THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 822/2018

In the matter between:

RAMESH SINGH	**FIRST APPELLANT**
LAHLENI LAKES (PTY) LTD	**SECOND APPELLANT**
FINISHING TOUCH TRADING 304 (PTY) LTD	**THIRD APPELLANT**
ONE VISION INVESTMENTS 344 (PTY) LTD	**FOURTH APPELLANT**

and

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**FIRST RESPONDENT**
MR R VOLLER N.O.	**SECOND RESPONDENT**
RALSTON EMMANUEL SMITH	**THIRD RESPONDENT**

Neutral citation: *Singh & others v The Companies and Intellectual Property Commission & others* (822/2018) [2019] ZASCA 69 (30 May 2019)

Coram: Navsa ADP, Mbha, Schippers JJA, Mokgohloa and Davis AJJA

Heard: 15 May 2019

Delivered: 30 May 2019

Summary: Powers of the Companies Commission to investigate a complaint – whether complaint time barred – Effect of civil litigation on an investigation by the Companies Commission.

ORDER

On appeal from: Gauteng Local Division of the High Court, Pretoria (Basson J sitting as court of first instance):

1 The appeal is dismissed with costs on an attorney and client scale.
2 The first and second respondents are entitled to costs only in respect of the opposition to the application to admit further evidence, also on an attorney and client scale.

JUDGMENT

DAVIS AJA (Navsa ADP, Mbha, Schippers JJA and Mokgohloa AJA concurring):

Introduction

[1] This case concerns the question whether the first respondent, being the Companies Intellectual Property Commission (the Commission) established in terms of Section 185 of the Companies Act of 2008 (the Act) has jurisdiction to investigate a complaint lodged by the third respondent, Mr Ralston Smith (Smith) to the effect that his removal as a director of the second appellant Lahleni (Pty) Ltd, (Lahleni) had been effected fraudulently. Smith alleged that either the first appellant, Mr Ramesh Singh (Singh), or persons associated with him fraudulently filed documents with the Commission which reflected that Smith had resigned as a director.

[2] On 23 February 2016, the Commission recommended that the complaint be investigated. As part of the investigation Singh was requested, in his capacity as a director of Lahleni, to appear before the Commission and to furnish certain

information in respect of Lahleni as well as the third appellant Finishing Touch (Pty) Ltd (Finish Touch).

[3] Singh did not appear nor did he comply with the Commission's request for documentation. Summons was subsequently served on Singh, on 5 April 2015, via email. The attorneys acting on behalf of Singh objected to the way which the summons was served and further contended that, in terms of s 219(1)*(a)* of the Act, the complaint had been lodged more than three years after the alleged act, which was the cause of the complaint, had been committed. Hence, so it was contended, the complaint could no longer be investigated as it had prescribed.

[4] The Commission remedied the objection to service of summons by ensuring that it was served by the Sheriff on 7 April 2016. The appellants then launched an application to review and set aside the decision of the Commission to accept and investigate the complaint and to authorise summons in terms of which Singh was requested to appear and provide information to the Commission, in his capacity as director of Lahleni and Finishing Touch.

[5] The court *a quo* dismissed the application with costs on an attorney and client scale. It is against that order that the appellants have approached this court, with the leave of the court *a quo*.

The factual matrix

[6] The appellants and Smith, together with certain other parties, entered into a series of commercial agreements between September and November 2012. The agreements were designed to transfer shares in Lahleni and Finishing Touch to Singh or entities controlled by him. It appears that the agreements were subject to various conditions precedent, including a clause which provided that all the existing shareholders and directors other than Singh, had to resign within 30 days as from 3 October 2012.

[7] A dispute arose as to whether the conditions precedent to the agreements had been fulfilled and further, whether Smith had resigned as a director of both Lahleni and Finishing Touch. On 21 May 2013 BTW Consulting (Pty) Ltd

obtained a final liquidation order against Lahleni, which caused the latter together with the fourth appellant (One Vision) to launch an application for the rescission of this liquidation order. Smith alleged that it was during the course of that litigation that he first ascertained that Singh had claimed that he, Smith, had resigned as a director of Lahleni and Finishing Touch. The claim of resignation as a director was based on a document dated 2 October 2012, headed 'Mandate for Resignation of Director' of Lahleni Lakes (Pty) Ltd. The document which is purportedly signed by Smith states that he had consented to his resignation as a director. Smith alleged that his signature had been fraudulently affixed to the letter of resignation, upon the discovery of which he lodged a complaint with the Commission.

[8] On 16 October 2014, One Vision 344 (Pty) Ltd (One Vision) launched an application in the North Gauteng High Court. The main relief sought was for specific performance of the Memorandum of Understanding (MOU) concluded between the various parties in respect of the sale of equity in Lahleni. According to the first appellant, one of the material issues in that litigation is whether the provisions of the MOU and the sale of equity had been fully executed and implemented, including the critical question as to whether Smith had resigned as a director of both Lahleni and Finishing Touch as contemplated in the MOU and the sale of equity agreement. On 26 October 2015, by agreement between the parties, the application was referred to trial.

[9] On 18 February 2016, Smith filed two complaints with the Commission in terms of s 168 of the Act, alleging that the records of the Commission incorrectly did not reflect that he was a director of both Lahleni and Finishing Touch and that his purported resignation had been fraudulently procured. Smith provided the Commission with a forensic report which concluded that the signatures used to effect his resignation as a director of Finishing Touch were 'without any doubt not authentic writing but a forgery'. He also deposed to an affidavit stating that the signatures used to reflect his resignation as a director of Lahleni were also forgeries.

[10] Pursuant to these complaints, the Commission initiated an investigation, as indicated above in paras 2 and 3, summoned Singh in his capacity as director to appear and to provide information on 25 April 2016. Not only did Singh refuse to comply with the summons but, as stated above, he applied to court to review and set aside the decisions of the Commission to accept the complaints, authorize summonses in which Singh was requested to appear and provide information to the Commission and in the alternative, an order setting aside the decision to investigate and issue summons and in the further alternative that all these acts of the Commission were *ultra vires*.

The judgment of the court *a quo*

[11] In dismissing the application with costs, Basson J, in the court a quo, found that the summons had been correctly served on 7 April 2016 by the Sheriff. On the merits, the learned judge dismissed the application, essentially for the following reasons:

'The investigative powers conferred upon CIPC are central to the statutory duty to maintain the companies register. I am further in agreement with the submission that it would be absurd to suspend the investigative powers of CIPC in exercising its statutory duties merely because an affected party has instituted proceedings into other matters relating to the investigation regardless of whether the statutory regulator (such as CIPC) is a party to those proceedings. Moreover, there is no reason, in my view, why the investigation conducted by the CIPC (which is a statutory obligation) cannot run concurrently to action proceedings instituted by a party to the investigation process. Lastly, if regard is had to the relief sought in the action proceedings, it is apparent that no relief is claimed with regard to the correction of the companies register maintained by CIPC.'

The appeal

[12] On appeal, the appellants' counsel raised a series of arguments which can be reduced to the following:

1. The complaint was time barred;
2. There is currently an action pending in the high court which deals with the same matter, that is the action launched by One Vision; and that matter ought to have been referred to trial and consolidated with this case.

3.1 Either on the basis of the Promotion of Administration of Justice Act 3 of 2000 (PAJA); inter alia, on the basis that the decision to investigate the complaints was based on incomplete information or

3.2 The residual principal of legality,

in that the Commission exceeded its statutory authority by taking decisions, where s 219(1) of the Act clearly precluded the initiation of the complaint. Furthermore, the appellants contended that the decision to pursue the complaint was neither rational nor reasonable.

[13] For those reasons therefore, it was argued by the appellants that the Commission lacks jurisdiction to investigate the complaints.

Was the complaint time barred?

[14] Section 219(1) of the Act provides as follows:

'A complaint in terms of this Act may not be initiated by, or made to the Commission or the Panel, more than three years after –

(a) the act or omission that is the cause of the complaint; or

(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.'

[15] Counsel for the appellants contended that Smith had lodged a complaint with the Commission more than three years after the alleged fraudulent submissions had been made removing him as a director of Lahleni and Finishing Touch. The court *a quo* found that the complaint was based upon 'a course of conduct or continuing practice' within the meaning of s 219(1)*(b)* of the Act. The reason for this, so it was said, is to be found in the obligation imposed upon the commission to ensure that the records and registers which it administers are maintained accurately. Section 187(4) of the Act provides that the Commission is obliged not only to establish but to maintain the companies register in the prescribed manner and form. This implies that the continued accuracy of the register is part of its mandate. It is clear that, if a record reflects a fraudulent entry and is not corrected, the records maintained by the Commission are not accurate. It must follow that if the Commission discovers a fraudulent entry some

three years after the fraud was perpetuated, on the basis of the argument of appellant's counsel, it would be powerless to effect a change.

[16] Counsel for the appellants focused his submission on the finding of the court a quo, based as it was on s 219(1)*(b)* of the Act, that the records of the company continued to reflect that Smith was not a director, was an omission which constituted a continuous practice. He submitted that an incorrect insertion into a record of a company is a single act. In the view of counsel for the appellants, the words 'continuing practice' were therefore inapplicable in this case.

[17] In my view, it is possible to find an answer to this submission in the dictum of Wallis AJ, in *Makate v Vodacom Ltd* [2016] ZACC13; 2016 (4) SA 121 (CC) para 192, wherein he states:

'In the case of a continuing wrong there can be no question of prescription, even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that *while the original wrongful act may have occurred in a time past the wrong itself continues for so long as it is not abated*.' (Emphasis added). See also *Barnett & others v Minister of Land Affairs & others* [2007] ZASCA 95; 2007 (6) SA 313 (SCA) para 20-21 and *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330H-331G which judgments accept the description of a continuing wrong as one which still is in the course of being committed and is not to be located wholly in a single past action.

[18] In the present case, however it appears to me to be unnecessary to decide this issue on the basis of a 'continuing practice' in that s 219(1)(a) of the Act is applicable rather than s 219 (1)(*b*) in which the phrase 'course of conduct or continuing practice is employed. Section 219(1)(*a*) refers to 'an act for an omission' either of which is applicable in this case. The Commission has an obligation to maintain an accurate register of companies. This obligation is not frozen in time. If it were it would compel the Commission to work knowingly with inaccurate information, even in a case where the record was tainted by fraudulent activity. If, as must be the case, the Commission is enjoined to

maintain accurate records and thus effect necessary corrections to ensure accuracy , the failure by a company to ensure that inaccuracies are corrected amounts either to a misrepresentation of the correct position or an omission to correct the incorrect entry. In summary, when s 219(1)(a) of the Act employs the words 'the act or omission' the purpose thereof is to impose an obligation not to misrepresent the accuracy of the records or to omit to ensure that they are corrected. Thus, if the records of the company reflect incorrect information, there is an obligation on officers of the company to ensure that the inaccuracy is cured. Thus the failure to ensure that the record is maintained accurately constitutes either an act or an omission which falls within the scope of 219(1)(*a*). Thus, if there is a complaint that the records of the company are inaccurate, that constitutes a complaint that there has been an act or an omission which in terms of s 219(1)(*a*) constitutes the cause of the complaint. The failure to cure the inaccuracy or to draw it to the attention of the Commission constitutes a discrete act which is not frozen in time, which was the appellants' argument in respect of prescription.

The effect of pending litigation

[19] The appellant's counsel contended that the pending litigation before the high court will be required to determine whether Smith had resigned as a director of Lahleni and Finishing Touch. In terms of an amended notice of appeal, it was argued that the precise dispute which confronts this court is pertinently relevant to the litigation which has been launched. If the Commission's investigation was allowed to continue, it would lead to 'a preview of the evidence to be presented at the upcoming trial' regarding the exact same issues, namely whether Mr Smith had resigned of his own free will or whether the resignation had been fraudulently procured.

[20] Counsel for the appellants contended that s 219(2) of Act prevented the Commission from investigating a complaint where the civil action was pending before the high court. Section 219(2) of the Act provides as follows:

'A complaint may not be prosecuted in terms of this Act against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.'

[21] The wording of this section makes it clear that a complaint cannot be prosecuted if there are other proceedings relating to substantially the same conduct that gave rise to the complaint where such other proceedings are based on a section of the Act. In this case, the proceedings before the high court are contractual in nature and thus are not based on any provision of the Act. Hence s 219(2) of the Act is inapplicable to the present case. The appellants' counsel sought to argue further that the first appellant could be prejudiced if he was to be compelled to co-operate with the Commission's investigation, given that the same question about an alleged fraudulent signature was the subject of civil litigation.

[22] This submission flies in the face of formidable authority. In *Davis v Tip No & others* 1996 (1) SA 1152 (W) at 1159A, the question arose as to whether a disciplinary inquiry should be postponed pending the conclusion of criminal proceedings relating to the same conduct, Nugent J said:

'In the present case the applicant may well be required to choose between incriminating himself or losing his employment. If he loses his employment that is a consequence of the choice which he has made but not a penalty for doing so. It will be the natural consequence of being found guilty of misconduct, and not a punishment to induce him to speak. Hard as the choice may be, it is a legitimate one which the applicant can be called upon to make and does not amount to compulsion. In my view his right to silence does not shield him from making that choice.'

[23] This approach commends itself to the present case, where the issue concerns a choice between pursuing a civil action and a refusal to comply with a lawful demand issued by the Commission. This conclusion finds further support in the judgment of Navsa J in *Seapoint Computer Bureau (Pty) Ltd v Mcloughlin and De Wet No* 1997 (2) SA 636 (W) at 648A-C, wherein the learned judge was required to deal with an application staying a civil action, pending the determination of a criminal case, both of which stemmed from the same conduct, In his judgment Navsa J said:

'I agree with Nugent J that the discretion the cases speak of, is not one in the traditional sense. To me, it means that a Court has authority to stay proceedings in suitable cases. In order to arrive at a decision whether to do so or not, a Court weighs all the facts and

circumstances to determine whether prejudice might attach to the accused person if the civil proceedings were to continue. Once potential for prejudice is established, the Court will stay proceedings or find a formula for preventing prejudice, such as, in appropriate cases, ruling that information obtained should not be subsequently disclosed, or barring the use of compelling or coercive measures.'

[24] Applying these dicta to the present dispute, the appellants have shown no prejudice of a kind of which these judgments had in mind, in the event that the Commission proceeds with its investigation of the complaint nor was appellants' counsel able to suggest any prejudice which would justify the relief sought by appellants. Simply put, when a party is required to appear in different fora, each of which has jurisdiction in respect of the subject matter the manner in which that party deals with the process in each forum is a matter of choice, which holds particular consequences attendant on the choice so made. Ironically it is the appellants who launched the litigation that they now contend should be put on hold, pending the outcome of litigation elsewhere or consolidated.

The significance of the Commission's mandate.

[25] The crisp issue which confronts this court is the role of the Commission under s 7*(b)*(iii) read with s 185(2) of the Act, in terms of which it is required to act independently and impartially and to perform its functions without fear, favour or prejudice, to encourage transparency and high standards of corporate governance. It is empowered to investigate complaints, particularly those which are sufficiently serious, such as the allegation of the fraudulent removal of a director in contravention of the provisions of the Act. Decisions taken in this regard by the Commission must be designed to ensure that it performs one of its core functions, namely the enforcement of proper compliance with the administrative provisions of the Act. In the event that an investigation concludes that there is no merit to the complaint that would be the end of the matter. In terms of s 170(1)(c) of the Act, the commission may "issue a notice of non-referral to the complainant, with a statement advising the complainant of any rights they may have under this Act to seek remedy in court" Alternatively, the investigation may indicate that the non-compliance requires a referral to the

Companies Tribunal or the National Prosecuting Authority or that proceeding may commence in the name of the complainant.

[26] Whatever the situation may be with regard to a private action launched in the high court concerning contractual disputes, the present dispute which deals with the accuracy of company records falls within the jurisdiction of the Commission, namely to investigate a complaint. This function, as indicated, goes to the heart of its mandate, namely to ensure the proper administration of the Act and compliance with the principles of good corporate governance.

[27] One would expect if there was an order of preference or priority in relation to the competing fora, the statutory regulator would enjoy preference .The share register is, after all, a document in which the world at large should have confidence. Thus the Commission must be empowered to fulfil its obligations to ensure accurate records of companies under its jurisdiction, the fulfilment of which is manifestly in the public interest. It stands to reason that the Commission's powers to investigate a complaint concerning the accuracy of a company record must enjoy primacy over private litigation involving companies.

Argument concerning a review based upon rationality/reasonableness

[28] Much of the argument raised, albeit very tentatively, by the appellants' counsel with regard to whether there is a ground to review the decision of the Commission, turned on a recourse to the PAJA. This argument turns on whether the investigation of a complaint lodged with the Commission constitutes administrative action. The definition of administrative action in s 1 of the PAJA has been described as simultaneously cumbersome, convoluted and narrow in its scope. But.[1] it does not stretch to cover a referral to a statutory body of an investigative nature, this is clear from the *Competition Commission of SA v Telkom SA Ltd & others* [2009] ZASCA 155; [2010] 2 All SA 431 (SCA) para 11 which decision followed, and relied on, *Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd & another* 2003 (3) SA 64 (SCA) para 17.

[1] See *Greys Marine Hout Bay (Pty) Ltd & others v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 21

[29] The alternative argument raised, albeit with equally little enthusiasm by appellants' counsel was based upon the residual concept of legality, namely whether the Commission was entitled in law to investigate the complaint. That is an issue that I have already determined, namely, that the Commission received a complaint which it was empowered to investigate in terms of s 169 of the Act and which had not prescribed in terms of s 219 of the Act. For this reason the jurisdictional facts required for the Commission to initiate a complaint are clearly present.

[30] There was some suggestion that there was insufficient evidence which had been contained in the complaint for the Commission to act rationally. The principle that all public power must be exercised within the confines of applicable law has been applied through the concept of legality. Its application is context driven; that is the application of legality depends on the facts of the particular case, particularly to ensure that a parallel universe of administrative law is not developed. See C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 130-32. Suffice to say that there is an obligation placed upon the Commission to act rationally when it exercise its statutory powers.

[31] In the present case it is difficult to follow the basis of the argument that the Commission did not act rationally, particularly since Singh has steadfastly refused to testify before the Commission or provide further documentation which may be relevant to its inquiry.

[32] In summary, it would be inappropriate at this stage of the Commission's investigation to prevent it from performing its statutory role and prevent it from investigating what is a serious complaint. If the Commission makes a finding on the basis of inadequate evidence, then the possibility of a review of a substantive decision based on questions of rationality or reasonableness may come into play. But, on the papers before this court, no case has been made out to review its decision, whether in terms of the PAJA or legality.

Application to allow further evidence on appeal

[33] The first appellant applied to have further evidence received by this court. This evidence relates to the amended pleadings and the facts set out therein, which were filed before the high court in the action to which reference has been made earlier in this judgment.

[34] This application was not opposed with any vigour by the respondents but counsel for the third respondent correctly noted that the contents of the evidence on which the application was based were totally irrelevant to whether the Commission was empowered to investigate the complaint. For this reason the respondent contended that the irrelevancy thereof was significant in respect of the award of costs.

[35] The appeal to this court was devoid of any merit. It appeared to be no more than an exercise in deferment; that is litigation designed to postpone a legitimate inquiry. This kind of litigation should be discouraged. For this reason a punitive costs order is clearly justified. However, as the Commission did not adopt a clear stance in opposing the appellants' litigation strategy, it is only entitled to its costs which were incurred in its opposition to the admission of further evidence by the appellants.

[36] In the result,

1 The appeal is dismissed with costs on an attorney and client scale.

2 The first and second respondents are entitled to costs only in respect of the opposition to the application to admit further evidence, also on an attorney and client scale.

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D Davis

Acting Judge of Appeal

Appearances:

For the Appellants:	DE Loggerenberg SC
Instructed by:	Hogan Lovells (SA) Inc, Johannesburg
	Honey Attorneys, Bloemfontein
For the First and Second Respondent:	ALS Msimang
Instructed by:	Rudman & Associates Inc, Pretoria
	Horn & Van Rensburg Attorneys, Bloemfontein
For the Third Respondent:	HF Oosthuizen SC
Instructed by:	Veneziano Attorneys, Pretoria
	Symington D Kok, Bloemfontein