CONSTITUTIONAL COURT OF SOUTH AFRICA

Independent Community Pharmacy Association v Clicks Group Ltd and Others

CCT 11/22

Date of judgment: 28 March 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 28 March 2023, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal (SCA). The application was brought by the Independent Community Pharmacy Association (ICPA), on behalf of its members, the latter being the independently owned community pharmacies. It was brought against Clicks Group Limited (Clicks Group), New Clicks South Africa (Pty) Limited (New Clicks), Unicorn Pharmaceuticals (Pty) Limited (Unicorn), Clicks Investments (Pty) Limited (Investments) and Clicks Retailers (Pty) Limited (Retailers) (hereinafter collectively referred to as "the Clicks Entities"). The sixth to eight respondents are the Minister of Health, the Chairperson of the Appeal Committee established in terms of section 22(11) of the Act (Appeal Committee), and the Director-General (DG) of the Department of Health (Department).

The matter turned on whether the expression "beneficial interest" in regulation 6 of the Ownership and Licencing of Pharmacies (Ownership Regulations), promulgated in terms of sections 22 and 22A of the Pharmacy Act 53 of 1974 (Act), includes a shareholding in a company that owns a pharmacy business. The foremost issue was whether the group corporate structure of the Clicks Entities contravened that regulation.

The application resulted from a complaint lodged by the ICPA against the Clicks Entities with the Department in May 2016. Based on the corporate group structure of the Clicks Entities, that complaint alleged that Retailers and Unicorn had direct or indirect

beneficial interests in one another. It contended that Unicorn's manufacturing pharmacy licence and Retailers' community pharmacy licences, issued after 30 May 2012, had been granted in contravention of section 22A of the Act read together with regulation 6(d) of the Ownership Regulations. It requested the Department to revoke those licences. In January 2017, the Deputy Director-General (DDG) rejected the complaint by finding that Retailers and Investments did not have a beneficial interest in each other. The ICPA appealed against the DDG's decision before the Appeal Committee in terms section 22(11) of the Act. It changed its complaint to allege that Clicks Group, New Clicks, and Investments contravened regulation 6(d), submitting that the crux of its complaint was that the corporate group structure of the Clicks Entities contravened regulation 6. The Appeal Committee dismissed the appeal, finding that the shareholder of a company cannot be said to have a beneficial interest in the company's assets.

Aggrieved, ICPA approached the High Court of South Africa, Western Cape Division, Cape Town (High Court) to review and set aside the decisions of the DDG and the Appeal Committee. The High Court reviewed and set aside both decisions, having concluding that they were based on a material error of law. It found that "beneficial interest" in regulating 6 included an interest held through a shareholding in a company that owns a pharmacy business, and that the Clicks Entities had consequently contravened that regulation. The Clicks Entities appealed against the decision of the High Court to the SCA. The majority judgment of the SCA upheld the appeal. The SCA minority judgment agreed with the High Court's decision.

The ICPA then approached this Court with the present application for leave to appeal against the majority judgment of the SCA. In this Court, the parties made extensive submissions on the pertinent issues raised in this matter. These submissions are addressed, where relevant, in the below summaries of the judgments by the Court in this matter.

The first judgment, penned by Majiedt J (Maya DCJ, Baqwa AJ and Tshiqi J concurring), which is the minority judgment, held that the Court has jurisdiction to entertain the matter and that it is in the interests of justice to hear the application. The first judgment viewed the issues as follows. The first issue concerns whether the DDG and the Appeal Committee had the power to revoke the manufacturing pharmacy licence held by Unicorn and the community pharmacy licences held by Retailers. Related to this is the issue of the change of ICPA's complaint and the consequences thereof for the review application. The second is the proper approach to interpreting regulation 6(d) of the Ownership Regulations. In particular, the interpretation of the expression "beneficial interest" in that regulation. The third concerns whether a shareholder of a company can be said to have a beneficial interest in the assets owned by the company. The fourth pertains to ICPA's conditional constitutional challenge to section 22A of the Act. The last concerns costs.

On the first issue, the first judgment notes that the ICPA's original complaint before the DG was that Unicorn and Retailers had direct or indirect beneficial interests in each other and that that state of affairs was inconsistent with regulation 6(d). Consequently, it requested the DG to revoke the companies' licences. The first judgment noted, however, that the ICPA's complaint changed before the Appeal Committee. Specifically, from one aimed at Unicorn and Retailers to one aimed at their holding companies (Investments, New Clicks and Clicks Group) that were then alleged to be the transgressors of regulation 6(d). The first judgment noted further that, despite the change in respect of its cause of action, the ICPA's claim remained one for the revocation of the licences held by Unicorn and Retailers. The first judgment held that the ICPA's change of course is no trifling matter. It held that what was before the High Court was a review of the decision of the DDG, as confirmed on appeal to it by the Appeal Committee. In a review, the question of whether a functionary exercised a power it did not have goes to the legality of that decision. This is a fundamental question that forms the foundational ground of review enshrined in the Promotion of Administrative Justice Act 3 of 2000 and the principle of legality. Absent a power to revoke Unicorn and Retailers' licences, the first judgment held that the DDG's decision dismissing ICPA's complaint, as confirmed by the Appeal Committee, was unassailable and the review application had to fail.

On the question whether the DG had the power to revoke Unicorn and Retailers' licences, the first judgment held that there is no such power. It held that, even if there was a contravention of regulation 6(d), neither the Act nor the Ownership Regulations grant the DG the power to revoke Unicorn and Retailers' licences in the circumstances. In particular, it held that neither sections 22(7) and (10) nor regulations 9(a) and (c) granted the DG that power.

Regarding the change in the ICPA's complaint, the first judgment held that the new complaint was directed at the Clicks Entities corporate structure. However, neither the Act nor the Ownership Regulations contain any prohibition against a group structure of the type encountered in the present case. It held that the relevant legislative prescripts in the Act and the Ownership Regulations are directed at persons, natural and corporate, not group structures. Consequently, where the revocation of the licences held by Unicorn and Retailers is sought, the enquiry must be whether Unicorn or Retailers breached their licence conditions.

On the question whether Unicorn is in breach of its licencing conditions, the first judgment held that the ICPA's attack against Unicorn was directed at its alleged contravention of regulation 6(d). It held that Unicorn, however, holds a manufacturing licence which is subject to regulation 2, as opposed to regulation 6. Thus, Unicorn cannot violate regulation 6(d). On the question whether Retailers is in contravention of regulation 6(d), the first judgment held that the ICPA failed to demonstrate that Retailers failed to satisfy the ownership requirements contained in regulation 6(d). Having concluded that neither Unicorn nor Retailers were in contravention of the regulations, the

enquiry had to turn to whether Investments, New Clicks or Clicks Group contravened regulation 6(d). The answer to this question required a resolution of the second issue.

On the second issue, being the proper interpretation of regulation 6(d) and its use of the expression "beneficial interest", the first judgment held that it is important to first set out the applicable principles to interpreting such regulations. When interpreting regulations made in terms of empowering legislation, *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC) and *Moodley v Minister of Education and Culture, House of Delegates* 1989 (3) SA 221 (A) make it clear that the point of departure ought to be the empowering provision and that the interpretation of the regulations must occur within the purview of the empowering provision.

In respect of section 22A, the first judgment held that it is clear from the text that the word "own", and the concept of ownership, is central to that section. Before proceeding to interpret the terms "own" and "ownership", it noted that it is worth remembering the rule that states that where the context in which a word appears is a technical legal one and the word is a legal term of art, or has acquired a technical meaning in legal nomenclature, it should be accorded that meaning. Furthermore, where a word is used in a statute which, in terms of the common law (which includes frequent usage in case law), has a particular legal meaning, it is presumed that the word bears that technical legal meaning. Thus, where a word or term has acquired a base legal meaning, which need not be comprehensive, and that word or term is used in a statute or regulation, then it must be given that base legal meaning. The first judgment held that the term ownership has acquired a base legal meaning and thus has to be accorded that meaning.

The first judgment held that, in our law, ownership is the real right that confers the most complete or comprehensive control over a thing and it entitles the owner to do with his or her thing that which he or she is legally entitled or empowered to do, subject to the limitations imposed by law. Furthermore, at the heart of ownership, and what it means to own, is control. In light of the context, purpose and legislative history of section 22A, the first judgment held that section 22A must be interpreted to empower the Minister to prescribe who may own a pharmacy. That is, who may possess the most complete or comprehensive control over a pharmacy, and who may legally have the power, right or entitlement to do with the pharmacy (comprising the pharmacy business, assets, goods, provision of services specifically pertaining to pharmacy practice) as they please, subject to the limitations imposed by law.

Regarding the interpretation of regulation 6(d), the first judgment held as follows. The terms "own" and, by implication, "ownership", and "beneficial interest", are central to regulation 6(d). In interpreting these terms, it is important to remember the principles that apply where a word or term has acquired a base legal meaning. Namely, that it must be accorded that base legal meaning unless the context and purpose indicate otherwise.

The first judgment held that, in the context of section 22A, the words own and ownership are to be given the base legal meaning that they have acquired in law as set out above.

Regarding the meaning of "beneficial interest", the first judgment held that the term beneficial interest, like ownership, has also acquired a base legal meaning and thus has to be accorded that meaning. It held that the concept of beneficial interest has been part of our law since the 1911 case of *The Princess Estate and Gold Mining Co Ltd v The Registrar of Mining Titles* 1911 TPD 1066. There, the Court made it clear that the term is usually used where there is a severance of the interests, rights, entitlements or powers that constitute full ownership. The first judgment, after a discussion of how the term is used in other areas of law (such as trusts and the Companies Act 71 of 2008) and after exploring several legal definitions of the term found in law dictionaries, concluded that the term beneficial interest has, in our law, been used to refer to a situation where there is a severance of interests, rights entitlements or powers. An analysis of the different areas of law reveals that the severance of interests is different in different areas of law. In the context of trusts, for example, a beneficial interest exists where the beneficiary has a legal right or entitlement to the fruits of the trust property, whereas in the context of company law a beneficial interest can exist where a person only has the legal right or entitlement to control the voting rights associated with a company's issued securities. In light of the purpose of the provision and the mischief sought to be averted, the first judgment holds that a beneficial interest would exist, for the purposes of the Ownership Regulations, where a person has a right or entitlement to control a pharmacy.

This being the case, the first judgment asks if a shareholder can be said to have a beneficial interest in the assets of the company? The first judgment held that shareholding, on its own and without more, does not give rise to a severance of interests in respect of the assets of the company and, consequently, a shareholder does not, without more, have a beneficial interest in the assets of the company.

The first judgment disagreed with the second judgment's interpretation of regulation 6(d) in several respects. In particular, it disagreed with the second judgment's holding that shareholding gives rise to a beneficial interest for the purposes of regulation 6. First, the first judgment disagreed with the second judgment's approach to interpreting regulation 6(d). It held that the second judgment should have commenced with an interpretation of section 22A to ascertain the ambit and scope of section 22A and, thus, the lawful boundaries of the Minister's powers under section 22A. The first judgment held that the failure to do so led the second judgment to overlook the confines of the Minister's powers which, in turn, led to a failure on the second judgment's part to fully appreciate the risk of the regulations being *ultra vires* if interpreted in a manner that is blind to section 22A.

Second, the first judgment disagreed with the second judgment's approach to interpreting the term beneficial interest and its holding that the term beneficial interest encompasses

or includes the interest conferred by shareholding. It took issue with the fact that the second judgment, instead of acknowledging and applying the base legal meaning of the term, chose to adopt and apply common or general definitions of the words "beneficial" and "interest", and thereafter endeavoured to formulate a new meaning for the term.

Third, the first judgment questioned the authority that the second judgment sought to rely on as support for the meaning it ascribed to the term beneficial interest (that is, that the term includes an interest conferred by shareholding). The second judgment relies primarily upon the following: general or common, as opposed to legal, dictionary definitions of the words "beneficial" and "interest"; the definition of "beneficial" adopted in *EBN Trading (Pty) Ltd v Commissioner of Customs and Excise* 2001 (2) SA 1210 (SCA) (*EBN Trading*); and the definition of "interest" adopted in *Stellenbosch Farmers' Winery Limited v Distillers Corporation (SA) Limited* 1962 (1) SA 458 (A) (*Stellenbosch Farmers' Winery*) and in the Australian case of *Attorney General for the State of NSW v Now.com.au Pty Ltd* [2008] NSWSC 276 (*Now.com.au*). The first judgment held that none of the cases relied upon by the second judgment support, fully or at all, the second judgment's interpretation.

The fourth point of disagreement pertains to the overall interpretation preferred by the second judgment. The first judgment held that the interpretation preferred by the second judgment renders the provision *ultra vires* and irrational. The interpretation renders the provision *ultra vires* because section 22A, as indicated above, only empowers the Minister to prescribe who may own a pharmacy and not who may own shares in a company that owns a pharmacy. On the point of rationality, it held that if it is accepted that section 22A and regulation 6 are concerned with who may legally exercise control over a community pharmacy (with the view to protecting patients' interests), then the second judgment's interpretation is irrational because shareholders of a company cannot, in law, control the assets of the company (which include businesses run by the company). Proscribing shareholding would be irrational because the means chosen to achieve the purpose of the provision would not be capable of doing so.

Fifth, the first judgment noted that, contrary to what the second judgment held, the interpretation adopted by the second judgment is not the panacea of the ills that are alleged to arise from the first judgment's interpretation. This is because, on the second judgment's interpretation, the Clicks Entities' current structure would potentially be in violation of regulation 6(d). On that interpretation, Investments would be a holder of a direct beneficial interest in Retailers' community pharmacies. Its shareholder, New Clicks, would have a direct beneficial interest in a manufacturing pharmacy owned by Unicorn by being its shareholder. However, the Clicks Entities would only have to insert a company between Investments and Retailers to comply with regulation 6(d). Investments would become a holder of an indirect beneficial interest, with the effect that the conditions imposed in regulation 6(d) would not apply to it, nor would it apply to New Clicks and Clicks Group. In the light, the first judgment held that each approach

potentially faces challenges, most of which are a product of the poor drafting of the Ownership Regulations.

On the question whether any of the companies within the Clicks Entities' corporate structure contravene regulation 6(d) as interpreted, the first judgment held that none of the companies are in contravention of regulation 6(d) because none of the companies have the legal entitlement, right or power to control the pharmacies owned by Unicorn and Retailers respectively.

As the first judgment found against the ICPA on the interpretation point and the question of whether the Clicks Entities are in contravention of regulation 6, the enquiry turned to the ICPA's conditional constitutional challenge of section 22A. The first judgment concluded that there is no merit in ICPA's constitutional challenge because section 22A does not limit section 27 of the Constitution. This is because the points advanced by ICPA as indicative of the State's failure to take reasonable measures to ensure that patients have access to quality and affordable medicines, do not arise from any inadequacies found in section 22A but rather arise from the Minister's lack of appreciation of his powers under section 22A and his failure to utilise them fully. As such, the first judgment held that ICPA has failed to satisfy the Court that section 22A limits section 27 of the Constitution and, consequently, the constitutional challenge must fail.

In conclusion, the first judgment held that the DDG was correct in dismissing ICPA's complaint on the basis that there was no contravention of regulation 6(d) and the Appeal Committee correctly dismissed the appeal against that decision. Had the first judgment commanded the majority, it would have granted leave to appeal but dismissed the appeal with costs.

The second judgment, which is the majority judgment, penned by Rogers J (Zondo CJ, Kollapen J, Madlanga J and Mbatha AJ concurring), agreed that this matter engages the Court's jurisdiction and that leave to appeal should be granted. However, it disagreed with the first judgment's conclusion that the appeal should be dismissed.

The second judgment identified this matter as turning on the interpretation of "beneficial interest" in the opening part and paragraph (d) of regulation 6 of the Ownership Regulations. It agreed with the first judgment's point that "ownership" and "beneficial interest" in regulation 6 are distinct concepts. However, as a result, the second judgment found that the first judgment's interpretation does not avoid the supposedly *ultra vires* interpretation of the second judgment. In other words, it does not dispose of the problem that section 22A only empowers the Minister to prescribe who may "own" a pharmacy. The second judgment reasoned that the first judgment essentially prefers its interpretation for being less *ultra vires*. Despite *ultra vires* not being a matter

of degree, it observed that the first judgment's interpretation is thought to be closer to "ownership" than the second judgment's interpretation.

In response to the meaning of "beneficial interest" being equated to that of "beneficial ownership" in the first judgment, the second judgment cautioned that the expression "beneficial owner" is imprecise in South African law. The precise rights of a "beneficial owner" are circumstantial. They are not a species of ownership because our law regards "ownership" as being a real right over a thing, whereas a "beneficial owner" only has personal rights, against the actual owner, entitling them to some or all of the benefits of ownership. Thus, practically, even if an agent takes possession of the thing, the owner is still the owner in the fullest sense. They are not a "beneficial owner", and the agent is not a "nominal owner". To illustrate this argument, the second judgment provided the following examples. First, the registration of land in a person's name is determinative of who owns the land in law. The registered owner remains the owner in law even if the owner has an agreement that the benefits of ownership will pass to another person. While the latter may be called a "beneficial owner", they are not the owner in law. They do not have real rights akin to ownership, instead they only have personal contractual rights against the actual owner. Second, by contrast, the registration of a share is not determinative of its "ownership". "Ownership", used in this context, is understood in the loose sense because a share is a bundle of personal rights against a company that cannot be "owned" in the strict legal sense. Our law regards the party vested with the personal rights comprising the share as its "owner", despite it being registered in name of another party. The nomenclature of "nominee" and "beneficial owner" is a relic of the English law of constructive trusts, which is not a part of our law. Accordingly, it held that the first judgment's interpretation of "beneficial interest" connotes an interest by someone who does not "own" a pharmacy but who has a personal right to claim the benefits of its ownership from its actual owner.

Responding to the first judgment's approach to statutory interpretation, it held that interpretation is a unitary exercise in which a consideration of the "plain meaning" of the words does not take primacy over other considerations, such as the broader context and purpose of the statutory provision. The second judgment held that it considered all relevant factors holistically, prior to setting out the exposition of its interpretation. This included the role of section 22A. Consequently, it held that the first judgment is inapt when criticising it for not starting its exposition with an interpretation of section 22A.

The second judgment found that the purpose of regulation 6(d) is to prevent tempting those in charge of a community pharmacy from prioritising a related manufacturing pharmacy's interests over the best interests of the community pharmacy's patients. It would not have been enacted had the Minister been content to rely on the ethical duties imposed on community pharmacists to avoid such a conflict of interest. The second judgment explained how the exclusion of shareholding in the first judgment's interpretation would allow ownership structures that give rise to the same perverse

incentives as the limited set of structures which the first judgment understands as being prohibited by regulation 6(d). However, the problem is resolved if "beneficial interest" includes an interest conferred by shareholding, and this thus better serves the purpose of the regulation. In support of its interpretation, the second judgment held that "beneficial interest" in paragraph (a) of the same regulation 6 must have the same meaning. If it does not include shareholding, then its purpose of preventing the control of a community pharmacy by a person, prohibited by any legislation from owning or having a beneficial interest in such pharmacy, would be circumvented. Further, if "beneficial interest" in section 13(4) excludes shareholding, a pharmacist that has been removed from the register of pharmacists for improper conduct could own all the shares in a company that owns a community pharmacy. If "beneficial interest" in section 13(4) is semantically capable of including an interest through shareholding, as the first judgment seems to acknowledge may be necessary, it is also capable of having that meaning in the Ownership Regulations.

The second judgment held that the Constitution fortifies its preference for a more generous interpretation. The constitutional injunction on the Court to interpret statutes to give effect to the spirit, purport or objects of the Bill of Rights pulls in the direction of an interpretation which protects community pharmacy clients' constitutional right of access to health care services. Therefore, one which more effectively promotes the preference of their best interests over perverse commercial incentives. Further, the second judgment held that it is artificial, as held in the first judgment, to find that the perverse incentives may only arise where the companies which respectively own a community and manufacturing pharmacy have common directors. Although agreeing that regulation 6 does not prohibit such common directorships, it held that in reality holding companies often exercise significant control over the way their subsidiaries' businesses are conducted. For example, in this matter there is evidence of this, for example that Retailers' pharmacists' performance contracts allegedly incentivised them to maximise sales of Unicorn's medicines.

However, even so, the second judgment held that the first judgment's emphasis on control being essential to having a "beneficial interest" is not justified by the language of regulation 6(d). To give rise to the perverse incentive to promote a manufacturing pharmacy's medicines at a related community pharmacy, a person only needs a financial interest in the manufacturing pharmacy.

In interpreting regulation 6, the second judgment held that an "interest" in a business naturally means a relationship causing a person's fortunes to be affected by the business. A shareholding in a company that owns a pharmacy business is such a relationship, as the value of the shareholding and dividends it yields are determined by the financial performance of the business. The second judgment reasons further held that the notion that a shareholding gives rise to an "interest" in the company's business is not controversial. For example, the Australian case of *Now.com.au* found that shareholding

in a company that owns a pharmacy could in appropriate circumstances contravene a statutory provision prohibiting non-pharmacists from having a "pecuniary interest, direct or indirect" in a pharmacy business. Further, although the Court in *Princess Estate* found that "beneficial interest" should be taken in its "narrowest sense" to exclude shareholding from the particular statutory provision dealt with, it commented that "beneficial interest" was a "difficult phrase". Further, that shareholders may in a certain sense be considered as having such an interest in a company's property, despite having no legal right to that property. Last, a plethora of American case law has interpreted statutory prohibitions against public officials being "interested" in a company that contracts with the public bodies they serve as precluding such public officials from being a shareholder of the contracting company.

The word "beneficial" was further found by the second judgment to speak to an interest which is to the benefit or advantage of its holder. It held that, in general, the purpose of shareholding is to derive benefit from the company's business because of the financial advantage which it confers. Consequently, in the context of shareholding, there is no big difference between an "interest" being called "financial" or "beneficial".

Neither "beneficial interest" nor "beneficial ownership" are terms of art with well-recognised meanings in South African law. The second judgment found that "beneficial interest" in regulation 6 cannot mean "beneficial ownership", as a pharmacy business does not lend itself to nominal holding or nominal ownership. The Act is concerned with actual ownership and not the pretence of ownership. It further held that, to the extent that "beneficial ownership" connotes the true owner in law of the pharmacy business, it is a species of ownership covered by the reference to ownership in the regulation. There can only be one "owner" of assets, not one "nominal owner" and another "beneficial owner". There is also no register of pharmacy businesses which could sensibly permit the distinction between a registered nominal holder of the business and a beneficial owner of the business. Only the true owner of the pharmacy business can apply for is premises to be licensed under section 22A. No other person for whom the licence holder may agree to hold the business can be described as its owner in law.

The use of "direct or indirect" in regulation 6 is also found to not be capable of applying to beneficial ownership. Even if there were a chain of nominees between the pharmacy business and its ultimate owner, there can only be one true owner in law. It is not possible for there to be a direct beneficial owner and then an indirect beneficial owner, as any nominee can only possibly be an agent and there can only possibly be one owner. However, the second judgment held that "direct or indirect" can sensibly qualify an interest in a business other than in the form of ownership. Particularly, in the form shareholding. A shareholder in the operating company can be said to have a "direct beneficial interest" in its business, and the shareholder of the holding company of the operating company can be said to have an "indirect beneficial interest" in the operating company's business.

The second judgment further held that if the first judgment interprets "beneficial interest" to instead mean the that the business actually belongs to the holder, albeit held in the name of a nominee, it would be ignoring instead of interpreting the expression "beneficial interest", as that interpretation would already covered by the regulation's use of "own". Further, absent an *ultra vires* challenge to the Ownership Regulations, the second judgment held that an interpreter cannot decline to give effect to their words out of concern that they may be *ultra vires*. Once it is accepted the first judgment's interpretation does not solves the supposed problem, the second judgment contended that there is every reason to prefer the interpretation adopted by it. The second judgment further provided the following possible answers to the *ultra vires* concern. First, "own" in section 22A could be assigned a broader meaning to include any interest by which a person directly or indirectly reaps the economic benefits of the pharmacy business. Second, the power to regulate arrangements that circumvent the purpose of section 22A, by interposing companies between the ultimate shareholder and the pharmacy business, could be regarded as reasonably ancillary to the express power in section 22A. Third, the Minister's general power to regulate under section 49(1)(q) may be invoked. Last, based on the Minister's power to regulate the conditions for owning a pharmacy, only a modest reorganisation of regulation 6 would be necessary to make "beneficial interest" in its opening part a condition for such ownership.

Although addressing the Clicks Entities' argument as to the supposed absurdity that would result from adopting the ICPA's interpretation, the second judgment concluded that it is unnecessary to address the potential situation of small shareholdings as this matter only concerns 100% shareholdings.

On the merits, the second judgment therefore concluded that "beneficial interest" in regulation 6 includes an interest by way of shareholding. Further, that New Clicks has at all material times had a beneficial interest in Retailers' community pharmacies as well as in Unicorn's manufacturing pharmacy.

The second judgment dealt with the procedural issues raised in this matter as follows. On the issue of the change in the ICPA's original complaint, the second judgment held that the facts of the ICPA's original complaint described the full group structure of the Clicks Entities, as well as manner in which conflicting beneficial interests could come about on ICPA's interpretation of the Ownership Regulations. The ICPA set out the facts that gave a clear picture of "the perversities created by the vertical integration of the Clicks Group". The change in the focus of its complaint before the Appeal Committee is found to not have prejudiced the Clicks Entities, and the change of focus was not contested by the Clicks Entities before the Appeal Committee. Regarding the power of either the Appeal Committee and DG to withdraw pharmacy licences, the second judgment found that, under the Ownership Regulations and the Act, there would have been the power to either withdraw Retailers' manufacturing licenses or to close its

pharmacies if there was found to be a contravention of regulation 6. However, as accepted by ICPA, the second judgment found that the decision on the sanction must be remitted by this Court back to the DDG.

The second judgment thus issued an order that, first, granted the application for leave to appeal; second, upheld the appeal with costs, including costs of two counsel; third, set aside the order of the SCA majority judgment, and substituted it with an order dismissing the appeal to it; and last, that the order that the remittal in paragraph 4 of the High Court's order shall be to the DG of the Department of Health.