**IN THE HIGH COURT OF SOUTH AFRICA**

**(NORTH GAUTENG DIVISION, PRETORIA)**

**Case No. 37377/09**

**DATE: 28/07/2010**

**In the matter between:**

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| **THE HOSPITAL ASSOCIATION OF SOUTH AFRICA LTD.** | **Applicant** |
| **and** | |
| **THE MINISTER OF HEALTH** | **First Respondent** |
| **THE DIRECTOR GENERAL OF THE DEPARTMENT OF HEALTH** | **Second Respondent** |

**Consolidated with:**

**Case No: 37505/09**

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| **ER24 EMS (PROPRIETARY) LIMITED** | **First Applicant** |
| **NETCARE 911 (PROPRIETARY) LIMITED** | **Second Applicant** |
| **and** | |
| **THE MINISTER OF HEALTH** | **First Respondent** |
| **THE DIRECTOR GENERAL OF THE DEPARTMENT OF HEALTH** | **Second Respondent** |

**and consolidated with**

**CASE NO 21352/09**

**In the matter between:**

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| **SOUTH AFRICAN PRIVATE PRACTITIONERS FORUM** | **First Applicant** |
| **SOUTH AFRICAN HEART ASSOCIATION** | **Second Applicant** |
| **OPHTHALMOLOGICAL SOCIETY OF SOUTH AFRICA** | **Third Applicant** |
| **SOUTH AFRICAN ORTHOPAEDIC ASSOCIATION** | **Fourth Applicant** |
| **SOUTH AFRICAN RHEUMATISM AND ARTHRITIS ASSOCIATION** | **Fifth Applicant** |
| **THE ASSOCIATION OF PLASTIC AND RECONSTRUCTIVE SURGEONS OF SOUTH AFRICA** | **Sixth Applicant** |
| **THE SOUTH AFRICAN GASTROENTOROLOGY SOCIETY** | **Seventh Applicant** |
| **THE FACULTY OF CONSULTING PHYSICIANS** | **Eighth Applicant** |
| **THE GYNAECOLOGICAL MANAGEMENT GROUP LIMITED** | **Ninth Applicant** |
| **THE SOUTH AFRICAN UROLOGICAL ASSOCIATION** | **Tenth Applicant** |
| **THE SOUTH AFRICAN SOCIETY OF OTORHINOLARYNGOLOGY HEAD AND NECK SURGERY** | **Eleventh Applicant** |
| **THE SOUTH AFRICAN ASSOCIATION OF AUDIOLOGISTS** | **Twelfth Applicant** |
| **THE SOUTH AFRICAN SPEECH LANGUAGE AND HEARING ASSOCIATION** | **Thirteenth Applicant** |
| **SURGICOM LIMITED** | **Fourteenth Applicant** |

**THE ASSOCIATION OF SURGEONS OF SOUTH AFRICA** **Fifteenth Applicant**
**THE SOCIETY OF NEUROSURGEONS OF SOUTH AFRICA** **Sixteenth Applicant**
**THE SOUTH AFRICAN SOCIETY OF PHYSIOTHERAPY** **Seventeenth Applicant**
**THE SOUTH AFRICAN PODIATRY ASSOCIATION** **Eighteenth Applicant**
**SOUTH AFRICAN SOCIETY OF PSYCHIATRISTS** **Nineteenth Applicant**
**THE DERMATOLOGICAL SOCIETY OF SOUTH AFRICA** **Twentieth Applicant**
**GENERAL PRACTITIONERS MANAGEMENT GROUP** **Twenty First Applicant**
**SOUTH AFRICAN MANAGED CARE COOPERATIVE** **Twenty Second Applicant**
**PAEDIATRIC MANAGEMENT GROUP LIMITED** **Twenty Third Applicant**

**and**

**THE DIRECTOR-GENERAL OF HEALTH** **First Respondent**

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** **Second Respondent**
**THE CHAIRPERSON OF THE ADVISORY COMMITTEE ESTABLISHED IN TERMS OF SECTION 91(1) OF THE NATIONAL HEALTH ACT** **Third Respondent**

**CORAM EBERSOHN AJ**

**DATE HEARD 22ND AND 23RD FEBRUARY 2010**

**JUDGMENT HANDED DOWN ON 28th JULY 2010**

## JUDGMENT

*[2010] ZAGPPHC 69; 2010 (10) BCLR 1047 (GNP); [2011] 1 All SA 47 (GNP)*

**EBERSOHN AJ.**

[1] The three matters dealt with in this judgment were consolidated by orders of this court. Contained in the orders was an undertaking by the respondents that the Director-General of the Department of Health ("DOH") would not publish a Reference Price List ("RPL") for 2010 before the date of the hearing of the matters. At the hearing of the matter, without advancing any reasons for her attitude, the acting Director-General refused to extend the undertaking until the final determination of the matters which attitude compelled this court to mero motu make the following order:

**"The Director-General is interdicted until the final determination of this matter from publishing any Reference Price List."**

[2] The three review applications were brought under the provisions of Rule 53 of the Uniform: Rules of Court, in terms of the provisions of the **Promotion of Administrative Justice Act,** 3 of 2000 ("PAJA").

[3] The administrative conduct or decisions which are the subject of the review are those of the Minister of Health and the Director-General of the DOH.

[4] The applicant in the first application, the Hospital Association of South Africa C'HASA"), the applicants in the second application Netcare 911 (Pry) Ltd ("Netcare 911") and ER24 EMS (Pty) Ltd ("ER24") and the twenty-three applicants ("SAPPF") in the third application, seek relief in respect of the promulgation by the Minister of Health of Regulations in terms of section 90 of the **National Health Act,** No. 61 of 2003 ("NHA") and the determination and publication by the Director-General of the Department of Health, of a national health reference price list ("NHRPL") and the process prescribed the Director-General prescribed and subjected the applicants to. In the HASA and ER24 matters the Minister of Health and her Director-General were cited as the first and second respondents respectively. In the SAPPF application the Director-General of the DOH. the Minister of Justice and Constitutional Development and the Chairperson of the Advisory Committee established in terms of Section 91(1) of the ("NHA") were cited as respondents.

[5] Section 22 of the NHA reads as follows:

**"(1) A council known as the National Health Council is hereby established. (2) The National Health Council consists of-**

**(a) the Minister, or his or her nominee, who acts as chairperson;**

**(b) the Deputy Minister of Health, if there is one;**
**(c) the relevant members of the Executive Councils;**
**(d) one municipal councillor, representing organised local government and appointed by the national organisation contemplated in section 163(a) of the Constitution;**
**(e) the Director-General and the Deputy Directors-General of the national department;**
**(f) the head of each provincial department;**
**(g) one person employed and appointed by the national organisation contemplated in section 163(a) of the Constitution; and**
**(h) the head of the South African Military Health Service."**

[6] Section 90 of the NHA provides for the proclamation of regulations, and reads inter alia, as follows:

**"90.(1) The Minister, after consultation with the National Health Council, may make regulations regarding-**

**(u) the processes and procedures to be implemented by the Director-General in order to obtain prescribed information from stakeholders relating to health financing, the pricing of health services, business practices within or involving health establishments, health agencies, health workers and health care providers, and the formats and extent of publication of various types of information in the public interest and for the purpose of improving access to and the effective and efficient utilisation of health services;**

**(v) the process of determination and publication by the Director-General of one or more reference price lists for services rendered, procedures performed and consumable and disposable items utilised by categories of health establishments, health care providers or health workers in the private health sector which may be used -**
**(i) by a medical scheme as a reference to determine its own benefits; and**

**(ii) by health establishments, health care providers or health workers in the private health sector as a reference to determine their own fees, but which are not mandatory;....".**

[7] The Minister of Health, in fact, promulgated the **Regulations Relating to the Obtainment of Information and the Process of Determination and Publication of Reference Price List** ("the Regulations") in terms of section 90(1 )(u) and (v) of the NHA in Government Gazette No. 681 on the 23rd July 2007.

[8] The applicants attacked the validity of the Regulations on several grounds.

[9] The main attack was that the Minister allegedly did not first consult with the National Health Council as is required in section 90(1) of the NHA, before promulgating the Regulations, which requirement is mandatory and that any regulations promulgated without there first having been compliance with this requirement would be invalid in terms of subsections 6(2)(b), 6(2)(f)(i) and 6(2)(i) of PAJA and the principle of legality. "Consultation" in the light of the vast impact such regulations would have on the medical professions and services, the medical aid funds, the

public interest and the responsibility resting upon the shoulders of the Minister and each individual member of the National Health Council to solve the problems regarding medical care in the country, dictated proper consultations and not merely a rubber-stamping of a one-sided process driven by the Minister and her Department.

[10] There is nothing ex facie the Regulations or any other aspect of the drafting history of the Regulations to indicate that the Minister in fact consulted with either the National Health Council or with the Advisory Committee with regard to the Regulations.

[11] In its founding affidavit HASA drew attention to the fact that it had submitted a request under PAJA for the record of the National Health Council and the record of the Department of Health pertaining to the promulgation of the Regulations and the consultations that took place between the Minister and the National Health Council prior to the promulgation of the Regulations. These requests under PAJA were refused by the respondents.

[12] Despite the fact that HASA drew express attention to the absence of any such minutes or proof of consultations and. further, despite the express challenge directed at the Regulations on the ground of non-compliance with the material provisions of the NHA, the respondents failed to include in the Record, filed in terms of the provisions of Rule 53, any documents or minutes evidencing consultations having occurred prior to the promulgation of the Regulations and also failed in the answering affidavit to advance any proof bar the ipse dixit of Dr. Chetty, the present acting Director-General of the DOH, in the answering affidavit to the effect that consultation took place.

[13] The respondents initially relied exclusively on the bald allegations of Dr. Chetty in this regard. The respondents did not reveal when those alleged consultations took place, who were present at the consultations, what the nature and import of the consultations were, (See **New Clicks SA (Pty) Ltd** v **Minister** of **Health** 2005 (3) SA 238 (SCA)), which conclusions, if any,

were arrived at, what the minutes of the National Health Council reflect in relation to those consultations, or even what the attitude of the National Health Council or the Advisory Committee were to the proposed Regulations.

[14] In the replying affidavit filed on behalf of the applicants the applicants challenged the locus standi of Dr. Chetty to make certain factual averments, especially with regard to the consultations, on the basis that the facts she deposed to were not within her personal knowledge as she was not the Director-General at the relevant time and that the averments thus constituted inadmissible hearsay evidence.

[15] At the hearing of the matter the respondents' counsel handed up, by consent, a further affidavit consisting of two and a half pages of text, deposed to by Dr. Chetty wherein she confirmed the contents of her answering affidavit. Attached to the further affidavit of Dr. Chetty was an affidavit, consisting of one and a half pages of text, of the erstwhile Director-General of the DOH, one Thamsanqua Dennis Mseleku ("Mseleku"). Paragraph 5 of his affidavit reads as follows:

**"5.1 confirm that:**

**5.1 I attended meetings of the National Health Council ("NHC") in which the Minister of Health, prior to the promulgation of the Regulations Relating to the Obtainment of Information and the Process of Determination and Publication of Reference Price List ("the Regulations"), consulted with the NHC in relation thereto; and**

**5.2 the decisions and steps referred to by Chetty as having been taken by the Director-General under the Regulations were taken by me."**

In the quoted paragraph Mseleku restricted his affidavit to meetings "held" and he specifically did not say that he attended **all** the meetings held and he also did not say that he attended the meeting where the Minister and the National Health Council finally agreed to the contents of the promulgated Regulations. This failure is most important when it comes to deciding the issue eventually.

[16] The Minister and Director-General attacked the applicants' contention that the Regulations

were invalid as prior consultation with the National Health Council did not take place and argued that the HASA and the ER24 applicants provided absolutely no factual basis to dispute that consultations between the National Health Council and the Minister in fact took place prior to the promulgation of the Regulations and relied on Dr. Chetty's bland statement, supported by the equally bland statement of the erstwhile Director-General, that consultations in fact did take place. Dr. Chetty stated that at the time it was, and the court finds her assertion in this regard unacceptable, not the practice of the National Health Council to have the proceedings of its meetings recorded and that there were therefore no minutes of the meetings and no documentary proof that the meetings took place existed. Surely correspondence between the Director-General's office and the members of the National Health Council arranging the consultations must exist somewhere and there must be diaries in which the dates of the consultations were recorded in, or hotel reservation documents confirming reservations that were made for the members of the National Health Council coming from all over the country to wherever the consultations were held, and the accounts were paid, lunches were paid for etc.. But to say that no documentary proof exists that consultations were held, is so far-fetched and clearly untenable that the court is justified in rejecting them on the papers for the reasons already stated and those set out hereunder. Even if the National Health Council did not keep minutes of their meetings, the Minister of Health and the Director-General must keep minutes and must have created documents with regard to and in connection with the consultations. Surely the Director-General must have sent out correspondence regarding the date of each meeting, the venue, the time and the agenda and even the draft regulations for the members of the National Health Council to study and to discuss beforehand with their local advisors and departments. The Advisory Committee surely must also have generated documents with regard to the consultations and these documents must still exist.

[17] The presence or absence of consultation is a jurisdictional fact the presence or absence of which is objectively justiciable by a court. The leading case on jurisdictional facts is **South African Defence and Aid Fund** v **Minister of Justice** 1967 (1) SA 31 (C). (See also **President of the Republic of South Africa** v **SARFU** 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059); **Pharmaceutical Society of SA** v **Tshabalala-Msimang NNO** 2005 (3) SA 238 (SCA)).

[18] For that purpose, there must be some evidence placed before the court to demonstrate that consultation in fact occurred and that it occurred as contemplated in the NHA and, more particularly, that it occurred prior to the promulgation of the Regulations.

[19] HASA and the ER24 applicants, already in their written heads of argument, filed before the hearing of the consolidated matter, contended that there must be some evidence to demonstrate that consultations in fact took place and in their heads quoted from the judgment of

the Ciskei High Court in the matter of **Maqoma** v **Sebe NO** 1987 (1) SA 483 (Ck GD) to support their contention that the mere ipse dixit of Chetty was insufficient to show and prove compliance with section 90(1) and referred especially to pages 489G—493B of the judgment in support of their contentions regarding the need for the administrative repository to place some evidence of the nature and extent of consultations before the court and which is particularly acute where - as in this case - the nature and extent of consultations is left to the discretion of the repository. The passage referred to reads as follows:

**"It is common cause that the powers so granted to the first respondent may only be exercised 'after consultation', making such consultation a condition precedent to the exercise thereof.**

**If the condition precedent is not fulfilled, the necessary consequence will be that the act of exercising the power granted under the section will be invalid. *Vide Government of the Republic of South Africa and Another v Government of Kwazulu and Another* 1983 (1) SA 164 (A) at 199H; Baxter *Administrative Law* at 445; Rose Innes *Judicial Review of Administrative Tribunals in South Africa* at 107; *Virginia Cheese & Food Co (1941) (Pty) Ltd v Minister of Agricultural Economics and Marketing and Others* 1961 (1) SA 229 (T); on appeal at 1961 (4) SA 415 (T).**

**The question which falls to be decided in this matter is whether or not, on the facts placed before us, the prerequisite of 'consultation' as provided for in s 2 has been adequately complied with.**

**Before dealing with the allegations of fact in this matter it seems advisable to consider in general terms the meaning, characteristics and implications of the word 'consultation'. The principle of providing in legislation that an authority is empowered to exercise its powers only after it has 'consulted' bodies or persons who have an interest in the subject-matter or will be affected thereby is well known in the statute law of this and other countries. Several such provisions have been quoted in argument and numerous authorities dealing therewith have been referred to.**
**I shall attempt to summarise the principles that may be extracted from a study of these authorities.**
**1. The *Concise Oxford Dictionary (New Edition)* consulted, equates 'consultation' with 'act of consulting; deliberation; conference' stating that it is derived from the Latin *consultatio.***

**2. 'Deliberation' in turn is given as 'weighing in mind, careful consideration; discussion of reasons for and against, debate; care, avoidance of precipitancy; unhurriedness of**

**movement.'**
**From the aforementioned it seems that 'consultation' in its normal sense, without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party (also indicative of the prefix 'con-') in a situation of conferring with each other where minds are applied to weigh and consider together the pro's and cons of a matter by discussion or debate.**

**The word 'consultation' in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.**
**The provisions of s 2 of the Administrative Authorities Act 37 of 1984 (hereinafter referred to as "the AA Act") do not expressly prescribe or lay down the form that the required 'consultations' should take, nor the nature or extent thereof. Accordingly, it seems to me that the submission of Mr Dison for the first respondent may be accepted that the procedure to be adopted in order to comply with the section was in the discretion of the first respondent who was entitled to adopt any reasonable procedure she chose providing it allowed her and those parties or persons entitled so to consult with her reasonable opportunity for achieving the objects for which the requirement of prior consultation was inserted in the enactment. As regards the time when consultations had to be embarked upon, suffice it to say that the enactment specifically requires it to be done prior to exercising the powers therein granted to her.**
**This view is supported by the *dictum* of Van den Heever JA in *R v Ntlemeza* 1955 (1) SA 212 (A) where a similar enactment was considered. The learned Judge of Appeal at 218D - E states the following:**
**"These considerations lead inevitably to the conclusion that, even if the direction to consult is a categorical imperative, the section contains no imperative direction as to how consultation should be had; that the manner in which the Natives should be consulted was largely left to the discretion of the Minister. I do not see therefore how the efficacy of any method not manifestly unreasonable adopted by him in <u>good faith</u> can be questioned.'(My italics.)**
**In considering the requirement of reasonableness it seems that various considerations are appropriate. The number of people or bodies to be consulted; the urgency of the matters under consideration; the background knowledge of the persons being consulted on the issues under consideration; the distances between parties and persons concerned and the available lines of communication; the nature of the powers intended to be exercised; the effect of the exercise of such powers on the rights of the persons affected; the practicalities of the case and such other considerations as I may not now have thought of but which, in a particular case, may be indicative of reasonableness.**
**Not only the method of consultation but also the nature and extent of the consultations envisaged by the enactment are not specified therein. In my view this aspect was left largely to the first respondent's discretion subject again to the requirement that the nature and extent thereof should at least be such as to allow him and the persons entitled so to consult, reasonable opportunity to achieve the objects for which the requirement of consultation was inserted in the enactment. Again, the test of what would reasonably suffice, would vary in each case according to the considerations which I have**

**attempted to enumerate supra as being appropriate with regard to the method to be adopted. Vide Port Louis Corporation v Attorney General of Mauritius 1965 AC 1111 (PC) at 1116).**

**The requirement of good faith referred to in the Ntlemeza case *supra* (a requirement which clearly must exist if proper discussion or debate is to be had) seems to me to be one of the cornerstones of any meaningful consultations. Donaldson J in Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd [19721 1 All ER 280 (QB) at 284E - F refers thereto in the following terms:**

**'The essence of consultation is the communication of a genuine invitation,extended with a receptive mind, to give advice....'**
**However convinced the empowered authority may be at the outset, of the wisdom or advisability of the intended course of action, he is obliged to constrain his enthusiasm and to extend a genuine invitation to those to be consulted and to inform them adequately of his intention and to keep an open and receptive mind to the extent that he is able to appreciate and understand views expressed by them; to assess the views so expressed and the validity of objections to the proposals and to generally conduct meaningful and free discussion and debate regarding the merits or demerits of the relevant issues. So receptive must his mind be that, if sound arguments are raised or other relevant matters should emerge during consultation, he would be receptive to suggestions to amend or vary the intended course to the extent that at least a possibility exists for those with whom he consults to persuade him to alter his intentions if not to abandon them.**
**In stating the aforesaid, I am fully mindful of the fact that despite the imperative requirements of consultation in the Act, he is not obliged to give effect to the wishes of those whom he has to consult. He is the sole decision-maker regarding the actions eventually to be taken but, nevertheless, he is enjoined by the enactment not to act in terms thereof until and unless he has given full, proper and *bona fide* consideration to the views expressed during consultations conducted as I have attempted to set out hereinbefore.**
**For the sake of a clearer and more comprehensive appreciation of what I have stated, the following quotes from various other authorities are of assistance.**
**In the Port Louis Corporation matter *supra,* counsel for the appellants are reported as having formulated argument as follows (at 1116):**
**'The English authorities may be relied on to determine the right approach to the question what a true "consultation" should be. The authorities indicate that, while the nature and extent of the communications between the consulting parties which are sufficient for "consultation" to have taken place will vary in each case, even under the same enactment, sufficient information must be supplied to the local authority to enable it to tender advice, and, on the other hand, sufficient opportunity must be given to the local authority to tender that advice. The statutory obligation is not fulfilled unless sufficient opportunity is given to the local authority to ask the executive questions and to put inquiries to the executive, so that the questions and answers amount to a free and frank exchange of views on all the questions raised by the local authority. That is the foundation stone of the appellants' case.**
**Further, there must be some essential factor without which no consultation can be said to have taken place. It is not sufficient for the executive to inform the local authority of its intentions, but the local authority must be given an opportunity to make adequate**

**representations and to tender advice. It is essential for the executive to approach that advice with an open mind, that is, to be open to persuasion and open to appreciate the advice tendered; "Consultation" connotes an exchange of ideas, information and views, in which each side has a full opportunity of contributing to such an exchange; it is not a one-way process but a two-way process:'**
**This view seems to be to me the correct approach in matters of this nature. Nor does the judgment of the Court suggest that the argument was not accepted.**
**In the judgment of the Court at 1124 the following view is expressed:**
**'If there is a proposal to alter the boundaries of a town, or the boundaries of a district, or the boundaries of a village, such alteration must not be made until after consultation with the local authority concerned. It follows that the local authority must know what is proposed before they can be expected to give their views. This does not however involve that the local authority are entitled to demand assurances as to the probable form of the solutions of the problem that may be likely to arise in the event of there being an alteration of boundaries. The local authority must be told what alterations of boundaries are proposed. They must be given a reasonable opportunity to state their views. They might wish to state them in writing or they might wish to state them orally. The local authority cannot be forced or compelled to advance any views but it would be unreasonable if the Governor in Council could be prevented from making a decision because a local authority had no views or did not wish to express or declined to express any views. The requirement of consultation is never to be treated perfunctorily or as a mere formality. The local authority must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems of difficulties: they must be free to say what they think.'**
**Fletcher and Others v Minister of Town and Country Planning [1947] 2 All ER 496 at 500B:**
**'The word "consultation" is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition.**
**Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the Court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one.'**
**Finally I should also refer to the matter of *Sinfield and Others v London Transport Executive* [1970] 2 All ER 264 (CA) at 269 where the learned Judge stated the principles in the following terms:**
**'It is apposite first to mention that counsel for the Executive emphasised not once but several times that whatever be the true construction of s 23(3) and whatever order this make, it was in the end the executive and no one else who would make the decision. If that was intended to intimate that the executive merely looked on consultations as being an opportunity for those consulted to make ineffective representations, it would represent an approach that, to put it mildly, cannot be supported. Consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal. I start accordingly from the viewpoint that any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals -before the mind of the executive becomes unduly fixed."**

[20] Regarding the need to place evidence regarding the consultations before the court see also **S v Smit** 2008 (1) SA 135 (T) at 147H—153J; **Hayes v Minister of Housing, Planning & Administration, Western Cape** 1999 (4) SA 1229 (C) at 1240B—1243B and **McDonald v Minister of Minerals and Energy** 2007 (5) SA 642 (C) at [18].

[21] In the light of the overwhelming authority and the timeous and clear attack of the applicants regarding the lack of evidence regarding consultations one would have expected the respondents to duly meet this point in full. The answering affidavit deposed to by Dr. Chetty consists of 360 pages with 54 pages of annexures. As the court have already stated, except for the bland allegation by her in the answering affidavit to the effect that consultations took place she imparted no further information regarding the alleged consultations. After the clear attack of the applicants in their replying affidavit and in their heads of argument on her locus standi and on her failure to provide information and particulars regarding the alleged consultations she clearly had ample time, and was invited to do so by the applicants, to prepare and depose to a proper supplementary affidavit wherein all the facts regarding the alleged consultations were set out in and to put it before the court. As already stated her further answering affidavit, which was put before the court at the hearing of the consolidated matters, amounted to only two and a half pages and that of the erstwhile Director-General. Mseleku, to only one and a half pages of text. It must have been clear to them, when they deposed to these two affidavits, that they were called upon to properly meet the attack of the applicants regarding the alleged consultations, yet they elected to repeat the mere bland allegations that consultations did take place, without imparting the required information regarding the consultations. If they could not lay their hands on any documents then surely they must have resorted to verifying affidavits of at least some of the members of the National Health Council who attended the consultations, and must still have documents relating to the consultations at their local bases. Yet this was apparently not even attempted by the respondents.

[22] The mere ipse dixit of Chetty[7] and Mseleku. in circumstances such as these, is insufficient to satisfy the evidentiary burden resting on the respondents to show compliance with the mandatory provisions of section 90(1) of the NHA requiring consultation between the Minister and the National Health Council prior to the promulgation of the Regulations. The mere ipse dixit of a repository of power can never be satisfactory as the standard of review for reasonableness is part of our law.

[23] Jafta AJ in **Walele v City of Cape Town** 2008 (6) SA 129 (CC), which case deals with a subjective jurisdictional fact, at [60] to [61], said the following:

**"Nor does the mere statement by the City to the effect that the decision-maker was satisfied suffice. In the past, when reasonableness was not taken as a self-standing ground for review, the City's *ipse dixit* could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds. In this case, it cannot be said that the information, which the City admitted had been placed before the decision-maker, constituted reasonable grounds for the latter to be satisfied.**

[24] The determination of whether the decision-maker in the **Walele** case was satisfied that the disqualifying factors would not be triggered by the erection of the block of flats concerned entailed a factual enquiry. The fact that the Building Control Officer had considered those factors was irrelevant to the enquiry unless it was established that this fact was communicated to the decision-maker. There was no evidence in the record showing that such communication took place. Consequently the court in that matter found that it was not correct for the City to assert that, since the relevant factors were considered by the Building Control Officer, it must be accepted that the decision-maker had also considered them. The position would, all the more so, be the same in relation to objective jurisdictional facts.

[25] The reliance of the Minister and Director-General on an argument regarding the test set out in the well-known case of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.** 1984 (3) SA 620 (AD) and in **Fakie v CCTI Systems (Pty) Ltd** 2006 (4) SA 326 (SGA), must be considered. The SCA cautioned that while courts have tended to adopt a robust approach to finding whether bona fide disputes of fact exist, a respondent's version can only be rejected if it is fictitious or so far-fetched and clearly untenable that it can confidently be said to be unworthy

of credence. Cameron JA stated at page 348 [56]:

**"Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."**

On the facts before this court the defence by the respondents based on the **Plascon** case must fail.

[26] Counsel of the Minister and the Director-General argued that in any event, section 90(1) of the NHA simply requires the Minister to consult with the National Health Council and it neither proscribes a procedure that must be followed nor formalities that must be complied with to give effect thereto. They argued that the position was in fact on all fours with the case of **R v Ntlemeza** 1955(3) SA 212 (A) at 218D - E, (a case where it had to be decided if an area was to be declared a "betterment" area for the residents) (on which the court in the **Magoma** case relied upon), wherein Van den Heever J stated:

**"These considerations lead inevitably to the conclusion that, even if the direction to consult is a categorical imperative, the section contains no imperative direction as to how consultation should be had; that the manner in which the Natives should be consulted was largely left to the discretion of the Minister. I do not see how the efficacy of any method not manifestly unreasonable adopted by him in good faith can be questioned".**

The **Ntlemeza** case is clearly distinguishable from the facts before this court and does not assist the respondents.

[27] In meeting the attack of the applicants that there was insufficient evidence before the court to demonstrate the reasonableness of the Minister's conduct in relation to the requisite consultations, the Minister and the Director-General responded by arguing that it has never

been the applicants' case that the process of consultation undertaken by the Minister was unreasonable. Such a case made out in the founding papers, so went the respondents' argument, may have invited a different response which delved more deeply into the nature and extent of the consultations held. It was already pointed out in this judgment that it was the case of the Minister and the Director-General that no documentary proof existed that the consultations took place. How they would have adopted **"a different response which delved more deeply into the nature and extent of the consultations held"** this court fails to understand as the respondents already had a prolonged period of time, after the replying affidavit and the applicants' heads of argument were filed and the hearing of the matter took place, in which to **"delve more deeply"** into the matter and come up with a supplementary affidavit wherein they could have detailed the nature and extent of the consultations held. All they did produce, in the end, was the two and a half pages affidavit of Dr. Chetty wherein she repeated her previous ipse dixit and the affidavit of the then Director-General Mseleku, consisting of one and a half pages of text wherein he merely stated that the consultations were held. This court rejects this reasoning by the respondents regarding them **"delving more deeply.".**

[28] Under the circumstances this court is compelled to find that there is no acceptable evidence before the court upon which the court can find, as a fact, that the Minister consulted with the National Health Council prior to and in respect of the promulgation of the Regulations and rejects the bald statements of Dr. Chetty and Mseleku in this regard and the attack on the validity of the Regulations regarding the lack of prior consultations must therefore succeed.

[29] Furthermore, the Regulations were attacked on other valid grounds by the applicants too.

[30] It is apparent, from the stated terms of Government Notice R681 of 23 July 2007. that the Minister relied, in promulgating the Regulations upon the provisions of sections 90(1 )(u) and (v) of the NHA.

[31] Any regulations promulgated pursuant to the provisions of section 90 of the NHA constituted delegated legislation in the sense that parliament entrusted to the Minister the task of making law.

[32] It must now be considered whether the promulgation on the 23rd July 2007 under GN R681 of the Regulations constituted administrative action.

[33] In the Government Notice it is recorded that
**"The Minister of Health has, in terms of section 90(l)(u) and (v) of the National Health Act, 2003 (Act No 61 of 2003), made the regulations in the Schedule."**

[34] It is not stated in the Government Notice, the Regulations, or in any document pertaining to the legislative history of the Regulations, that the promulgation of the Regulations was preceded by consultation between the then Minister and the National Health Council.

[35] The majority decision of the Constitutional Court in the **New Clicks** case found that the making of regulations constituted administrative action which was susceptible to review under PAJA. This included a review on the grounds of unreasonableness.

[36] The court will now consider the intention and purpose of the legislation and Regulations - including the legislative background to the introduction of the Regulations and the proposed amendments - for purposes of interpreting the Regulations **(New Clicks** case at [199 to 203]. That is, the court will accept the legislative purpose as a guide for purposes of understanding how the Regulations are to be understood and applied and for purposes of deciding whether or not the Regulations are reasonable or not.

[37] In considering a review on the grounds of reasonableness, the context of the regulations

and the subject matter thereof will be paramount (the **New Clicks** case at [345]).

[38] In **Merafong Demarcation Forum v President of Republic of South Africa** 2008 (5) SA 171 (CC) at [62] to [66] the Constitutional Court accepted that the promulgation of new legislation was subject to challenge for rationality (See also at [72] and at [165] to [175]). This case dealt with the promulgation of legislation aimed at the amendment of the Constitution and not to subordinate legislation. The principle of rationality would, however, by extension, apply also to the promulgation of regulations. On this basis, the challenge to the regulations on the grounds of rationality would not be confined to PAJA but finds its force in the provisions of section 1 of the Constitution. In this regard, **'objectively viewed, a link is required between the means adopted by the legislature and the end sought to be achieved'** (at [62]). At [114] this test was described as follows:

**"What is required, insofar as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved."**

[39] Even if the promulgation of the regulations was not susceptible to review under PAJA or section 1 of the Constitution for rationality, those regulations must nonetheless meet the requirements of legality:

**"The Commission's decision may, however, be set aside on the principle of legality even if it is not reviewable under PAJA [Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA) para 9; Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC) para 97; Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) paras 56-9; President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) para 148.]. The principle of legality entails that no public power may be exercised and no function performed beyond that conferred by law [Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566**

**(CC) para 80.].'**

(Per Malan JA in **The Competition Commission of South Africa v Telkom SA Ltd** (623/2008) [2009] ZASCA 155 at [12], This finding of the Supreme Court of Appeal in relation to review for legality is. in turn, based upon the decisions of the Constitutional Court in **New Clicks** at [97], **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council** 1999 (1) SA 374 (CC) at [56]—[59], **President of the Republic of South Africa v SARFU** 2000 (1) SA 1 (CC) at [148] and **Masetlha v President of the Republic of South Africa** 2008 (1) SA 566 (CC) at [80]; and the Supreme Court of Appeal in **Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd** 2009 (4) SA 928 (SCA) at [9].

[40] In all of the circumstances it is clear that the promulgation of the Regulations by the then Minister constituted administrative action on her part.

[41] That the Minister conflated subsections (u) and (v) of section 90 of the NHA, is apparent from the provisions of regulation 2(1), which provides that

**'The Director-General shall, annually by notice in the Gazette, require from any stakeholder contemplated in section 90(1 )(v) of the Act, the submission of certain information:**

**(a) relating to health financing, the pricing of health services, business practices within or involving health establishments, health agencies, health workers or health care providers; and**

**(b) as is necessary for the development and publication of the reference price list/**

[42] It is immediately apparent from a reading of this regulation that the information called for in regulation 2(1 )(a) derived from subsection 90(1 )(u) of the NHA, but was not information that falls within the scope of subsection 90(1 )(v) of the NHA. Put simply, compiling a reference price list under subsection (v) on the strength of the information contemplated in (u) is an impermissible conflation of the two subsections.

[43] Sub-sections (u) and (v) of section 90(1) of the NH Act also contain within them qualifications as to:

a) the type of regulations which may be made by the Minister;

b) the nature and extent of the Minister's powers as well as the obligations resting on the Minister when making regulations; and

c) the purpose/s which the regulations under (u) and (v) are intended to serve.

ci)

[44] The only provisions in the NHA that are concerned with a reference price list are to be found in sub-section 90(1 )(v) of the NHA and that the same could not be said insofar as concerns the obtaining of information via regulations.

[45] It is clear that sections 12 to 14 of the NHA are concerned with the provision of and access to information and records pertaining to health sendees and that section 12 of the NHA imposes an obligation on the national and provincial departments of health to disseminate information concerning health care. The section reads as follows:

**"The national department and every provincial department, district health council and municipality must ensure that appropriate, adequate and comprehensive information is disseminated on the health services for which they are responsible ..**

[46] Sections 74, 75 and 76 of the NHA also make provision for the publication and the provision of access to information relating to health care. Subsections 74(1) and (2), in particular, bear quoting:

**"(1) The national department must facilitate and co-ordinate the establishment, implementation and maintenance by provincial departments, district health councils, municipalities and the private health sector of health information systems at national, provincial and local levels in order to create a national health system.**

**(2) The Minister may, for the purpose of creating, maintaining or adapting databases within the national health information system contemplated in subsection (1), prescribe categories or kinds of data for submission and collection and the manner and format in**

**which and by whom the data must be compiled or collated and must be submitted to the national department."**

[47] It is clear that the provisions of subsection 90( 1 )(u) and (v) of NHA are designed and are intended to achieve different and discrete purposes under the NHA. That this is so derives from a reading of the subsections on their own, as well as within the context of the NHA as a whole:

a) The purpose of section 90(1 )(u) is to obtain information and thereafter to publish that information or various parts of it as may be in the public interest and in order so as to improve access to and the efficient utilisation of health services in the Republic of South Africa. The process under (u) is confined to gathering and thereafter publishing information, absent any process of determination.

b) Subsection 90(1 )(v). in contradistinction, is intended to provide for the compilation of reference price lists, the dual purposes of which are stipulated in subsections 90(1 )(v)(i) and (ii). These purposes differ markedly from the purposes of subsection 90(l)(u) and involve something more than the mere gathering of information and the subsequent publication thereof. Under (v), the Director-General is required to exercise a discretionary role in "determining"' one or more reference price lists.

c) It is apparent from a plain reading of the words used in subsection (u) as compared with (v) that the nature and extent of the information that can be relied upon by the Director-General in determining a reference price list differs from that information which the Director-General is otherwise entitled to assimilate and publish under subsection (u). Not the least of these differences is the exclusion from (v) of **"health financing"** and **"business practices within or involving health estab care providers".**

d) Subsection (v) requires the Director-General to determine one or more reference **lishments, health agencies, health workers and health** price lists on the strength of **"services rendered, procedures performed and consumable and disposable items utilised".** In this regard, the reference price lists to be determined by the Director-General are intended, by the subsection, to be a reflection of actual prices for services rendered, procedures performed, and items utilised. This is consistent with the meaning of the word **"reference[1]*** used in context.

[48] When regard is had to the provisions of the NHA. the following principles emerge:

a) It is only in terms of subsection 90(1 )(v) of the NHA that the Minister is afforded the power to prescribe the processes to be followed by the Director-General in determining a reference price list.

b) The Minister is not empowered to prescribe under section 90(1 )(u) how the Director-General

is to determine and publish an NHRPL.
c) The purpose of a reference price list publishable under section 90(1 )(v) is confined to those purposes set out in subsections (i) and (ii).
d) A reference price list is intended to reflect the actual prices charged for services actually rendered, procedures actually performed and consumable and disposable items actually utilised.

[49] It was already detailed supra how subsection 90(1 )(u) is intended to serve a different purpose from and is distinct from the aims of subsection 90(1 )(v).

[50] Reliance on the one subsection for purposes of informing the reference price list published under the other subsection is ultra vires the powers of the Minister as they were delegated by the legislature.

[51] In the answering affidavit of the Minister and the Director-General, (it is apparent that the answering affidavit deposed to by Chetty, despite what is said therein, is not also filed on behalf of the Minister of Justice, who has been cited as second respondent in the SAPPF matter and who filed his own answering affidavit which is at odds with the answering affidavit of the Director-General and the Minister of Health), a number of allegations were made regarding the purpose of a reference price list in the context of the South African health care industry. The stated purpose, on the part of the respondents, of an NHRPL. is as is encapsulated by the following paragraph of the answering affidavit:
**"71. It is evident from the above that it is imperative that the healthcare industry be regulated in the public interest. This is the case in all countries. The healthcare industry, itself, accepts that there is a compelling need for it to be regulated. The government is obliged in terms of section** 27 **of the Constitution to take measures to ensure that healthcare is accessible to all. The publication of the RPL is one such measure."**

[52] These purposes are attributable to the then Minister of Heath in her promulgation of the Regulations and discloses the reason for the Minister having promulgated the regulations.

[53] On a plain reading of the NHA, these quoted purposes or reasons for the promulgations of the regulations were contrary to the provisions of section 90(1 )(v) of the NHA.

[54] Our law is abundantly clear to the effect that powers granted to the Minister for one purpose cannot be used for a different purpose, however laudable.(See **Van Eck NO and Van Rensburg NO v Etna Stores** 1947 (2) SA 984 (A)). It is trite law that any statutory function could only be validly performed within the limits prescribed by the statute itself Where administrative action was taken substantially for an ulterior purpose that administrative action was thereby rendered invalid.(See **Administrator, Cape v Associated Buildings Ltd.** 1957 (2) SA 317 (A) at 325D and sections 6(2)(e)(i), (ii), (f)(i), (ii)(aa) and (bb) of PAJA.)

[55] Ulterior purpose does not necessarily bear a sinister meaning. It can simply mean the use of a discretionary power for a purpose not expressly or impliedly authorised by the empowering statutory enactment.(See **Goldberg v Minister of Prisons** 1979 (1) SA 14 (A) at 48E.)

[56] In meeting this attack on the Regulations counsel of the Minister and Director-General argued:

a) that it was proper and valid for the Minister to issue the Regulations in terms of both subsections, and that, in any case, reference to subsection (u) in the Regulations is superfluous and did not of itself rendered the Regulations invalid. At worst, so it was argued, the Regulations simply failed to provide for processes and procedures contemplated in subsection (u) and this, however, did not mean that the information referred to in subsection (u) may not be obtained for purposes other than what is set out in the subsection. This is so, so went the argument, because subsection (v) granted the Minister wide powers in regard to the determination of a reference price list and the subsection empowers the Minister to

**"make regulations regarding the processes of determination and publication by the Director-General of one or more reference price lists for services rendered".**

b) The process contemplated in sub-section (v) included the obtainment of information from medical aid schemes, health establishments, health care providers and/or health workers in the private sector. This was clear from the reading of the subsection which provided that a reference price list was:

**"for services rendered, procedures performed and consumable and disposable items utilised by categories of health establishments, health care providers or health workers in the private health sector."**

This information was obtainable only from the health establishments, health care providers or health workers that rendered the services, performed the procedures and/or utilised the consumables and disposable items.

c) The NHA did not prescribe the process of determination of the RPL. Neither did it prohibit the Minister from including in such process the obtainment of information as he/she, deemed necessary for the development and publication of the RPL. The power to determine the process, therefore, was left entirely to the discretion of the Minister. This process was what is reflected in Regulation 2.

d) Following thereon. Regulation 3 proceeded to identify in more detail the nature of the information contemplated in Regulation 2.
e) HASA and the ER24 challenged the validity of Regulations 2 and 3 on the basis that:
(i) the information required in terms of Regulation 2 derived from subsection 90(1 )(u). and was not information falling within the scope of subsection 90(1 **Xv);** and
(ii) the Minister was not empowered to delegate her functions set out in subsections 90(1 )(u) and (v).
f) That a clear line should not have been drawn between sub-sections 90(1 )(u) and (v). However, in the event that the court was to hold that the Regulations did not serve the purpose set out in subsection 90(1 )(u) of the NHA, counsel submitted that the Regulations were not invalid for that reason alone. At best, whereas the Regulations purported to set out process and procedures contemplated in subsection 90(1 )(u) on the one hand and process of determination of the RPL in terms of subsection 90(1 )(v) on the other, the Regulations were really based on section 90(1 )(v).
g) Setting the Regulations aside would thus have no bearing on the processes envisaged in sub-section 90(1 )(u) as, according to this contention, they were not based on this sub-section; it would however adversely affect the determination of the RPL in circumstances where the Regulations relating to the processes envisaged in sub-section 90(l)(v) have been properly promulgated. Such an approach would not be warranted.
h) In the event the court was to hold that the Regulations were invalid due to the fact that though they purport to include processes contemplated in sub-section 90(1 )(u) in effect they do not, counsel submitted that an appropriate order would be to uphold the invalidity only to the extent they purport to regulate matters listed in sub-section (u) when they should not have done so. Such an order would not invalidate the Regulations for purposes of sub-section (v) of the Act.
i) To the extent that reference to section 9l(l)(u) was invalid, counsel submitted that the remedy proposed by Jafta J in **Kruger** v **President of South Africa** 2009 (1) SA 417 (CC), where the Constitutional Court considered the validity of Proclamations, is appropriate.

j) The purpose of section 90(1 )(u) could not be realised through the Regulations as they currently stand. This is because the Regulations were solely geared towards the processes of determination of a reference price list. In fact the Regulations would be inapplicable to the processes contemplated in section 90(1 )(u) and that the process of severing should be employed so as to retain the Regulations in their entirety. This would be effected by severing the words "(u) and " from the preamble of the Regulations.

[57] The submissions by the counsel of the Minister and Director-General cannot be sustained in the light of the valid grounds stated by the applicants and the general failure of the Regulations and the lack of consultations by the Minister with the National Health Council.

[58] The Regulations are clearly invalid on the said ground too.

[59] The applicants, furthermore, maintained that to the extent that the court may find that the Regulations were lawfully promulgated, there were nonetheless provisions contained in the Regulations that were unlawful and fall to be struck down. These included provisions that were *ultra vires* the enabling legislation and provisions which were vague and irrational and it was clear that even if the Regulations as a whole survived scrutiny, these individual provisions could not.

[60] Furthermore, the regulations were subject to review under the provisions of PAJA as well as review for rationality and reasonableness under the Constitution. In addition, the exercise by the Minister of her powers under the NHA to promulgate the Regulations was subject to the requirement of legality that derived from section 1 of the Constitution.

[61] To the extent that the Regulations contained within them provisions that offended against the rights contained in the Constitution, then they would additionally be liable to be set aside to the extent of such conflict in accordance with sections 2, 7, 8, 36(2), and 172(l)(a) of the

Constitution.

[62] In the first place, it was apparent from section 90(1 )(u) and (v), that the Minister was required to prescribe, under both of those subsections, the processes and procedures to be followed by the Director-General in calling for information and in determining and publishing a reference price list respectively. The plain reading of these subsections was unambiguous to this extent: it is the Minister in whom the power vested to determine the processes and procedures to be followed and, in so determining, she was required to establish the limits of the Director-General's powers and duties.

[63] In regulation 3(2)(a), the Minister stipulated that information submitted must **'be** in **accordance with the pricing methodology contemplated in regulation 4(2)(a)',** and regulation 4 in turn provided as follows:
**(1) The submission of information referred to in regulation 3 must be in accordance with the guidelines as determined by the Director-General in the notice contemplated in regulation 2.**

**(2) The guidelines referred to in subregulation (1) shall include, but not limited to:**
**(a) pricing methodology', for determination of reference prices for items;**

**(b) procedures for addition, deletion or change of items; and**
**(c) calculation of responsibility values. Responsibility value means the increased responsibility for providing a service relative to a standard service for providers and is calculated by taking into account experience and knowledge, judgment and mental effort, skill and physical effort as well as risk and stress to the patient."**

[64] It must be noted that regulation 2 obliged the Director-General, annually, by notice in the Gazette, to require from any "stakeholder" the submission of certain information.

[65] An instance of the methodology determined by the Director-General, which was detailed and far-reaching in both its scope and content, is to be found at file 1, pages 182—215 of the record. This draft methodology was changed from time to time by the Director-General in and at

the time of the publication of the notice contemplated in regulation 2.

[66] It is apparent from sub-regulation 4(2) read with 3(2)(a) that the Minister left to the Director-General the determination of how a reference price list was to be compiled insofar as it concerned the guidelines that were to be followed by anyone submitting information.

a) It was the Director-General that determined the scope and content of those guidelines and thereby the manner in which a reference price list would be determined.

b) This is particularly so insofar as concerns regulation 4(2)(a) being the methodology for the determination of reference prices for items to be included on the NHRPL and the procedures for the addition, deletion or change of items as referred to in regulation 4(2)(b).

c) As far as concerns regulation 4(2)(c), the applicants made the point that there was nothing in either subsection 90(1 )(u) or (v) of the NHA that afforded the Minister the power to allow the Director-General to determine what price should be charged with reference to any of the factors contemplated in regulation 4(2)(c) or at all. This regulation - and the power it afforded the Director-General - was therefore ultra vires the NHA.

[67] In promulgating the Regulations in this manner the Minister failed to prescribe the processes or procedures to be followed by the Director-General and has instead afforded to the Director-General the discretion to himself determine how he will call for information, what information he will call for, and how this information will be relied upon for the compilation of a reference price list.

[68] In so doing, the Minister has impermissibly delegated to the Director-General the powers afforded the Minister under subsections 90(1 )(u) and (v) of the NHA. In so doing, the Minister offended against the principle that a person to whom the power to make legislation was delegated may not delegate those powers further - a principle expressed in the maxim delegatus delegare non potest and which finds expression in the provisions of section 6(2)(a)(ii), *(f)(1)* and (i) of PAJA. The proscription on further delegation is also a function of the principle of legality and constitutional sovereignty, including the legislative authority of parliament.

[69] In this regard, the maxim delegatus delegare non potest

**"is based upon the assumption that, where the Legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."**

(Per Botha JA in **Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd.** 1965 (4) SA 628 (A) at 639C - D. See also **Aluchem (Pty) Ltd. v Minister of Mineral and Energy Affairs** 1985 (3) SA 626 (T) at 631F - G; **SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission** 1987 (4) SA 155 (W) at 164B - C; **SA Airways Pilots Association v Minister of Transport Affairs** 1988 (1) SA 362 (W) at 371C - D; **Veldsman v Overberg Regional Services Council; Martin v Overberg Regional Services Council** 1991 (2) SA 651 (C) at 656E - F; **Chairman, Board on Tariffs and Trade v Teltron** (Pty) Ltd 1997 (2) SA 25 (A) at 34E; **Government of the Province of the Eastern Cape v Frontier** Safaris (Pty) Ltd 1998 (2) SA 19 (SCA) at 32B - D; **Spier Properties (Pty) Ltd and Another v Chairman, Wine and Spirit Board** 1999 (3) SA 832 (C) at 846D – E.)

[70] The Legislature could not have intended that the Minister would be entitled to delegate to the Director-General her powers under the NHA inasmuch as the relevant subsections provided that the Minister was to prescribe to the Director-General how those functions were to be performed. It could never have been intended that the Minister could delegate to the Director-General the power to prescribe to himself how he is to perform his functions.

**"Such an incompetent subdelegation may occur where the repository of the legislative power, the *delegatus,* in the purported exercise of that power (say, by regulation) confers upon another an unlimited discretion to deal with the matter which is the subject of the regulation. In such a case the effect of the regulation is to make such other person, and not the *delegatus,* the legislator on the matter with which the regulation seeks to deal. It amounts to an abdication by the *delegatus* of his power to legislate. This, in general, the delegatus cannot do, unless authorised thereto by the empowering statute. (See generally Natal Organic Industries (Pty) Ltd v Union Government 1935 NPD 701 at 714 - 15; *Arenstein v Durban Corporation* 1952 (1) SA 279 (A) at 297A - 298F; *United Democratic Front* v *Staatspresident en Andere (supra* at 652H - 1, 654F - H);**

***Staatspresident en Andere v United Democratic Front en 'n Ander (supra* at 861H - 863C).)'**

(Per Corbett CJ in **Catholic Bishops Publishing Co v State President** 1990 (1) SA 849 (A) at 863H—864B.)

[71] This delegation of powers to the Director-General - as reflected in regulations 2(1), 3(2)(a) and 4 read together - was impermissible. In the absence of the guidelines or methodology, the Regulations became unworkable.

a) This is a further indication why the delegation of the power to the Director-General was an impermissible sub-delegation in that the guidelines and methodology lie at the very heart of the process of determining a reference price list.

b) In the absence of this power of sub-delegation, the Regulations could operate and must themselves be set aside. There is nothing else in the Regulations that describe how the guidelines were to operate, what is to be contained in them, or what their purpose was - these are matters left entirely to the discretion of the Director-General. (See **Staatspresident v United Democratic Front** 1988 (4) SA 830 (A) at 83 6D - F; **Catholic Bishops Publishing Co v State President** 1990 (1)SA 849 (A)at865B.)

[72] The problem posed by the Minister having abdicated to the Director-General the responsibility for determining the process of determining a reference price list has had very real ramifications for the applicants.

a) The Director-General did not, in the guidelines, put forward a methodology that was suited to the health services provided by the applicants.

b) The Director-General instead invited alternative methodologies to be submitted in respect of, inter alia, private hospitals and emergency medical services.

c) As is set out hereunder, the Director-General therefore not only recognised that the guidelines and methodology published by him were ill-suited to their assigned task in relation to private hospitals and emergency medical services, but thereafter failed to deal properly with alternative and more suitable guidelines proposed to him by HASA, Netcare 911 and ER24.

d) Suffice to state for present purposes, that the impermissible delegation by the Minister to the Director-General resulted in real prejudice to the applicants.

[73] In addition the 2008 and the 2009 guidelines published by the Director-General also fall to be reviewed and set aside on the basis that the Director-General was not authorised by the NHA to publish those guidelines. The guidelines therefore offend against the principle of legality

and constitutionality reflected in section 1 of the Constitution and also fall to be reviewed and set aside under the provisions of sections 6(2)(a)(i) and (ii), (f)(i), and (i) of PAJA.

[74] The provisions of regulation 2 must now be considered. It required the submission of information from "any stakeholder contemplated in section 90(l)(v) of the Act".

[75] Section 90(1 )(v) does not define or identify any "stakeholders'[1] and indeed the use of such an inappropriate word is regrettable. Indeed, there is no reference to the term at all in the subsection, as compared with section 90(1 )(u), which refers expressly to the Director-General obtaining the "prescribed information from stakeholders" albeit without defining who those "stakeholders" are.

[76] There is no indication in the regulations who the "stakeholders" are and neither did any clarity emerge in this regard from the NHA. In particular, it is not apparent from the wording of section 90(1 )(v) which - of the persons referred to — could be a "stakeholder" and hence be required to submit information when called upon to do so by the Director-General.

[77] A further difficulty arose in relation to the ordinary meaning of the word "stakeholder", which is defined in our case law in accordance with its ordinary grammatical meaning: to wit, "an independent party with whom each of those who make a wager deposits the money etc. wagered" (Shorter Oxford English. Dictionary).

[78] The term "stakeholder" is vague and irrational when regard is had to the terms of section 90(1 )(v) of the NHA and, more particularly, the absence of any definition of who "stakeholders" may be. This vagueness renders the regulations invalid. In **Affordable Medicines Trust v Minister of Health** 2006 (3) SA 247 (CC) in para [108] Ngcobo J, with reference to the relevant authorities, said the following:

**"The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is**

**a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.'**

[79] It is not possible, from the Regulations, to determine who is affected by them or how they are required to respond thereto.

[80] The vagueness associated with the term "stakeholders" is exacerbated rather than clarified by the remaining provisions of the Regulations and the manner in which the Regulations have been applied.

[81] Regulation 3(2)(d) stipulates as a mandatory qualification to the submission of information that the information must "provide for representative samples and how the sample sizes used have been calculated". The term "representative sample" is in turn defined in the Regulations as meaning

**"a sample of health establishments, health agencies, health care providers or health workers that will result in a statistically significant result at the 95% confidence limit."**

[82] On the 4th February 2008 the Director-General, acting in terms of regulation 2 of the Regulations, issued an invitation for the submission of information for purposes of the determination and publication of a reference price list for 2009 ('the 2008 invitation" and "the 2008 guidelines'" respectively).

[83] On the 22nd January 2009 the Director-General, again acting in terms of regulation 2 of the Regulations, issued an invitation for the submission of information for purposes of the determination and publication of a reference price list for 2010.

[84] In both the 2008 and 2009 invitations the Director-General repeated the phraseology used in item 2(1) of the Regulations regarding calling for submission of information from stakeholders. The wording of the 2008 invitation reads as follows:

**"The Director-General of the National Department of Health hereby invites submissions from all stakeholders contemplated in section 90(l)(v) of the National Health Act, 2003, read together with regulation 2 of the regulations."**

The wording of the 2009 invitation, whilst not in identical terms, is to similar effect.

[85] The second numbered paragraph of the 2008 invitation published by the Director-General reads as follow:

**"Who may make submissions:**

**It is preferred that submissions be made by professional associations representing particular disciplines, or a statutory body established to regulate the relevant profession. Where several sub disciplines are represented by an umbrella professional association which provides an interdisciplinary peer review process, submissions must preferably be made through that umbrella body.'**

[86] The 2009 invitation contains an even more restricted delineation of who may make submissions:

**"2.1 RPL submissions are expected to have gone through a rigorous peer review process prior to submission of the RPL. As a consequence of this and the fact that the RPL affects all providers in the relevant disciplines, submissions will not be accepted from individuals or individual companies.**

**2.2 Submissions will therefore only be accepted if they are received from a professional association representing the discipline concerned, or a statutory body established to regulate the relevant profession, provided that there are no legal impediments to the relevant bodies making the submission. Where several sub disciplines are represented by an umbrella professional association which provides an interdisciplinary peer review process, submissions must be made via that umbrella body.**

**2.3 The submissions made in 2008 for 2009 [ie, that formed part of the 2008 process] that**

**were accepted, but are still in the process of verification should not make a submission for 2010."**

[87] In the 2009 invitation the Director-General further restricted who may be consulted by and commissioned on behalf of "stakeholders" to submit information.

[88] In paragraph 3 of the 2008 invitation (the 2009 invitation is to similar effect) it is stated that **"The stakeholder making a submission must warrant that the procedures listed in the submission fall within the scope of practice of the relevant profession, as determined by the relevant statutory council."**

[89] The difficulty in understanding who the "stakeholders" are, is all the more perplexing when regard is had to the 2008 guidelines (once again, there is a similar provision in the 2009 guidelines), which provide in paragraph 1 that

**"Reference price components will be based on country wide averages, with the result that actual price components:**

**i. Will differ geographically; and**

**ii. Will depend on individual practice efficiencies and practice specific factors."**

[90] On the 18th March 2009 the Director-General published a further document headed **"Notice Number 4 Population sizes for Reference Price List 2010",** in which was included certain information pertaining to the number of practitioners and practice areas. The Director-General stipulated in Notice 4 that the sample size for purposes of the submission of any information -should be not less than the total population of practitioners reflected on a document referred to as "FAIT' as being active in any particular area. Insofar as it concerned private hospitals and ambulance services the population size necessary for any submission would therefore have included all private hospitals and all ambulance services practicing in the Republic of South Africa.

[91] As is apparent from the Regulations and the invitations and guidelines, the identity of the persons who may make submissions is restricted so as to exclude submissions from individuals or from any association or professional council that represents less than 95% of the discipline in question. This process of curtailing submissions did not serve to identify who the relevant "stakeholders" were as identified in section 90(1 )(v) or as described in the Regulations.

[92] The application of these Regulations, however, has had the effect of excluding HASA, ER24, NETCARE and most of the applicants in the SAPPF matter from making acceptable submissions.

a) Netcare 911 and ER24 are private companies providing emergency medical and ambulance services in South Africa. These two companies are unique in being the only private service providers in South Africa to operate a dedicated nationwide call service. Together Netcare 911 and ER24 account for more than 80% of all emergency medical services and ambulance calls across the Republic of South Africa. Neither company belongs to a representative association as the only organisation that exists is largely ineffectual and is not representative of the interests of either company.

b) In its founding affidavit HASA explained its position as a company incorporated under the provisions of section 21 of the Companies Act, 61 of 1973, representing the collective interests of private hospitals in South Africa. Its members have joined HASA voluntarily and, on the strength of its current membership, HASA is representative of 85.7% of private hospitals in South Africa by number and 89.9% of private hospitals in South Africa as a percentage of licensed hospital beds.

c) There is no professional council or statutory body applicable to either private hospitals or to private emergency and ambulance services.

d) Both HASA and Netcare 911/ER24 explained that it was not possible for them, as privately constituted bodies, to compel any entity or individual to join in association with them for purposes of making submissions under and in terms of the regulations or at all. That this is so is self-evident as a matter of law and a matter of fact, as is demonstrated below.

[93] Notwithstanding the level of HASA's and Netcare 911/ER24's representation in their respective industries, it is apparent that they did not meet the very unreasonable, irregular and non-sensical requirement of representation stipulated by the Regulations and demanded by the

Director-General.

[94] In this regard and despite the quoted facts the Director-General rejected the Netcare 911/ER24 submission by reason of it not being "sufficiently representative" of all of the industry - despite the fact that the services provided by ER24 and Netcare 911 were, according to the undisputed evidence before the court, unique across the industry. The same problem afflicts HASA's submission.

[95] On the 19th May 2008 a consolidated submission in response to the Director-General's notice requiring such submissions, was timeously submitted by SAMA (the South African Medical Association) to the DOH in respect of the following medical disciplines: cardiology, cardiothoracic surgery, ENT, general practitioners, gynaecology and obstetrics, neurosurgery, ophthalmology, orthopaedics, paediatrics, physicians, plastic and reconstructive surgery, psychiatry, surgery and urology.

[96] The purpose of the SAMA submission was to record accurately and fairly the true costs of running medical practices and thereby to ensure a RPL which would, as the RPL Regulations put it, ensure "the need for private health establishments and health agencies to have a return on investment" and "the need for health care providers to earn an income" (regulation 7(2)(b) and (c)).

[97] In addition timeous submissions were made by other associations on the 18th April and the 19th May 2008, including by SASOP in respect of psychiatry; SAAA for audiology; SASLHA in respect of speech and language therapy; the Podiatry Association for podiatry; the Psychological Society of South Africa ("PsySSA") in respect of psychology; and SASP in respect of physiotherapy.

[98] A perusal of the submissions indicated that they were prepared on the basis of extensive

research, including a comprehensive costing study which involved considerable person hours and significant costs to the applicants. For example, a total of 1 296 practitioners participated in the costing study that was performed for purposes of the SAMA submission, which obtained detailed financial information relating to the running of a professional practice.

[99] A statement was published on the DOFFs web site on 12 September 2008 (i.e. before the publication of the Draft 2009 RPL on 3 October 2008) ("the Statement")- It indicated that: **"the 48 submissions received [by the DOH], 37 submissions did not comply with regulation 3(2) of the Regulations relating to the obtainment of information and the process of determination and publication of a reference price list. These 37 price submissions were not satisfactory for one or more of the following reasons;**

- **non-representative sample size**
- **unacceptable costing methodology**
- **unacceptable coding methodology".**

[100] The Statement continued: "it was therefore not possible to make a determination about the reference price list from the information presented in these submissions". The Statement provided that as a result "all 48 submissions have been increased by 8.7% of the 2008 Reference Price Lists Schedule".

[101] Further, the Statement indicated that the "remaining 11 submissions complied with the information requirements as outlined in regulation 3(2) and are currently being verified". The 11 submissions that were "being verified" were listed as that from cardiologists, ENT, general practitioners, obstetric and gynaecology, ophthalmology, orthopaedics, paediatricians, psychiatry, acupuncture and Chinese medicine, optometry and physiotherapists. These submissions will further herein be collectively referred to as "the accepted submissions"; and the remaining submissions as "the rejected submissions".

[102] It must be noted that the accepted submissions were in the end not truly accepted by the

DOH - since none of the proposals or recommendations made therein were factored into the draft or the final 2009 RPL. Accordingly, they were accepted only in the sense that they were said to have complied with the requirements in regulation 3(2) of the RPL Regulations. They otherwise appear to have been ignored by the Director-General in his determination of the draft and final 2009 RPL.

[103] The Statement thus did no more than provide a generic account of why the bulk of the submissions were rejected and did not furnish reasons as to why a particular submission was rejected and was manifestly and singularly unhelpful to the affected associations and societies. Thereafter numerous requests were directed to the Director-General for an explanation for the rejection of submissions - but no adequate reasons were furnished in response.

[104] After the Statement was published on the website of the DOH, a meeting was convened between representatives of the DOH and SAM A on the 2nd October 2008. At this meeting the Deputy Director-General, Dr Chetty of the DOH, indicated that the rejected submissions had been rejected because of inadequate sample sizes. She further indicated that the DOH did not consider the proposals regarding coding structures or costing methodologies for the rejected submissions. She also stated that the sample size, costing methodology and coding structure of the accepted submissions were accepted.

[105] The RPL Regulations required that, after verification of submissions, a draft RPL must be determined and published in the Government Gazette for at least four weeks for public comment (regulations 7 and 8 of the RPL Regulations). The Director-General is then obliged to consider the comments and publish the final RPL by the end of September of each year. This fact was drawn to the Director-General's attention on numerous occasions by Healthman, on behalf of some of the applicants and thereafter by Webber Wentzel (the attorneys who, at the time, also represented a number of the applicants).

[106] Most unfortunate and without having completed, or, for that matter, even starting the verification of any of the submissions, the Director-General published the Draft 2009 RPL for public comment in GNR 31469 in the Government Gazette of 3 October 2008 ("the Draft 2009 RPL")- The deadline for submissions was 31 October 2008. The question inevitably arises as to why the submissions were required if the Director-General, without even starting the verification of the contents of any of the submissions, proceeded to publish, in an equally unfortunate fashion, the Draft 2009 RPL.

[107] A number of professional associations submitted comments on the Draft 2009 RPL on 31 October 2008. They were obviously hampered from doing so meaningfully by virtue of the fact that no reasons were provided for the rejection of the rejected submissions.

[108] In terms of the RPL Regulations, the Director-General is required in his annual determination of the RPL to publish the final RPL by the end of September. This did not occur in respect of the 2009 RPL which was only published almost three months late, on the 24th December 2008.

[109] The 2009 RPL, like the Draft RPL before it, was published without the verification of the accepted submissions. From the record it is noted that it was only during the course of September 2008 that the Director-General indicated (in the Statement) that he wished to verify the accepted submissions and that this would include an audit of the practices which participated in the costing surveys that were included in these submissions. It is clear that the auditing (verification) process was inordinately slow. The DOH only commenced with the auditing of selected practices in January 2009 after a period of some eight months had passed since the submissions, containing the costing studies, were submitted on 19 May 2008, and some three or four months after the identifying details of the participating practices were disclosed to the DOH as per its request. Thereafter on numerous occasions meetings with doctors were set up with unreasonably short notice and/or cancelled at the last minute, or, in some cases, appointments were not kept by the DOH.  While the respondents submitted in the

answering affidavit that the verification process was "now complete" (they studiously avoided saying precisely when this completion occurred), the fact of the matter was that even if one assumed the completion occurred around the time the answering affidavit was finalised, then the process took from early September 2008 to November 2009.

[110] The Director-General eventually published the 2009 RPL on 24 December 2008. The official version of the 2009 RPL contained numerous errors which fact was conceded by the Director-General.

[lll] The decision by the Director-General to publish such a flawed RPL ("the RPL Decision"), so went the argument of the applicants, represented the culmination of a crisis situation that existed for an unhealthy period of time in the health care industry, that apparently was exacerbated over the years and that will not be resolved without this court's intervention. The apparent unacceptable status quo ante which private health care practitioners have had to endure under sufferance was fully described in the SAPPF founding affidavit and need not be repeated here.

[112] The Minister of Health and the Director-General, however, attacked the locus standi of some of the applicants in the SAPPF mattter, and in doing so, they relied on the wording of the Regulations and the requests and directives of the Director-General, and the challenge was inter alia on the following bases:

a) SAMA was the only entity entitled to challenge the decision by the D-G to reject its submissions. Submissions made by certain of the SAPPF applicants were accepted by the D-G. In these circumstances, these applicants were constrained to challenge the manner in which their submissions were handled by the D-G. It had some of the applicants as its members.

b) The SAMA submissions were prepared by Healthman, appointed by it to assist its two private practice committees - the Specialist Private Practice Committee ("SPPC") and the General Private Practice Committee ("GPPC")- and its Private Practice Unit with preparing the SAMA's submission in terms of the National Health Reference Price List (NHPRL) for 2009.

c) The SAMA submissions did not constitute submissions by any of the individual applicants in the SAPPF application, notwithstanding the fact that they may have been members of SAMA and they participated in the compilation of the submissions.

d) SAMA did not challenge the D-G's decision to reject its submissions. It must therefore be

deemed to have accepted the decision. In so doing SAMA acted for and on behalf of all its affected members. Having authorised SAMA to act on their behalf and in their interests these applicants could not seek to usurp the power and authority of SAMA and assume its submissions as their own.
e) In seeking relief, the cause of action upon which the SAPPF applicants relied is the alleged illegality of the decision to reject the SAMA submissions. The rejection of these submissions would constitute a wrong against the entity that made them, in this case SAMA and in this regard the respondents relied on **Petersen and Another v Amalgamated Union of Building Trade Workers of SA** 1973(2)SA 140 (E) at 145B-D and **Edwards and Another v Halliwell and Others,** (1950) 2 All. E.R. 1064 at p. 1066.

[113] This attack on the locus standi of the applicants in the SAPPF matter is not sound and the question in any case became academic in the light of this court's finding regarding the invalidity of the Regulations. The wrong was not done to the company SAMA and in any case the applicants still retained their right of recourse and also did not cede that right to SAMA. Whether or not the challenge to the rejection of the SAPPF submissions was brought as a derivative action or not is immaterial in view of the court's ultimate decision against the Minister of Health and the Director-General on the merits of the consolidated action.

[114] At this juncture it must be recorded that the record of the consolidated cases before the court consists of 7 007 pages and of the Rule 53 record another 752 pages. The answering affidavit of the Director-General numbered 360 pages but despite that fact the Director-General omitted to deal in the answering affidavit with the following material aspects of the consolidated cases raised by the applicants:

a) The failure to verify prior to publication of the Draft 2009 RPL and the final 2009.

b) The failure to take into account the views of the Advisory Committee of the DOH.
c) SAPPF's second review ground: the process followed by the Director-General was procedurally unfair.
d) Sources of the duty to comply with procedural fairness.
e) SAPPF's fifth review ground: the 2009 RPL set rates at an inappropriately low level.
1) SAPPF's sixth review ground: the failure to amend certain item codes was irrational or unreasonable.

g) SAPPF's seventh review ground: irrational and unreasonable distinctions between « groups of practitioners.

[115] It is the case of the applicants that they harboured the belief and relief that the process by which the 2009 RPL Decision was to be arrived at would herald the prospect of a promising change. Under the statutory framework, there was reason for them to believe that the time had

come for the Department of Health to follow a process of properly procuring, considering and verifying submissions from "stakeholders" in order to determine a true cost-based RPL for 2009 and onwards. For that reason the applicants and other service provider groupings committed significant amounts of time, energy and money to make submissions to the Director-General and to comply with the elaborate regime that was put in place to determine the RPL for 2009.

[116] The applicants contended that unfortunately that opportunity was squandered by the Department of Health and the Director-General. Instead of a 2009 RPL which accurately and properly reflected the costs of running of private health care practices, the defects of the previous years were simply perpetuated. After inordinate delays and deficient procedural steps, the Director-General published a 2009 RPL which effectively defaulted to a RPL which provided an across-the-board 10.7% increase for all health care disciplines in the private sector, with no material variations across disciplines, and no change to the structure of the 2008 RPL (other than in relation to the coding of audiology). In short: the cost-based outcome that "stakeholders" (and ostensibly the Department of Health) had committed to by engaging in the 2009 RPL process was not achieved, and the 2009 RPL was not updated to keep pace with new coding structures and refinements to existing codes required within and by the medical profession. Two aspects of the non-variation of the 2008 RPL's coding structure stood out: the failure to put in place tiered, time-based consultations; and the coding changes proposed on behalf of, inter alia. ENT, gynaecology, podiatry, physiotherapy and urology are not reflected at all in the 2009 RPL. This failure is strikingly anomalous in the light of the fact that the proposed coding changes in respect of audiology came to be reflected in the 2009 RPL. It is these defects that clearly necessitated the SAPPF application.

[117] The publication of the 2009 RPL had a profound effect on the health care profession and the public. It was already having a damaging impact on private health care service providers and on health care consumers. As the applicants pointed out. this impact manifested itself in two principal ways.

[118] **Firstly:** although the 2009 RPL purported to be a non-binding guideline for the determination of levels at which medical schemes reimburse (and health care providers charge) for health care services, it in many instances effectively determined the levels at which medical schemes reimbursed for these services and the amount that service providers were able to charge for these services. In other words, the 2009 RPL to some extent **DE FACTO** determined levels of reimbursement and fees in the health care industry. The fact that the 2009 RPL reflected rates that were unreasonably low meant that private health care providers would continue to struggle to cover their costs (let alone make a reasonable return on investment) - a burden many of them have already carried for a number of years.) Ultimately, there was the real risk that the effect of the RPL Decision would play out on patients who may face the burden of a declining number of doctors within the country, and who may be confronted with general and specialist practitioners who, in an attempt to make ends meet, would be forced to focus on high-volume turnover of patients at the expense of quality provision of medical services.

[119] **Secondly:** to the extent that the RPL was no more than what it purported to be - a non-binding guideline - it was, at a minimum, required to act as an **EFFECTIVE** guideline. If the RPL fell short on this score, it operated to the particular detriment of patients:

a) At the time that a member contracted with a medical scheme, he or she agreed to pay the scheme's premiums in return for the right to certain medical benefits. As the applicants demonstrated in their founding affidavit, the RPL in many respects determined the levels of reimbursement for medical schemes (which was what is envisaged in the legislation which empowered the RPL).

b) If the RPL was set at an appropriate level, patients would know at the time that they contracted with a medical scheme which adopted the RPL, that if they pay the stipulated premiums, they would receive the medical benefits in respect of which they have contracted without the need to make dramatic co-payments out of their own pockets. This certainty not only arose where the medical scheme was able to afford to reimburse at the full amount of a properly-determined RPL rate. It was also created in circumstances in which medical schemes (or particular benefit options) catered for lower income members and thus chose to reimburse at

less than the properly-determined RPL rate (but still use RPL as a reference point). In such circumstances, the scheme could set its benefits at an appropriate level for that scheme or benefit option (e.g. at, say, 80% of the RPL rate). If the RPL rates were at an appropriate level, the member would then know, for example, that he or she would need to pay the medical scheme premiums and roughly 20% of the cost of medical treatment received. In other words, it was only through an accurate, cost-based RPL that a scheme member was able to predict accurately what the true cost of medical services would be to him or her within a given year.

c) If, however, there was a dramatic difference between the actual costs of providing medical services (together with a reasonable rate of return) and the RPL rates, two things could happen. Either *(a)* a medical scheme would not determine its benefits with reference to the RPL (in which case, the RPL did not serve its purpose as a reference for medical scheme reimbursement); or *(b)* if the medical scheme used the RPL rate, practitioners would be forced to demand co-payments from patients in their attempts to keep pace with the financial reality of running general and specialist medical practices. This undermined the certainty that was meant to flow from a statutory guideline and turned the utility of the RPL as a pricing guideline on its head. It could not be in the interests of the public for medical scheme rates not to reflect the real amounts that scheme members may ultimately have to pay for the provision of medical services. In fact, if the RPL was not grounded in the reality of the cost of medical service provision, the entire statutorily required process for determining the RPL became a futile exercise and a monumental waste of resources.

[120] It was therefore incumbent upon the Director-General to produce an effective RPL which set rates at an appropriate, reasonable level that was grounded in the reality of the costs or operating private meaical practices. R***egrettably, this did*** not occur ana tne zouv k^l ien well short of the statutory requirement.

[121] The Director-General failed to explain on what basis he required submissions to be "representative" in the manner which he did and why he rejected submissions which were for all practical reasons substantially representative.

[122] The manner in which the Regulations have been formulated and the manner in which the Director-General applied these Regulations had the effect, in respect of both private hospitals and emergency medical and ambulance services, of excluding submissions from representatives of more than 80% of each of those industries.

[123] The corollary of this is necessarily that the remaining members of the industry could also not be sufficiently representative to meet the threshold stipulated in the regulations and required ***by*** the Director-General.

[124] Thus, through the vague definition of "stakeholder", the exclusion of submissions from anyone other than representative associations, professional bodies or statutory councils, and the requirement of a representative sample at the 95% threshold, the Minister and the Director-General have excluded any submissions being made at all in respect of either private hospitals or emergency medical and ambulance services.

[125] Implicit in the Regulations and the approach taken by the Director-General is a requirement that individuals and companies from across South Africa must join together in sufficient numbers so as to achieve the requisite representative sample size demanded by the regulations and the Director-General. This amounts to a compulsion on people to form associations and, in the case of Netcare 911 and ER24, against their wishes, to join the existing association SAPESA.

[126] This is a direct and unjustifiable infringement of the right to freedom of association contained in section 18 of the Constitution, which necessarily carries with it the right not to associate.

**"There are a number of other provisions designed to protect the rights of members of communities. They underline the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right to**

**freedom of association contained in s 18. Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves**
**to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern."**
(Per Sachs J in **Christian Education SA v Minister of Education** 2000 (4) SA 757 (CC) at [24]. Reaffirmed in **Minister of Home Affairs v Fourie (Doctors For Life International And Others, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs** 2006 (1) SA 524 (CC) at [61])

[127] In the absence of some legislative provision for enforcement, this requirement was, in any event, impossible of being implemented or enforced as against all of the service providers across the private hospital or private emergency medical and ambulance service industries. No single entity, association or individual can compel any other individual, association or entity to join with it, let alone make available information for purposes of a joint submission of that information to the Director-General.

[128] It is clear that these provisions are at odds with any semblance of rationality or reasonableness. They are such that no reasonable administrator - whether in the position of the Minister or the Director-General - could have exercised the powers under the NHA and the regulations in this way. The provisions of regulation 2, read with the definition of "representative sample", and the provisions of the 2008 and 2009 guidelines and invitations referred to above, fall to be reviewed and set aside under the provisions of section 6(2)(h) of PAJA read with the residual power of review for reasonableness deriving from section 1 of the Constitution and the principle of legality.

[129] The requirement that administrative conduct be rational is an adjunct of the rule of law: all exercises of public power are required to comply with this principle.(See **Pharmaceutical Manufacturers of SA: In Re Ex Parte President of the Republic of South Africa** 2000 (2) SA 674 (CC) at [90]; **Merafong Demarcation Forum v President of Republic of South Africa** 2008 (10) BCLR 969 (CC) at [62] to [66].) If it did not, it fell short of the standards demanded by our Constitution for such action.(See for example: the **Pharmaceutical Manufacturers** case par 85-86.)

[130] There must be some rational objective basis justifying the conduct of the Director-General and the Minister, which basis is not too remote or removed from the facts before **them.(See Carephone (Pry) Ltd v Marcus NO 1999 (3) SA 304 (LAC); Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA 2007 (1) SA 576 (SCA); Trinity Broadcasting (Ciskei) v Independent Communications Authority of SA 2004 (3) SA 346 (SCA).) Put differently, there should, when viewed objectively, be a rational connection between the outcome of the decision of an administrative decision-maker and the material on which it is based. (See Derby-Lewis v Chairman, Amnesty Committee of the Truth and Reconciliation Commission 2001 (3) SA 1033 (C); Bel Porto School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC).)**

**[131] The question here is not whether the decisions and conduct of the Minister and the Director-General were capable of being justified, but whether the Minister and Director-General properly exercised the powers entrusted them. The focus is on the process and on the way in which they arrived at the challenged conduct.**

**[132] The presence of some grounds for justification, in the midst of other factors pointing to the fact that the decision was incorrectly arrived at. does not save the conduct from being set aside.(See: the Rustenburg Platinum Mines case.)**

**[133] Where the evidence is such that the decision maker failed to apply his/her mind to the questions before him/her. then the decision can validly be set aside on the basis of unreasonableness - as all administrative action and exercises of public power are required to be reasonable.(See: Bato Star Fishing (Pry) Ltd v Minister of Environmental Affairs & Tourism 2004 (4) SA 490 (CC).)**

**[134] Furthermore, and inasmuch the very purpose of the NHA is defeated by precluding the submission of information on the strength of which a reference price list could be determined, the provisions referred to also fall to be reviewed and set aside on the basis that they contravened the NHA and were not rationally connected to the purpose thereof. Hence, the provisions of the Regulations and the 2008 and 2009 invitations and guidelines referred to above fall to be reviewed and set aside in terms of section 6(2)(f)(i) and (ii)(aa) and (bb) of PAJA and is the reason why the interim interdict was issued by this court when the respondents refused to give an undertaking not to issue further RPL's.**

**[135] Two further aspects arose from the Regulations that require consideration and which relate to the provisions of regulation 7(2). That regulation stipulated certain factors that the Director-General was obliged to take into account in determining a reference price list.**

[136] Two of these considerations are respectively the need for private health establishments and health agencies to have a return on investment (regulation 7(2)(b)) and the need for health care providers to earn an income (regulation 7(2)(c)).

[137] Significantly, the draft regulations, when referring to the need for private health establishments and health care providers to earn an income qualified that income as being "reasonable". The final regulations, as promulgated, deleted any reference to that income as being needing to be "reasonable".

[138] In order for the regulations to have meaning, the word "reasonable" should be read into regulations 7(2)(b) and (c). (Cf the **New Clicks** case.)

[139] That said, it is clear that the provisions of regulation 7(2)(e), (f), (g), (h) and (i) are ultra vires section 90( 1 )(v) of the NHA. There is nothing contained in section 90( 1 )(v) that affords the Minister any power to stipulate that these were considerations that must be taken into account in determining a reference price list or that a reference price list must be adjusted so as to meet these criteria.

[140] To that extent, these provisions of the Regulations also fall to be set aside on the principles of legality and in accordance with the provisions of section 6(2)(a)(ii), (e)(i) and (ii). (f)(i),and (i) ofPAJA.

[141] Reference was made supra how the Director-General, in 2008 and 2009, published invitations for the submission of information for the determination and publication of a 2009 and 2010 NHRPL respectively. Attached to those invitations were the guidelines contemplated in regulations 3(2)(a) and 4(2)(a) of the regulations. Reference has also been made how those methodologies or guidelines served, inter alia, to restrict the number of persons who could submit information.

[142] It is clear that the guidelines were not apposite to the businesses and practices of the applicants. In paragraph 3.6 of the 2008 guidelines and in paragraph 10 of the 2009 invitation, the Director-General drew attention to the fact that the methodology or guidelines were not suitable to all health care disciplines or service environments.

[143] In paragraph 3.6 of the 2008 guidelines the Director-General recorded the following:

**"It is acknowledged that the costing methodology described in this document is not**

**suitable for all health care disciplines or service environments. This is particularly applicable to facilities such as hospitals, pathology laboratories and emergency services. If an intended costing methodology deviates substantially from the methodology documented here, then the methodology must be properly documented and submitted for approval prior to its use in costing studies for the RPL."**

[144] In paragraph 10 of the 2009 invitation the Director-General stated the following:

**"10.1 It is acknowledged that the costing methodology described in this document may not necessarily be suitable for all health care disciplines or service environments. Any modifications to the methodology may be appropriate but the Department of Health must be informed of such process, for example, in relation to private hospitals, pathology laboratories and emergency services.**
**10.2 If an intended costing methodology deviates substantially from the methodology documented here, then the parties and the Department of Health, in consultation with the provider group will develop an appropriate costing methodology.'**

[145] There are two significant factors that emerge from the statements reflected above.

[146] **Firstly,** the conduct of the Director-General in inviting changes to the methodology is contrary to and therefore ultra vires the provisions of the Regulations. The court supra, have set out the provisions of the Regulations dealing with the methodology and guidelines. These provisions require that:

a) the Director-General publish the methodology together with the invitation for submissions, and the provisions of the Regulations insofar as concerns this requirement are mandatory;

b) persons submitting information must comply with the methodology, a requirement that is again mandatory.
c) there is no provision made in the Regulations for the Director-General or for any person submitting information to deviate from the methodology provided for in the guidelines. There is also no provision made for the Director-General to approve a methodology different to the one published together with the invitation for submissions.
d) Under these circumstances, the Director-General did not have the authority to publish a methodology and thereafter to call for deviations to that methodology and the Director-General did not have the authority to approve any such alternative methodology other than at the time of publishing an invitation for submissions.

f) To the extent that the Director-General purported to do otherwise, he has acted outside of the authority conferred on him by and contrary to the Regulations. His decision to call for an

alternative methodology would, therefore, in any event, fall to be reviewed and set aside under the provisions of section 6(2)(a)(i), (e)(i), (f)(i) and (i) of PAJA as well as in terms of the doctrine of legality founded on section 1 of the Constitution.

g) In those circumstances, the conduct of the Director-General in purporting to call for alternative methodologies was unlawful, invalid and null and void.

[147] **Secondly,** a further significant feature, which flows from the first, lies in the fact that the Director-General acknowledged that the methodology prepared by him was not suited to private hospitals and emergency services.

a) The Director-General knew, when he published the methodology according to which information must be submitted, that the methodology was inapposite to that task. In the answering affidavit the acting Director-General denied that the methodology, which was developed on the basis of the practice of a general practitioner, is completely at odds with the business of private hospitals, but recognises that it would require modification or adaptation for use in the context of private hospitals. Substantial modification would require the approval of the Director-General.

b) The publication by the Director-General of a mandatory guideline that is, to the knowledge of the Director-General, ill-suited for use in the determination of a reference price list, is irrational, unreasonable, and arbitrary.
c) To publish such a guideline/methodology under circumstances where the Director-General has no authority under the Regulations to permit of an alternative methodology is a further indication of the unreasonable and irrational nature of the Director-General's decision.
d) The Director-General had the opportunity, when he published the 2009 invitation, to then approve and publish an alternative methodology applicable and apposite to the businesses of the applicants. The Director-General failed to do so, but instead again published an unsuitable methodology and again requested that alternatives be proposed.
e) In those circumstances, it is self-evident that the decision on the part of the Director-General to publish the methodology falls to be reviewed and set aside as provided for in section 6(2)(e)(iii) and (vi), (f)(ii)(aa), (bb) and (dd), (h) and (i) of PAJA as also on the principle of legality and reasonableness.

[148] Inasmuch as the methodology was published in and formed part of the 2008 and 2009 invitations, it follows that those invitations fall to be reviewed and set aside. In this regard it is clear that the Director-General could not publish the invitations under the Regulations unless and until an appropriate methodology was in place. The Director-General's failure to implement such a methodology was contrary to his obligations under the Regulations and is accordingly illegal and unlawful.

[149] The publication of the invitations for submissions, in those circumstances, offended against the principle of legality and falls to be set aside.

[150] HASA and Netcare 911/ER24, clearly as a testament to their good faith in the process and in an attempt to ensure that a responsibly formulated and representative NHRPL was drafted, in fact engaged with the Director-General in relation to an alternative methodology.

[151] In response to the 2008 invitation and the contents of clause 3.6 of the guidelines, both HASA and Netcare 911/ER24 submitted alternative methodologies to the Director-General.

**[1**52] The deviations proposed on behalf of Netcare 911 and ER24 were not substantial and, accordingly, the alternative codings and pricing methodologies were incorporated in the Netcare 911/ER24 submission made to the Director-General.

a) These alternative proposals were rejected at the time that the Director-General rejected the entire Netcare 911/ER24 submission on the grounds that the sample size was insufficiently representative of the industry.

b) The rejection of this alternative proposal was clearly irrational, arbitrary and unreasonable. In rejecting the alternative proposal the Director-General did so on the strength of the sample size and not on the merits of the alternative proposal itself.
c) In the circumstances, the Director-General's refusal to accept or rejection of the alternative proposal was wrongful.
d) In the case of HASA, the deviation from the alternative methodology was substantial and, in accordance with the requirements of clause 3.6 of the guidelines, HASA sought the prior approval of the Director-General for the use of this alternative methodology.
e) The HASA founding affidavit set out the attempts that were made on behalf of HASA to engage with the Department and the Director-General, during both 2008 and the first half of 2009, for purposes of having the alternative methodology approved.
f) These attempts included the exchange of a plethora of correspondence which was largely ignored by the Department and the Director-General.
g) It is common cause that, as at the end of 2008 - by when the Director-General had already published an NHRPL for 2009, which included reference price lists for private hospitals - the Director-General had neither approved nor rejected the alternative methodology submitted on behalf of HASA.
h) Instead, in January 2010, the Director-General caused the 2009 invitation to be published which again drew attention to the deficiencies in the methodology/guidelines insofar as concerned private hospitals. Reference in this regard to the position of HASA is apposite. It is set out in paragraphs 108—114 of the founding affidavit:
**"108. In this way, the process that had been set in motion by the 2008 Notice and**

**Invitation was commenced afresh under circumstances where the same issues and the same procedural iniquities and unlawfulness that had arisen in the course of the 2008 RPL process were carried over into the 2009 process.**

**109. Yet again, HASA and its members found themselves in a situation of limbo where - yet again - an alternative methodology was invited and HASA was precluded from submitting information until such time as an alternative methodology had been developed by HASA, the Department and "provider groups".**

**110. HASA was, in the circumstances, left with little option but to re-engage with the Department, including Jikwana, in an attempt to try and progress the issues in a meaningful manner.**
**111. I have been advised that little purpose would be served in incorporating into this affidavit, details concerning the correspondence that was exchanged and the meetings that took place between HASA and its representatives and the Department. Some of these details are to be derived from Schedule "A" and, to the extent that they are disputed, will be dealt with by me in the fullness of time and in further affidavits.**
**112. Suffice to state that, when the prescribed deadline came for the submission of information by 3 April 2009, HASA had still not received any response from the Department or the Director-General regarding an alternative methodology or the basis upon which HASA was to submit its information.**
**113. For the sake of completeness, I record that neither was there any response received by the time of the revised deadline which had been improperly stipulated by Jikwana in his RPL Notice Number 3.**
**114. In the circumstances, HASA has once again been denied the opportunity - within the requisite time periods - to submit information on the basis of which an RPL for private hospitals can be established."**

i) On 8 June 2009 the Director-General wrote to HASA in relation to the alternative methodology. This correspondence, which is equivocal at best and, at worst, hopelessly vague and uncertain, was considered by HASA as being short of an outright acceptance or rejection of the alternative methodology. This approach is consistent with the terms of the letter and was communicated on those terms in correspondence and in the founding affidavit.

j) The Director-General construed this letter as having been a proposal of another methodology in the answering affidavit, which HASA did not agree to and therefore HASA could not make any submissions.
k) In their answering affidavit the Minister and the Director-General construed the letter of 8 June 2009 as being a rejection of a portion of the alternative methodology as proposed by PWC. As far as concerns the remainder of the proposed alternative methodology, the answering affidavit recorded simply that it was rejected, but did not state when, where, how, or the reasons for that rejection.
1) These contentions were inconsistent with the facts, but in any event did not assist the respondents: if the alternative methodology had been rejected, then the Director-General was left in the position that his own methodology was unsuitable, he rejected the alternative methodology proposed by HASA, and he proposed no better alternative.
m) In effect, therefore, the Director-General foreclosed on the possibility of HASA or its

members having any input into a reference price list for private hospitals.

[153] The approach of the Director-General to the approval or refusal of an alternative methodology as proposed by HASA, lacked the essential requirement of procedural fairness that, by law, must prevail in any and every administrative process.(See, for example. **New Clicks** at [151] *ff.)*The requirement that the Director-General should have conducted himself in a manner that is lawful and procedurally fair also embraces the principle of legality, on which our Constitution is founded and which informs all administrative conduct and the exercise of public power. (See, for example, the **New Clicks** case.)

[ 154] The Director-General failed to respond timeously to the proposal submitted by HASA in relation to the alternative methodology. In so doing, he effectively barred HASA from making any submission in relation to either the 2009 or 2010 NHRPL. The correspondence reveals a consistent failure on the part of the Director-General to engage meaningfully with, or to listen to submissions from, or thereafter, to provide reasons and rational responses to the proposals **submitted by and on behalf of HASA. The process of interaction on the part of the Director-General could best be described as one of disdain for and disregard of the rights of HASA.**

**[155] This conduct on the part of the Director-General, and his subsequent publication of an RPL in the face of these attempts by HASA to be heard, tainted the process and the subsequent publication of an RPL with procedural unfairness such that the entire process and the resultant publication falls to be reviewed and set aside.**

**[156] In addition to the principle of fairness inherent in the obligation of rule of law, the process also falls to be reviewed and set aside under the provisions of section 6(2)(c) of PAJA.**

**[157] The Director-General's publication of the 2008 and 2009 invitations, which included the methodology/guidelines attached thereto, omitted to provide for a methodology apposite and suited to private hospitals and emergency medical and ambulance services.**

**[158] In the absence of a reasoned and reasonable methodology that is apposite to private hospitals and emergency medical services, the Director-General failed to comply with the mandatory requirements of regulations 3(2)(a) and 4(2)(a).**

**[159] The publication, in those circumstances, of the 2008 and 2009 invitations was not only contrary to the provisions of the Regulations, but was furthermore irrational and unreasonable. This is particularly so in relation to the publication of the 2009 invitation - by when the Director-General knew of the deficiencies in the methodology published by him. knew that an alternative had been proposed, and failed properly to consider that alternative methodology or apply his mind to it.**

**[160] In those circumstances, for the Director-General to issue the 2008 and 2009 invitations calling for submissions in respect of private hospitals and emergency and ambulance services and for him thereafter to publish an NHRPL in relation to private hospitals and emergency and ambulance services, was manifestly unreasonable, irrational and unlawful.**

**[161] The 2008 and 2009 invitations for submissions and the resultant 2009 NHRPL accordingly fall to be set aside on the grounds of legality, embracing the principles of fairness, lawfulness, reasonableness and rationality. They also fall to be reviewed and set aside under the provisions of section 6(2)(b), (c), (e)(iii). (v) and (vi), (f)(i) and (ii). (h) and (i) of PAJA.**

[162] The applicants have given notice that, at the hearing of the application, they would move for amendments of the notices of motion filed by them in order so as to claim further relief aimed at setting aside such further invitations as may have been published by the Director-General in respect of a 2011 NHRPL and seeking further interdictory relief.

[163] In spite of an invitation to them to do so, the respondents have declined to address either this further relief sought or the contents of the applicants' supplementary affidavit, in the supplementary affidavit by Dr. Chetty and the affidavit by Mseleku.

[164] It is abundantly clear that both in respect of the use of the powers afforded her under subsection 90(1 )(u) for purposes of promulgating regulations for the determination of an NHRPL as also for her motives in attempting to regulate health care in South Africa through an NHRPL, the Minister's promulgation of the Regulations was in any case for an ulterior purpose and invalid and it must be set aside on those grounds too.

[165] It is clear that the Regulations must be set aside, firstly, due to the lack of the required consultations between the Minister of Health and the National Health Council, and, secondly, on the other grounds referred to in this judgment. As nothing that was done in terms of the ill-fated Regulations is salvageable it is clear that all that was done qua the Regulations must also be set aside and that the whole process commence de novo and in a proper, open and transparent manner and in terms of reconsidered regulations.

[166] With regard to costs it is clear that costs must follow the event and a special order will be made with regard to the costs the applicants incurred as a result of the Regulations being published.

[167] The following order is accordingly made:

1. The promulgation, by the Minister of Health on 23 July 2007, under GN 681, and purportedly

in terms of the powers afforded her by section 90(1) of the National Health Act, No. 61 of 2003. of the Regulations Relating to the Obtainment of Information and the Process of Determination and Publication of Reference Price List ("the Regulations") is hereby reviewed and declared invalid and is set aside together with the Regulations.

2. In consequence of the order in paragraph **1** hereof, all acts and on the part of the Director-General of the Department of Health, purportedly in terms of the Regulations -including the promulgation of guidelines and methodologies, notices and invitations, and the publication of any one or more national reference price lists - is hereby declared to be invalid and null and void and of no force and effect with retro-active effect.

3. The Minister and the Director-General, the one paying the other to be absolved, are ordered to pay the costs of the three applications, including the costs consequent upon the employment of two counsel in cases number 37377/09 and 37505/09 and the costs consequent upon the employment of three counsel in case number 21352/09. The costs shall include as taxable costs the professional fees and all other costs incurred by each of the applicants in the three applications to cause costing surveys to be done and submissions prepared and filed to meet the purported requirements of the Regulations and subsequent further requirements of the Director-General and/or alternative methodologies, and all costs of meetings held and/or attended by or on behalf of the applicants, and all other costs reasonably incurred in connection therewith.

**P.Z. EBERSOHN**

**ACTING JUDGE OF THE HIGH COURT**

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