 (CC) at [16] ('Chief *Lesapo'*)**

77 **Brickhill *et al,* 'Access to Courts' (chapter 59) in Woolman *et al* (eds) Constitutional Law of South Africa 2 ed (revision service 6, 2014) volume 4, p 59-22**

78 ***Chief Lesapo supra* at [13]**

79 **FA (constitutional review): Vol 3, pp 334 - 348, para 31 - 74**

80 **FA (constitutional review): Vol 3, pp 349 - 352, para 75 - 84**

81 **FA (constitutional review): Vol 4, pp 352 - 354, para 85 - 91**

83. The implications of a finding that the ARB does not oust the jurisdiction of the courts are serious. The corollary is that it is constitutionally unimportant that a person has, without consent, been deprived of the right to have the merits of a dispute determined by a court, since he or she retains a right of review, even though reviews do not assess whether a decision is right.

84. The SCA erred in several ways.

85. Firstly, this matter is not distinguishable from *Chief Lesapo*.[82]

86. As stated in *Chief L*esapo, a right of review does not cure the limitation of the section 34 right, it merely restricts its duration. [83]

87. A review assesses the procedure followed to reach a decision not the correctness of the decision reached.

88. Secondly, this matter is, in fact, distinguishable from *Nestlé*[84] in that *Nestlé* did not concern the ousting of the jurisdiction of the courts

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82 **SCA Judgment: Record, Vol 7, pp 762 – 763, [51]**

83 ***Chief Lesapo* (*supra*) at [20]**

84 ***Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA)**

but rather whether, on the basis of *lis pendens*, the ASA (again, not the ARB) could refuse to consider a complaint because similar issues had arisen, involving the same parties, in an opposition to the registration of certain of the complainant's trade marks before the Registrar of Trade Marks.

89. *Nestlé* found that as between the ASA and its members *inter se*, the ASA was obliged to consider and rule upon complaints to it[85].

90. Unlike in *Nestlé*, this dispute does not relate to the ARB's refusal to adjudicate a complaint and does not relate to a complaint against a member of the ARB.

91. *Nestlé* is, therefore, not authority for the proposition that the '*mere fact that elements of a complaint before the ARB might overlap with a cause of action that could be pursued in a court or other tribunal, does not mean that the ARB ousts the court's jurisdiction*'.[86]

92. *Nestlé* is both inapplicable and distinguishable.

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85 ***Nestlé supra*** **at [12]**

86 **SCA Judgment: Record, Vol 7, p 765, [58]**

93. Thirdly, the Code imposes non-statutory advertising standards on advertising. In the case of clauses 8 and 9 of Section II[87], there is an overlap with the causes of action of passing off, trade mark infringement and copyright infringement, more properly determined by the courts. However, the bar for establishing a breach of clauses 8 and 9 is lower than the bar to establish passing off, trade mark infringement or copyright infringement. Furthermore, the statutory defences in relation to claims of trade mark infringement and copyright infringement are absent in the Code. Yet, the sanctions imposed by the ARB and/or the enforcement of rulings by members of the ARB have almost the same effect as an interdict granted by a court to restrain passing off, trade mark infringement or copyright infringement.

94. A complainant to the ARB can thus interfere with an entity's trade without establishing a cause of action, based on the common law or statute, justifying such interference. Such consequence is even more egregious where the complainant is a funder of the ARB[88] and is a competitor of the advertiser, the market leader, and uses the mechanisms of the ARB to interfere with the advertiser, a

87 **Old Code: Record, Vol 2, p 168, clauses 8 – 9; New Code: Record, Vol 3, pp 271 – 272, clauses 8 - 9**

88 **ARB AA (constitutional review): Record, Vol 4, p 402, para 85**

relative minnow[89], by involving the advertiser in the ARB's processes, and to stifle its trade, by interfering with its ability to advertise its goods and, where the complaint relates to packaging, by interfering with its ability to sell its goods.

95. Fourthly, *Metcash*[90] does not serve as a basis for finding that the ARB is a tribunal as envisaged in section 34.

96. *Metcash* considered whether sections 36(1) and sections 40(2)(a) and 40(5) of the Value-Added Tax Act ('**the VAT Act**') ousted the jurisdiction of the courts in contravention of section 34 of the Constitution[91].

97. The court found that none of the sections breached section 34[92].

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89 **AAC Decision (FA14): Record, Vol 1, p 8, para 16; FA (administrative review): Record, Vol 1, p 86, para 98.4; p109, para 149; FAC Decision (FA10): Record ,Vol 2, p 200, para 10; p202, para 2; pp 203 -204, para 13; Colgate AA (administrative review): Record, Vol 3, p 316, para 29**

90 ***Metcash Trading Limited v Commissioner, South African Revenue Service and another*** **2001 (1) SA 1109 (CC)**

91 ***Metcash supra*** **at [1]**

92 ***Metcash supra*** **at [72], [74]**

98. *Metcash* did not concern itself with whether a particular tribunal constituted the kind of tribunal contemplated by section 34 of the Constitution.

99. Although *Metcash* did find, in an *obiter dictum*, that the special court which deals with tax disputes meets the criteria set by section 34 of the Constitution, such a finding was made on the facts of that matter which are not the same as the facts in this matter, *inter alia*:

99.1 the tribunal referred to in *Metcash*, the special court, was established by law, namely the Income Tax Act[93]. That court would have constituted a court, as defined in section 166(e) [94] of the Constitution;

99.2 the special court operates like an ordinary court: it contemplates *inter alia* a full hearing like a trial, it is presided over by a judge and there is an unqualified right of appeal to the Full Bench of the High Court[95].

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93 ***Metcash (supra*) at [47]**

94 **The courts are - … any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts**

95 ***Metcash* (*supra*) at [47]**

100. Furthermore, the tribunals contemplated by section 34 are tribunals established by law[96] and not tribunals established by consent[97].

101. Fifthly, insofar as the independence of the ARB is concerned, the SCA's finding that no reasonable, objective and informed person would consider it likely that a few funders influence the running of the ARB[98] does not address a perception of a lack of independence where the complainant is a funder of the ARB and the respondent is a non-member.

102. Furthermore, whether the AAC or FAC is informed that a party is a funder of the ARB does not mean that members of the AAC or FAC are unaware of this fact. The ARB's funders are publicly identified on its website.[99]

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96 ***Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and another*** **2009 (4) SA 529 (CC) ('*Lufuno*') at [201]**

97 ***Lufuno*** **(*supra*) at [202] - [218]**

98 **SCA Judgment: Record, Vol 7, p 763, [53]**

99 **Printout from ARB website (RA10): Record, Vol 5, pp 573**

103. Also, the AAC and FAC usually consist of more than three members with the result that the independent chairman can be outvoted.

104. Lastly, rejecting an alleged apprehension of a lack of independence of an adjudicative tribunal funded by one of the parties to the dispute is at odds with this Court's findings as to what circumstances would render a decision-maker not independent.

105. In *Amabhungane*[100], this Court dealt with the constitutionality of certain provisions of RICA[101] which regulate the interception of both direct and indirect communications. With one exception, all surveillance directions must be issued by a 'designated judge'.

106. The issue was whether a designated judge had the requisite independence.

107. This Court held that even in the case of a judge, there may be factors that conduce to a perception of lack of independence. In

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100 ***Amabhungane Centre for Investigative Journalism NPC and another v Minister of Justice and Correctional Services and others*** **2021 (3) SA 246 (CC) ('*Amabhungane*')**

101 **The Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002**

that case, the factors included that the designation is by a member of the executive in ill-defined circumstances or circumstances that lack description and which would not result in a reasonable perception of independence. [102]

108. Sixthly, because the ARB's processes are so different from court proceedings e.g. no evidence on oath, no application of the *Plascon-Evans* rule to disputes of fact, this deprives advertisers of a fair hearing in violation of section 34.

109. This unfairness does not equate to procedural unfairness, as contemplated by section 6(2)(c) of PAJA.

CONSENT

110. The SCA held that Bliss had submitted to the jurisdiction of the ARB by participating in its proceedings.[103] That finding ignores entirely the circumstances under which Bliss participated.

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102 ***Amabhungane*** **(*supra*) at [92]**

103 **SCA Judgment: Record, Vol 7, pp 748-9, [13]**

111. Any choice as to whether to participate in ARB proceedings and/or to object to the jurisdiction of the ARB was illusory. Regardless of whether Bliss participated in or objected to the ARB's jurisdiction, the ARB would have determined the complaint and issued a ruling or decision which its members would enforce. There can be no true election unless the election has a cognisable consequence.

112. The fundamental flaw in the proposition that by participating in the proceedings before the ARB, Bliss consented to its jurisdiction is, thus, that for participation to confer jurisdiction, it must be clear that a refusal to participate, or the raising of an objection to the exercise of jurisdiction, would deprive the court or tribunal of jurisdiction. This much is clear from the very decisions relied upon by the SCA for its finding that jurisdiction was conferred upon the ARB by Bliss' failure to object and its participation.

113. In *Purser*[104]*,* the SCA held that the English court had jurisdiction because the defendant had the right to object to the court's

104 ***Purser v Sales; Purser and another v Sales and another*** **2001 (3) SA 445 (SCA) at [21] - [22]**

jurisdiction based on *forum non conveniens* but failed to do so. Had he done so successfully, the English court would have declined jurisdiction. In *Naidoo*[105], defendant was deemed to have acquiesced to the jurisdiction of the arbitrator because he had willingly participated in the proceedings without raising an objection to jurisdiction. Had the objection been successfully raised, the proceedings would have been terminated.

114. In short, therefore, where, as here a refusal to participate in the tribunal's proceedings will not preclude the tribunal from continuing to adjudicate the complaint before it, continued participation by the defendant cannot confer jurisdiction.

RAISING CONSTITUTIONAL ISSUES

115. The finding by the SCA that the High Court ignored the admonition in *Fischer*[106] that courts must determine the issues identified in the pleadings or affidavits is puzzling.[107] After the court raised its constitutional concerns, Bliss supplemented its

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105 ***Naidoo v EP Property Projects and others*** **[2014] ZASCA 97 (31 July 2014) at [27]**

106 ***Fischer and another v Ramahlele and others*** **2014 (4) SA 614 (SCA)**

107 **SCA Judgment: Record, Vol 7, pp 747-8, [9]**

founding affidavit and amended its notice of motion to deal with the issue, as it was bound to do. The respondents did not object to those steps and answered the new allegations. The constitutional issues were then fully canvassed by the parties in their heads and in oral argument. All of this was clear from the record and the argument addressed to the SCA, and is specifically referred to in the judgment[108].

116. Equally puzzling is the SCA's reference to *AmaBhungane*[109] in support of the statement that constitutional issues should only be raised by the courts *mero motu* in exceptional circumstances.[110] As the passage referred to by Schippers JA makes clear, the court was there concerned with a constitutional issue not raised by any of the parties, which is not the case here.

117. In the circumstances, the SCA's criticism of the approach adopted by the High Court was wholly uncalled for.

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108 **SCA Judgment: Record, Vol 7, pp 745 - 746, [3]**

109 ***Amabhungane Centre for Investigative Journalism NPC and another v Minister of Justice and Correctional Services and others*** **2021 (3) SA 246 (CC)**

110 **SCA Judgment: Record, Vol. 7, p748, [10], fn 4**

118. A court may raise a constitutional issue of its own accord. However, since courts are ordinarily required to decide only issues properly raised, constitutional issues should only be raised where it is necessary for the disposal of the matter or where it is in the interests of justice to do so, usually where there are compelling reasons that this should be done. [111]

119. The constitutionality of the exercise of the ARB's public powers over non-members is an issue which might dispose of the relief sought in the administrative review, which is directed at setting aside the FAC Rulings. Such relief should follow from a finding that the ARB's exercise of public powers over non-members is unconstitutional. Simply on this basis, the issue was properly raised.

120. Given that the issue highlights possible infringements of three constitutional rights, we submit that it was in the interests of justice to raise this issue.

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111 ***Amabhungane* (*supra*) at [58]**

121. In the circumstances, the SCA erred in finding that the constitutional issue should not have been raised; and in ignoring the fact that the constitutional issues decided were squarely raised on the papers.

THE SCA'S JURISDICTION

122. The SCA may decide only appeals, issues connected to appeals and matters referred to it by legislation. [112]

123. The High Court made an order in terms of prayers 2, 3, 4 and 8 of the Amended Notice of Motion. [113]

124. The SCA substituted the High Court's order by dismissing the relief sought in prayers 1, 4, 5, 6 and 8 of the Amended Notice of Motion and referring back for hearing the relief sought in prayers 2, 3 and 7 of the Amended Notice of Motion. [114]

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112 Section 168(3)(b) of the Constitution

113 High Court Judgment: Record, Vol 7, pp 802 – 803, Order read with Amended Notice of Motion: Record, Vol , pp 871 - 872

114 SCA Judgment: Record, Vol 7, p 744

125. The SCA can only decide matters on appeal to it. Accordingly, it could not dismiss the relief in prayers 1, 5 and 6 of the Amended Notice of Motion. Furthermore, what remains outstanding if the appeal against the High Court decision is upheld is the relief sought in prayers 2, 3 or 7, 6, 8 and 9, which should be referred back.

126. Should this Court dismiss the appeal, we request that the Court make the necessary amendments to the SCA's order.

WHY LEAVE TO APPEAL SHOULD BE GRANTED

127. The grounds of appeal concern constitutional issues[115], namely, the principle of legality, the infringement of the constitutional rights contemplated by sections 34, 18 and 16 of the Constitution, the question of when constitutional issues may be raised by a court, and the jurisdiction of the SCA. [116]

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115 Section 167(3)(b)(i) of the Constitution

116 See also FA (leave): Record, Vol 7, pp 738 - 739, para 180 - 184

128. These grounds of appeal[117] also raise arguable points of law of general public interest. [118]

129. The grounds of appeal have reasonable prospects of success.

130. In the premises, this Court has jurisdiction to hear the appeal and it is in the interests of justice that it does so.

RELIEF

131. In the premises, the applicant seeks the following order:

131.1 The application for leave to appeal is granted with costs, such costs to include the costs consequent upon the employment of two counsel;

131.2 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel;

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117 Section 167(3)(b)(ii) of the Constitution

118 See also FA (leave): Record, Vol 7, pp 739 - 741, para 185

131.3 The order of the Supreme Court of Appeal is substituted with the following order: ‘The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel’.

CDA LOXTON SC

F SOUTHWOOD SC

Applicant’s Counsel

Chambers, Sandton

23 January 2023