IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: YES .

(3) REVISED.

2025-04-23

DATE SIGNATURE

Case Number: 2024-085397

In the matter between:

IBEX INVESTMENT HOLDINGS LIMITED	First Applicant
SIHPL PROPRIETARY LIMITED	Second Applicant
SAHPL PROPRIETARY LIMITED	Third Applicant
IBEX RSA HOLDCO LIMITED	Fourth Applicant
AINSLEY HOLDINGS PROPRIETARY LIMITED	Fifth Applicant

and

THE SOUTH AFRICAN RESERVE BANK	First Respondent
LESETJA KGANYAGO N.O.	Second Respondent
NOMFUNDO TSHAZIBANA N.O.	Third Respondent
TSUMBEDZO CHARLES NEVHUTANDA N.O.	Fourth Respondent

DION NANNOOLAL N.O.	Fifth Respondent
THE MINISTER OF FINANCE	Sixth Respondent
FIRSTRAND BANK LIMITED	Seventh Respondent
THE STANDARD BANK OF SOUTH AFRICA LIMITED	Eighth Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 23 April 2025.

JUDGMENT

POTTERILL J

[1] The applicants, to whom I for ease of reference will collectively refer to as Ibex Investment Holdings [Ibex], the successor company of Steinhoff International Holdings N.V. [Steinhoff] has for 7 years through restructuring and settlements attempted to minimise the extreme harm caused by Steinhoff that was exposed in December 2017. The first to fifth respondents to whom I collectively will refer to as the South African Reserve Bank [SARB] approved, where necessary, the externalisation of funds for purposes of restructuring or paying stakeholders outside of South Africa. The seventh respondent, FirstRand Bank Limited [FirstRand] and the eight respondent, The Standard Bank of South Africa Limited [Standard Bank] are authorised dealers to deal in foreign exchange and Ibex is required to deal with the SARB through these dealers pertaining to the exchange control applications. No relief is sought against them and they did not participate in the proceedings. The sixth respondent, the Minister of Finance, did not participate in the proceedings.

[2] Ibex sought permission for foreign exchange payments from the SARB referred to as the 0443 application [0443]. The purpose of the 0443 was summarised as "Permission to expatriate funds received in future by the Ibex group in respect of South Africa assets to settle foreign commitments as previously authorised." The purpose of 0443 was to implement Ibex's obligation to implement a restructuring plan. The transactions contemplated in the WHOA Restructuring Plan [the Netherlands settlement] were submitted to the Reserve Bank as part of obtaining approval for the delisting of SIHNV form the JSE in 2023. In order to implement the WHOA Ibex needed to expropriate funds. The detail of how this would be achieved was depicted as a flow diagram using the face value of the various loans, the relationship between the Topco, RSA Holdco, Ibex Investments, SIHPL, SAHPL, Newco 2A, the Newco2A Loan, the RSA Holdco Loan, the Ibex Investments Loan, the S133 Settlement loan, the Titan Receivable and the South African Assets and the flow of the funds were set out in 0443. The SARB approved Payments 1-5 as the 0433 in April 2024.

[3] The primary asset of Ibex is its shareholding in Pepkor Holdings Limited [Pepkor]. Ibex would realise from the sales of this shareholding funds and these funds would be transferred within the Ibex Group to SIHPL and Ibex Investments to pay its financial creditors in the 0443.

[4] On 11 April 2024 the SARB authorised the payments as requested as follows:

Payment 1: EUR 212,486,869 under loan reference number 1602000345641 for the Newco2A loan note

Payment 2: EUR 122 million under loan reference 16202000345642 under the RSA Holdco loan note

Payment 3: EUR 473,778,870[amount could vary] under loan reference number 160220028421 payment of the section 155 settlement note;

Payment 4: EUR 1,632,287,754 as a dividend payment to RSA Holdco Limited, but this amount could vary dependant on the Pepkor share price, operating expenses and the Rand/Euro exchange rate;

Payment 5: " With regard to the request to settle the remaining obligations of SIHPL Proprietary Limited (SIHPL), including for example the S155 Settlement Note without further reference to the South African Reserve Bank (SARB)(except for reporting on a quarterly basis), we note that this amount is included in payment 3 above of EUR473 778 870 with the Titan Receivable, valued at 2024-01-31 determined at EUR 65 900 362 of the EUR 65 900 362 of the EUR 473 778 870. Kindly note that such remaining obligations are to be placed on record with the Financial Surveillance Department and that prior written approval be obtained as and when SIHPL intends to implement settlement of same.

Furthermore, it should be noted that the payments now approved above may not be made by utilising any of the blocked funds,

Finally, we require to be updated on the processes and external payments as and when same are being implemented, during the entire period."

[5] After the SARB gave 0443 approval for payment to be made in terms of 0433 Ibex realised funds by selling 500 million Pepkor shares in a process followed on 24 and 25 June 2024, raising ZAR 9 billion. Ibex had approached investment banks to on behalf of Ibex ensure the shares are sold in a commercial window to realise the best price. The investment banks did this through an accredited book build. The SARB was informed of this sale. Ibex consequently requested FirstRand and Standard Bank to make the payments in terms of the approved 0443.

[6] On 26 June 2024 FirstRand informed Ibex that it may not make any payments under 0433 without further permission from the SARB. It was also conveyed that the SARB sought a summary of the planned payments. It is common cause the SARB had at the time that approval was sought been provided with extensive detail of the planned

payments. Ibex on the same day provided such summary. On 28 June 2024 Standard Bank informed Ibex it could not proceed with any payments as the SARB had queried typographical errors in the 0433. These typographical errors had been corrected on 23 April 2024 via FirstRand. There was incorrectly referred to "sections B3B(ii) and (vi) of the Authorised Dealers Manual" instead of B3(B)(ii) and I.3(B)(vi) of the Authorised Dealers Manual.

[7] On 2 July 2024, the day that the majority of the payments were to be made to the expectant offshore recipients FirstRand informed Ibex that the SARB had instructed it not to make payments and sought information detailing the sources of the funds to be externalised, financial statements, as well as information on the identities of the purchasers of the Pepkor shares. This information had to be supplied on the same day, 3 July before close of business. Ibex complied and provided the information to FirstRand on 3 and 4 July 2024.

[8] Ibex on 8 and 16 July 2024 by means of letters set out the prejudice it was suffering by being hindered to make the payments in terms of the approved 0443 and that the actions of SARB would force Ibex to approach a court for relief. The SARB's attorneys answered that Ibex had not sufficiently informed the SARB of the implementation of the 0443 Approvals; the sale of the Pepkor shares needed specific approval and the funds that were being expatriated were in nature capital that required specific approval from the SARB. It is common cause that not one of these reasons are now submitted as reasons for the prohibition of the withdrawal of funds in SARB's answering affidavit to this application.

[9] On 25 July 2024 the attorneys for the SARB attached blocking orders issued by the SARB as a "response" to Ibex's communications. Three sets of blocking orders over funds in Ibex's accounts were issued in terms of Regulation 22A(1) and/or 22C(2):

- R53,105,570.19 in respect of Ainsley;

- R572,554,084.02 in respect of SAHPL;
- R3,075,213,477.00 in respect of Ibex in respect of Ibex Investment;
- R5,497,686,532 in respect of SIHPL.

[10] Ibex then launched this application on an urgent basis in a nutshell seeking a review, a declaration of invalidity and setting aside of the decisions of the SARB under Regulation 22 A(1) and/or 22C(2) of the Exchange Control Regulations [Regulations] of the prohibition of the withdrawal of funds in the accounts standing to the credit of Ibex for the payments as approved in 0443. Furthermore, that the blocking orders be lifted. The other relief sought will be addressed later on in the judgment. This application will be referenced as the "main application."

[11] Pursuant to a meeting held between the legal representatives of the parties a settlement agreement was reached that was made an order of court on 19 September 2024. The settlement agreement provided that the payments in terms of Payments 1 and 2 of 0443 be settled in full. In terms of payment 3 of 0443 a substantial portion could be implemented but not in its entirety. In terms of payment 4 of 0443 ZAR 3,075,200.000 could be paid but not the balance of EUR 1,63 billion.

[12] The settlement agreement provided that the blocking orders issued to Ainsley, Ibex Investment and SIHPL be uplifted. The settlement agreement also provided that certain funds held by SAHPL in the blocked account be released, but that an amount of R200 million plus accrued interest would remain blocked in the SAHPL account. In clause 13 it is recorded that "The Reserve Bank shall not issue any further attachment or blocking orders in terms of Regulation 22A or Regulation 22C of the Regulations in respect of the funds released from the Blocking Orders in terms of this Agreement and which shall be used for purposes of making payments in accordance with this Agreement."

[13] Only during counsel's argument on behalf of the SARB was the concession made that payment 3 could be settled as worded in 04333, i.e. the amount is subject to variability and that the anomaly between the wording in 04333 and the settlement can be settled as the wording as set out in 04333. There is accordingly no further dispute pertaining to payment 3 of 0443.

[14] The SARB filed a counterclaim to the main application. In a self-review it is seeking this Court to review, declare invalid and set aside the permission(s) granted on 11 April 2024 by Mr Johan Kruger [Kruger], a functionary of the Financial Surveillance Department [FinSurv] of the SARB pursuant to the submission by FirstRand Bank of 0433. Alternatively, reviewing, declaring invalid and setting aside of the permission granted in respect of Payment 4 in the 0433 approval. The basis for this relief is that Kruger did not have the authority to grant permission for 0433. The counterclaim is to be read as the defence to the main application.

Lack of authority

[15] I find it prudent to first address the issue of the lack of authority of Kruger. This is simply so because this is also the sole defence raised to the issue of payment 4 in the main application. I also entertain it as the alternative to prayer 1 as set out in prayer 2 of the counterclaim because payments 1-3 of 0433 are moot.

[16] I start of by setting out the relevant Regulations. The Regulations [GNR.1111 of 1 December 1961] made under the Currency and Exchanges Act,1933 sets out the default position that no foreign exchange transaction may be entered into except with the permission of Treasury. In terms of Regulation 22 E(1) of the Regulations the Minister of Finance may delegate any power or function conferred upon the Treasury under the Regulations to any person. In terms of a delegation dated 29 March 2023 the Minister of Finance delegated as follows:

"2. All powers and functions conferred, and duties imposed on the Treasury by Regulations 22A(1)(c),22A(2),22A(3),22B,22C(1),22C(3) and 22D to-

2.1 the Head of the Financial Surveillance Department of the South African Reserve Bank;

2.2 a Divisional Head of the Financial Surveillance Department of the Bank; or

2.3 any official of the Bank who in terms of the internal rules or authorisations, or both of the Financial Surveillance Department of the Bank is an authorised signatory of the Financial Surveillance Department of the Bank ..."

[17] The SARB has internal rules contained in a document titled "Limits for signing officials for the period 2024-04-01 to 2025-03-21". It is marked confidential and it is thus common cause that that it is an internal governance document not published externally containing internal signing limits. The heading of this document contains the following:

> "NB! – Associate/Analyst staff should note that having an application with a transaction value in excess of R10 billion (as explained in this document) you would be required to draft a submission to the DG and where the transaction value exceeds R15 billion a submission to the GEC must be drafted, both documents must be submitted to your signing official/manager."

[The DG is the Deputy Governor and the GEC is the Governor's Executive Committee.]

[18] The signing limits also references respective job levels. Alongside the job levels are different processes for different categories of signing officials; "FC3", "M2" or "M3"

and "M1'. The SARB avers that Kruger has a M1 designation. The process set out for an M1 official is as follows:

> "1. Transaction value not to exceed R10 billion at time of application.
>
> 2. In excess of R10 billion review submission to DG.
>
> 3 In excess of R15 billion review submission to GEC and give/send to Divisional head."

The evidence of the SARB in the counter-application and reply.

[19] It is set out in the affidavit of Mr Nevhutanda, the Acting Head of FinSurv, that he "noticed during the course of the current litigation, that certain amendments had been made by Kruger to the 0433 pertaining to payments 1-3. These "amendments were not communicated to the management of FinSurv by the designated functionary." When he investigated this it "became apparent that Kruger did not have the authority to grant permission, as one composite approval, in respect of Payments 1 to 4, in terms of the applicable signing limits referred to above." And "According to the signing limits the designated official did not have the authority to approve an application the value of which exceeded ZAR 10 billion, and in instances where an application and/or the transaction value exceeds ZAR 10 billion a submission needs to be submitted to the responsible DG for approval. Applications and/or transaction values which exceed ZAR 15 billion need to be submitted to the Governor's Executive Committee (GEC) for approval."

[20] Payment 4 on its own also "exceeded the designated official's signing limit in terms of the applicable signing limits." The approval of Payment 4 required the designated official to refer it to the GEC, but he did not.

[21] This is the only evidence set out in the founding affidavit bar the content of 0443, the content of the settlement agreement and the relevant legal framework.

SARB's reply

[22] It was submitted that Kruger's decision stands, even if the senior management was aware or became aware 0443 was granted by Kruger, until set aside by a court. It could not be expected of Kruger to file an affidavit as he is suspended pending an investigation by an independent third party relating to this matter.

[23] The GEC did not approve the transactions contained in the 0443 and therefore no valid permission existed in terms of the SARB's internal protocol. There need not be evidence put up by the SARB pertaining to the flow of applications to FinSurv because the issue is the approval by the GEC. There was no subsequent endorsement or ratification of 0433 and therefore there can be no trail of evidence. The lack of authority is an inference that needs to be drawn by the Court and the evidence therefore lies in the documents before the Court.

[24] The person who signed the 0443 approval is identified by a person's signature. Attached to the reply is then attached 0433 with a signature, not the same document as attached to the founding affidavit. The other approved applications were granted at GEC level and communicated to Ibex also as "obo Division Head", as on the 0443, but that is "no more than co-incidental."

[25] It is denied that Kruger only had to escalate 0433 to the DH, it was required to be escalated to the executives of the SARB. It is submitted that the Excon Delegation delegates powers and functions, *inter alia*, to the Head, a DH or authorised signatories in acting on the strength of the Excon Delegation. "However, in this regard the Head of Department, the Divisional Head and Mr Kruger had no authority to approve the 0443 Application, and it would have to be referred to the required duly authorised level for approval and the grant of permission." The GEC is only a committee that advises and makes recommendations to the Governor or a Deputy Governor who then makes a decision.

[26] It was denied that it would not be just and equitable to set aside the decision as Ibex could just approach the SARB for the approvals again. There is no prejudice to Ibex. The review was brought as soon as possible and a Court would be slow to let an unlawful administrative action stand due to some measure of delay.

Ibex's answer to the counter-application

[27] In the answering affidavit it is set out that the SARB, as an organ of state seeking to review its own exercise of public power, has failed to set out sufficient and full disclosure to establish that Kruger had no authority.

[28] The full extent of the facts set out by the SARB is that it received 0443 in February 2024 and the approval was granted in April 2024. Not a single fact is set out as to who received or considered it. The SARB did not tell the Court who sought clarification and no supporting evidence of such clarification request is attached. The SARB did not set out the conduct of Kruger to enable a determination of what he did. The averment that Kruger granted the approval is not supported by a single document, least of all by Kruger himself. The identity of the DH is not identified and no evidence is forthcoming from the DH on whose behalf 0433 was issued. The deponent to the answering affidavit, Mr Nevhutanda [Nevhutanda], the acting Head of Department of Finsurv, does not say that that he was unaware of 0443. There are no affidavits from Kruger, the unidentified DH and any of the members of the GEC to confirm that they had no knowledge of 0443. There are no supporting affidavits from the 1st, 2nd, 3rd or 5th respondents to support the version of Nevhutanda.

[29] In the letter of 11 July 2024 from FirstRand setting out the reasons why payment in terms of 0443 was prohibited there is no indication that the relevant senior officials were unaware of the approved 0443. This was five months after the application was sent in for approval and three months after it was approved. It was argued that it was

improbable that senior management did not know or approved 0443 and that Kruger, as a senior official, was on a frolic of his own.

[30] It was submitted that the self-review must be evaluated against the SARB's refusal to deliver a record for its self-review despite requests, an undertaking and its obligations to do so. The SARB had in fact in the settlement agreement agreed to file a record if it was to bring a self-review.

[31] On 25 October 2024 the SARB delivered documents with the heading "Record." It included the settlement agreement and the Court Order recording the settlement. As well as the 0443 application with the SARB reply to the 0443 application. The delegation in terms of the Exchange Control Regulations and the FinSurv limits for signing officials for the relevant period and a letter dated 4 March 2024 from Ibex to the SARB. When Ibex sought a full and proper record from the SARB on 4 November 2024 SARB through its attorneys submitted that the self-review is brought in terms of a legality review, not PAJA and therefore Rule 53 is not applicable and the documents attached to the founding affidavit constitute the record.

[32] On 13 November 2024 the SARB then changed its stance submitting that it was not obliged to file a record and the documents provided as the "Record" were in fact just annexures to the founding affidavit. In the replying affidavit the SARB again flip-flopped averring that the documents under the "Record" do constitute the "record that befits the self-review," but do not "address the merits of the 0443 Application and the facts that were considered by Mr Kruger in granting the 0433 Approvals without the required authority."

[33] It was argued that the documents that the SARB had not provided are the documents that are in law required to be produced. Ibex submitted that the decision to issue the 0443 approvals was valid and the record of that decision must be provided.

In LNG Scientific (Pty) Ltd v Special Investigating Unit and Another 2024 JDR 2618 (GP) at para [53] the Full Court found that:

> "There can be no doubt that a respondent is entitled to the record in self-review applications. A refusal of the record impinges on the procedural rights of the respondent. The fact that a state organ initiates a legality review of its own decision, cannot limit a respondent's right to a record. It is of no comfort to be advised that the Rule 53 discovery is the applicable procedure for access to documents in self-review applications."

The Constitutional Court has found that: "The current position in our law is that – with the exception of privileged information - the record contains all the information relevant to the impugned decision or proceedings. Information is relevant if it throws light on the decision-making process.[1]

[34] The argument went that there must be documents that served before the person or persons granting the 0443. In the founding affidavit no document was provided that Kruger granted the approval. All of a sudden in reply a copy of the 0433 approvals is attached onto which an electronically scanned unidentified signature has been affixed. No explanation is provided as to why this was not attached to the founding affidavit, why it differs from the 0443 attached to the founding affidavit and the approval that Ibex received. There is not a single document supporting the contention that the approval was granted without authority by Kruger or the DH. There are no internal emails, no minutes of meetings or any document attached that Kruger granted the 0433 and in a rogue manner. There is no explanation provided as to why senior management, when aware of the 0433 approval, allowed it to be taken without authority and why the lack of authority was only discovered during this litigation. There is simply silence as to who then raised the queries on 0433 and how those concerns could have been raised if the 0443 where unauthorised at source. Nevhutanda's say-so is not confirmed by anybody with direct knowledge, because it is important to remember that he denies that; "I as Acting Head of the Department and the executive

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[1] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) para [17]

management of the SARB knew about, approved of, or had been involved in the, granting of the 0433 Approvals."

[35] In the replying affidavit Nevhutanda makes a new allegation that in fact the senior officials at FinSurv did know by whom the 0433 approvals were given. It was argued if they knew that Kruger gave the approval then it showed a complete absence of subterfuge on the part of Kruger. Yet in the replying affidavit is also now averred that Kruger knew he did not have the authority to grant the approvals. Moreover that Kruger could not make an affidavit where he has "been suspended pending an investigation by an independent third party into this matter." It was argued this can only mean that Kruger disputes Nevhutanda's version of events and it is not stated that Kruger refused to make an affidavit.

[36] Also contradictory is Nevhutanda stating that: "It is denied that I as Acting Head of the Department and the executive management knew about, approved of, or had been involved in, granting of the 0443 approvals." How is it possible to know that Kruger granted the 0433, but did not know of the 0433 approval? If they did not know, it was surely to have been raised when in June/July 2024 0433 was sought to be implemented.

[37] It was also submitted that the gaps in the evidence must be evaluated against the extensive engagements between the SARB and Ibex over the last seven years. This includes the high profile investigation into Steinhoff, with blocking orders and forfeitures being granted. Kruger was a senior official who attending many meetings between SARB and Ibex and he was well aware of the heightened scrutiny of SARB's approach to Ibex. It was improbable that the 0443 with vast amounts would have been approved by someone lacking authority. It cannot be ignored that the SARB first tried to block the implementation of 0433 for completely other reasons and only when the urgent application was launched did the lack of authority arise.

[38] On behalf of Ibex it was argued that the SARB had not made out a case that the 0433 was granted by a person lacking authority. The Court must decide whether the 0443 approval was granted *ultra vires*. A DH had the authority, without referencing any other procedure, to grant an approval of a transaction of any value. It was submitted that upon a reading of the delegation with the signing limits document a manager with an M1 designation has the power to grant approval over R15 billion. The only requirement is that it must sent to either the DG or the GEC and DH dependant on the amount. This interpretation must be correct because, it is conceded that the GEC is not granted any power to approve. The SARB confirmed that the signing limits document does not prevent Kruger from "purporting to grant the 0433 Approval." The GEC only gives their blessing to Kruger's approval. The signing limits does not grant any power it simply caters for an internal process.

[39] *Ex facie* the 0443 it is granted "o.b.o the Divisional Head." The 0443 was addressed to the DH by Ibex and the authorised dealer. The queries and answers thereto were addressed to and answered by the DH. Yet, the DH, who is unidentified, has provided no evidence. Nevhutanda in reply avers that he and the executive management of the SARB did not know of the 0433, but did not say the DH did not know. There is no evidence as to whether Nevhutanda was the acting DH at that time or who the DH was when 0433 was granted. Nowhere is the allegation made that the submission in terms of the signing limits document was not sent to the DH. The only inference is that the DH was aware of 0433.

[40] Reliance was also placed on the presumption that acts that occur regularly or routinely are presumed to have followed a regular routine or course *[omnia praesumuntur rite esse acta].* It was submitted the SARB did not with this in mind prove the unlawfulness of the 0433.

Decision on lack of authority

[41] The SARB, an organ of state, is bringing an illegality review based thereon that the official that granted the 0443 did not have the authority to do so. The SARB thus has the onus to prove that 0443 was granted unlawfully, is invalid and must be reviewed and set aside. It has this duty in the counter-application as well as in the main application simply because the approval stands until set aside.[2] There can accordingly be no duty on Ibex to prove that the approval was lawful. I only mention where the onus lies in response to argument from counsel for the SARB, who argued that Ibex has the onus. However, in motion court proceedings the question of onus does not arise and the approach in *Plascon-Evans*[3] is applicable irrespective where the legal or evidential onus lies.[4] It may be that the SARB as the respondent in the main application and, as the applicant in the counter-application, attracts different approaches in term of the *Plascon-Evans* principle, but that is questionable as the defence to the main application is only set out in the counter-application where the SARB is the applicant.

[42] To be successful in the self-review the SARB must set out a full account of the facts before the Court. In *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) in para [152] the Court expressed this requirement as follows:

> "The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court."

[43] I make little of the SARB's argument that although 0443 is termed an "approval" it is in fact a permission and the Court must draw a distinction between the two; it is seeking the setting aside of the permission and not the approval. Permission was sought and 0443 was approved and nothing turns thereon; if the permission is set aside the approval is set aside and the permission falls away.

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[2] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)
[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)
[4] *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para [27]

[44] The SARB in its self-review is seeking to review its own decision and is called upon to in its founding affidavit set out fully and satisfactorily why its own written and communicated 0443 approval was invalid. In SARB's founding affidavit the only facts relating to a lack of authority is summarised as follow:

- The SARB received ECA0443;
- The four payment applications' details are set out [I do not find it necessary to repeat it as it has been set out];
- FinSurv requested further clarifying information that Ibex furnished in a letter dated 4 March 2024. The information related to payments 3 and 4 and the details thereof are set out;
- The details of the approved 0443 is set out;
- During the course of this litigation Nevhutanda, as acting HD, discovered that certain amendments to 0443 were made by Kruger in relation to payments 1 to 3 which were not communicated to the management of FinSurv by the designated functionary. Upon investigating this incident it became apparent that Kruger did not have the authority to grant permission. Kruger holds the position of a M1[manager] in FinSurv.
- He did not have authority to approve as one composite approval, Payments 1-4 in terms of the applicable signing limits. Kruger did not have the authority to approve an application that exceeded ZAR 10 billion. In such instances a submission needs to be submitted to the responsible DG for approval. Applications that exceed R15 billion needed to be submitted to the GEC "for approval."[5]
- Payment 4 on its own also "exceeded the designated official's signing limit in terms of the applicable signing limits." The approval of Payment 4 required the designated official to refer it to the GEC, but he did not.

[5] Para 20 of founding affidavit

[45] Since I need not deal with 0433 as a composite application [payments 1-3 being moot], the only grounds for setting aside payment 4 is thus that the designated official exceeded the signing limits in terms of the signing limits document and payment 4 required the designated official to refer it to the GEC which he did not do.

[46] There are no confirmatory affidavits from the first, second, third, or fifth respondents. There is no affidavit from the DH at the time of approval of 0433. There is no affidavit from any member of the GEC at the time.

[47] The documents filed as a "record" is of no help to this Court. It consists of the 0443 application, the approval of 0443, the delegation in terms of the Exchange Control Regulations and the FinSurv limits for signing officials for the relevant period. Also included is a letter dated 4 March 2024 from Ibex to the SARB. From these documents I cannot determine whether Kruger granted the application. There is no document from the DH or the GEC stating that it did not receive any referral from the designated official.

[48] This Court is left in the dark as to how this process of approval flows. I don't know to whom this application was allocated when received. In the words of the Constitutional Court[6] "no light is thrown on the decision-making process" and I don't know if it was Kruger who raised the queries on 0443. SARB is completely silent on who the unidentified DH is. It is not anywhere averred if the approval of payment 4 landed on Kruger's desk what his next step should have been. This is not a legal interpretation, it is a factual enquiry based on Mr Nevhutanda's assertion it should have been sent to the GEC for approval. Yet, it is common cause that the GEC cannot approve it because the GEC is only a committee that advises and gives recommendations to the Governor or DG. This is confirmed by Mr Nevhutanda's

[6] *Helen Suzman* matter para [17]

replying affidavit with Nevhutanda contradicting himself by therein conceding that the escalation to the GEC is only for consideration, not approval.

[49] The argument on behalf of the SARB that because there was no approval there will be no evidence to put before this Court, is rejected. It would have been a simple exercise to obtain affidavits from the DH and a member of the GEC to confirm that in terms of the signing limits documents Kruger had not referred it to the DH or the GEC; Kruger was on a frolic of his own. I also find it difficult to accept that there is no-email, minute, written enquiry, a telephone note, a WhatsApp or any scrap of paper from Nevhutanda as the acting DH querying the authority of Kruger when he, as averred, during this litigation discovered that Kruger approved the 0443. There is simply no key supporting evidence of the process and that the permission was granted without authority. On the *Plascon-Evans* principle this version of SARB in the main application as a defence is bald and uncreditworthy and the version put up by Ibex in the counter-application is to be accepted.

[50] Even leaving facts aside, on a legal interpretation the lack of authority claim falls short. I accept that the first document one has to turn to is the Delegation and that the signing limits document does not give a person power to grant permission, it is an internal process regulating the different categories of people to sign-off a particular approval. The case made out in counter-application is specifically that the 0443 "exceeded the designated official's signing limit in terms of the applicable signing limits." There is no reliance on the delegation, but on the signature limits document. The approval of Payment 4 required the designated official to refer it to the GEC, but he did not. It is not their case that the Kruger did not have authority in terms of the delegation. The case thus revolves around the heading of the signing limits document with the following instruction: "where the transaction value exceeds R15 billion a submission to the GEC must be drafted, both documents must be submitted to your signing official/manager."

[51] It was argued on behalf of SARB that the designated official's signing limit was exceeded because it was above R15 billion. If it was above R15 billion he simply could not entertain it, end of story. The oral argument went Kruger had the delegated power, but it was only to R10 billion and so to speak had to get it off his desk, and pass it on to a designated official with authority. Kruger cannot give permission and then send to the GEC. He has no power to grant approval. The Court must apply a purposeful interpretation and there must be a purpose to send to the GEC and the reason is it was above Kruger's pay-grade. This last argument is contrary to the SARB's own case that the GEC cannot give approval. The case is never made out that it was not sent to the DH at the time.

[52] This procedure of Kruger having to pass it to another official and who this official must be, is not on the papers. This argument is also contrary to the plain reading of the delegation with the instruction that a M1 official in fact has the power to grant a R15 billion transaction but, must adhere to the instruction by drafting a submission to the GEC; he cannot do that if the application is off his table. Upon an interpretation of the instruction he could not approve it without sending it to the GEC and then both documents to the signing manager. The signing limits document does not even require "approval" from the GEC or for that matter from the DH. The version put up by the SARB in the counter-application is palpably implausible and Ibex's version on the *Plascon-Evans* principle is to be accepted.

[53] The document attached to the founding affidavit as the permission is unsigned "o.b.o. DH." It is not denied that Ibex received all other approvals unsigned with "o.b.o DH" identical to 0433, but this is made off as co-incidental. However, this Court can in terms of *Plascon-Evans* use it a common cause fact from which an inference can be drawn. It in fact shows that 0443 was granted by a person with authority, the DH. In the reply Nevhutanda makes the new bald statement: "The Excon Delegation delegates powers and functions, *inter alia*, to the Head, a Divisional Head or authorised signatories in acting on the strength of the Excon Delegation. However, in this regard the Head of the Department, the Divisional Head and Mr Kruger had no authority to approve the 0443 Application, and it would have had to be referred to the

required duly authorised level for approval and the grant of permission." No reason is provided for this and no identification of this duly authorised level is provided.

[54] It is common cause that in June/July 2024 when Ibex sought to implement 0443 the SARB raised three objections as to why the 0443 could not be implemented. None relating to lack of authority and those reasons have been abandoned with no explanation for this change in stance. The argument on behalf of SARB that there is nothing controversial about Nevhutanda stating that he knew nothing of 0443 because payments 1 and 2 were within Kruger's authority. Payment 4 was not yet on the table, just like it is not now on the table, it's only planned for 2026. Only when the urgent application came and payment 4 featured did the SARB realise that Kruger had no authority to grant permission for payment 4. This argument is untenable because payments 1-4 were applied for at the same time and approved at the same time. It matters not that the execution would take place later. In fact, the whole purpose of payment 4 was future payments.

[55] Nevhutanda in the founding affidavit says he was not aware of the amendments to the 0443 and that Kruger had not conveyed the amendments to 0443. He does not say that he did not know of the 0443 application and approval, he specifies that the amendments to the 0443 triggered the investigation to lack of authority. In the replying affidavit he then admits that the senior officials at FinSurve knew by whom the 0443 approvals were given, but then does not divulge if this was from the inception, or at what stage. In the reply for the first time it is also divulged that Kruger knew that he did not have the authority to grant the 0443 permission with no factual basis to support this allegation. If the senior management knew that Kruger had granted it, then the question remains why his lack of authority was not raised earlier.

[56] The approval attached to the replying affidavit differs from the approval that was attached to the founding affidavit in that it now reflects an illegible electronic signature. Not a single word in the reply as to whose signature this is, where this now comes from, or why it was not attached to the founding affidavit, but the SARB was attempting

to make out a case in reply. This Court must have regard to the principle that the more serious an allegation and its consequences the stronger the evidence must be before I can find the allegation is established.[7] There is no doubt that now seeking a self-review of permission granted has serious consequences for the process Ibex has followed to pay its creditors and the SARB has not put up any evidence, let alone strong evidence.

[57] Counsel for the SARB submitted that if the Court cannot decide the factual dispute pertaining to the lack of authority the matter must be referred to oral evidence. Contrary to Ibex's addressing this issue in its papers this relief now sought by the SARB was not addressed or sought in the SARB's papers or heads of argument.

[58] Rule 6(5)(g) of the Unfirm Rules provides that:

> "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

[59] It is well-established that if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order unless, the court is satisfied that the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so far-fetched or so clearly untenable or so palpably

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[7] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para [27]

implausible as to warrant its rejection merely on the papers. If in such a case the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief sought.

[60] As general rule an application for the hearing of oral evidence must be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail.

[61] I cannot define a real, genuine and bona fide dispute of fact better than the Supreme Court of Appeal:

> "[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."[8]

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[8] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008)

[62] When I consider the SARB's counter-application taking into account the paucity of facts, the lack of supporting evidence and documents, the contradictions between the founding and relying affidavits together with the common cause facts, together with the facts set up by Ibex no *bona fide* dispute of fact exists. I am satisfied that there is no genuine *bona fide* dispute of fact raised that needs to be solved by means of *viva voce* evidence and the application for referral to oral evidence is dismissed.

[63] Upon finding that there is not a *bona fide* factual dispute the only conclusion is that I should approach the applications upon the assumption that Ibex's account of the permission granted is substantially true and correct, in the main application and accept their version in the counterclaim.[9] I accordingly find on the merits that there was no lack of authority and that the 0443 was granted with authority by the DH. *Ex facie* the 0443 it is granted "o.b.o the Divisional Head." The 0443 was addressed to the DH by Ibex and the authorised dealer. The queries and answers thereto were addressed to and answered by the DH. The unidentified DH knew of 0443 and nowhere is the averment made 0443 was not sent to the DH. The previous approvals were also signed as "o.b.o the Divisional Head".

[64] This matter is urgent, comprehensive, complex, consisting of 5 lever-arch files with Counsel arguing for two solid days requiring judgment to be speedily delivered. In view of these factors and my finding pertaining to the lack of authority, I find it is unnecessary to address the delay pertaining to the self-review or whether it would be just and equitable to set aside the 0443. I also do not address the estoppel argument, except to *obiter* remark that where the SARB itself relies on the signing limits documents as not being adhered to, this internal document not falling within the knowledge of Ibex, it was entitled to assume that all internal requirements had been satisfied. Ibex acted on the 0443 by realising the funds with a meticulously planned strategy to achieve the best value and to realise its assets in an optimal way before June 2026. With payment then refused, prejudice followed and estoppel would find application.

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[9] *Wightman supra* para [23]

[65] In finding that payment 4 was granted with authority there is no basis in fact or law to prevent payment 4 and the decision is reviewed and set aside.

Must the blocking order over R200 million plus interest in the SAHPL account be reviewed and set aside?

[66] The reason provided by the SARB for the blocking order reads as follows:

> "... on reasonable grounds suspect[s] the Respondent [i.e.SAHPL] to have committed a contravention or failure to act or omission as provided for in in Regulation 22A.(1) and/or 22 C.(1) of the Regulations, read with Regulations 2,3,6,10,14,19 and/or 22.5." The contravention or omission was not identified. Mr Nannoolal [Nannoolal] issued and signed the blocking order.

The facts and argument on behalf of Ibex

[67] It was submitted that even if one reads all the quoted Regulations, the information in the blocking order and the affidavits before Court, it is impossible to determine on what basis any reasonable suspicion was formed by Nannoolal. He has not filed an affidavit and accordingly no reasons are before the Court as to what was suspected to be contravened and what requirements were not met. The letter from Bowmans, attorneys for the SARB, that accompanied the blocked orders, informed that the blocking orders flowed from the communications regarding the implementation of 0443, however, this is not explained. When the settlement agreement was concluded no reason was forwarded as to why the SARB insisted to continue with this blocking order despite the other blocking orders being uplifted. In the answering affidavit filed after the settlement agreement was concluded no reason for this blocking order is given. It is common cause that the decision to issue a blocking order is administrative action, but no reasons for the decision is set out in the answering affidavit.

[68] In the SARB's answering affidavit the only vague statement is that the blocking order related to: "suspected or known contraventions of the entity in question at the time", and the blocking of the funds was not inexplicable or arbitrary. In the replying affidavit it is stated that SAHPL itself "has admitted having contravened, the Regulations to the extent of at least ZAR 4.5 billion." No explanation is given and no supporting evidence is provided. The only averment is: "I submit that it seems that Ibex, notwithstanding extensive engagement with the SARB in relation to its investigation pertaining to alleged contraventions of the Regulations, wants to distance itself therefore under the guise of 'new Management' whilst not accepting responsibility for the conduct of Steinhoff as an entity. They furthermore seem to ignore the SARB's mandate and obligations to act under the Regulations in respect of contraventions therefore which are in the region of ZAR600 billion."

[69] The only inference Ibex can make is that it referred to alleged historic contraventions, but is common cause that the SARB had investigated the alleged historic contraventions and issued blocking orders of approx. R6 billion based on these findings. It informed Ibex that it considered to forfeit the funds subject to the initial blocking orders and on 19 July 2024 made a final determination to forfeit R6.2 billion of these contraventions. The SARB was aware of all the asserts of the Ibex Group in South Africa prior to issuing these blocking orders. The Regulations do not permit for multiple forfeiture decisions in respect of the same contraventions, but even if it did, it would be unreasonable to do so.

[70] The forfeiture of 19 July 2024 constituted a final decision as to the censure of Ibex for the historic contraventions. The *functus officio* doctrine is accordingly applicable because Ibex cannot be a continuous moving target; the SARB had discharged its office in relation to those contraventions. It is unlawful for the SARB to a week, after the forfeiture decision, to block further funds for historic contraventions.

[71] On behalf of Ibex it was argued that the SAHPL blocking order must be set aside as it falls short of the standards set out by all three of these frameworks. Not in any of the affidavits of the SARB are any of these bases displaced.

[72] The SARB in the affidavit sets out that the that the reasons set out in the letter of 11 July 2024 are not the reasons for the blocking order; Ibex's failure to comply with its reporting obligations in terms of 0443; any contravention of the Regulations pertaining to the acquisition and disposal of controlled securities by the current management; the funds being externalised being of a capital nature for which specific prior approval was required.

[73] The SARB baldly denied that its conduct was unlawful and this is done by Nevhutanda who did not issue the blocking orders. The SARB only answered one of the reasons set up by Ibex denying that it had to give a party an opportunity to make representations before the blocking orders were issued. With no reasons provided Ibex submitted that the blocking orders were issued solely for the unlawful purpose of thwarting the implementation of 0443. It was argued that the purpose of issuing the 0443 blocking order on the day the SARB knew an urgent application was to be served enforcing the 0443 was to prevent exactly that. The SARB has put up no cognisable defence to the relief sought pertaining to the setting aside of the blocking order.

The facts and argument on behalf of SARB.

[74] The facts set up in the answering affidavit pertaining to the blocking order was that at the time that the SARB issued this blocking order, an amount of ZAR R200 million in excess of the ZAR R9 billion proceeds of the sales of the Pepkor shares were also blocked in respect of contraventions of the Regulations suspected to have been committed by SAHPL. The attachment of money by the SARB is in terms of Regulation 22 A(1)(a) and or Regulation 22C(1) and the prohibition from withdrawing or causing to be withdrawn any money to the credit of SAHPL is done in terms of

Regulations 22A(1)(b) and/or 22C(2). These orders by the SARB are generally known as blocking or attachment orders.

[75] Once the monies have been blocked the blocking or attachment remains in place for 36 months for FinSurv to conclude an investigation. Suspicion is a state of conjecture and the investigation is to obtain *prima facie* proof. The suspicion is on reasonable grounds that in future it will become necessary to recover the shortfall in respect of the contraventions committed by SAHPL. It is denied that the blocking orders were issued for an obstructive purpose to impede this application, or the 0433 payments.

[76] The blocking orders were lawful, reasonable and procedurally fair. A designated functionary need not provide reasons for the blocking orders. An entity that has been blocked can ask reasons in terms of Promotion of Administrative Justice Act 3 of 2000. It is denied that the letter of 11 July 2024 formed the basis of the blocking order, it informed the reasons for the delay in processing the transactions.

[77] The blocking of the additional funds was not arbitrary as it related to suspected or known contraventions of SAHPL at the time. SAPHL had admitted to contravening the Regulations to the extent of at least ZAR 4.5 billion. The fact that some of the funds may not have been earmarked to be exported was not a relevant concern at the time. It is denied that the financial creditors were entitled to have been given an opportunity to make representations before the blocking orders were issued because to give notice would defeat the purpose of a blocking order, i.e. to preserve the funds or assets.

[78] In the written heads of argument of SARB nothing more is said. In oral argument much was made of the fact that it was not common cause that the investigations surrounding Steinhoff had been finalised and that the Court can take note from the newspapers that SARB had recently gained access to further documents from Jooste; this is not on the papers. I was referred to a few paragraphs out of voluminous

submissions made by Ibex to the SARB, not referenced in the papers before Court, suggesting that there were new contraventions with SAPHL admitting it had contravened to the amount of 4.5 billion and on that basis the SARB could never let billions go out of the country. A blocking order is not a penalty but a recovery and the SARB has duty to ensure recovery. The global approval did not absolve the group from contraventions.

Decision on whether the blocking order must be set aside.

[79] It is common cause that the blocking order relates to SAPHL, unrelated to 0443 and is in excess of the proceeds of the PPH shares. The blocking order is sought to be set aside in terms of PAJA and also in terms of Regulation 22D read with section 9(2)(d) of the Act which provides that an aggrieved person may bring an application to a competent court for the review of blocking orders.

[80] I am well aware of the extremely important function the SARB has to fulfil in South Africa relevant to these applications before me:

> "Here we are dealing with exchange control legislation. Its avowed purpose was to curb or regulate the export of capital from the country. The very historic origins of the Act, in 1933, were in the midst of the 1929 Great Depression, pointing to a necessity to curb outflows of capital. The Regulations were then passed in the aftermath of the economic crises following the Sharpeville shootings in 1960. The domestic economy had to be shielded from capital flight. Regulation 10's very heading is 'Restriction on Export of Capital'. The measures were introduced and kept to shore up the country's balance of payments position. The plain dominant purpose of the measure was to regulate and discourage the export of capital and to protect the domestic economy. ... [T]he exchange control system is designed to regulate capital outflows from the country. The fickle nature of the international financial environment required the exchange control system to allow for swift responses to economic changes... Exchange control provided a framework for the repatriation of foreign currencies acquired by South African residents into the South African banking

> system. The controls protected the South African economy against the ebb and flow of capital. One of these controls, which we are here dealing with specifically, served to prohibit the export of capital from the Republic (unless certain conditions were complied with.)"[10]

[81] To achieve some of its objectives the SARB has draconian powers to ensure compliance with its purpose, mandate and Regulations. I also understand that the Ibex group's actions stand to be scrutinised. However, I am mystified that an organ of state, when confronted with reviews in terms of PAJA and s22 of the Regulations relating to its approvals and blocking order, sets out none of the required facts to enable a Court to decide whether these decisions were lawful, procedurally fair and should not be reviewed and set aside. An organ of state is not above the law and a Court can only decide on what is on the papers before it. I cannot be persuaded by emotive statements from the bar that pensioners and businesses lost 90% of their investments; it is not on the papers. I cannot make findings on snippets of a "report" that was not before the Court in the papers. The attitude of the SARB was displayed by a remark from the SARB's Counsel in open Court that if the SARB did not set up enough facts, then the Court dismissed their version on a lack of facts, not on the merits, and they will just come back to Court. But, it is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. If the facts of the case are not sufficiently clear to indicate what a party is relying on that party's version is rejected on the merits. Where a respondent alleged bald facts without any substantiating facts Ibex's version on the *Plascon-Evans* Rule must be accepted because the SARB had not set up a *bona fide* defence:

> "[23] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) paras 11 to 13, I had occasion to consider the adequacy of allegations in answering affidavits in the context of the rule. What I said there applies with equal force to a respondent

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[10] *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC) paras [53] and [54]

who endeavours to raise a special defence as here. See also *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (CC) para 26. The alleged knowledge of the respondents concerning the long lease was averred without reference to any detail as to when, where and how the information was communicated to them. Such facts being peculiarly within the knowledge of the first appellant, his silence on the matter is inexcusable and explicable only by the inference that the bald allegation was false or not capable of substantiation. As I have pointed out the defence was not raised in the magistrate's court proceedings, a fact which is unexplained and merely strengthens the inference. In these circumstances it cannot be concluded that a bona fide defence has been made out by the appellants founded on the respondents' knowledge of the existence of a long lease."

[82] The SARB cannot get past the first hurdle; on what was the suspicion based? The person who formed the suspicion is completely silent thereon; no affidavit from Mr Nannoonal. There is a vague submission that the suspicion is on reasonable grounds that in future it will become necessary to recover the shortfall in respect of the contraventions committed by SAHPL. This averment is not substantiated by any fact, what contravention and what shortfall? The further vague statement is that the blocking of the additional funds was not arbitrary as it related to suspected or known contraventions of SAHPL at the time. The Court is again not told what contraventions and at what time. Ibex then takes the position that it could only relate to historic contraventions. This is not denied in the answering affidavit, however, in oral argument, it is denied that the investigation on historic contraventions is finalised.

[83] Pertaining to the averment of the self-admitted R4.5 billion contravention there is no supporting evidence or document to show this. In oral argument the Court is handed up a voluminous document [RA1 submissions to GEC], not referenced in the answering affidavit, and with no context, with facts not set up in the answering affidavit and is of no help to the Court. It was argued on behalf of Ibex if one has regard to the whole report it is 100% against the submission by the SARB in that it acknowledges that there has to be a balancing act between protecting the economy and the

payments that Ibex must make. The SARB averring contraventions of up to amount of R6 billion being bantered about is outlandish and not substantiated.

[84] The SARB has not set out a single fact as to why the blocking order was issued, why it is lawful and why it should not be set aside. These facts are peculiarly within their own knowledge and their silence thereon is inexcusable. It can only be concluded that there is not a reasonable suspicion and the blocking order is to be reviewed and set aside. The SARB did not observe it heightened standards required of it in litigation. The SARB was not candid and did not place a full and fair account of the facts before Court.

[85] The remedy sought to set aside the blocking order is in terms of PAJA. The decision to block was not rationally connected to the reasons set up by the SARB and there is no basis set up in fact or law for the decision-maker to block the funds [section 6]. As the review will be granted in terms of PAJA I need not address the application in terms of Regulation 22D read with section 9(2)(d) of the Act which provides that an aggrieved person may bring an application to a competent court for the review of blocking orders. The grounds for the setting aside are that the person who took the decision did not act in accordance with the relevant provisions or did not have reasonable grounds to make such decision or the grounds for making such decision did no longer exist. I only need to reiterate that with no facts placed before the Court by SARS the only assumption is that there were no reasonable grounds to make such a decision.

Can this Court grant prayers 5.2 and 5.3?

[86] The remainder of prayer 5 in the main application relates to directing the SARB to permit Ibex to make any further payments in terms of the 0443 Approval subject only to Ibex complying with their reporting obligations under the 0433 Approval to update the SARB on the processes and external payments as and when same are being implemented. Furthermore, the SARB are to take no steps to prevent Ibex from

making further payments, including issuing an attachment and/or blocking order under Regulation 22A or 22C of the Exchange Control Regulations. Directing that the seventh and eighth respondents [FirstRand Bank Limited and the Standard Bank of South Africa Limited] are permitted to take such necessary steps to effect and implement these payments.

Ibex's facts and arguments

[87] On behalf of Ibex it was argued that the facts set up for such an order is the pattern the SARB had followed in this application. It set out that the SARB's actions to stop the implementation of the 0433 and the subsequent issue of the blocking order must be seen not in isolation. In mid-July 2024 whilst Ibex was seeking to engage the SARB on the implementation of the 0443 the SARB forfeited the initial blocked funds amounting to R6.2 billion. The forfeiture took place while the SARB left Ibex's letters and applications pertaining to the 0443 unanswered.

[88] On 18 July 2024 at 14:30 the SARB's attorneys wrote a letter to Ibex indicating that the SARB is taking a decision to forfeit the blocked funds and that the decision would be communicated in due course. The attorneys for Ibex immediately responded that the SARB had given the following undertaking:

> "It is our instruction to inform you that our client hereby undertakes to provide your clients reasonable prior notice, via your office, of any intended administrative action that our client may take against your clients after consideration of the written representations provide by your client."

The very next day, 19 July 2024 the forfeiture decisions were published in the Government Gazette, despite the undertaking. The undertaking was given at the time that Ibex threatened an urgent application to prevent forfeiture in circumstances where the review pertaining to the blocking was pending. It was argued that the letter stating that a decision would still be made can only be incorrect because the decision must already have been made when forfeiture was published less than 24 hours later. The

only reply to seeking the undertaking to be adhered to was a letter attaching the forfeiture notices. It was submitted that the SARB acted *mala fide*.

[89] The funds were blocked [prior to the blocking orders in this matter], despite the SARB approving the restructuring and settlement process after six years of engagement with Ibex. The SARB forfeited no matter that Ibex had launched a review against the blocking orders and this was not yet decided. A date for this review has now been procured. Ignoring the pending review against the blocking order and just forfeiting the money can only be *mala fide.*

[90] Similarly, in this application, 0443 was granted and acting thereon Ibex sold the Pepkor shares and kept the SARB updated of the process. Contrary to its own approval it prevented the implementation of 0443 and then issued the blocking orders. In the settlement the blocking orders were lifted bar the order against SAPHL. No reasons have ever been provided why these blocking orders were issued, or why it was not lifted.

[91] In the light of this pattern of unreasonable and unlawful conduct of the SARB Ibex fears that there is a real risk that the SARB will use its draconian powers to prevent Ibex from making approved payments in 0443 in the future. The SARB's exercise of its powers in this manner constitutes an abuse; by denying the payments in terms of its own approvals.

The SARB's facts and arguments

[92] It was submitted that the review application pertaining to the forfeiture is not relevant to this matter before this Court and by introducing these irrelevant considerations in this application it may unduly influence the Judge who may well hear all these matters. It would not be wise for a Court to make a finding of *mala fides*.

[93] It denied that the SARB acted unlawful or untoward and the facts set up by Ibex are noted in the context of the subsequent settlement agreement made an order of Court.

[94] The SARB denied that it had to take any steps before issuing the blocking order and specifically that the financial creditors were entitled to have been given an opportunity to make representations before the blocking orders were issued keeping in mind that a blocking order can be defeated if notice is given thereof.

[95] Ibex does not take responsibility but merely blames all of its woes on "previous management." Pertaining to forfeiture the SARB has in the past fulfilled its legal obligation to allow for legal representations pertaining to forfeiture. There is no ground for an apprehension by Ibex that the SARB would not continue to do so.

[96] In oral argument it was submitted that the relief sought in prayer 5.3 is a blanket permanent interdict against the exercise of public power authorised in terms of the Regulations. If such an order is granted the Regulations will be amended by a final Court Order. It would result therein that Ibex need not seek permission from anybody. The flow of funds will end with SIHPL and Ibex Investments to make payments but in the chain as set out nobody in that chain has permission or can be immunised from seeking permission. The SARB would not have objection to prayer 5.3 being granted if amended to leave the second applicant out [because payment 3 is now settled] and that the entity in prayer 5.3 be limited to Ibex Investments, then the prayer would not be too wide.

[97] SAPHL does not have permission from the SARB. A Court can set aside the blocking order, but it cannot order that SAPHL need not obtain permission. It was submitted that the day after the Court sets aside the blocking order the SARB can obtain a new blocking order.

Decision on whether this Court can grant prayers 5.2 and 5.3

[98] A Court when reviewing an administrative action may grant any order that is just and equitable, including orders:

"(1) The court or tribunal, in proceedings for judicial review in term sof section 6(1), may grant any order that is just and equitable, including orders –

(a) directing the administrator –

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and –

(i) Remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) In exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders –

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs."

[99] In terms of section 8 of PAJA a Court can thus order the SARB to permit the approved payments to be made in terms of 0443 [s8(a)ii)] and in terms of 8(b) prohibit the SARB from blocking the funds again if just and equitable to do so.

[100] Permission was sought in terms of 0443 and was granted. Payment 4's permission was sought as future payments and granted as future payments, thus not having to again, in future, seek permission from the SARB. Permission was necessary so that Ibex could realise funds to fulfil the future payments sought and approved. The flow of the funds to achieve this was set out in detail to the SARB and the SARB was kept informed of the bookbuild and the intended payments. Upon a reading of the approved 0443 the only interpretation is that Ibex would sell South African assets to expatriate the proceeds to repay its foreign debts without further approval from the SARB. The SARB had in the 0443 itself expressed that the amount to be paid would depend on "the underlying Pepkor share price, operating expenses and the Rand/Euro exchange rate', acknowledging the future payments upon realising of the assets.

[101] In the 0443 granted there is no express requirement for prior written approval for payments 1-4, contrary to the wording in payment 5. The only requirement pertaining to payments 1-4 were that the SARB needed to be updated "on the processes and external payments as and when same are being implemented, during the entire process." It is common cause that this was done.

[102] In directing the SARB to permit Ibex Investment Holdings and SIHPL to make any further payments in terms of the 0443 Approval subject only to the entities complying with their reporting obligations under the 0433 Approval to update the SARB on the processes and external payments as and when same are being implemented, the Court is not fulfilling or usurping the duty of the SARB. The SARB had already granted permission for the future payments. This Court is only directing the SARB to act in accordance with their own permissions granted.

[103] The next question is whether the Court can direct the SARB not to take any steps to prevent Ibex Investment Holdings and SIPHL from making further payments, including issuing an attachment and/or blocking order under Regulation 22A or 22C of the Exchange Control Regulations.

[104] It was made clear by counsel for the SARB that the SARB could render an order for payment of the 0443 by this Court worthless by issuing a blocking order the day after this Court issued its order. In terms of the SARB's functions and powers this is true, but a Court has to ensure that its own order is obeyed, and if it is not going to be obeyed, that there is means to ensure compliance. This is especially so where this Court has found that the SARB has not been candid in these applications and the blocking order issued was unlawful. A blocking order's purpose is not to prevent payments that the SARB had approved. If a further blocking is issued as a means to prevent the payment that the SARB had approved it is not the Court usurping the powers of the SARB, but the SARB abusing its powers.

[105] Of further relevance is that in the settlement order the SARB had agreed to: "The Reserve Bank shall not issue any further attachment or blocking orders in terms of Regulation 22A or regulation 22C of the Regulations in respect of the funds released from the Blocking Orders in terms of this Agreement and which shall be used for purposes of making payments in accordance with this Agreement." The prayer sought is thus in line with the upliftment of the other blocking orders with payment to follow the upliftment and agreement that no further blocking orders would be issued. I

see no reason why where the blocking order is found to be issued unlawfully the same principle should not apply here. Paragraphs 5.2 and 5.3 should be granted.

Costs

[106] Both parties in their written heads of argument sought the costs of three counsel. In argument on behalf of Ibex this was persisted with but counsel for the SARB submitted that this Court should only allow the costs of two counsel. I am satisfied that the costs of two counsel should be allowed.

Other issues

[107] The fact that I did not address all the issues raised does not mean that I did not consider same. The only other issue raised on behalf of the SARB was that the Treasury was not a party because only Treasury can approve or block. Yet, the counterclaim is not brought by Treasury and the upliftment of the blocking orders and the payments in the settlement agreement is made by the SARB and not Treasury. I made little of this argument.

Order

[108] [108.1] This application is enrolled as an urgent application, dispensing with the forms and service provided for in the Uniform Rules of court and it is directed that the matter be heard as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court.

[108.2] The decisions of the first and/or fifth respondents are reviewed, declared invalid and set aside under Regulation 22A(1) and/or 22C(2) of the Exchange Control Regulations, as set out in the following orders:

108.2.1 the "order with regard to the prohibition of the withdrawal of funds in terms of the provisions of

Exchange Control Regulation 22A(1) and/or 22C(2)" issued to the third applicant on 25 July 2024, attached as "FA5" to the founding affidavit; and

108.2.2 the "order with regard to the prohibition of the withdrawal of funds in terms of the provisions of Regulations 22A(1) and/or 22C(2) of the Exchange Control Regulations" issued to the first and second applicants on 25 July 2024, attached as "FA6" to the founding affidavit.

[108.3] It is declared that the payments set out in Payments 1 to 4 of the 0433 Approval are capable of implementation without further approval required by the first respondent;

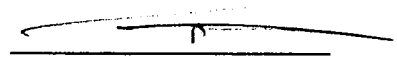
[108.4] The first to fifth respondents are directed to:

108.4.1 permit the first and second applicants to make any further payments in terms of the 0433 Approval ("the further payments"), subject only to the applicants complying with their reporting obligations under the 0433 Approval to update the first respondent on the processes and external payments as and when same are being implemented; and

108.4.2 take no steps to prevent the first and second applicants from making the further payments, including issuing an attachment and/or blocking order under Regulation 22A or 22C of the Exchange Control Regulations.

[108.5] It is directed that the seventh and eight respondents [FirstRand Bank Limited and the Standard Bank of South Africa Limited] are permitted to take such steps as are necessary to effect and implement these payments.

[108.6] The first to fifth respondents are to pay the costs of this application, including the costs of two counsel on scale C.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 2024-085397

HEARD ON: 12 and 13 February 2025

FOR THE APPLICANTS: ADV. M. VAN DER NEST SC
ADV. D. WIID
ADV. E.A. VAN HEERDEN

INSTRUCTED BY: Webber Wentzel

FOR THE 1ST-5TH RESPONDENTS: ADV. N.G.D. MARITZ SC
ADV. T. GOVENDER

INSTRUCTED BY: Bowman Gilfillan Inc.

DATE OF JUDGMENT: 23 April 2025