

JSC INTERVIEW ROUND: OCTOBER 2022

CANDIDATE: JUSTICE BASHIER VALLY

COURT FOR WHICH CANDIDATE APPLIES: SUPREME COURT OF APPEAL

1. The candidate's tertiary qualifications, professional admissions, honours, and permanent judicial appointments:

1.1. The candidate holds the following tertiary qualifications:

1.1.1. BCom from the University of Witwatersrand – 1982;

1.1.2. BA Hons (Industrial Psychology) from the University of Witwatersrand – 1983;

1.1.3. MA (Sociology) from the University of Warwick (UK) – 1985;

1.1.4. LLM (Labour Law) from the University of Witwatersrand – 1994; and

1.1.5. LLB from the University of Witwatersrand – 1996.

1.2. The candidate is appropriately qualified.

1.3. The candidate holds the following professional admissions:

1.3.1. Admitted as an advocate of the High Court of South Africa - 1996 to 2012.

1.4. The candidate was appointed in the following permanent judicial capacities:

1.4.1. High Court Judge, Gauteng (Johannesburg) – 2012 to present

1.4.2. Judge of Appeal, Competition Appeal Court – 2018 to present

2. The candidate's integrity and ethics:

2.1. No circumstances are known that would suggest that the candidate is not a person of integrity with a reputation for ethical behaviour or is not a fit and proper person for appointment.

3. Whether the candidate's appointment would help to achieve an appropriate racial and gender composition on the bench:

3.1. There are currently 21 full time judges in the Supreme Court of Appeal, comprising (as far as could be ascertained):

3.1.1. 10 black women (7 African, 2 Indian, 1 Coloured);

3.1.2. 6 black men (5 African, 1 Indian);

3.1.3. 1 white woman; and

3.1.4. 4 white men.

3.2. The candidate is a black (Indian) man.

4. The maximum time period the candidate could serve if appointed:

4.1. Section 176(2) of the Constitution provides that all judges other than Constitutional Court judges "*hold office until they are discharged from*

active service in terms of an Act of Parliament.” The Act in question is the Judges Remuneration and Conditions of Employment Act 47 of 2001.

- 4.2. Section 3(2)(a) of the Act provides that, subject to section 4(4), a judge will ordinarily be discharged from active service upon reaching the age of 70 if, by that date, they have completed a period of active service of not less than ten years. If not, they will be discharged from active service after having completed ten years of active service.
- 4.3. Section 4(4) allows for a judge who reaches the age of 70 to continue serving until the age of 75 if, at the time of turning 70, they have not yet served 15 years’ active service.
- 4.4. The candidate is 63 and has completed a period of 10 years of active service as a judge.
- 4.5. If appointed, the candidate could serve up to 7 years actively in office.

5. The candidate’s personal commitment to the values of the constitution:

- 5.1. During the candidate’s previous interview for a position at the Constitutional Court, he mentioned that he approaches each matter before him, to the extent applicable, with the guiding principles and values of the Constitution in mind. This is apparent from many of the candidate’s judgments.
- 5.2. Before being appointed as a Judge of the High Court, and during the period that he practiced as an advocate, the candidate was a member of Advocates for Transformation (2003 to 2012). He also served as a

member of the Access to Justice Committee in 2009. The candidate was a member of Black Advocates Forum (1996 to 2003).

5.3. The candidate has been involved in the Commercial, Catering and Allied Workers Union and the Metal Industries Bargaining Council.

6. The candidate's knowledge of the law, including constitutional law:

6.1. The candidate has a wide range of experience of the law. The judgments reviewed relate to the following specific areas of law:

6.1.1. constitutional law;

6.1.2. contract law and the influence of constitutional principles;

6.1.3. criminal law;

6.1.4. labour law;

6.1.5. mining law;

6.1.6. tax law;

6.1.7. competition law;

6.1.8. customary international law;

6.1.9. family law;

6.1.10. insolvency law; and

6.1.11. administrative law.

7. Judgments of the candidate that have been overturned, upheld or commented on, on appeal:

7.1. The candidate has listed 6 judgments that have been overturned by the Supreme Court of Appeal compared to 3 judgments that have been upheld.

7.2. These decisions are discussed below to the extent that they commented on the candidate's decision *a quo*.

7.3. The following judgments by the candidate were overturned on appeal:

7.3.1. *Moropa & Others v Chemical Industries National Provident Fund & Others* (GJ case no. A5041/2021, 29 June 2022):

7.3.1.1. This was a review under PAJA of the decisions of a Pension Fund to terminate the contracts of an administrator of a fund, NBC, and conclude a contract with Akani to replace it. The basis for the attacks was that the termination of NBC and appointment of Akani was tainted by fraud and corruption.

7.3.1.2. The candidate found that the previous administrator ("NBC") that sought to review the decisions did not have locus standi based on its own interests to do so, and the interests of justice exception did not apply because the decision under review was taken by a private body and not a public body. The candidate's judgment nevertheless dealt with the termination of the contract with NBC, and he

accepted that there was “*substantial evidence*” of corruption against NBC.

7.3.1.3. The candidate found that 8 members of the pension fund had locus standi to bring the application. However, he declined to interrogate the evidence of corruption against Akani because the FSCA was conducting a parallel investigation into the claims. The candidate relied on the principle of the separation of powers to defer to those investigations by the FSCA, rather than engage with the evidence himself. The candidate also found that 3 accused members that received cash benefits from an entity related to Akani, NFS (which has the same directors and shareholders), were not conflicted because NFS was not awarded the contract, but rather Akani. The application was therefore dismissed for these reasons.

7.3.1.4. On appeal to the Full Court, it was common cause that the accused members, who were involved in the decisions to terminate the services of NBC and appoint Akani, received cash payments from NFS, and that NFS was an entity related to Akani. The main issue before it was whether those payments constituted bribes in the course of a corrupt relationship. It highlighted that the 5 accused members received cash payments from NFS one week after Akani was appointed, and within 4 minutes of one another. The cash payments to 3 accused members were alleged to be benefits from the death of respective family members

(within 1 week of each other); under the same funeral policy with the NFS that it was not licenced to offer; coincidentally concluded independently with NFS in April 2019. The Full Court found that any suggestion that this was merely coincidence was so far-fetched that it could be rejected on the papers. It found that the candidate should have rejected the versions of the accused members and Akani, and confirmed that the termination of NBC and the appointment of Akani was therefore tainted with fraud and corruption.

7.3.1.5. The candidate was criticised for not interrogating this evidence and instead deferring the dispute to the authorities investigating the matter. With reference to two decisions of the SCA, the Full Court found that a court is obliged to determine a material dispute before it, regardless of whether it is being investigated by another body of agency. The candidate was also criticised for his finding that the NBC did not have legal standing, given the allegations of fraud and bribery which involved the termination of its contract.

7.3.1.6. The candidate's judgment was overturned, the impugned decisions were reviewed and set aside, and two of the accused members (the third having died during the course of the litigation) were removed as trustees of the pension fund.

7.3.2. *Capitec Bank Holdings & Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA):*

7.3.2.1. An urgent application came before the candidate to compel Capitec to give its consent for the sale of Capitec shares by Coral to a third party. Capitec had previously refused to consent to the sale on the basis that they should only be sold to a qualifying black person, failing which Coral had to acquire an equal number of shares pursuant to the subscription agreement.

7.3.2.2. The candidate found that Capitec's refusal to give its consent to the sale of the shares by Coral was in breach of its contractual and common law duties of good faith and reasonableness. The candidate granted the relief sought in the urgent application and ordered Capitec to give its consent to the sale of the shares within 2 days. The candidate subsequently refused Capitec leave to appeal the orders.

7.3.2.3. The Supreme Court of Appeal granted leave to appeal the candidate's order. The central issues were whether Capitec's consent was required for the sale of the shares, and if so, did Capitec owe duties of good faith and reasonableness to Coral, which it breached by failing to provide consent.

7.3.2.4. On appeal, the candidate was criticised for failing to properly consider the text of the subscription agreement, as

required by the well-established test in, *inter alia*, *Endumeni*, before embarking on the enquiry into good faith and reasonableness. The Supreme Court of Appeal found that, based on both a plain reading and considering the context of the relevant clause in the subscription agreement, Coral did not require Capitec's consent. The subscription agreement only imposed conditions on Coral in the event the shares were sold to a person who does not comply with the BBBEE Act.

7.3.2.5. The Supreme Court of Appeal also considered Capitec's good faith obligations. It held that “[in] sum, the ambitious efforts to use the concept of good faith to re-engineer the subscription agreement so as to require Capitec Holdings' consent and then to find Capitec Holdings wanting for failing to give it cannot prevail.”

7.3.2.6. The Supreme Court of Appeal noted that the candidate incorrectly relied on his minority judgment in *Atlantis Property Holdings CC v Atlantis Excel Service Station CC (Atlantis Property)* as authority for his finding that the doctrine of good faith required Capitec's consent. The candidate failed to apply the principle of *stare decisis*.

7.3.2.7. During the candidate's interviews in 2021 and 2022 for a position at the Constitutional Court, he was asked to comment on his judgment in Capitec being overturned on appeal. The candidate maintained that his judgment was

correct and referred to the tension between the Supreme Court of Appeal and the Constitutional Court on the issue.

7.3.2.8. In the candidate's second interview for a position at the Constitutional Court, the candidate advised that this decision is in the process of being appealed to the Constitutional Court. The Constitutional Court website does not indicate where in the process that appeal is.

7.3.3. *De Beer v S* 2018 (1) SACR 229 (SCA):

7.3.3.1. The candidate sat as a court of appeal of the appellant's conviction of rape in the regional court. He was sentenced to 15 years' imprisonment, 5 of which were suspended. The appellant did not appeal against his sentence, but he was notified that the court was considering increasing the sentence if the conviction was upheld.

7.3.3.2. The candidate, sitting with Siwendu J, dismissed the appeal and increased the sentence to life imprisonment, on the basis that the court of first instance had not provided any logical reason to depart from the minimum sentence of life imprisonment. The Supreme Court of Appeal granted the appellant special leave to appeal against the order by the candidate and Siwendu J.

7.3.3.3. The main issue before the Supreme Court of Appeal was whether the adjusted sentence of life imprisonment was disproportional to the crime, given that the crime would

previously have been classified as indecent assault and would have attracted a much lighter sentence. The candidate and Siwendu J were criticised for focusing primarily on the minimum sentence, but without giving proper consideration to the proportionality of the sentence to the crime, the appellant and the legitimate needs of society.

7.3.3.4. After considering the aggravating and mitigating factors, the Supreme Court of Appeal both concurring judgments determined the life imprisonment imposed by the candidate and Siwendu J was disproportional to the crime committed. The concurring judgement of Bosielo JA stated additionally that the sentence induced a sense of shock, and the candidate, together with Siwendu J, should not have interfered with the original sentence. The candidate's judgment was overturned.

7.3.4. *South African Municipal Workers Union & Others v Mokgatla*
2016 (5) SA 89 (SCA):

7.3.4.1. The candidate dismissed a special plea that the High Court lacked jurisdiction to entertain the dispute to determine whether a trade union failed to comply with its own constitution in both suspending and expelling certain of its members and terminating their employment with the trade union as the Labour Relations Act (LRA) conferred exclusive jurisdiction on the Labour Court.

7.3.4.2. The Supreme Court upheld the appeal, holding that the candidate had failed to follow the fundamental guiding principles laid down by the Constitutional Court in two decisions which determined the jurisdiction of the courts under the LRA.

7.3.5. *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA):

7.3.5.1. This case dealt with the doctrine of fictional fulfilment relating to a sale of property agreement, and the status of affidavits in trial proceedings.

7.3.5.2. The candidate allowed a witness to read extensively from his affidavit when giving oral evidence in a trial. The candidate held that those affidavits read into the record were proper evidence before the trial court. The candidate also found that the requirements for the doctrine of fictional fulfilment had been met.

7.3.5.3. The Supreme Court of Appeal disagreed with the candidate on these two issues and overturned his judgment. With regard to the issue relating to the doctrine of fictional fulfilment, the Supreme Court of Appeal found that it had not been established that the appellant intended to frustrate the condition contained in the contract, and the doctrine therefore did not apply. On the issue of the evidentiary value of affidavits in trial proceedings, the Supreme Court of Appeal found that they had no probative value except

for purposes of cross-examination and as proof of admissions.

7.3.5.4. The candidate was criticised for the manner in which the trial was conducted and, more specifically, for allowing the witness to read extensively from his affidavit.

7.4. The candidate refers to the following judgments that were upheld on appeal:

7.4.1. *Tridevco (Pty) Ltd v Zenprop Property Holdings (Pty) Ltd* 2018 JDR 1531 (GP):

7.4.1.1. This dispute pertained to a review under PAJA of a decision by the municipality to approve an application to establish and develop a township. The review was brought after 180-day period provided for in PAJA. The candidate held that the applicant did not properly apply or motivate for an extension of the period within which to bring the review. The candidate dismissed the application accordingly.

7.4.1.2. The candidate has not provided the citation upholding this judgment on appeal, and the reviewers have not been able to locate any. Counsel involved in this matter confirmed that special leave to appeal was declined by the Supreme Court of Appeal. It follows that the candidate's judgment was not overturned on appeal.

7.5. The following judgment by the candidate was taken on appeal, but was struck from the roll:

7.5.1. *Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg 2015 JDR 0674 (SCA):*

7.5.1.1. The appellant appealed to the Valuation Appeal Board against rates that had been levied by the City of Johannesburg. Although the Valuation Appeal Board overturned the valuation by the City, it substituted a valuation of R308 million. The Appellant applied to review and set aside the decision of the Valuation Appeal Board and contended that the correct valuation was approximately R162 million, alternatively requested that the valuation be remitted back to the municipal valuer for reconsideration. The candidate granted the application and remitted the valuation for reconsideration.

7.5.1.2. The appellant applied for leave to appeal against certain findings by the candidate, but not against the order. The appellant was of the view that it was necessary to appeal against the candidate's findings because they would be binding on the parties and the Valuation Appeal Board. The candidate granted the application for leave to appeal directly to the Supreme Court of Appeal.

7.5.1.3. The Supreme Court of Appeal held that the candidate's findings were not binding in the circumstances, and found that the candidate was incorrect to grant leave to appeal

against findings in the first place. It noted that the candidate did not furnish reasons as to why he believed the matter was appealable.

7.6. The judgment of *Eskom Holdings SOC Ltd v Econ Oil & Energy (Pty) Ltd* 2021 JDR 1412 (GJ) as warrants mention:

7.6.1. The candidate granted an application to self-review and set aside the award of a tender by Eskom in favour of Econ.

7.6.2. In arriving at his decision, the candidate relied on the evidence contained in a memorandum prepared by Mr Hewu on behalf of Eskom. The candidate stated that the memorandum was confirmed by a confirmatory affidavit deposed to by Mr Hewu, which was met with a bare denial by Econ. The candidate found that Mr Hewu's evidence in the form of the memorandum constitutes one of the "*primary facts*" towards drawing an inference that a resolution was passed by Eskom. He added that "*[this] fact [of the resolution] must bear weight when scrutinising the outcome of the tender*" because the tender "*trailed the resolution*".

7.6.3. Leave to appeal was denied by the Supreme Court of Appeal.

7.6.4. When the candidate applied for a position at the Constitutional Court in 2021, Econ addressed a letter to the JSC on the basis that Mr Hewu never deposed to a confirmatory affidavit in the above proceedings. An article by Independent Online, published on 21 October 2021 quotes Mr Hewu as stating:

“I never deposed an affidavit in support of Eskom’s review application pertaining to Bid Corp 4786, the fuel oil tender award. I was surprised when I read the judgment that made reference to the effect that I submitted a sworn statement.

After reading the judgment I sent a text message to Eskom CEO André De Ruyter. He didn’t favour me with a reply. I also sent a text to the attorney at ENSAfrica, Aslam Moosajee, requesting a copy of such an affidavit and his response was that no such affidavit was submitted and that the judge had made an error.”

- 7.6.5. This issue was raised with the candidate during his interview for a Constitutional Court position. The candidate’s response was that he was sure that Mr Hewu did provide a confirmatory affidavit but, even if he was incorrect, the candidate maintained that it was “a minor error blown out of all proportion”. The candidate stated that the article should not be taken seriously.

8. The extent and breadth of the candidate’s professional experience:

- 8.1. The candidate has substantial experience in the High Court, serving as an Acting Judge in 2010, and appointed as a permanent Judge since 2012. The candidate also served as an Acting Judge in the Competition Appeal Court between 2016 and 2018, and as a permanent Judge of that Court from 2018 to present.

8.2. During the candidate's interview in April 2021 for a position at the Constitutional Court the candidate stated that he had not acted in either the Supreme Court of Appeal or the Constitutional Court.

9. The candidate's linguistic and communication skills:

9.1. The candidate's judgments are well-written, clear and concise.

9.2. The candidate's judgments are generally well-reasoned.

10. The candidate's ability to produce judgments promptly:

10.1. Most of the candidate's judgments are delivered timeously, including many that are delivered ex tempore.

10.2. We have come across the following cases that were handed down after the 3-month period:

10.2.1. *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ) - almost 4 months.

10.2.2. *Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg* 2014 (5) SA 485 (GJ) – 3 months, 10 days.

10.2.3. *Nkala v Harmony Gold Mining Co Ltd* 2016 (5) SA 240 (GJ) – approximately 6 ½ months, however, this was a complex full court matter dealing with the certification of a class action).

10.2.4. *Tshuma v Minister of Safety and Security* 2015 JDR 1701 (GJ) – 5 ½ months.

10.2.5. *Pinto v Dimension Data* (Equality Court, Case no. 3/2021) – just under 3 ½ months.

11. The candidate’s ability to conduct court proceedings fairly, efficiently and effectively:

11.1. Postponement of matters:

11.1.1. In the candidate’s interview in April 2021 for a position at the Constitutional Court, a concern was raised with the candidate that the GCB had received a number of negative comments, including two from senior counsel. These complaints related to the manner that the candidate conducts court proceedings, and more specifically, that matters (including urgent matters) were purposefully avoided by standing them down or postponing them.

11.1.2. The candidate rejected the criticisms and stated that the Judge President of his division had not raised those concerns with him; he was unable to respond without proper context or detail; and a letter from Group 16 Advocates distanced themselves from the concerns that had been raised.

11.1.3. In preparing this report, the reviewers received a comment from senior counsel pertaining to a matter that came before the candidate in October 2018. The applicant in that matter applied to have an arbitral award made an order of court. Counsel for the applicant presented argument. During the respondent’s argument, respondent’s counsel sought to rely on a case not

referred to in his heads of argument and handed up a copy of the judgment. The candidate took an adjournment to consider the matter. When he returned, he postponed the matter *sine die* instead of either considering the judgment during the adjournment, or after argument in the matter when deliberating his judgment. The matter subsequently came before Mr Justice Tsoka who granted the application on the basis that the respondent's defence was frivolous and vexatious.

11.1.4. Other members, including senior counsel, of the Johannesburg Society of Advocates ("the JSA") have submitted comments indicating that they have not had such experiences before the candidate, and would distance themselves from the above comments.

11.2. The candidate's temperament:

11.2.1. Previous reviews have stated that the candidate is reported to be abrupt and discourteous with counsel at times. The candidate responded to these criticisms in the April 2022 interview by recording that his court was intellectually challenging and that may be the reason for the discomfort by certain counsel.

11.2.2. Other members of the JSA do not agree with the adverse comments on the candidate's temperament, and record that there is no evidence that the candidate's approach to counsel affects the fairness of the hearing received by the parties.

- 11.2.3. Concerns that the candidate may appear abrupt or discourteous at times is not limited to counsel appearing in his court. A synopsis by ‘Judges Matter’ on the candidate’s interview in April 2018 for a position at the Competition Appeal Court recorded

“When it was Davis’ turn to question Vally the interview soon descended into an unedifying series of bickering, interruptions, allusions to some previous disagreements over cases they may have heard together, and shout downs. At one point Vally accused Davis of acting immaturely in the interview: “You sometimes distract me with your facial expressions,” he said when trying to answer a question.”

12. The candidate’s independent mindedness:

- 12.1. The candidate is undoubtedly independently minded. This is apparent from his minority judgments in the matter before the Competition Appeal Court of *Isipani Construction (Pty) Ltd v The Competition Commission*.
- 12.2. The candidate has not shied away from delivering judgments that have attracted criticism from political quarters. One example is his judgment in *Democratic Alliance v President of South Africa* 2017 (4) SA 253 (GP), which compelled the President to provide reasons and the record for reshuffling cabinet. Another example is the matter of *Democratic Alliance v The Minister of International Relations & Co-Operation* 2018 (6) SA 109 (GP), which held that the spouse of a head of state does not enjoy diplomatic immunity.

13. **The candidate's administrative ability (other than in relation to court proceedings):**

13.1. There is nothing to suggest that the candidate does not possess good administrative ability.

14. **The message that the candidate's appointment would send to the public at large:**

14.1. The candidate's unwavering determination to exercise an independent mind and not submit to the will of the majority would send a positive message. Considered minority decisions are the exception in South African jurisprudence and play an important role in the development of the law. Such a role is critical in the Supreme Court of Appeal to which the candidate seeks appointment.

14.2. The candidate's sometimes disregard for binding nature of precedent and in particular his reliance on his own decisions is concerning. Even if the candidate has sound reason for disagreement with the higher courts decision and articulates this in the judgement, precedent is binding. Failure to follow precedent may be interpreted by the public as a disregard for the rule of law.

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

1. Reported judgments:

- 1.1. *Eskom Holdings SOC Ltd v Econ Oil & Energy (Pty) Ltd* [2021] 2 All SA 507 (GJ) – leave to appeal declined by the Supreme Court of Appeal
- 1.2. *Atlantis Property Holdings CC v Atlantis Exel Service Station CC* [2019] 3 All SA 441 (GJ)
- 1.3. *Isipani Construction (Pty) Ltd v The Competition Commission* [2017] 2 CPLR 542 (CAC)
- 1.4. *Democratic Alliance v Minister of International Relations & Co-operation & Others* 2018 (6) SA 109 (GP)
- 1.5. *Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg* 2014 (5) SA 485 (GJ), criticised by the Supreme Court of Appeal in *Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg* 2015 JDR 0674 (SCA)

2. Unreported judgments:

- 2.1. *Pinto v Dimension Data* (Equality Court Case no. 3/2021, 15 June 2022)

3. Judgments upheld on appeal:

- 3.1. *The Black Eagle Project Roodekrans v The MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government* [2019] 2 All SA 322 (GJ), upheld in *The Black Eagle Project Roodekrans v The MEC: Department of Agriculture,*

Conservation and Environment, Gauteng Provincial Government 2021
JDR 1208 (SCA)

3.2. *Tridevco (Pty) Ltd v Zenprop Property Holdings (Pty) Ltd 2018* JDR 1531 (GP) – special leave to appeal declined by the Supreme Court of Appeal.

4. Judgments overturned on appeal:

4.1. *Coral Lagoon Investments 194 (Pty) Limited v Capitec Bank Holdings Limited 2019* JDR 2457 (GJ), overturned in *Capitec Bank Holdings & Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022* (1) SA 100 (SCA)

4.2. *Ekurhuleni Metropolitan Municipality v Nature's Choice Farms (Pty) Ltd (unreported)*, overturned in *Nature's Choice Farms (Pty) Ltd v Ekurhuleni Metropolitan Municipality 2020* JDR 0500 (SCA)

4.3. *De Beer v S [2016]* All SA 746 (GJ), overturned in *De Beer v S 2018* (1) SACR 229 (SCA)

4.4. *Mokgatla & Others v South African Municipal Workers Union & Others [2014]* JOL 32937 (GJ), overturned in *South African Municipal Workers Union & Others v Mokgatla 2016* (5) SA 89 (SCA)

4.5. *Lekup Prop Co No 4 (Pty) Ltd v Wright (unreported)*, overturned in *Lekup Prop Co No 4 (Pty) Ltd v Wright 2012* (5) SA 246 (SCA)

4.6. *SFF Association v Xstrata South Africa (Pty) Ltd 2011* JDR 0407 (GSJ), overturned in *Xstrata South Africa (Pty) Ltd & Others v SFF Association 2012* (5) SA 60 (SCA)