CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 11/22

In the matter between:

INDEPENDENT COMMUNITY PHARMACY ASSOCIATION	Applicant
and	
CLICKS GROUP LIMITED	First Respondent
NEW CLICKS SOUTH AFRICA (PTY) LIMITED	Second Respondent
UNICORN PHARMACEUTICALS (PTY) LIMITED	Third Respondent
CLICKS INVESTMENTS (PTY) LIMITED	Fourth Respondent
CLICKS RETAILERS (PTY) LIMITED	Fifth Respondent
MINISTER OF HEALTH	Sixth Respondent
CHAIRPERSON OF THE SECTION 22(11) APPEAL COMMITTEE	Seventh Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT OF HEALTH	Eighth Respondent

Neutral citation:	*Independent Community Pharmacy Association v Clicks Group Ltd and Others* [2023] ZACC 10
Coram:	Zondo CJ, Maya DCJ, Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mbatha AJ, Rogers J and Tshiqi J

Judgments: Majiedt J (minority): [1] to [221]
Rogers J (majority): [222] to [307]

Heard on: 22 September 2022

Decided on: 28 March 2023

Summary: Pharmacy Act 53 of 1974 — section 22A — Ownership of Pharmacies — Regulations relating to the Ownership and Licensing of Pharmacies — regulation 6(d) — Ownership of community pharmacies — meaning of the expression "beneficial interest" — interpretation of subordinate legislation

Pharmacy Act 53 of 1974 — constitutionality of section 22A — section is constitutional

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel.
3. Subject to 4 below, the order of the Supreme Court of Appeal is set aside and replaced with the following order:

   "The appeal is dismissed with costs, including the costs of two counsel."

4. The remittal in paragraph 4 of the High Court's order shall be to the Director-General of the Department of Health (being the third respondent in the High Court and the eighth respondent in this Court).

JUDGMENT

MAJIEDT J (Maya DCJ, Baqwa AJ and Tshiqi J concurring):

Introduction

[1] The issue for determination in this matter is the interpretation of section 22A of the Pharmacy Act[1] (Act) and of regulation 6(d) of the Regulations relating to the Ownership and Licensing of Pharmacies[2] (Ownership Regulations). The Ownership Regulations were promulgated in terms of sections 22 and 22A of the Act to give effect to these sections. The central question before this Court is whether some or all of the relationships in the corporate structure of the Clicks group of companies violate section 22A of the Act, read with regulation 6(d).

Parties

[2] The applicant is the Independent Community Pharmacy Association (ICPA), a registered non-profit company that represents more than 1 200 independently-owned community pharmacies, with approximately 3 500 pharmacists and 20 000 supporting healthcare personnel. The first respondent is Clicks Group Ltd (Clicks Group). The second respondent is New Clicks South Africa (Pty) Ltd (New Clicks). The third respondent is Unicorn Pharmaceuticals (Pty) Ltd (Unicorn). The fourth respondent is Clicks Investments (Pty) Ltd (Investments). The fifth respondent is Clicks Retailers (Pty) Ltd (Retailers).[3] Together, the first to fifth respondents comprise the Clicks group of companies, and for ease of reference they will collectively be referred to as the

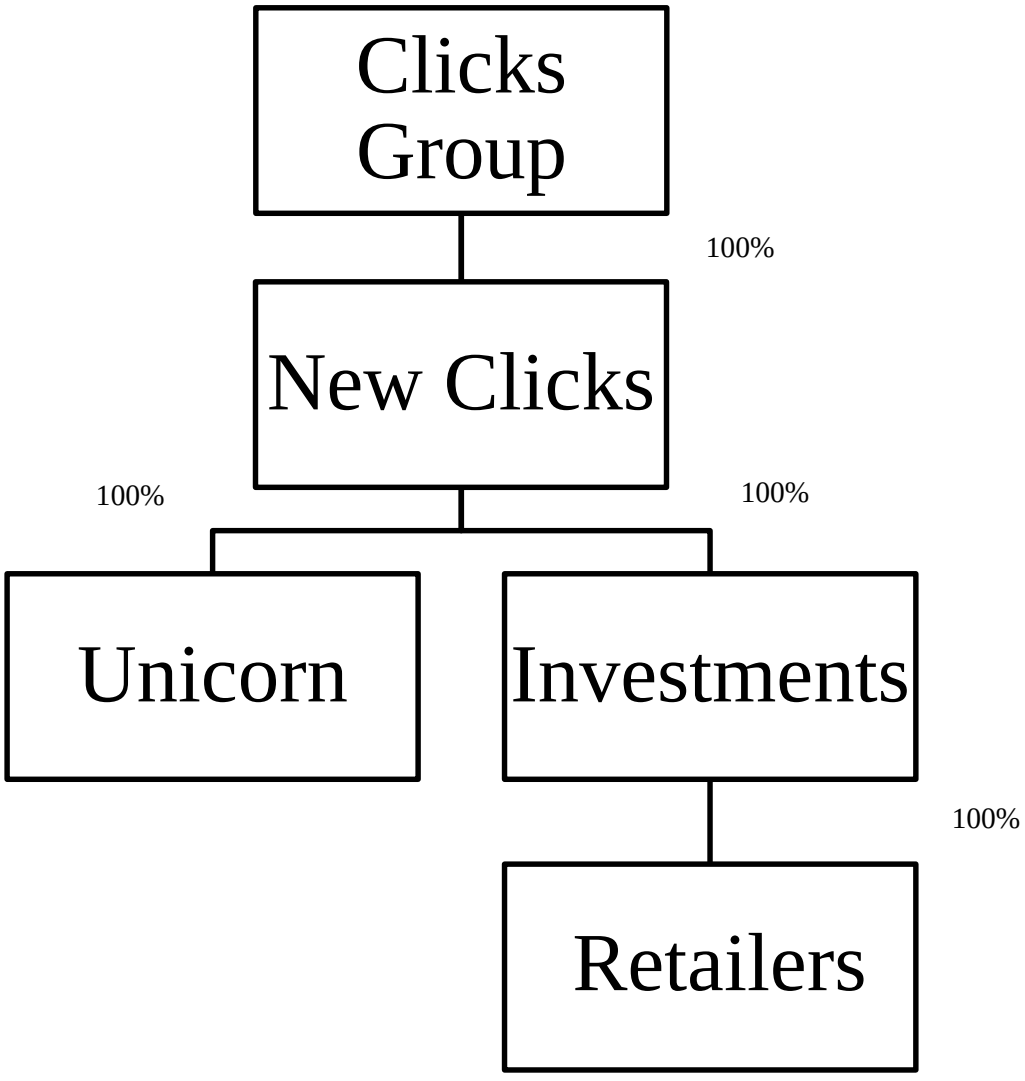
[1] 53 of 1974.

[2] Regulations relating to the Ownership and Licensing of Pharmacies, GN R553 *GG* 24770, 25 April 2003. The erroneous spelling "Licencing" has been corrected for purposes of this judgment. They are defined as "Ownership Regulations" to distinguish them from the Practice Regulations.

[3] Retailers currently operates over 640 community (retail) pharmacies, with over 3000 pharmacy staff (pharmacists and pharmacist assistants) and 200 nursing practitioners.

Clicks Entities. The sixth respondent is the Minister of Health. The seventh respondent is the Chairperson of the Appeal Committee established in terms of section 22(11) of the Act. The eighth respondent is the Director-General of the Department of Health (DG).[4]

[3] The corporate structure of the Clicks group of companies is constituted as follows. The Clicks Group is the holding company and it holds all the shares in New Clicks. New Clicks holds all the shares in Unicorn and Investments. Investments holds all the shares in Retailers. Schematically, it looks as follows:



[4] The role of the DG in the complaint will be explained later.

[4] In the structure, there are only two companies that operate pharmacy businesses, these are Unicorn and Retailers. Unicorn is the holder of a manufacturing licence in terms of section 22C of the Medicines and Related Substances Act[5] (Medicines Act). In 2017 it held the registrations of 39 generic medicines under the regulatory regime that applies to the manufacture, import and sale of medicine. Retailers holds a retail pharmacy licence in terms of section 22(1) of the Act and operates approximately 640 licensed community pharmacies throughout the country.

Factual matrix

[5] On 6 May 2016, ICPA lodged a complaint against the Clicks Entities with the Department of Health. That complaint appears to have been delegated to the Deputy Director-General of the Department (DDG) for decision.[6] It is of some importance to provide details of the complaint. In essence, ICPA's complaint was that "Unicorn and Clicks [Retailers] clearly have direct or indirect beneficial interests in each other". The complaint was unquestionably directed at Unicorn and Retailers. Much emphasis was placed on the concept of a beneficial interest. The complaint was expanded as follows:

(a) Retailers and Unicorn are amongst Clicks Group's subsidiaries and have at the very least indirect beneficial interest in each other;

(b) Unicorn is clearly conducting business as a manufacturer of medicine; and

(c) in terms of the Act and the Ownership Regulations, the Minister has prohibited manufacturers from having a direct or indirect beneficial interest in a retail pharmacy.

[5] 101 of 1965.

[6] ICPA's complaint was lodged with the Department of Health and appears to have been adjudicated by the DDG by virtue of delegated authority, as he was the official who conveyed the decision to ICPA. Section 49A(2) of the Act empowers the DG to delegate some of his powers to, amongst others, the DDG. ICPA says in its papers that it is not clear who made the decision and that it always assumed that it was the DG who took the decision, although nothing turns on this. I proceed on this assumption and the reference to the DG who made the decision must be thus understood.

[6] As redress, ICPA requested the DG to "revoke the manufacturing pharmacy licence of Unicorn as well as the retail pharmacy licences [held by Retailers,] obtained after 30 May 2012, as they were granted on the incorrect facts".[7] The basis for this was that the Clicks Entities contravene section 22A, read with regulation 6(d).

[7] After considering the relevant provisions and the structure of the Clicks Entities, the DG rejected the complaint on 19 January 2017. He took the view that neither Retailers nor Investments could be said to have a beneficial interest in Unicorn and, thus, he could not grant ICPA the redress sought. ICPA appealed against the DG's decision in terms of section 22(11) of the Act.[8]

[8] Although its original complaint made specific reference to the revocation of the licence held by Unicorn and those held by Retailers, before the Appeal Committee ICPA submitted that the crux of the complaint was directed at the corporate structure of the Clicks Entities. The essence of the complaint was that the corporate structure of the Clicks Entities violated section 22A read with regulation 6(d), because it created a situation where companies within the Clicks group corporate structure could have a beneficial interest in community pharmacies while simultaneously having or holding a beneficial interest in a manufacturing pharmacy.

[9] The Appeal Committee, after considering the ratio in *Princess Estate*,[9] held:

> "[I]t is clear that neither Clicks Group, the 100% shareholder of New Clicks, nor New Clicks, the 100% shareholder of Unicorn and Investments, can be said [to] own or have [a] beneficial interest in Retailers' community pharmacies, since a shareholder may never be said to have a beneficial interest in the assets of the company other than

[7] The significance of 30 May 2012 is that on that date Unicorn was granted its manufacturing licence. According to ICPA, it was not lawful as from that date for retail licences to be issued to Retailers.

[8] Section 22(11) of the Act reads:

> "Any person aggrieved by a decision of the Director-General or the council, as the case may be, may within the prescribed period, in the prescribed manner appeal against such decision to an appeal committee appointed by the Minister: Provided that the chairperson of such appeal committee shall be a person appointed on account of his or her knowledge of the law."

[9] *The Princess Estate and Gold Mining Co Ltd v The Registrar of Mining Titles* 1911 TPD 1066 at 1078.

> his/her entitlements to the share of the profits or, in the event that the company is liquidated, to the share of the surplus of the liquidation account."

[10] Thus, according to the Appeal Committee, neither of the referenced relationships within the Clicks Entities violated regulation 6 and it consequently dismissed ICPA's appeal against the DG's decision dismissing its complaint. Aggrieved, ICPA approached the High Court of South Africa, Western Cape Division, Cape Town (High Court) to have the decisions of the DG and the Appeal Committee reviewed and set aside.

Litigation history

High Court

[11] The High Court had to determine the following issues:

(a) Whether ICPA's initial complaint had metamorphosed from one which sought the revocation of the licences held by Retailers and Unicorn on the basis that the companies "clearly have direct or indirect beneficial interests in each other", to one which still sought the revocation of the aforesaid licences but now on the basis that New Clicks, and not Retailers and Unicorn, has a direct or indirect beneficial interest in a community pharmacy and a manufacturing pharmacy. If there was such a metamorphosis, the Court had to determine whether that was fatal to ICPA's review application.

(b) The proper interpretation of regulation 6(d); in particular, whether beneficial interest was to bear the meaning contended for by ICPA or that contended for by the Clicks Entities. ICPA contended that "beneficial interest" included the interest that a shareholder has in the business of the company. The Clicks Entities, on the other hand, argued that a shareholder of a company does not have a beneficial interest in the company's assets.

(c) If it bore the meaning contended for by the Clicks Entities, whether section 22A, the empowering provision, was unconstitutional.

(d) If it bore the meaning contended for by ICPA, whether the Clicks Entities violated the regulation.

Revocation of licences and mutation of complaint

[12] As regards the metamorphosis of the complaint, the High Court rejected the argument advanced by the Clicks Entities that ICPA's complaint before the DG and that before the Appeal Committee were different complaints.[10] It held that, while the complaint before the DG incorrectly stated that Retailers and Unicorn had direct or indirect beneficial interests in each other, when the complaint is read with the relevant annexures it reflected that both entities were held by the Clicks Entities through New Clicks.[11] Therefore, the true "mischief" was reflected in and exposed by the contents of the complaint. As such, there was no obstacle to ICPA's review application.

Interpretation of regulation 6(d)

[13] On the interpretation of regulation 6(d), the High Court held:

> "It would be artificial to contend that a company which owns 100% of the shares in a company does not have a direct or indirect beneficial interest in the business owned and operated by that company. The shareholder appoints directors to the company's board. The board determines what dividend is declared, which is then paid to the shareholder from the funds generated by the business. The proceeds of the winding up of the company go to its shareholder. The shareholder thus clearly has a beneficial interest in the business owned by the company."[12]

[10] *Independent Community Pharmacy Association v Minister of Health*, unreported judgment of the Western Cape High Court, Cape Town, Case No 11647/18 (3 June 2020) at paras 44-5.

[11] Id.

[12] Id at para 18.

[14] The High Court held that the interpretation contended for by the Clicks Entities would frustrate the purpose of the prohibition.[13] It held that an entity having interests in both types of pharmacies would gain financially if the manufacturing pharmacy's products were promoted by the pharmacists in the community pharmacies over products manufactured by rival manufacturers.[14]

Beneficial interests within the Clicks Entities corporate structure

[15] In light of the above, the Court concluded that:

> "[Investments] has a beneficial interest in community pharmacies through its 100% shareholding of [Retailers], which owns community pharmacies, and the shareholder of [Investments], being [New Clicks], has a direct or indirect beneficial interest in the form of shareholding in [Unicorn], which owns a manufacturing pharmacy.
>
> [New Clicks] has a beneficial interest in community pharmacies through its 100% shareholding in [Investments] which, in turn, has a 100% shareholding in [Retailers], which owns community pharmacies, and its direct or indirect beneficial interest in the form of shareholding in [Unicorn], a manufacturing pharmacy."[15]

[16] The High Court thus found shareholding to amount to a beneficial interest and, consequently, held that the Clicks Entities violated regulation 6(d). As a result, the Court concluded that the Appeal Committee's decision amounted to a material error of law and both the decisions of the DG and Appeal Committee fell to be reviewed and set aside.

Constitutional Challenge

[17] The primary basis for ICPA's constitutional challenge was that section 22A impermissibly limits a patient's rights to have access to quality and affordable medicines as entrenched in section 27(1)(a) of the Constitution. Another attack on the

[13] Id at para 27.

[14] Id at paras 29-30.

[15] Id at para 53.

constitutionality of section 22A was that the interpretation contended for by the Clicks Entities, and endorsed by the majority in the Supreme Court of Appeal, would lead to arbitrariness and offend the rule of law entrenched in section 1(c) of the Constitution, because it would only apply if specific owners of community pharmacies apply to obtain licences of manufacturing pharmacies but not if that owner interposes a legal person between it and the community or the manufacturing pharmacies.

[18] Having found that the Appeal Committee's finding was incorrect, the High Court held that it became unnecessary to decide the constitutional challenge to the validity of section 22A. The High Court granted leave to appeal to the Supreme Court of Appeal.

Supreme Court of Appeal

[19] Before the Supreme Court of Appeal, the appeal turned on three main considerations, namely (a) the revocation of the licences; (b) what constitutes a "beneficial interest" for the purposes of regulation 6(d) and; (c) the constitutional challenge to section 22A. In a 4:1 split decision, that Court upheld the appeal.[16]

Supreme Court of Appeal majority judgment

Revocation of licences and mutation of complaint

[20] The majority judgment found that ICPA's submission that there was no change in the original complaint was unsustainable.[17] It found that ICPA failed to adduce evidence that Unicorn and Retailers did not comply with licensing conditions as required by the Act and Ownership Regulations.[18] The majority held that, in terms of the Act and the Ownership Regulations, a licence may only be cancelled, suspended or withdrawn after the licence holder has been afforded a full and proper opportunity to

[16] *Clicks Group Ltd v Independent Community Pharmacy Association* [2021] ZASCA 167; [2022] 1 All SA 297 (SCA) (Supreme Court of Appeal judgment). Mathopo JA penned the majority judgment (Petse AP, Plasket J and Kgoele AJA concurring) and Makgoka JA the minority judgment.

[17] Id at para 20.

[18] Id at para 21.

explain why the licence in question should be cancelled or suspended.[19] It found that neither Unicorn nor Retailers had been afforded such an opportunity. It also held that the entire process offended the principle of legality because the DG had no power to review complaints relating to the revocation of the licences.[20]

[21] Ultimately, the majority judgment found that ICPA's complaint was without merit and that—

(a) Unicorn and Retailers did not contravene regulation 6(d);

(b) the DG did not have the power to revoke the licences; and

(c) the High Court erred in not distinguishing the complaints against Unicorn and Retailers on the one hand, and the complaint against the Clicks Entities on the other.[21] As a result, the High Court failed to recognise that the dismissal by the Appeal Committee was lawful.[22]

Interpretation of regulation 6(d)

[22] The majority judgment held that the concept of beneficial interest is derived from English law and that it connotes the interest held by someone who is not the legal owner of a thing but has a legal right to the benefits of ownership.[23] It invoked *Princess Estate*[24] in this regard. As further authority, the majority judgment also referred to the judgment of the House of Lords in *Macaura*[25] where it was held "no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein".[26]

[19] Id at para 22.

[20] Id.

[21] Id at para 22.

[22] Id.

[23] Id at para 23.

[24] *Princess Estate* above n 9.

[25] *Macaura v Northern Assurance Company* [1925] AC 619. The reference in the Supreme Court of Appeal is recorded as "*Macaura v Northern Assurance Company* [1952] AC 619". This may have been a clerical error.

[26] Id at 626.

Beneficial interests within the Clicks Entities corporate structure

[23] After considering the relevant authorities and applying them to the facts, the majority judgment held:

> "[T]he structure of the Clicks [Entities] represents separate and different juristic persons. New Clicks has no beneficial interest or control of the assets of Retailers, which assets are mainly Clicks Pharmacies. Consequently, New Clicks cannot exercise the rights that derive from Retailers' community pharmacy licence. There is no evidence and neither has any been adduced by the ICPA that because New Clicks is a 100% shareholder of Unicorn, it gives instructions to the staff employed by Retailers on the benchmarks to be achieved in terms of minimum percentage of Unicorn products sold.
>
> It is equally not correct to contend that because New Clicks holds shares in Unicorn or Retailers, they have a beneficial interest in the underlying pharmacies owned by them. It is clear that New Clicks and Clicks Group do not own a community pharmacy or retail pharmacy and thus do not contravene regulation 6(d). Any suggestion that, by virtue of their shareholding in Retailers and Unicorn, they or their shareholders have a beneficial interest in a community pharmacy, or that they have a direct or indirect beneficial interest in a manufacturing pharmacy, is misplaced."[27]

[24] The majority judgment held the view that, on a purposive and textual interpretation, regulation 6(d) must be interpreted to be limited to a prescribing who may own a pharmacy, whether legally or beneficially.[28] This is so because the regulation would be invalid or *ultra vires* (beyond the Minister's powers) if it is interpreted to extend beyond "ownership" which is what section 22A empowers the Minister to regulate.

Constitutional challenge and outcome

[25] The majority dismissed ICPA's constitutional challenge. It did so, broadly, on the basis that the empowering provision was not enacted for the purposes contended for

[27] Id at paras 34-5.

[28] Id at para 37.

by the ICPA – that is, it was not intended to empower the Minister to proscribe who may have a financial interest in a pharmacy.[29] Ultimately, the majority upheld the appeal and set aside the order of the High Court.

Supreme Court of Appeal minority judgment

Revocation of licences and mutation of complaint

[26] Regarding ICPA's alleged "change of complaint", the minority judgment held that the complaint was carried through in the High Court and became the main focus of the submissions in the Supreme Court of Appeal.[30] Furthermore, the Clicks Entities did not allege any prejudice resulting from the "mutation" of the complaint.[31] Thus, in light of the fact that the dispute is of public importance and implicates a constitutional right, the minority judgment held that "it would be inappropriate to non-suit ICPA on an overly technical and dilatory point which [occasioned] no prejudice at all to any of the parties".[32]

Interpretation of regulation 6(d)

[27] On the question of the proper interpretation of regulation 6(d), the minority judgment held that, while in terms of section 39(1)(c) of the Constitution foreign law may be considered when interpreting the Bill of Rights, the proper interpretation of regulation 6(d) is a matter of South African law and there is no need to have regard to foreign case law in this respect.[33] The minority judgment added that the concept of beneficial interest as understood in the English law of property is not part of our law.[34]

[29] Id at para 48.

[30] Id at para 83.

[31] Id.

[32] Id.

[33] Id at para 62.

[34] Id at para 64.

[28] The minority judgment agreed with the High Court's finding that it would be artificial to contend that a company which owns 100% of the shares in a company does not have a direct or indirect beneficial interest in the business owned and operated by that company.[35] Furthermore, it held that the regulation squarely implicates the right to have access to health care services.[36] In this respect, where the Court is faced with two interpretations, it must adopt the constitutionally valid interpretation, provided that to do so would not unduly strain the language of the statute.[37]

[29] The minority judgment held that an interpretation of beneficial interest that places undue focus on "ownership", ignores the fact that section 22A also allows the Minister to prescribe the conditions under which a person may own a community pharmacy, and the conditions upon which such authority may be withdrawn.[38] It held that it also ignores the express and plain wording of regulation 6(d), which, apart from ownership, also refers to "direct or indirect beneficial interest".[39] Absent a challenge that the Ownership Regulations were *ultra vires*, the minority judgment held that the regulations stand and must be applied, even where they are (notionally) *ultra vires* the Act.[40]

[30] The minority judgment found that the Clicks Entities contravened regulation 6(d) as interpreted and, as a result, would have dismissed the appeal with costs, including the costs occasioned by the employment of two counsel.

[35] Id at para 73.

[36] Id at para 78.

[37] Id.

[38] Id at paras 55-6.

[39] Id at para 56.

[40] Id.

In this Court

ICPA's submissions

[31] ICPA submits that lawmakers in South Africa, and elsewhere in the world, have recognised that it is undesirable for the same person to have an interest in both a retailer and a manufacturer of medicines. It contends that such a state of affairs gives rise to a conflict of interest. This, according to the ICPA, is because "[i]f a pharmacist stands to gain financially by promoting some medicines over others, consumers are exposed to the risk of not being provided with the best product or the lowest-priced product". ICPA adds that "[t]here will also be a risk that medicines may be recommended and sold to consumers who do not need them".

[32] In addition, the conflict of interest may result where the manufacturing pharmacy provides its products to related retail pharmacies only. This, so the argument goes, will prejudice pharmacies that do not belong to the group; and it will prejudice customers of those pharmacies. They will not have access to the group's medicines, as they are reserved for the group's own pharmacies and customers.

Revocation of licences and mutation of complaint

[33] In respect of the revocation of the licences, ICPA submits that the DG and the Appeal Committee have the power to revoke licences, but that the sanction to be imposed is not a matter for the Court to determine. The reason for this is that, if there is a contravention, "the Department has the primary responsibility to decide on the form of action it regards as appropriate". ICPA further submits that regulation 9(a) provides for the withdrawal of licences when a licensee fails to comply with the conditions of ownership.[41] Regulation 6(d), according to ICPA, deals with the conditions of

[41] Regulation 9, headed "Withdrawal of a licence", provides:

> "The Director-General may withdraw a licence issued in terms of regulation 8(3) if the person issued with such a licence—
>
> (a) has failed to comply with any of the conditions of ownership or the licensing requirements in terms of the Act and these Regulations."

ownership. Accordingly, non-compliance by Retailers with those conditions may lead to the withdrawal of its licences.

[34] In addition, ICPA submits that regulation 9(c) provides for the withdrawal of licences for a contravention of a provision of the Act. In terms of the definition section of the Act, the term "the Act" includes any regulation made under the Act. This means that a contravention of regulation 6 is a contravention of the Act. Regulation 9(c) accordingly also authorises the withdrawal of a licence in the present instance.

[35] With regard to the contention that it should have sought an order reviewing and setting aside the initial granting of the licences, ICPA submits that all Retailers' licences are in jeopardy. ICPA submits that in its internal appeal to the Appeal Committee, it made clear that the complaint was not about a specific licence application but the operation of pharmacies in contravention of the Act.

Interpretation of regulation 6(d)

[36] ICPA contends that a beneficial interest, for the purposes of the Ownership Regulations, may include a *financial interest* even if that interest does not derive from ownership. ICPA submits that shareholders do not "own" the assets of a company in the juridical sense, but they undoubtedly have an "interest" in how the company's profit-generating assets perform. The value of their shares, including their prospects of obtaining a dividend, depends on the performance of those assets. That is the ratio in *Stellenbosch Farmers' Winery*.[42]

[37] ICPA submits that regulation 6(d) refers to "any direct or indirect beneficial interest in a manufacturing pharmacy". If the majority judgment of the Supreme Court of Appeal was correct, that "regulation 6(d) must be interpreted to be limited to a proscription of who may own a pharmacy, whether legally or beneficially", then the word "indirect" would be meaningless since it is not possible to own property

[42] *Stellenbosch Farmers' Winery Limited v Distillers Corporation (SA) Limited* 1962 (1) SA 458 (A).

"indirectly". For this reason alone, ICPA submits that the Clicks Entities are wrong when they say that regulation 6(d) is solely concerned with ownership. ICPA submits that *Stellenbosch Farmers' Winery* makes it clear that company A can have an indirect *financial interest* in the business of subsidiary B even though A could never "indirectly own" the business of B.

[38] ICPA submits that the phrase beneficial interest was intended to broaden the regulatory reach of regulation 6(d). It is a phrase of wide import, which was used because it is flexible and generous enough to cover a wide range of relationships. This was doubtless intended to prevent the prohibition in regulation 6 from being circumvented by way of clever corporate structuring. The aim, ICPA submits, is that *financial interests* should not be pitted against the best interests of patients. The patient is entitled to be provided with the best product at the lowest price. Thus, according to ICPA, a court should interpret regulation 6 to achieve that manifest purpose.

[39] It is submitted further that, if the interpretation of the Clicks Entities were to be adopted, it would be absurdly easy to circumvent the prohibition. All that would be required would be to interpose one juristic person between the "owners" of the manufacturing and community pharmacies, as the Clicks Entities have done. Such an interpretation completely undermines the evident aim of the legislative scheme, which is to ensure that the best interests of patients are protected.

Beneficial interests within the Clicks Entities' corporate structure

[40] Based on the above submissions, ICPA contends that the Clicks Entities' corporate structure is inconsistent with regulation 6 because a 100% shareholder has a beneficial interest in the subsidiary company's assets (being the pharmacies in this case). ICPA submits that two of the Clicks Entities (New Clicks and Clicks Group) have a financial interest in both manufacturing and retail pharmacies through their 100% shareholding of the entities which ultimately own and operate the pharmacies. ICPA submits that Investments also contravenes regulation 6(d), because New Clicks is its shareholder and has a financial interest in both manufacturing and

retail pharmacies. It submits that it is undesirable to have such a direct or indirect beneficial interest in both a community and manufacturing pharmacy because the shareholder would gain financially if the manufacturing pharmacy's products were promoted by the pharmacists in the community pharmacies over others. Thus, the finding that there is no beneficial interest in such circumstances is artificial and makes it possible to circumvent the purpose of the prohibition. ICPA contends that, in respect of the sanction to be imposed for the contravention of this regulation, the matter must be remitted to the Appeal Committee, alternatively the DG.

Other submissions

[41] With regard to the findings of the Appeal Committee, ICPA submits that the first error in law is that the Appeal Committee accepted the argument of the Clicks Entities that section 22A of the Act merely confers powers on the Minister to determine who may own a pharmacy. The second error in law, ICPA submits, is that the Appeal Committee found that, since the assets of a company do not belong to the shareholders of the company, but to the company itself, a shareholding in a company can never translate into a beneficial interest in the company's assets. This aspect forms the crux of the matter.

Constitutionality of section 22A

[42] ICPA submits that if it were to be found that the Minister is only empowered to regulate the ownership of pharmacies in the narrow sense, as contended by the Clicks Entities, then section 22A of the Act would imperil patients' right to access to health care services guaranteed in section 27(1)(a) of the Constitution.[43] This, in turn, would mean that the state would have failed in its duty to adopt reasonable and rational measures to realise the right to quality and affordable medicines. If the same person holds a beneficial interest in both community and manufacturing pharmacies, the

[43] In this regard, ICPA cites the dictum of Moseneke J in *Minister of Health N.O. v New Clicks SA (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 704 where he held that "the right of access to health care services embraces the right to access quality and affordable medicines".

conflict of interest has the potential to jeopardise access to the best product at the best price. ICPA made this submission before the High Court. However, it was not dealt with by the High Court as it upheld ICPA's contentions concerning the interpretation of regulation 6(d) and found that the Appeal Committee's decision amounted to an error in law.

[43] In addition to the above, ICPA submits that on the interpretation advanced by the Clicks Entities, section 22A would be rendered arbitrary and contrary to the rule of law, as it would apply only if the owner of a community pharmacy also tries to obtain a licence for a manufacturing pharmacy. It would not apply if that owner simply interposes a legal person between it and either the community or the manufacturing pharmacy. In other words, on the Clicks Entities' interpretation, section 22A cannot achieve the purpose of ensuring that pharmacists do not have a vested interest in the drugs which they dispense or recommend. According to ICPA, the means chosen, on this interpretation, would not be rationally related to the objective sought to be achieved.

[44] ICPA submits that section 22A must be declared inconsistent with sections 1(c) and 27 of the Constitution. It submits that such invalidity must be suspended and be replaced with the following amended provision that would cure the invalidity in the interim period:

> "The Minister may prescribe who may own a pharmacy and who may hold a direct or indirect beneficial interest in a pharmacy, the conditions under which such person may own such pharmacy or such interest, and the conditions upon which such authority may be withdrawn."

Clicks Entities' submissions

Revocation of licences and mutation of complaint

[45] The Clicks Entities submit that ICPA's complaint lodged with the Department of Health was fatally flawed. ICPA's request was for the DG to revoke the licences held by Unicorn and Retailers. However, the DG has no power to revoke the licences

held by Unicorn or Retailers in the circumstances advanced by ICPA. In this respect, the Clicks Entities argue that the Act does not empower the DG to revoke licences absent proof that the licensees failed to comply with their licensing conditions. ICPA never contended that any of the Clicks Entities failed to comply with their licensing conditions. The Clicks Entities argue that section 22(7) of the Act provides that the DG may cancel or suspend any licence contemplated in subsection (1) in regard to which the licensee does not comply with the licensing conditions as determined in terms of subsection (3). They emphasise that the DG may only do so for breaches of the licence conditions imposed in terms of section 22(3). As such, the Clicks Entities suggest that the ICPA confuses licensing conditions with the requirements for owning a community pharmacy set out in regulation 6(d). The latter are not licence conditions of the type contemplated by section 22(7).

[46] With regard to the revocation of the licences, the Clicks Entities argue that section 22(10) of the Act provides that the DG, "in consultation with the council, may close a pharmacy which is being conducted in contravention of this Act . . . or which does not comply with the licensing conditions". But ICPA did not seek the closure of any pharmacies. It sought the withdrawal of the Clicks Entities' licences. This section does not permit the DG to withdraw anybody's licence. In a similar vein, the Clicks Entities submit that regulation 9(a) does not assist ICPA in its argument for the withdrawal of the licences as regulation 9(a) is targeted at the conduct of the licensee and not at whether the decision to grant the licence in the first place was correct.

[47] The Clicks Entities submit that, before the DG, the complaint by ICPA was that Unicorn and Retailers should never have been granted licences. This constitutes an attack on the decisions to grant the licences. Thus, ICPA should have lodged a review application in respect of the decision to grant the licences. The Clicks Entities contend that it has become common cause that Unicorn and Retailers have never contravened the Ownership Regulations. On this alleged common cause fact, there was in any event never any basis for the revocation of their licences. The Clicks Entities, therefore, submit that ICPA's complaint was stillborn and that it would not have been competent

for the DG or the Appeal Committee to uphold it. The DG's and the Appeal Committee's dismissal of ICPA's complaint was, according to the Clicks Entities, accordingly lawful and indeed a foregone conclusion.

Interpretation of regulation 6(d)

[48] The crux of the Clicks Entities' argument on this point is that beneficial interest is an English term. It connotes an interest held by a person who is not the legal owner of a thing but has a legal right to the benefits of its ownership. The Clicks Entities rely heavily on *Princess Estate*[44] and subsequent case law that held that a shareholder does not have a beneficial interest in the underlying assets of the company. Accordingly, the Clicks Entities argue that when regulation 6(d) speaks of someone who owns or has a beneficial interest in a pharmacy, it means someone who is the legal owner of the pharmacy or is legally entitled to the benefits of ownership of the pharmacy.

[49] The Clicks Entities submit that in terms of section 22A, the Minister may only determine who may own a pharmacy. He may not prescribe who may hold a financial interest in a pharmacy. Regulation 6(d) would be invalid if it were interpreted to regulate, not only who may own a community pharmacy, but also who may have a financial interest in it. The Clicks Entities argue that it follows that the ICPA's interpretation of regulation 6(d) renders it *ultra vires* because the Minister would have purported to regulate, not only who may own a pharmacy but also who may have a mere direct or indirect financial interest in a pharmacy. The Clicks Entities contend that this is a compelling reason to prefer their interpretation which confines the regulation to a prescription of who may be the legal or beneficial owner of a pharmacy.

Beneficial interests within the Clicks Entities corporate structure

[50] In light of the interpretation preferred by the Clicks Entities, they submit that the High Court erred in finding that the corporate structure of the Clicks group of

[44] *Princess Estate* above n 9.

companies violated the regulation. They argue that regulation 6(d) regulates persons and not structures. Thus, each entity must be investigated individually.

[51] The Clicks Entities further argue that Retailers clearly does not contravene regulation 6(d), because neither it nor its shareholder (Investments) holds a direct or indirect beneficial interest in a manufacturing pharmacy. The Clicks Entities therefore submit that the only residual debate is whether the holding companies (Investments, New Clicks and Clicks Group) can be said to contravene regulation 6(d). None of them owns a manufacturing pharmacy or a community pharmacy. The question is thus whether it can be said, purely by virtue of their direct or indirect shareholdings in Retailers and Unicorn, that they, or their shareholders, "have a beneficial interest in a community pharmacy"; and that they are the holders of "any direct or indirect beneficial interest in a manufacturing pharmacy".

Constitutional challenge

[52] The Clicks Entities argue that no constitutional rights are infringed. They contend that there is a sophisticated statutory framework in place that regulates the conduct of pharmacists to prevent any conflict of interest. Under this framework, pharmacists are obliged to act in the best interests of their patients. Thus, ICPA's constitutional challenge must therefore fail.

Jurisdiction and leave to appeal

[53] It is well established that for leave to appeal to be granted in this Court, an applicant must meet two requirements. First, the matter must fall within the jurisdiction of this Court in that it raises a constitutional issue or an arguable point of law of general public importance which ought to be considered by this Court and, second, the interests of justice must warrant that leave to appeal be granted.

[54] This application plainly engages this Court's constitutional and extended jurisdiction. In the first instance, this matter engages this Court's constitutional

jurisdiction because we must decide whether, as ICPA contends, the Supreme Court of Appeal interpreted section 22A of the Act, together with regulation 6(d), incorrectly and in a manner which is inconsistent with the Constitution. Where a matter involves the interpretation of legislation in conformity with the constitutional imperative to best promote the spirit, purport and object of the Bill of Rights, then that matter raises a constitutional issue that engages this Court's jurisdiction.[45] Furthermore, the Court's constitutional jurisdiction is engaged by reason of ICPA's conditional constitutional challenge to section 22A.[46]

[55] In the second instance, the matter engages this Court's extended jurisdiction as the proper interpretation of section 22A and regulation 6(d), particularly the term "beneficial interest" as used therein, raises an arguable point of law of general public importance that ought to be considered by this Court, as demonstrated by the litigation history of this matter.

[56] The matter plainly transcends the interests of the parties as its reach may extend to all pharmacy licensees and pharmacy users, that is, members of the general public. Further, as will appear, there are reasonable prospects of success. Thus, it is undoubtedly in the interests of justice for us to hear this matter. Therefore, leave to appeal is granted.

The legislative framework

[57] The Act has as its objects, amongst others, the requirements for registration of a pharmacy, the practice of pharmacy and the ownership of pharmacies. Section 22 of the Act deals with the licensing of pharmacies as well as the circumstances in which

[45] *Competition Commission of South Africa v Standard Bank of South Africa Limited and Related Matters* [2020] ZACC 2; 2020 (4) BCLR 429 (CC) at para 39 and *Fraser v ABSA Bank Limited (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 47.

[46] This Court need only determine the challenge if it finds in favour of the Clicks Entities on the interpretation of regulation 6(d). In that event, this Court needs to determine whether, on the interpretation to beneficial interest adopted by the Supreme Court of Appeal, and also contended for by the Clicks Entities, section 22A unreasonably and unjustifiably limits section 27 of the Constitution.

the DG is empowered to revoke pharmacy licences. The following subsections and regulations are relevant.

[58] Section 22(1) provides:

> "A person authorised in terms of section 22A to own a pharmacy shall in the prescribed manner, specifying the prescribed particulars, apply to the Director-General for a licence for the premises wherein or from which such business shall be carried on and the Director-General may be entitled to *issue or refuse* such licence on such conditions as he or she may deem fit." (Emphasis added.)

[59] Section 22A provides that the Minister may prescribe by regulation who may own a pharmacy and under what conditions, and the conditions upon which such authority may be withdrawn. Section 22(3) provides that "[a] licence issued in terms of subsection (1) may be subject to conditions as determined by the Director-General". This section would find application in circumstances where a pharmacy has contravened a licensing condition. Licensing conditions are provided for in the Ownership Regulations.

[60] Regulation 6, headed "Ownership of community pharmacies", reads:

> "Any person may, subject to the provisions of regulation 7, own or have a beneficial interest in a community pharmacy in the Republic, on condition that such a person or in the case of a body corporate, the shareholder, director, trustee, beneficiary or member, as the case may be, of such body corporate—
>
> (a) is not prohibited by any legislation from owning or having any direct or indirect beneficial interest in such a pharmacy;
> (b) is not an authorised prescriber;
> (c) does not have any direct or indirect beneficial interest in or on behalf of a person contemplated in paragraphs (a) and (b); or
> (d) is not the owner or the holder of any direct or indirect beneficial interest in a manufacturing pharmacy."

[61] Regulation 9, headed "Withdrawal of a licence", reads:

> "The Director-General may withdraw a licence issued in terms of regulation 8(3) if the person issued with such a licence—
>
> (a) has *failed to comply with any of the conditions of ownership* or the licensing requirements in terms of the Act and these Regulations." (Emphasis added.)

[62] Regulation 9(c) reads:

> "The Director-General may withdraw a licence issued in terms of regulation 8(3) if the person issued with such a licence—
>
> . . .
>
> (c) *contravenes any provision of the Act*, the Medicines Act or any other legislation applicable to such pharmacy." (Emphasis added.)

[63] Section 22(7) of the Act provides:

> "The Director-General may cancel or suspend any licence contemplated in subsection (1) [in regard to which the licensee does not comply] with the *licensing conditions* as determined in terms of subsection (3), after giving notice in writing to the owner of the pharmacy or the responsible pharmacist, and affording the owner or the responsible pharmacist an opportunity to furnish reasons why the licence should not be cancelled or suspended." (Emphasis added.)

Revocation of the licences and mutation of complaint

[64] As stated, section 22A empowers the Minister to revoke a licence in instances of the breach of the prescribed conditions under which that licence was granted. It bears repetition that this case originated with a request by ICPA for the revocation of the licences held by Unicorn and Retailers, on the basis that the licences had been issued in contravention of regulation 6(d). There was much debate about this aspect, particularly in the Supreme Court of Appeal and this Court. It appears that, once the shoe started pinching, ICPA attempted to resile from the particulars of its original complaint to the DG. This attempt, which found favour with the minority judgment of the Supreme

Court of Appeal, does not bear scrutiny. It is important to fully set out that original complaint. In explicitly taking aim at the licences held by Unicorn and Retailers, ICPA stated:

> "It is thus evident that the two subsidiary companies will have a direct or, at the very least, indirect beneficial interest in each other.
>
> . . .
>
> Unicorn and Clicks [Retailers] have direct or indirect beneficial interests in each other. Unicorn has a manufacturing pharmacy licence and Clicks [Retailers] pharmacy licences are being granted in contravention with the Act and its regulations."[47]

[65] It expressed itself, as regards the relief sought, thus:

> "We request that the Department of Health revoke the manufacturing pharmacy licence of Unicorn as well as all the retail licences obtained after 30 May 2012, as they were granted on the incorrect facts."[48]

[66] Strangely, ICPA shifted ground before the Appeal Committee. The complaint changed from one aimed at Unicorn and Retailers to a complaint against their holding companies (Investments, New Clicks and Clicks Group) who were now alleged to have contravened regulation 6(d). But despite this drastic and startling change in respect of the cause of action, ICPA's claim still remained one for the revocation of the licences held by Unicorn and Retailers. ICPA unequivocally persisted in seeking that relief before the Appeal Committee and the appeal was decided accordingly. The Appeal Committee noted that ICPA had asked the DG "to revoke the manufacturing pharmacy licences of Unicorn as well as the retail pharmacy licences held by Retailers".[49]

[47] Complaint at paras 2.5 and 5.

[48] Ibid.

[49] Appeal Committee decision at para 3.

[67] The Appeal Committee was fully aware that, in the appeal, ICPA sought the setting aside of the DG's decision, "ultimately causing Unicorn's manufacturing pharmacy licence as well as the community licences obtained after 30 May 2012 to be revoked for lack of compliance with the law".[50] It recognised that on appeal, one of the issues it had to decide was whether it had the power to revoke the licences granted to Retailers.[51] It noted ICPA's submission that its complaint was not directed at the original grant of the licences in that it sought "a fresh decision to revoke or withdraw those licences" because they contravened regulation 6(d).[52]

[68] ICPA's change of course is no trifling matter. The minority judgment of the Supreme Court of Appeal described this as an "overly technical and dilatory point", which amounted to placing "form over substance".[53] I disagree. What was before the High Court was a review of the decision of the DG (confirmed on appeal to it by the Appeal Committee). In a review, the question of whether a functionary exercised a power he 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[54] (PAJA) and the principle of legality. It can hardly be described as "technical", nor is it "dilatory" at all – if upheld, it would be dispositive of the case. Absent any power by the DG to revoke the licences as claimed, his decision (confirmed by the Appeal Committee) is unassailable and the inevitable outcome would be that the review application must fail.

[69] I have had the pleasure of reading the second judgment authored by my Colleague Rogers J. He is equally dismissive of ICPA's significant deviation in the course of litigation.[55] As stated, this perfunctory approach to a matter as important as

[50] Id at para 7.

[51] Id at para 9.4.

[52] Id at para 32.

[53] Supreme Court of Appeal judgment above n 16 at para 82.

[54] 3 of 2000. See section 6(2)(a)(i).

[55] Second judgment at [290] to [291].

this does not withstand scrutiny. It bears emphasis that the original complaint as set out in the letter of complaint and the founding affidavit made plain that the complaint was directed at the revocation of the licences of Unicorn and Retailers. Unsurprisingly, Unicorn and Retailers were not asked by the Department of Health for reasons or an explanation pursuant to ICPA's complaint. The Department only requested Retailers to make representations regarding the corporate structure, which it did. Before the Appeal Committee, despite having changed its cause of action, ICPA's claim remained one for the revocation of the licences held by Unicorn and Retailers. It made plain that:

> "In the original complaint, ICPA asked the DD-G to revoke the manufacturing licence of Unicorn [as] well as all the retail (community) licences obtained by Retailers after 30 May 2012 . . . ICPA stands by that request."[56]

[70] The DG and the Appeal Committee correctly concluded that the DG did not possess the requisite power to revoke the licences under the circumstances. Thus, even if there were a contravention of regulation 6(d) (an aspect to be discussed presently), neither the Act nor the Ownership Regulations, grant the DG the power of revocation. This will become apparent below as I consider possible sources of the power.

[71] First, there is section 22(7).[57] It bears emphasis that under this section the DG may only cancel or suspend a licence in instances of breaches of the licence conditions imposed in terms of section 22(3). The latter section provides that a "licence issued in terms of subsection (1) may be subject to conditions as determined by the Director-General". ICPA has never suggested, even in the faintest, that Unicorn or Retailers had failed to comply with any licensing conditions of this kind. ICPA has also never identified any licensing conditions imposed by the DG in terms of section 22(3). It appears that ICPA confuses licensing conditions with the requirements for owning a community pharmacy set out in regulation 6(d). But those requirements are not licence conditions of the type contemplated by section 22(7).

[56] Paragraphs 53 to 54 of ICPA's written submissions before the Appeal Committee.

[57] See [63].

[72] Second is section 22(10). Section 22(10), however, is also of no assistance to ICPA. That section provides that the DG "in consultation with the council may close a pharmacy which is being conducted in contravention of this Act . . . or which does not comply with the licencing conditions". The problem is that ICPA did not seek the closure of any pharmacies; instead, it sought the withdrawal of the licences. Section 22(10) does not permit the DG to withdraw anybody's licence. Insofar as section 22(10) refers to non-compliance with "the licensing conditions" as a ground for closing a pharmacy, these too must be understood as the licensing conditions imposed by the DG in terms of section 22(3), not the requirements for ownership of a community pharmacy. ICPA did not identify any licensing conditions properly understood, with which there was non-compliance.

[73] Third, there is regulation 9(a). ICPA also placed reliance on regulation 9(a). But that regulation's object is not, as ICPA would have it, the alleged erroneous decision of the DG to grant a licence in the first place, but the licensee's conduct. Regulation 9(a) provides that the DG may withdraw a licence if the licensee "has failed to comply with any of the conditions of ownership or the licensing requirements in terms of the Act and these Regulations". There was never any suggestion that Unicorn or Retailers had failed to comply with any conditions of ownership or licencing requirements. The reliance on regulation 9(a) is therefore misplaced.

[74] The fourth possible source of the power is regulation 9(c). Regulation 9(c) is, however, also of no assistance to ICPA's case. Regulation 9(c) permits the DG to withdraw a licence if the licensee "contravenes any provision of the Act, the Medicines Act or any other legislation applicable to such pharmacy". ICPA contends that the Act defines "this Act" to include the Ownership Regulations. Therefore, it argues, a breach of regulation 6(d) is a breach of the Act that entitles the DG to withdraw a licence. This reasoning is unsound. A licensee who is granted a licence is not, by merely holding the licence, doing anything to contravene regulation 6(d). The holding

of a licence is a legal fact that remains extant and in force until set aside on review.[58] It is the licence-holder that must be in breach of the licence conditions. It bears repetition that it was never ICPA's case that Unicorn and Retailers had contravened any provision of the Act, the Medicines Act or any other legislation applicable to such pharmacy.

[75] This brings me to a fundamental misconception in ICPA's argument. Faced with the conundrum of its original complaint having been directed at Unicorn and Retailers, it changed course and directed the challenge to those two entities' holding companies, but without any concomitant change in the relief sought. Its complaint was redirected at the "Clicks Group's corporate structure". Neither the Act, nor the Ownership Regulations, contain any prohibition against a group structure of the type encountered here. The relevant legislative prescripts in the Act and the Ownership Regulations are directed at persons (natural and corporate), not structures. The group structure, however ethically questionable it may be perceived to be, does not offend any legal prescripts and is insufficient to sustain the revocation of the licences of Retailers and Unicorn. It is convenient to discuss next whether there has been any breach of licence conditions by any one or more of the Clicks Entities.

[76] Axiomatically, revocation of a licence can only occur against licence holders – something which you do not have in the first place cannot be taken away. In this case, the licence holders are Unicorn (manufacturing pharmacy licence) and Retailers (all the community pharmacy licences). Thus, the enquiry must self-evidently be whether Unicorn or Retailers breached their licence conditions. This is not the case that ICPA brought at any stage, although it sought relief before both the DG and the Appeal Committee against Unicorn and Retailers. Instead, its case transmogrified into an allegation that their holding companies – Investments, New Clicks and Clicks Group – contravened regulation 6(d).

[58] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) at paras 99-102.

[77] What requires determination is which of the Clicks' Entities are alleged to be in contravention of which regulation. As stated, neither the Act nor the Ownership Regulations contain any prohibition against a "group structure" and it would be wrong to ask whether the Clicks "group structure" contravenes the Act or the Ownership Regulations. I discuss next in particular the attack against the licence held by Unicorn and those held by Retailers.

[78] First, it bears repetition that ICPA's attack against Unicorn was directed at Unicorn's alleged contravention of regulation 6(d). But, Unicorn holds a manufacturing licence subject to regulation 2 and not regulation 6. Regulation 6(d) regulates ownership of community pharmacies, not of manufacturing pharmacies. Regulation 2 provides that it is subject to regulation 7(a), but there is no regulation 7(a). Thus, anybody may own or have a beneficial interest in a manufacturing pharmacy. Properly understood, therefore, Unicorn's licence is lawful on any basis and the attack on Unicorn's licence was misconceived.

[79] What bears consideration next is the challenge against Retailers' licence. Retailers holds its licences subject to regulation 6(d). ICPA has not shown that Retailers has failed to meet the requirements in regulation 6(d). That is unsurprising, since:

(a) Retailers is not the owner or holder of any direct or indirect beneficial interest in a manufacturing pharmacy; and

(b) Retailers' only shareholder is Investments, which does not have any direct or indirect beneficial interest in a manufacturing pharmacy.

[80] Retailers accordingly passes the ownership test, because neither Retailers, nor its only shareholder (Investments), has any direct or indirect interest in a manufacturing pharmacy. ICPA appears to have abandoned its original attack on the community pharmacy licences held by Retailers, namely that Retailers had had a beneficial interest in Unicorn's manufacturing pharmacy. The jettisoning of that assertion is sound, since neither Retailers nor Unicorn holds an interest of any kind in the other.

[81] The High Court upheld ICPA's new contentions that the holding companies, Investments and New Clicks, contravene regulation 6(d). Investments was found by the High Court to be in contravention on the basis of its beneficial interest in community pharmacies and because its sole shareholder (New Clicks) has a beneficial interest in a manufacturing pharmacy, Unicorn. New Clicks, in turn, was held to be in contravention of regulation 6(d), because it has a beneficial interest in Unicorn's manufacturing pharmacy and a beneficial interest in Retailers' community pharmacies. In so holding, the High Court has erred.

[82] Neither Investments nor New Clicks owns a manufacturing pharmacy or a community pharmacy. Can it be said, though that, purely by reason of their shareholding in Retailers and Unicorn, they, or their shareholders, "have a beneficial interest in a community pharmacy"; and that they are the holders of "any direct or indirect beneficial interest in a manufacturing pharmacy"? I think not, for the reasons that follow.

General principles of interpretation of subordinate legislation

[83] In *Afribusiness*, this Court explicated:

> "It is trite law that subordinate legislation must be created within the limits of the empowering statute. If they are not, the exercise of the power is unlawful and may be set aside like an unlawful act of any other functionary who has acted outside the powers conferred upon her by the Legislature. This means *any regulations promulgated by the Minister under the Procurement Act, including the impugned regulations, must be consistent with the Procurement Act.* If they are not, the Minister acted beyond the scope of the powers conferred on him by the Legislature.
>
> . . .
>
> *No matter how clear the regulations are, it is necessary to consider the empowering provision and the intention of the Legislature as reflected in the Procurement Act*."[59] (Emphasis added.)

[59] *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) at paras 41 and 43. See also *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6)

[84] Regulations, as legislation subordinate to the empowering provision, cannot establish powers beyond that set out in the empowering provision. Put differently, the ambit of the powers outlined in regulations is constrained to the purview of the empowering legislation. Exceeding those powers would render the regulations *ultra vires*, in breach of the doctrine of legality, and thus unconstitutional.[60]

[85] In *Moodley*, the Appellate Division held:

> "In terms of section 1 thereof 'this Act' [that is, the Indians Education Act 61 of 1965] includes any regulation. But although regulations have the force of law, they are not drafted by Parliament. It follows that *section 15(1) must be interpreted before regulation 3(1) is scrutinised and a meaning is assigned to it*. *It is not permissible to treat the Act and the regulations made thereunder as a single piece of legislation; and to use the latter as an aid to the interpretation of the former*. Regulation 3(1) cannot be used to enlarge the meaning of section 15(1)."[61] (Emphasis added.)

[86] From the above the following is clear. First, the point of departure in such cases ought to be the empowering provision. Second, it is clear that the interpretation of subordinate legislation must occur within the purview of its empowering legislation.[62] Third, subordinate legislation cannot be used to interpret primary legislation. As this Court succinctly expressed it in *Sebola* in respect of ascertaining the means of delivery

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SA 14 (CC); 2020 (10) BCLR 1173 (CC) at paras 51-2 where this Court held that "[i]t is now axiomatic that the interpretation of legislation must follow a purposive approach. . . . *The purposive or contextual interpretation of legislation must, however, still remain faithful to the literal wording of the statute*" (emphasis added).

[60] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 50:

> "In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts ultra vires (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid."

[61] *Moodley v Minister of Education and Culture, House of Delegates* 1989 (3) SA 221 (A) at 233D–F.

[62] *Afribusiness* above n 59 at paras 38-43.

of a registered notice in terms of section 130 of the National Credit Act,[63] read with section 129 of that Act:

> "[S]ince the Regulations cannot be used to interpret the Act, we are brought back to the provisions of the Act itself."[64]

[87] The Court referred to *Rossouw,* where the Supreme Court of Appeal held:

> "It is generally impermissible to use regulations created by a minister as an aid to interpret the intention of the legislature in an Act of Parliament, notwithstanding that the Act may include the regulations."[65]

[88] The position is neatly summarised by Kellaway:

> "A provision in a statute must be interpreted before the regulation is considered, and if the regulation purports to vary the provision as so interpreted it is ultra vires and void. Also, the regulation cannot be used to cut down or enlarge the meaning of a statutory provision."[66]

[89] The above, in light of trite principles of well-established statutory interpretation, makes plain that:

(a) Regulation 6(d) must be interpreted within the textual, contextual and purposive confines of section 22A.

(b) The words employed in section 22A must be the starting point and they must be afforded their ordinary meaning, unless to do so would lead to an absurdity. Context and purpose cannot supplant the plain meaning of the wording in the text. Interpretation must remain precisely that and must

[63] 34 of 2005.

[64] *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 62.

[65] *Rossouw v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South Africa Ltd)* [2010] ZASCA 130; 2010 (6) SA 439 (SCA) at para 24.

[66] Kellaway *Principles of the Legal Interpretation of Statutes, Contracts and Wills* (Butterworths, Johannesburg 1995) at 374-5.

> not impermissibly stray into the terrain of the lawmaker, to legislate, instead of to interpret. Reliance on context and purpose in violation of the plain wording of the text of the statute runs that very risk. And, interpreting a piece of subordinate legislation beyond the ambit of its empowering provision leads to invalidity.

[90] The second judgment appears to have no quarrel with the role that section 22A must play in interpreting regulation 6(d). But it fails to properly interpret section 22A to ascertain its meaning and thus the implications for regulation 6(d). It instead puts the cart before the horse and embarks on an exercise that should, logically, only come after the meaning of section 22A has been determined. This is the fatal rudimentary flaw in the second judgment – it commences the enquiry from the wrong end, by first interpreting regulation 6(d) without proper reference to the empowering provision, section 22A.

[91] We are urged in the second judgment to read the impugned provision "holistically" and to bear in mind that "interpretation is a unitary exercise". These two self-evident truisms go nowhere in addressing the two central difficulties faced by the second judgment in its interpretation of regulation 6(d). It is this. The regulation, subordinate as it is to the empowering provision, section 22A, cannot be utilised to interpret the latter. And, closely related to this, the text of section 22A is plain and unambiguous, must be interpreted as it stands and, absent any absurdity, meaning and effect must be given to the words in section 22A.

Interpretation of section 22A

[92] There are two parts to section 22A. First, the Minister may prescribe who may own a pharmacy. Second, once the Minister has prescribed who may own a pharmacy, the Minister may prescribe the conditions under which the prescribed person may own such pharmacy. Central to a proper understanding of the first part is what is meant by "pharmacy" and "own". It is important to discuss these concepts separately in some detail.

"Pharmacy"

[93] The definition of "pharmacy" in section 1 of the Act, read with the definition of, amongst others, "pharmacy practice" and sections 35A and 36, reveals that the word "pharmacy" in the Act is used to refer to a *pharmacy business*. The concept of a business is fairly uncontentious. A business, broadly, is a commercial or mercantile activity engaged in as a means of livelihood, often consisting of dealings or transactions especially of an economic nature. It often involves the exchange of goods or services and is usually undertaken for financial gain or benefit. A business is thus a sum of, amongst other things, the assets, goods, services, goodwill and staff.

[94] Thus understood, section 22A empowers the Minister to prescribe who may own the place, the goods, the goodwill, and provide services, specially pertaining to the scope of practice of a pharmacist, for commercial reasons. It does not empower the Minister to prescribe who may have shares in a company that owns a pharmacy business.

"Own"

[95] The word "own" ("to own") is plainly at the centre of the debate in this matter. "To own", simply put, is to have ownership over a thing, be it corporeal or incorporeal. Notwithstanding the fact that ownership is rather difficult to comprehensively define,[67] it is nevertheless a legal concept and thus recourse to general dictionary definitions is not necessary. In *Govindamall*, the Court held:

> "The primary rule of construction is that the words of a statutory enactment must be accorded their ordinary or popular meaning unless the context or subject-matter clearly shows that they were intended to bear a different meaning. *If the context in which a word appears is a technical legal one and* the word is a legal term of art *or has acquired*

[67] Badenhorst et al *Silberberg and Schoeman's The Law of Property* 6 ed (LexisNexis, Pretoria 2019) at 104. Van der Walt and Dhliwayo "The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis" (2017) 134 *SALJ* 34 at 37.

> *a technical meaning in legal nomenclature*, it should be accorded that meaning."[68] (Emphasis added.)

[96] De Ville expands on this:

> "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."[69]

[97] This approach cannot be faulted. It is based on common sense. It is unnecessary to resort to general dictionary definitions of words which are commonly used in the law and have, through usage in the practice of the law and judgments acquired a particular legal meaning (exhaustive or not). Where a court is faced with such words, it should turn to the acquired legal meaning. General dictionary definitions of "ownership" are superfluous where, notwithstanding difficulties in legal interpretations of the concept, ownership has acquired what can best be described as a base legal meaning. Recourse ought to be had to the base legal meaning. This accords with the principle that Parliament is presumed to be acquainted with the existing law and with the interpretation of earlier legislation by the Courts. Thus, in *Fundstrust*, the Appellate Division held:

> "The principle that Parliament is presumed to be acquainted with the existing law and with the interpretation of earlier legislation by the Courts can only be applied if the words in question had acquired a *settled and well-recognised* judicial interpretation before the relevant legislation was passed."[70] (Emphasis added.)

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[68] *Govindamall v Munsami* 1992 (1) SA 676 (D) at 678.

[69] De Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants Pty Ltd, 2000) at 102. De Ville cites *Sentraalwes Personeel Ondernemings (Edms) Bpk v Nieuwoudt* 1979 (2) SA 537 (C) at 544 and *S v Tinto* 1979 (3) SA 407 (C) at 411.

[70] *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 732.

[98] According to Badenhorst et al modern South African legal theory has been dominated by two definitions of ownership,[71] or rather a combination of the two. The first, which was endorsed in *Gien*, holds:

> "[O]wnership is the real right that potentially confers the most complete or comprehensive control over a thing, which means that the right of ownership entitles the owner to do with his or her thing as he or she deems fit, subject to the limitations imposed by public and private law."[72]

[99] This definition was recently endorsed by the Supreme Court of Appeal in *Hendricks*.[73] According to van der Walt and Dhliwayo, decisions such as *Gien*, and by implication *Hendricks*, are more representative of the general approach in South African case law on the subject.[74]

[100] The second definition describes ownership with reference to the various entitlements (or powers) of ownership and a number of characteristics that distinguish ownership from limited real rights.[75] The entitlements that are commonly used to define ownership, in terms of this definition, are:

> "(a) the entitlement to use the thing (*ius utendi*);
> (b) the entitlement to draw the natural (*fructus naturales*) and civil fruits (*fructus civiles*) from the thing (*ius fruendi*);
> (c) the entitlement to consume and destroy the thing (*ius abutendi*);
> (d) the entitlement to possess the thing (*ius possidendi*);[76]

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[71] Badenhorst et al above n 67 at 104.

[72] *Gien v Gien* 1979 (2) SA 1113 (T) at 1120.

[73] *Hendricks v Hendricks* [2015] ZASCA 165; 2016 (1) SA 511 (SCA) at para 7, where the Court with reference to Grotius held that "[i]t is well established that ownership is the most comprehensive real right". The reference is to Grotius: Inleidinge 2.3.10, as translated in Badenhorst et al *Silberberg and Schoeman's The Law of Property* 5 ed (LexisNexis, 2006) at 91 fn 7, which reads "[o]wnership is complete if someone may do with the thing whatever he pleases, provided that it is permitted in terms of law". See also *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106-7.

[74] Van der Walt and Dhliwayo above n 67 at 43.

[75] Badenhorst et al above n 67 at 105.

[76] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20, where the Court held:

(e) the entitlement to dispose of the thing (*ius disponendi*);[77]

(f) the entitlement to claim the thing from any unlawful possessor (*ius vindicandi*);[78] and

(g) the entitlement to resist any unlawful invasion (*ius negandi*)."[79]

[101] According to Badenhorst et al the characteristics of ownership that are usually referred to when distinguishing ownership from limited real rights are:

"(a) Ownership is a 'mother right' in the sense that it confers the most comprehensive control over a thing. However, an owner can dispose of many of the entitlements of use and enjoyment by granting limited real rights to others.

(b) Ownership has a residuary character, sometimes referred to as the 'elasticity of ownership'. This implies that no matter how many entitlements the owner disposes of, he or she retains a reversionary right to these entitlements, so that once those entitlements are extinguished, the ownership automatically becomes unencumbered again. This characteristic of ownership is inherent in ownership as a natural corollary of it.

(c) Ownership is unlimited in duration.

(d) Ownership is an independent right. Unlike limited real rights, it is in the final instance not dependent on or derived from any other right."[80]

[102] *Claassen's Dictionary of Legal Words and Phrases* defines "full ownership" as a right "whereby a person may, for his own benefit, do with a thing whatever he pleases

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"It may be difficult to define dominium comprehensively (cf. *Johannesburg Municipal Council v Rand Townships Registrar and Others*, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in *Munsamy v Gengemma*, 1954 (4) SA 468 (N) at pp. 470H - 471E) that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right)."

[77] *Vaal Transport Corporation (Pty) Ltd v Van Wyk Venter* 1974 (2) SA 575 (T) at 577, where the Court held that the "right of free disposition really constitutes the essence of ownership".

[78] *Chetty v Naidoo* above n 76 at 20.

[79] Badenhorst et al above n 67 at 105-6.

[80] Id at 106.

so long as it is not forbidden by law", and qualified ownership as "where something is wanting to this general power of doing everything".

[103] As stated, a comprehensive, exhaustive definition of the concept of ownership is redundant. It would suffice to state that ownership is the real right that confers the most complete or comprehensive control over a thing. 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. At the heart of the ownership, and what it means to own, is control.

[104] In sum, in this instance the text as starting point and as primary interpretive tool can hardly be said to be contentious. This is not, however, the end of the exercise. Recourse must be had to the context[81] and purpose.

[105] The long title gives little away as regards the Act's concern over the ownership of pharmacies. It simply tells us, insofar as the ownership of pharmacies is concerned, that the Act seeks to provide for the requirements for registration, the practice of pharmacy, and the ownership of pharmacies. The long title and the Act appear to have as their focus the establishment of the South African Pharmacy Council and its powers and functions. From the functions and objects of the Council one is able to deduce the overall objects of the Act. That objective appears to be to ensure the health of the population. In other words, the Act has as one of its main concerns the interests of patients.[82]

[81] Context includes, amongst others, other provisions in the statute.

[82] This is evident from the objects and functions of the Council which include, amongst others:

> (a) to assist in the promotion of the health of the population of the Republic;
> (b) to promote the provision of pharmaceutical care which complies with universal norms and values, in both the public and the private sector, with the goal of achieving definite therapeutic outcomes for the health and quality of life of a patient; and
> (c) to uphold and safeguard the rights of the general public to universally acceptable standards of pharmacy practice in both the public and private sector.

[106] With the primary concern being the interest of patients, the Legislature has sensibly considered it appropriate to empower the Minister to prescribe who may and may not own, or rather, control a pharmacy. Placing the control of a pharmacy in the wrong hands may result in substantial harm being caused.

[107] The conclusion that section 22A's concern is who can control a pharmacy with the view to protect patients' interests is confirmed by the history and background of the provision.

[108] Section 22A was introduced into the Act by section 10 of the Health Laws Amendment Act[83] which reads:

> "(1) As from the commencement of the Health Laws Amendment Act, 1977, *no body corporate*, other than a body corporate which complies with the provisions of section 22(6), *shall open, purchase or otherwise acquire a pharmacy in which the business of a retail pharmacy is carried on, or acquire any share*[84] *in such pharmacy*.
>
> (2) Any contravention of the provisions of subsection (1) shall be an offence and any person shall on conviction thereof be liable to a fine not exceeding five hundred rand." (Emphasis added.)

[109] That particular provision was subsequently amended by section 22 of the Pharmacy Amendment Act[85] to remove the phrase "As from the commencement of the Health Laws Amendment Act, 1977" and to insert the words "or 22B(1)(f)" in between "section 22(6)" and "shall open". In relevant part, section 22B(1) provided:

> "Notwithstanding anything to the contrary contained in this Act, a corporation may carry on business as a pharmacist in the Republic on the following conditions:

[83] 36 of 1977.

[84] Not a company that owns a pharmacy.

[85] 88 of 1997.

(a) (i) *The corporation shall have as the manager of its business in the Republic a pharmacist who resides in the Republic and who is not engaged in a pharmacy business which does not belong to the said corporation either alone or in partnership with another person*;

(ii) the manager may be a director (excluding a managing director) of a body corporate referred to in section 22;

. . .

. . .

(c) a corporation shall not carry on business as a pharmacist unless it and its manager are registered under section 14(1)(eA) and *unless the person who is registered as manager in fact manages the business of the corporation and complies with the requirements set out in paragraph (a) in respect of such manager*;

. . .

(e) every pharmacy in which such a corporation carries on business *shall be conducted under the continuous personal supervision of a pharmacist* whose name shall be displayed conspicuously over the main entrance of that pharmacy;

(f) (i) *only a natural person who is a pharmacist may hold a member's interest in such a corporation*;

(ii) *no voting rights, except in respect of a resolution enabling the corporation to comply with the provisions of this section or to dispose of its undertaking or assets or any part thereof, shall attach to any interest held in terms of the proviso to subparagraph (i)*." (Emphasis added.)

[110] Thus, it is clear that, from its inception, section 22A had, as its main concern, the proscription of who could own a pharmacy – that is, possess the most complete or comprehensive control over a pharmacy and who could exercise the powers and entitlements associated with ownership. In particular, it appears that section 22A sought to ensure that control over the operations of pharmacy businesses was exercised exclusively by pharmacists as, perhaps, they were considered to have patients' best interests at heart (or rather they were so compelled by their codes of practice and ethics, a violation of which could result in them being penalised or disbarred).

[111] From all of the above, a purpose emerges: to empower the Minister to prescribe who can control a pharmacy business and the conditions under which that person can exercise said control over the pharmacy business for their personal or direct benefit, at the expense of patients' interests. In particular, it is to empower the Minister to prescribe who can possess the most comprehensive or complete control over a pharmacy business and exercise the legal *entitlements, rights and powers* that flow from ownership in respect of a pharmacy business.

[112] Underlying the power conferred to the Minister by this provision appears to be the desire to ensure that pharmacies are controlled by persons who can be trusted to put the interests of patients first and above their own. In empowering the Minister, for the benefit of patients, to prescribe who may own a pharmacy, the Legislature clearly appreciated that not everyone can be trusted to exercise control over a pharmacy business.

[113] Before concluding on the ambit and scope of section 22A, a question that bears consideration is whether section 22A empowers the Minister to prescribe who may own *or* have a beneficial interest in a pharmacy. Relevant to this discussion is section 13(4) of the Act. Section 13(4) provides:

> "Any person who has been suspended from practising in terms of this Act or whose name has been removed from a register in terms of subsection 45(1)(c) and whose name has not been restored to such register shall not be entitled to remain, or be registered as the owner of a pharmacy, or hold any beneficial interest in a pharmacy."

[114] Section 13(4) refers to both "ownership" and "beneficial interest". As sections 13(4) and 22A appear in the same statute; and section 13(4) refers to "beneficial interest" while section 22A does not, it must follow that the Legislature did not intend for the Minister to regulate who may have a beneficial interest, direct or indirect, in a pharmacy.[86] As a result, it must follow that section 22A does not give the

[86] *Expressio unius est exclusio alterius* (the explicit mention of one (thing) is the exclusion of another).

Minister the power to prescribe who may have a beneficial interest in a pharmacy. This irresistible conclusion does not depend on what interpretation one gives to the term. Thus, it can safely be concluded that section 22A only empowers the Minister to prescribe who may "own" a pharmacy, and the conditions under which that ownership can be exercised, and no more.

[115] It is fallacious reasoning to contend that the provision empowers the Minister to prescribe who may have a beneficial interest in a pharmacy. In view of the exclusion of the term "beneficial interest" in section 22A and its inclusion in section 13(4), it may well be that all of the provisions that purport to prescribe who may have a beneficial interest in a pharmacy are prima facie[87] *ultra vires*. Absent a challenge to these provisions, one could interpret "beneficial interest" to mean something very close to ownership, something akin to "beneficial ownership", that is, a situation where the person in whom, as between himself and the registered shareholder, the benefit of the bundle of rights constituting the shares vest. If, however, the term is interpreted to include the interest conferred by shareholding, then the regulations may very well be *ultra vires*.

[116] It is trite that where a court is faced with two interpretations, one being *ultra vires* and the other being *intra vires*, courts should prefer the interpretation that is *intra vires*. This means that, notwithstanding the laudable purpose that is proposed in the second judgment, the interpretation espoused there cannot and should not be adopted. That interpretation would render the provision *ultra vires* simply because section 22A is exclusively limited to ownership and does not extend to beneficial interest. To endorse it would be an egregious intrusion into the exclusive province of the Legislature. It would constitute a violation of the separation of powers.

[87] I say prima facie because I am of the view that if beneficial interest is interpreted in its usual way – that is, as connoting a severance of interests that comprise ownership – then the term may very well fall within the ambit and scope of section 22A.

[117] If the Legislature intended to empower the Minister to prescribe who may have a beneficial interest as defined in the second judgment, the Legislature could have, and can still, amended section 22A to include "financial interest". This is within its powers. Following that, the Minister can similarly amend regulation 6(d) to include "financial interest". In this way the doctrine of separation of powers is respected.

[118] As I see it, section 22A envisages ownership as espoused above. That is, it is a 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. Absent indication to the contrary, I see no reason why it should bear a different meaning.

[119] My conclusion on ownership, in effect, means that section 22A empowers the Minister to prescribe who may possess the most complete or comprehensive control over a pharmacy (as explained above), and who may legally have the power, right or entitlement to do with the pharmacy – pharmacy business, assets, goods, provide services specifically pertaining to pharmacy practice – as he, she or it pleases, subject to the limitations imposed by law.

[120] Now that the meaning of section 22A is clear, the enquiry must turn to regulation 6(d).

Interpretation of regulation 6(d)

[121] It is axiomatic that interpretation must, logically, start with the words of the provision.[88] ICPA lays much emphasis on the context and purpose of regulation 6(d). We are urged to bear consideration to its laudable objectives, that is, that "[t]he aim of the legislative scheme is ultimately to protect the best interests of patients". In respect

[88] *Diener N.O. v Minister of Justice and Correctional Services* [2018] ZACC 48; 2019 (4) SA 374 (CC); 2019 (2) BCLR 214 (CC) at para 37; *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28; *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 70; and *Chisuse* above n 59 at para 47.

of context, ICPA contends that "it is undesirable for there to be a direct or indirect beneficial interest in both a community pharmacy and a manufacturing pharmacy". The submission is further that—

> "[a]n entity having interests in both types of pharmacies [retail and manufacturing] would gain financially if the manufacturing pharmacy's products are promoted by the pharmacists in community pharmacies over others. This could result in consumers not getting the best product at the best price. Products which are not strictly needed might be recommended and sold."

[122] Context and purpose are plainly important, but, as this Court held in *Diener*, "[t]he ordinary rule and starting point in an interpretative exercise entails a determination of the plain meaning of words in the relevant statutory provision to be construed".[89] In addition, in *Mankayi*, it stated that "[w]hile language cannot always have a perspicuous meaning, the elementary rule and starting point in an interpretive exercise entails a determination of the plain meaning of words in the relevant statutory provision to be construed".[90]

[123] It bears emphasis that in the course of this interpretive exercise and applying this elementary rule, the principle of interpretation against a construction that would render words chosen meaningless must be employed.[91] Self-evidently, context and purpose must have its foundation in the text.[92] And, it is axiomatic that one cannot read words

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[89] *Diener* id at para 37.

[90] *Mankayi* above n 88 at para 70. See also *Chisuse* above n 59 at para 47 where this Court said that "in legal interpretation, the ordinary understanding of the words should serve as a vital constraint on the interpretative exercise, unless this interpretation would result in an absurdity" and that "[t]he purposive or contextual interpretation of legislation must, however, still remain faithful to the literal wording of the statute" (at para 52).

[91] *National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) (*Opperman*) at para 99 and *Member of the Executive Council for Development Planning and Local Government, Gauteng, v Democratic Party* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 53.

[92] See also *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) at para 51:

> "[I]nterpretation begins with the text and its structure. They have a gravitational pull that is important. *The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure*. Rather, context and purpose may be used to elucidate the text." (Emphasis added.)

into a statute by implication unless the implication is necessary in the sense that without it effect cannot be given to the statute as it stands, and that without the implication the ostensible legislative intent cannot be realised.[93] Interpretation is not divination[94] – we must interpret what the statutory provision actually means, not what we think it ought to mean or would like it to mean.[95] To draw from the law of delict – in interpreting legislation we must take the text of the statute as we find it, not as we would like the text to read or think it ought to read.[96] In *Poswa*, the Supreme Court of Appeal cautioned that the difficulty—

> "which faces any argument which claims better knowledge of what the legislature intended than what the legislature itself appears to have had in mind when it expressed itself as it did, is to establish with reasonable precision what the unexpressed intention contended for, was."[97]

[124] Regulation 6(d) has two main parts: first, it prescribes (a) who may own a pharmacy and (b) who may have a beneficial interest in a pharmacy; second, it imposes conditions under which that person may own or have said beneficial interest in a pharmacy.

[125] The first part states that "[a]ny person may . . . own or have a beneficial interest in a community pharmacy in the Republic". Central to this part are the words "own"

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[93] *Masethla v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 192.

[94] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 18.

[95] This Court in *Opperman* above n 91 at para 100, citing Kentridge AJ in *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 18, held that:

> "As this Court pointed out in its very first judgment, if the language used by the lawgiver is ignored in favour of other pursuits, 'the result is not interpretation but divination'. Though said in a different context, the point is that constitutionalism has not upended the basic rules of interpretation."

At footnote 115 it is stated that: "Kentridge AJ was talking about constitutional interpretation, but what he says applies all the more to statutory interpretation generally".

[96] It is a well-established principle of the law of delict that one must take the victim as you find him or her.

[97] *Poswa v Member of the Executive Council Responsible for Economic Affairs Environment and Tourism, Eastern Cape* [2001] ZASCA 31; 2001 (3) SA 582 (SCA) at para 9.

and "beneficial interest". Before turning to the meaning of these two words, a brief word on their relationship within the regulation in question is warranted.

[126] The words "own" and "beneficial interest" in regulation 6 are separated by the disjunctive "or". Properly understood, the use of the disjunctive "or" in the first part of the regulation, relating to the identification of the authorised parties, in between the words "own" and "have a beneficial interest" denotes two concepts which have been connected as being in the alternative. If the two concepts were deemed as synonymous by the Minister, it would have been unnecessary to include the wording of "beneficial interest" as an alternative, and therefore distinct, concept. This is a significant feature – it means that the concept of ownership, on the one hand, and that of beneficial interest, on the other, are recognised as being distinct from each other in terms of the plain language used in the regulation. Based on the use of the word "or" in the first part of the regulation pertaining to the identified authorised persons in relation to retailer pharmacies, it would seem, prima facie,[98] that the Ownership Regulations, insofar as they are concerned with prescribing who may have a beneficial interest in a community pharmacy, have gone further than simply identifying parties who may own a pharmacy, as provided for in the empowering provision, section 22A. *If* it has indeed exceeded the bounds of section 22A, then the Regulations, to the extent that they purport to regulate who may have a beneficial interest in a pharmacy, are *ultra vires*. This all depends on the interpretation that one gives the term beneficial interest.

[127] It is also plain that, contrary to ICPA's argument and what the second judgment holds, the inclusion of the concept of "beneficial interest" in the first part of the regulation does not amount to a condition for ownership, as the conditions are only set out thereafter (in the second part) – specifically, where the regulation continues with the wording "on condition that". Instead, its amounts to a regulatory identification of who may hold a beneficial interest in a pharmacy.

[98] I say "prima facie" because I am of the view that the interpretation that one gives regulation 6 can bring it back within the ambit and scope of section 22A. Equally, though, it can send it far out of the said ambit and scope.

[128] Since the text plainly indicates that the concept of beneficial interest denotes something distinct from ownership, regulation 6(d) accordingly identifies two categories of regulatory authorised legal relationships in respect of pharmacies, being: first, who may *own* a retailer pharmacy; and second, who may *hold a beneficial interest* in a community pharmacy. It bears repetition that, prima facie, regulation 6(d) would seem to have travelled beyond regulating the simple identification of who may *own* a pharmacy, and has added the concept of beneficial interest. The question of whether it has in fact travelled beyond the permissible bounds depends on the interpretation that one gives the term beneficial interest. If the interpretation is consistent with or close enough to ownership (i.e. connoting control and/or other rights and entitlements to ownership)[99] then, regulation would be compliant; if, however, the interpretation is such that the term does not connote control and/or other *rights and entitlements* to ownership, thus moving it far from ownership, it must follow that the regulation would have, indeed, travelled far beyond the bounds of section 22A and would thus be ultra vires. I turn now to the interpretation of the two words or concepts that are at the centre of this case – ownership and beneficial interest.

Own

[129] As regards, the word "own", based on the principles outlined regarding terms that have acquired a legal or base legal meaning, I hold that the concept of ownership, as used here, bears the same meaning as that outlined. That is, it is the real right that potentially 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.

[130] The above definition is consistent with, amongst others, regulations prohibiting certain prohibited persons from owning pharmacies. It can hardly be argued that the prohibitions barring certain prohibited persons from owning pharmacies have, as their

[99] See for example, the concept of beneficial interest in the Companies Act 71 of 2008, discussed below.

concern, preventing those persons from profiting from pharmacies. It is hard to see how that would be a concern of the Minister. The concern is clearly to prevent certain persons who have violated one or other pharmacy related law from controlling pharmacies and exercising entitlements and legal powers that flow from ownership in respect of a pharmacy business. This, needless to say, is to ensure the safety of patients, something that is plainly a concern of the Minister. To the extent that the Ownership Regulations proscribe who may own a pharmacy, then, this aspect of regulation 6(d) poses no problems and is valid.

[131] The contentious concept in this case is that of beneficial interest. The term "beneficial interest" appears in both parts of the regulation: it features in the prescription of who may own a pharmacy, and it also features as a condition. When it is used to stipulate who may own, it is not qualified by the phrase "direct or indirect"; when, however, it is used as a condition it is qualified by that phrase.

Beneficial interest

[132] The concept "beneficial interest" plays a central role in this matter, because ICPA's case is largely based on it and it receives considerable attention in the second judgment. The argument advanced by ICPA in this regard was upheld by the High Court and by Makgoka JA in the Supreme Court of Appeal. Relying on the dictum of Solomon J in *Lucas' Trustee*,[100] Makgoka JA held:

> "As a matter of fact, the concept of 'beneficial interest' as understood and applied in the English law of property is not part of our law. As explained in *Lucas' Trustee*, English law ownership of property can be separated into two parts, namely a legal estate and an equitable or beneficial estate, which can vest in two different persons at the same time. Our law does not recognise such division."[101]

[100] *Lucas' Trustee v Ismail and Amod* 1905 TS 239 (TS) at 247-8, where Solomon J made plain, in respect of the principle in English law that there can be two estates in land, that—

> "our law . . . does not recognise that there can be any such division of the dominium, or that there can be two estates in landed property, but that the person who is registered in the Deeds Office as the owner of the landed property is the one *dominus* of such property."

[101] Supreme Court of Appeal judgment above n 16 at para 64.

[133] It is indisputable that none of the English law of property has been incorporated into our law, nor should it be. Notwithstanding, it can hardly be disputed that the term and concept of beneficial interest has been part of our law for over a century.[102] And while, like ownership, "beneficial interest" has no comprehensive and exhaustive definition, it too, like ownership, has a base legal meaning which has been acquired through the case law and usage in legislation. As a result, I am of the view that recourse to general dictionary definitions is both inappropriate and unnecessary. I will elucidate this base legal meaning.

[134] *Princess Estate* seems the appropriate starting point as it received much attention in previous courts and so, too, in this Court. There, Princess Estate and Gold Mining Co Ltd (Princess Estate) approached the Court for an order directing the Registrar of Mining Titles to transfer into its name, without payment of stamp duty, certain properties that were registered in the name of the Norman Properties Syndicate Ltd (Norman Properties). The basis for this was that Princess Estate was the sole shareholder of Norman Properties (which was, at the time of the application, in liquidation) and as such was of the view that it had a beneficial interest in the properties. As it had a beneficial interest in the properties held by its wholly-owned subsidiary, and because there was no change of beneficial interest occasioned by the liquidation, it was entitled to have the properties registered in its name without the need to pay stamp duty as required by item 24 of the second schedule of the Stamp Duties and Fees Act.[103] One of the issues that the Court had to decide was whether the facts of the case demonstrated that, in the transfers to be effected, there was no change of beneficial interest as contemplated by that Act.

[135] The Court unequivocally rejected the argument advanced by Princess Estate, holding:

[102] *Princess Estate* above n 9.

[103] 30 of 1911.

> "[W]e should restrict the words 'beneficially interested' to that meaning which it usually has when the term is used to call attention to a severance of interests, as where in England lawyers speak of the severance of the legal estate from the equitable estate.
> . . .
> But although our law does not recognise an equitable estate, it does admit of a person having an interest in property which is not registered in his name, and this interest does in some respects resemble the 'beneficial interest' of the English law. To this extent our law does recognise a severance of interests."[104]

[136] The Court thus made it clear that there is a way in which the term "beneficial interest" is usually used, that is, where there is a severance of the interests that constitute the full dominium. In other words, the usual way in which the term is used is where the interests (legal rights, entitlements or powers) that collectively comprise ownership are separated from each other or from the rest of the bundle of interests that make up ownership – with the result that legal title or interest vests with one person, and beneficial interest vests with another. Thus understood, beneficial interest in its usual sense is a component of ownership – it is an interest within the composite bundle of interests that make up ownership. It is not, however, on its own, ownership.

[137] In the trust context, the Supreme Court of Appeal in *Parker* held:

> "In *Nieuwoudt* Harms JA drew attention to this 'newer type of trust' where for estate planning purposes or to escape the constraints imposed by corporate law assets are put into a trust 'while everything else remains as before'. The *core idea of the trust* is debased *in such cases because the trust form is employed not to separate beneficial interest from control, but to permit everything to remain 'as before', though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control*."[105] (Emphasis added.)

[104] *Princess Estate* above n 9 at 1077-9.

[105] *Land and Agricultural Bank of South Africa v Parker* [2004] ZASCA 56; 2005 (2) SA 77 (CC) at para 26.

[138] Much earlier, in a separate concurrence in *Sive's Estate* in the Appellate Division, in describing the facts before the Court, Hoexter JA stated:

> "The present case is one in which the testator has separated the legal ownership from the *beneficial enjoyment* of the bequest, vesting the *legal ownership* in the administrators and indicating succeeding sets of beneficiaries as the objects of his bounty subject to the fulfilment of certain conditions."[106]

[139] The term "beneficial interest", in the context of trusts, is therefore used where legal title and, depending on the nature of the trust, control vest with the trustee and the right or entitlement to or to enjoy the benefits arising from the property (beneficial interest) vests with the beneficiaries. In the present instance, too, it is clear that the term is used where there is a *severance of interests* (legal rights, entitlements or powers).

[140] Apart from the trust context, the term is also used in several statues which include, amongst others, the Companies Act.[107] "Beneficial interest" for purposes of the Companies Act—

> "when used in relation to a *company's securities*, means the *right or entitlement* of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to—
>
> (a) receive or participate in any distribution in respect of the company's securities;
>
> (b) exercise or cause to be exercised, in the ordinary course, any or all of the *rights attaching to the company's securities*; or
>
> (c) dispose or *direct the disposition* of the company's securities, or any part of a distribution in respect of the securities, but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002)."[108] (Emphasis added.)

[106] *Commissioner for Inland Revenue v Sive's Estate* 1955 (1) SA 249 (A) at 269 (emphasis added).

[107] 71 of 2008.

[108] Section 1 of the Companies Act.

[141] Section 56(1) of the Companies Act, headed "Beneficial interest in securities", provides that "[e]xcept to the extent that a company's Memorandum of Incorporation provides otherwise, the company's issued securities may be held by, and registered in the name of, one person *for the beneficial interest of another person*".[109] Read together, thus, it would seem that the Companies Act's concept of beneficial interest, too, refers to a situation where there is a severance of the interests (legal rights, entitlements or powers) that comprise ownership. For example, for the purposes of the Companies Act, a person would be considered to hold a beneficial interest if the person only had the right or entitlement to receive or participate in any distribution in respect of the company's securities which, as indicated above, comprise only a part of the bundle of entitlements or rights that comprises ownership.

[142] To accentuate the point, I turn to legal definitions of the concept. As I see it, the availability of legal definitions, while not conclusive, must suggest that the term is a legally recognised term and has acquired a base legal meaning.

[143] *Claassen's Dictionary of Legal Words and Phrases* states that the concept "connotes someone who is not the legal owner of a thing but has a *legal right* to the benefits of ownership".[110]

[144] The *Oxford Reference* provides the following definition for the concept as used in the legal context:

> "The *right* to the use and enjoyment of property, rather than to its bare ownership."[111]
> (Emphasis added.)

[109] Emphasis added.

[110] *Claassen's Dictionary of Legal Words and Phrases* (2022), available at mylexisnexis.co.za./index.aspx (emphasis added).

[111] Oxford University Press "Overview - beneficial interest" *Oxford Reference* (2009), available at oxfordreference.com/display/10.1093/oi/authority.20110803095458553;jsessionid=5D4F6ADB42D36E950D980156895D18B1.

[145] Finally, the *Cambridge Dictionary* provides the following definition, in the legal context—

> "the *right* to receive income, profits, interest etc from a business, contract or investment; the *right* to live in or receive income from a property."[112] (Emphasis added.)

[146] All of the above definitions are consistent with the understanding of "beneficial interest" in the case law – the understanding that the Court in *Princess Estate* referred to as the "usual" use – that is: where there is a severance of legal interests, rights entitlements or powers. What is important to highlight here is that it connotes a legal right or entitlement to something. Shareholders of a company have no legal right or entitlement to fruits of the assets of the company nor do they have a legal power, right or entitlement to control the assets or business of a company. It consequently becomes difficult to understand how one can interpret the term as the second judgment does – I have not encountered the use of the term, in the legal context, in the manner and sense proposed by the second judgment.

[147] In light of all of this, it is clear that "beneficial interest" has, in our law, a settled or recognised base legal meaning. That is, it refers to a situation where there is a severance of interests (legal rights, entitlements or powers) that comprise ownership. These, it will be recalled, include, amongst others, the entitlement to use the thing (*ius utendi*); the entitlement to draw the natural (*fructus naturales*) and civil fruits (*fructus civiles*) from the thing (*ius fruendi*); and the right or entitlement to exercise control over the thing. One can only speak of a beneficial interest where there is a severance of legal interests, rights or entitlements that comprise ownership. That severance can occur, for example, by agreement.

[112] Cambridge University Press "Meaning of beneficial interest in English" *Cambridge Dictionary* (2011), available at https://dictionary.cambridge.org/us/dictionary/english/beneficial-interest.

[148] The question becomes whether we should ascribe the base legal meaning to regulation 6(d) or whether we should adopt a wider meaning. As indicated above, "[w]here 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".[113] The presumption may, in certain circumstances, be rebutted by, for example, the context or purpose, or both.

[149] The purpose of regulation 6 generally, and regulation 6(d) in particular, as I see it, is to impose restrictions on who may own community pharmacies, not for the sake of doing so, but to protect the interests of patients. This view is fortified by a reading of regulation 6 together with regulation 2. Read together, it becomes plain that there are no restrictions on who may own a manufacturing pharmacy; the restrictions are on who may own community pharmacies. Furthermore, ownership or a direct or indirect beneficial interest in a manufacturing pharmacy disqualifies a person from owning a community pharmacy. The mischief sought to be prevented by this regulation seems to me to be the harm that would arise from the following situation: A person who owns or has a beneficial interest in a community pharmacy, uses the control that they derive from their ownership or beneficial interest to sell or give preference to the medicines of the manufacturing pharmacy that they own or have a beneficial interest in, over those of rival manufacturing pharmacies. This would, first, confer a competitive advantage (fair or unfair) upon the person's manufacturing pharmacy and, second, threaten patients' right to access to quality and affordable health care services and medicines. This risk is real and the Minister cannot be faulted for seeking through, among other measures, the Ownership Regulations, to prevent the risk from materialising.

[150] With this mischief in mind, it would appear that the danger arises from the control exercised over the community pharmacy and not the manufacturing pharmacy (manufacturing pharmacies have no access to end users; community pharmacies do). Alternatively put, the risk of the harm materialising depends, by and large, if not

[113] De Ville above n 69 at 102. See also *Fundstrust* above n 70 at 732 and *Govindamall* above n 68 at 678.

exclusively, on whether or not there is control over the community pharmacy. On this, the second judgment and I are in agreement.[114] Without such control, a person cannot sell or give preference to any manufacturing pharmacy's medicines, no matter how much that person may desire to do so.

[151] It does not seem that the purpose of the regulation suggests that the term "beneficial interest" should bear a different meaning to the settled base legal meaning. If anything, it supports it. As beneficial interest has a particular legal meaning, absent any indication to the contrary, I see no reason why it should not bear that base legal meaning. Beneficial interest in regulation 6, thus, must refer to a situation where there is a severance of interests.

[152] Perspicuously, the severance of interests is not the same in every single context. Each law, in light of and in line with its purpose, makes the delineation.

[153] Control over the community pharmacy is central to both section 22A and regulation 6. Furthermore, it is plain that the mischief sought to be averted by regulation 6 can only materialise where there is control over the community pharmacy. It seems to me that the concept of a beneficial interest for the purposes of the Ownership Regulations generally, and regulation 6(d) in particular, would be characterised by the following severance of interests (legal rights, entitlements or powers): *at the least*, it would require a person to have the legal right, entitlement or power to exercise control over the pharmacy business.[115] Without this, there can be no beneficial interest for the purposes of regulation 6(d) and the Ownership Regulations. The person need not have legal title, but must have this listed right, entitlement or power. Anything less would serve no purpose, for no danger to patients' interests or other risk arises without control. This is consistent with section 22A.

[114] Second judgment at [285] read with [242].

[115] This type of beneficial interest is not uncommon. See for example section 1 of the Companies Act: having the right, entitlement or power to *control* the rights and entitlements that attach to the share qualifies as a beneficial interest. See also the definition of "beneficial owner" in section 1 of the Financial Intelligence Centre Act 38 of 2001 (FICA). This definition is set out below at [158].

[154] In interpreting "beneficial interest", we have been urged to have regard to section 13(4) of the Act, which is the only place in the Act where that phrase appears. That section provides that a person who has been suspended from practising as a pharmacist, or whose name has been removed from the register of pharmacists, shall not be entitled to remain, or be registered, as the owner of a pharmacy, "or hold any beneficial interest in a pharmacy". It was argued that, on a "narrow" interpretation of "beneficial interest", as adopted by majority of the Supreme Court of Appeal and in this judgment, section 13(4) may have the effect, for example, that a pharmacist who has been suspended or struck off may be the sole shareholder and director of a company which conducts a pharmacy business. That argument must be rejected. Nothing stands in the way of a purposive broad interpretation of section 13(4) because, unlike regulation 6(d), that section is not constrained by section 22A and thus does not face an *ultra vires* interpretation hurdle.

Beneficial ownership

[155] Before concluding, it is worth saying something about the concept of beneficial ownership and its relationship to that of beneficial interest. Beneficial interest and beneficial ownership are closely related, if not synonymous. Just like beneficial interest, the term "beneficial owner" is equally well known in our company law. Thus, in *Ocean Commodities* the Appellate Division held:

> "In some instances, however, the registered shareholder may hold the shares as the nominee, i.e. agent, of another, generally described as the 'owner' or 'beneficial owner' of the shares. This fact does not appear on the company's register, as it is the policy of the law that a company should concern itself only with the registered owner of the shares. . . . *The term 'beneficial owner' is, juristically speaking, not wholly accurate, but it is a convenient and well-used label to denote the person in whom, as between himself and the registered shareholder, the benefit of the bundle of rights constituting the share vests*."[116] (Emphasis added.)

[116] *Standard Bank of SA v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 289.

[156] In the context of trusts, in *Estate Merensky* Schreiner JA remarked:

> "The first argument presented in support of this contention was that what section 3(3)(a) describes in the above language is the equivalent of what counsel called '*beneficial ownership*'. For the concept Innes CJ used '*right to the beneficial enjoyment*' in *Estate Kemp and Others v MacDonald's Trustee*, 1915 AD 491, while Solomon JA used '*beneficial interest*'. I shall use the last expression.
> . . .
> In regard to (a) the trust deed clearly shows that the settler was stripping himself of the beneficial interest as well as the legal dominium."[117] (Emphasis added.)

[157] In *Yarram Trading*, the Supreme Court of Appeal held the common law rule with reference to ownership in the context of trusts is that—

> "the trustee is not the beneficial owner of the trust assets. His title is usually described as 'bare ownership' (*nudum dominium*) – sometimes also called 'legal ownership' – while 'beneficial ownership' (*utile dominium*) is said to vest in the beneficiaries of the trust."[118]

[158] Just like beneficial interest, beneficial owner or beneficial ownership is also commonly used in statutes. It occurs, for example, in the Financial Intelligence Centre Act (FICA).[119] Section 1 of FICA, which was recently amended, provides that "beneficial owner":

> "(a) means a natural person who directly or indirectly—
>
> (i) ultimately owns or *exercises effective control* of—
>
> (aa) a client of an accountable institution; or
>
> (bb) a legal person, partnership or trust that owns or *exercises effective control* of, as the case may be, a client of an accountable institution; or

[117] *Commissioner for Inland Revenue v Estate Merensky* 1959 (2) SA 600 (A) at 613.

[118] *Yarram Trading CC t/a Tijuana Spur v ABSA Bank Ltd* [2006] ZASCA 132; 2007 (2) SA 570 (SCA) at para 10.

[119] 38 of 2001.

(ii) *exercises control* of a client of an accountable institution on whose behalf a transaction is being conducted." (Emphasis added.)

[159] Prior to its amendment, section 1 of FICA defined "beneficial owner"—

> "in respect of a legal person, [as] a natural person who, independently or together with another person, directly or indirectly—
>
> (*a*) owns the legal person; or
>
> (*b*) *exercises effective control* of the legal person." (Emphasis added.)

[160] Lastly, commenting on the South African law of trusts, Cameron et al observe:

> "In spite of the somewhat restricted character of the beneficiary's rights in our law in comparison with English law it is common to speak of the beneficiary as having the 'beneficial ownership' of or a 'beneficial interest' in the trust property, or of the trust property as 'belonging' to the beneficiary. Likewise, it is emphasised that the trustee does not have the 'beneficial ownership' or a 'beneficial interest' in the trust property, or that the trustee only has the 'legal ownership' in the trust property."[120]

[161] It is clear that the terms "beneficial ownership", "beneficial interest" and "beneficial enjoyment" have been used interchangeably by our courts to describe a situation where there is a severance of interests (legal rights, entitlements or powers) that comprise ownership.

[162] The inescapable conclusion from all of this is that a person who has beneficial ownership has a beneficial interest in the property in question. It emerges from the case law that the two concepts are not unrelated or different. Thus understood, "beneficial interest" means a legal right or entitlement to the benefits of ownership.

[120] Cameron et al *Honore's South African Law of Trusts* 6 ed (Juta & Co, Cape Town 2018) at 589.

Can a shareholder have a beneficial interest in the assets of the company?

[163] The fundamental starting premise must be the trite principle in company law that the assets of a company are its exclusive property and do not belong to its shareholders.[121] A shareholder cannot manage the business affairs of the company nor can it bind the company in contract. Furthermore, it is trite that a shareholder has no interest in the assets of the company.[122] That principle has been confirmed by our courts in a long line of cases.[123] It was enunciated thus in *The Shipping Corporation of India*:

> "It seems to me that, generally, it is of cardinal importance *to keep distinct the property rights of a company and those of its shareholders*, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil."[124] (Emphasis added.)

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[121] For the principle, see Delport et al "Juristic person" in Delport (ed) *Henochsberg on the Companies Act 71 of 2008* Service 3 (2022) at 83; Blackman et al *Commentary on the Companies Act* Revision Service 9 (2012) vol 1 at 4-116 and 5-167 fn 2.

[122] See *Princess Estate* above n 9 at 1079-80:

> "By our law a liquidation order does not vest the assets of the company in liquidation in the liquidator. If there is *no dominium* in the liquidator of a company which is being wound up, then there *cannot be a severance of two interests* so that the legal interest is in one person and the 'beneficial interest' in another. Both legal and 'beneficial interest' is vested in the company and the winding up does not *in any way sever those two interests*. The company, during the winding up, lies dormant, as it were, and the liquidator realises its assets for distribution, but nothing that he does, during this distribution, divests the company of its *full dominium in the property*. Its land is transferred, not from the liquidator to the purchaser, but from the company to the purchaser . . . *there is no severance of interests* as regards the company and its shareholders. The latter have no dominium in the land of the company, neither a *nuda proprietas* nor a utile dominium. A shareholder has no jus in re in any of the assets of the company; he can only lay claim to such a share of the profits as are awarded to him, or in case of liquidation to such a share in the surplus as he is entitled to according to the liquidation account. *There is no severance of interests between the company and the shareholder, and, therefore, I fail to see how the latter can be said to have any 'beneficial interest*'. Nor does it appear to me to make any difference that one person has bought up all the shares. This can make no difference to the relationship between the sole shareholder and the company. Unless we go to the length of giving to 'beneficial interest' so wide a meaning as to include all persons who may in some way or other eventually derive a benefit from immovable property, I cannot see how a shareholder of a company or the successor to all the shareholders can be said to have a beneficial interest in the land of the company." (Emphasis added.)

[123] See, among others *City Capital SA Property Holdings v Chavonnes Badenhorst St Clair Cooper* [2017] ZASCA 177; 2018 (4) SA 71 (SCA) at para 27; *The Shipping Corporation of India v Evdomon Corporation* [1993] ZASCA 167; 1994 (1) SA 550 (A) at 566; and *Dadoo Limited v Krugersdorp Municipal Council* 1920 AD 530 (*Dadoo*) at 550-1.

[124] *The Shipping Corporation of India* id at 566, where Corbett CJ endorsed the earlier finding of the Appeal Court in *Dadoo* id.

[164] In *Princess Estate*, the Court made it clear that, in light of the way that the term is "usually" used – that is, where there is a severance of the interests that comprise ownership – shareholders could not be said to have a beneficial interest in the property of the company. This was so because, there was no severance of interests in those cases.[125] It bears consideration that, earlier, the Court acknowledged that shareholders could "in a certain sense be considered to have a 'beneficial interest' in the property which is registered in the company's name".[126] This would obviously be the case where the property was, for example, acquired and the ownership interests were severed and legal title or interest was vested in the company, as the registered owner, and the beneficial interest was vested in the shareholder(s). It would work in much the same way as it would in the case of, say, natural persons. I would, however, add that, it seems as though the beneficial interest would not vest in the shareholders by virtue of the mere fact that they are shareholders. In other words, the mere fact of being shareholders would not automatically confer a beneficial interest upon them; the beneficial interest would vest by virtue of some or other agreement.

[165] English courts, too, have endorsed this principle.[127] Recently, in *Sevilleja*, Lord Reed in the United Kingdom Supreme Court, stated:

> "The starting point is the nature of a share, and the attributes which render it valuable. A share is not a proportionate part of a company's assets . . . Nor does it confer on the shareholder any legal or *equitable interest* in the company's assets."[128] (Emphasis added.)

[125] *Princess Estate* above n 9 at 1077 and 1080.

[126] Id at 1076.

[127] *Sevilleja v Marex Financial Ltd* [2020] UKSC 31; *Aron Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL) (*Aron Salomon*) at 42-3 and 51; and *Macaura* above n 25.

[128] *Sevilleja* id at para 31 (emphasis added).

[166] This foundational principle applies even if the company has only one member or, although it has more, one of them effectively controls it.[129] It also finds application where the company is a subsidiary or even a wholly owned subsidiary of another company.[130] It follows, then, that the reference in regulation 6(d) to "own or have a beneficial interest in" must refer to someone who is the legal owner of the community pharmacy or who has a legal right or entitlement to the powers or benefits commonly deriving from ownership.

The second judgment

[167] The second judgment consists, broadly, of two main discussions: the first relates to its interpretation and application of regulation 6(d) (I refer to this below as "the second judgment's approach"); and the second concerns supposed challenges with my approach. For the sake of convenience, I will deal with each of these separately. As the second judgment, by and large, agrees with ICPA's submissions on the interpretation of beneficial interest I will, to the extent necessary, also deal with ICPA's approach as I address the second judgment's approach.

Second judgment's approach

[168] The second judgment holds that the term "beneficial interest" is not a term of art and that it is imprecise. As a result, so it would seem, we cannot rely on cases that have defined the term nor can we rely on legal definitions found in law and other dictionaries. Instead, so the second judgment holds, we should consult common or general definitions of the two words that comprise the term. The judgment provides a few general or common definitions of the words "interest" and "beneficial". In support of its conclusion on the meaning of the word interest, the second judgment calls to aid *Stellenbosch Farmers' Winery*[131] and the Australian case of *Now.com.au*.[132] To support

[129] See *Aron Salomon* above n 127 at 44-5 and 53 and *CIR v Richmond Estates* (*Pty*) *Ltd* 1956 (1) SA 602 (A) at 606.

[130] *Wambach v Maizecor Industries* (*Edms*) *Bpk* [1993] ZASCA 28; 1993 (2) SA 669 (A) at 674-5.

[131] *Stellenbosch Farmers' Winery* above n 42.

[132] *Attorney General for the State of NSW v Now.com.au Pty Ltd* [2008] NSWSC 276.

its conclusion on its preferred interpretation of the word "beneficial" the second judgment, in addition to the general dictionary definition advanced, relies upon *EBN Trading*.[133] After ascribing meaning to the two words, the second judgment marries the two and concludes that the term beneficial interest in regulation 6(d) includes the interest conferred by shareholding.

[169] The flaw with the second judgment's approach stems from its point of departure. It holds that the term beneficial interest is not a term of art and suggests that recourse cannot or should not be had to cases where the term has been defined and used. The second judgment thus would have us rather look to common or general definitions of the two words that comprise the term. That is inappropriate and misleading. As demonstrated above, the term has a base legal meaning. According to the authorities, we must accord it that meaning. The Court in *Govindamall*, unequivocally held:

> "The primary rule of construction is that the words of a statutory enactment must be accorded their ordinary or popular meaning ***unless*** the context or subject-matter clearly shows that they were intended to bear a different meaning. ***If*** *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."[134] (Emphasis added.)

[170] It is clear from the above that, to accord a term a meaning that it has acquired through the years in case law, the word or term need not be a term of art. It is sufficient if it has a base legal meaning or, alternatively put, a meaning that is settled and well-recognised.[135] I demonstrated above that the term beneficial interest has a base legal meaning – it connotes a severance of rights or entitlements. I also demonstrated that while the exact delineation of legal rights and entitlements is not consistent in every law, there is always, however, a severance. And the fact that the delineation is not always consistent in every law, cannot be used to argue that the term does not have a

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[133] *EBN Trading (Pty) Ltd v Commissioner of Customs and Excise* [2001] ZASCA 6; 2001 (2) SA 1210 (SCA).

[134] *Govindamall* above n 68 at 678.

[135] Id. See also *Fundstrust* above n 70 at 732.

base legal meaning. It will be recalled that ownership is a concept that has been said by many to be difficult to define, but that of course is not to say that we cannot ascribe it its base legal meaning. If we can accept that notwithstanding the difficulties in defining ownership it has a base legal meaning, and that as a result thereof we must ascribe it that meaning, I cannot see how the same cannot be true for the term beneficial interest. The second judgment does not tell us why that ought to not be the case for beneficial interest.

[171] I now turn to the second judgment's interpretation of the term. As indicated above, it defines the term by defining, individually, the two words that comprise the term. It commences by defining the term "interest". In doing so, it supplies a general definition and then attempts to support its conclusion with the holdings in *Stellenbosch Farmers' Winery* and the Australian case of *Now.com.au*. ICPA also placed heavy reliance on *Stellenbosch Farmers' Winery*. The response here applies equally to the second judgment and ICPA.

[172] *Stellenbosch Farmers' Winery*, decided in 1961, concerned the prohibition contained in section 166(v) of the Liquor Act, as it then was.[136] This provision made it an offence for a producer "directly or indirectly" to acquire "any financial interest in a business in respect of which a liquor licence has been issued".[137] In their written submissions in this Court, ICPA correctly concedes that this is so – "[w]e accept that

[136] 30 of 1928.

[137] Section 166 of the Liquor Act read:

> "Every person shall be guilty of an offence who—
>
> . . .
>
> (v) being a producer or manufacturer as defined in [section 114] *bis* or a brewer, or a person who has a controlling interest (as defined in [section] 114 *bis*) in a company who is such a producer or manufacturer or a brewer, *directly or indirectly acquires*, except in accordance with the proviso to para. (a) of section 114 *ter*, after the commencement of this paragraph, *any financial interest* in a business in respect of which a liquor licence has been issued under this Act, other than a business in respect of which a wholesale liquor licence or a brewer's licence has been issued to himself or a hotel liquor licence has been so issued to himself or to any other person, or continues for a period exceeding thirty days after such commencement to own any financial interest acquired by him prior to such commencement but after the fourth day of May, 1956."

the legislation in the *Stellenbosch Farmers' Winery* case referred to a 'financial interest' rather than a 'beneficial interest'". ICPA contends, however, that "beneficial interest" in regulation 6 includes the notion "financial interest". That submission is devoid of merit for the reasons advanced below.

[173] The second judgment holds that—

> "[t]he notion that a shareholding gives rise to an 'interest' in the company's business is not controversial. In *Stellenbosch Farmers' Winery*, the expression 'financial interest' in relation to a business was held to include shares in a company which owns the business."[138]

[174] The conclusion reached by the majority in *Stellenbosch Farmers' Winery* was clearly based on the general premise that "[i]n acquiring a proprietary interest in the company, the shareholder acquires as of right an interest in the business of that company which can by permitted grammatical use of language properly be termed a financial interest".[139] So even if it is accepted, on the basis of *Stellenbosch Farmers' Winery*, that "a shareholding gives rise to an 'interest' in the company's business", as held by the second judgment and ICPA, that case makes it abundantly clear that *that interest* (that is, the interest conferred by shareholding) is, "by permitted grammatical use of language[,] properly . . . termed a financial interest".[140] This seems to me to be fatal to the second judgment's reasoning. It cannot be that the word can properly, by permitted grammatical use of language, be termed a "financial interest" and, at the same time, by the same rules, be termed a "beneficial interest".

[175] I next consider *Now.com.au*. That case concerned the proper interpretation of section 25 of the Pharmacy Act of New South Wales (New South Wales Act).[141] The part of the provision that was relevant to those proceedings, provides:

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[138] Second judgment at [254].

[139] *Stellenbosch Farmers' Winery* above n 42 at 485.

[140] Id.

[141] 48 of 1964.

> "(1) A person (not being a pharmacist), a corporation or a body of persons unincorporated shall not carry on, as owner or otherwise, the business of a pharmacist in a pharmacy or otherwise have a pecuniary interest, direct or indirect, in the business of a pharmacist carried on in a pharmacy.
>
> . . .
>
> (2) Subsection (1) does not prevent:
>
> (a) an individual from being employed in the carrying on of the business of a pharmacist, or
>
> . . .
>
> (c) an individual, a body corporate or an unincorporated body from having such an interest in circumstances prescribed by the regulations.
>
> (3) Any person or corporation who or which contravenes any provision of this section shall be guilty of an offence against this Act."

[176] "Pecuniary interest" is defined by a definition added by Act No. 59 of 2006, and provides:

> "Pecuniary interest means a direct or indirect *monetary or financial interest* and includes:
>
> (a) a proprietary interest (including *a proprietary interest as a* sole proprietor, partner, director, member or *shareholder*, or trustee or beneficiary)." (Emphasis added.)

[177] In coming to the conclusion that shareholding coupled with "active involvement" and "effective control" constitutes a "pecuniary interest" for the purposes of section 25 of the New South Wales Act, the Court appears to have been cognisant of the definition of "pecuniary interest"[142] introduced by Act No 59 of 2006.[143] For example, the Court in the course of its reasoning states:

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[142] The Court also considered case law.

[143] See *Now.com.au* above n 132 at paras 38, 69 and 96-9. The defendant submitted that "as at the acquisition date, the Act contained no definition of 'pecuniary interest' . . . [and as such] the new definition of 'pecuniary interest' should be disregarded in construing section 25" (para 89). The Court, however, paid little to no attention to this submission. See also Faunce "Should Only Pharmacists Hold Pecuniary Interests in a Pharmaceutical Business?" (2010) 17 *Journal of Law and Medicine* 502 at 503, read with 502.

> "The term 'pecuniary interest' *must mean* more than a 'proprietary interest' *as section 25 itself states* that a proprietary interest among others is included amongst the sorts of interests which may constitute a direct or indirect monetary or financial interest.
>
> . . .
>
> That pecuniary interest is not limited to *proprietary interest* is clear from the *wording of the section*."[144] (Emphasis added.)

[178] As is clear from the provisions quoted, section 25 does not define "pecuniary interest" to include a "direct or indirect monetary or financial interest", "a proprietary interest", or something more than a proprietary interest, the definition in the definitions provision does.[145] This is why I say that the Court, in reaching its conclusion, appears to have been cognisant of the statutory definition of the term which, as is clear from above, includes shareholding.[146] In my view, thus, *Now.com.au* does not appear to provide significant support for the second judgment's approach.

[179] It bears mention that the Court emphasised that a pecuniary interest does not exist automatically from the mere act of shareholding alone – something more was required.[147] The Court held:

> "To make my finding quite clear, if an investor on the Stock Exchange buys a Wesfarmers' share and all that that person obtains is a dividend or perhaps a dividend and some bonus shares from time to time, and that the source of some part of the moneys which went to pay the dividend derive from a pharmacy in New South Wales, it cannot be said that that shareholder has a pecuniary interest in the pharmacy. *The*

[144] *Now.com.au* above n 132 at para 38 and 69.

[145] See [173] to [174].

[146] On the question of whether or not the Court applied the statutory definition, see Faunce above n 143 at 503, read with 502, where the author notes that—

> "[t]hese provisions [section 25 and the definition of 'pecuniary interest] implied, in the view of Young CJ, that a non-pharmacist must not have a direct or indirect monetary or financial interest in the dispensing or compounding of prescriptions for substances specified in 'the poisons list'."

[147] *Now.com.au* above n 132 at paras 66-73.

> *mere holding of a share in the holding company of a company which owns the pharmacy business does not constitute holding a pecuniary interest in a pharmacy*."[148]

[180] The "more" that is required for shareholding to give rise to a pecuniary interest, according to the Court, is a degree of active involvement and control in the business of the pharmacy.[149] After having found that the shareholder in that case exercised a great deal of control over the pharmacy, the Court found that the said shareholder had a pecuniary interest as defined.[150]

[181] In light of the above, I cannot see how *Now.com.au* supports the second judgment's approach or how it supports the proposition that shareholding can qualify as an interest.

[182] As neither *Stellenbosch Farmers' Winery* nor *Now.com.au* support the second judgment as regards its interpretation of interest, it is unclear why we should accept the definition preferred therein.

[183] The second judgment's interpretation of the word "beneficial" suffers from the same limp. The second judgment holds:

> "Shares in a company are beneficial to the shareholder. If the company's business thrives, the *value* of the shares will go up and they will yield higher *dividends*. Shares may become *valueless* if the company's business fails, but shareholding has as its purpose to derive benefit from the company's business. The downside is normally limited by the *amount the person paid for the shares*, because shareholders do not usually have to make good a company's losses . . . *Shares in a company are beneficial to the shareholder mainly because of the financial advantages they confer*."[151] (Emphasis added.)

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[148] Id at para 73.

[149] Id at para 69.

[150] See id at paras 95 and 108.

[151] Second judgment at [259] to [260].

[184] This is strikingly similar to the reasoning advanced in *Stellenbosch Farmers' Winery* in support of the Court's conclusion to the effect that the interest conferred by shareholding is "*by permitted grammatical use of language [,] properly* . . . termed a financial interest".[152] It is not clear how the same reasoning and same rules of grammar can lead to two different conclusions.

[185] As support of its interpretation of "beneficial", the second judgment calls in aid *EBN Trading*. That case must be read carefully. Notwithstanding the lack of depth of the Court's interpretation of the word "beneficial"[153] (which the second judgment seeks to rely on), a proper reading of the judgment of the Court demonstrates that the Court's interpretation of beneficial interest accords with that preferred in this judgment. The relevant part of the judgment reads:

> "When the contracts are so interpreted the question is not, as I have indicated already, whether EBN acted as a financier, but whether it was beneficially interested in the goods in terms of para (e) of the definition of 'importer' [in the Customs and Excise Act 91 of 1964]. When this question is adverted to, one finds at the outset the three faxes sent by Effective Barter to Dragon in November and December 1994. In these *Effective Barter unequivocally offered to 'purchase and resell' the goods*. Dragon accepted that offer. Next, para 3.1 made orders conditional upon Dragon's obtaining from Pick 'n Pay and Tom Distributors undertakings 'to purchase' the goods. *These undertakings had to be addressed not to Effective Barter but to EBN*. It is clear from

[152] *Stellenbosch Farmers' Winery* above note 42 at 484-5. The Court held:

> "By virtue of his rights in the company [a shareholder] is as a matter of right so circumstanced with respect to the business of that company that his financial position as a shareholder is affected by it either beneficially or detrimentally. If the company, otherwise than in the ordinary course of its business, disposes of its assets (e.g. upon winding up, a reduction of capital or a declaration of dividends) the shareholder benefits financially as a matter of right. If the business of the company fails completely his financial position will be affected detrimentally by his loss of the value of his investment. . . . In acquiring a proprietary interest in the company, the shareholder acquires as of right an interest in the business of that company which can by permitted grammatical use of language properly be termed a financial interest."

[153] See *EBN Trading* above n 133 at para 24. The statement of the issue, interpretation and application, as regards this word, is a mere three short sentences long:

> "Was it a 'beneficial interest' in the sense of the definition? The meaning of the word 'beneficial' is given by The Shorter Oxford English Dictionary as 'of benefit', and the relevant meanings of 'benefit' are 'advantage, profit, . . . pecuniary profit'. In my opinion EBN's interest in the goods was both advantageous and profitable to it."

the evidence of various witnesses that Porritt [the managing director of both EBN and Effective Barter] was not prepared to proceed with the financing without the provision of these undertakings. When effect was given to this condition in November and December 1994, Tom Distributors sent a 'buying order' to Dragon and Pick 'n Pay undertook to Dragon to 'purchase'. So far the documents consistently indicate that *Effective Barter would purchase the goods from Dragon and that EBN would sell them to Pick 'n Pay and Tom Distributors*. *What exactly the relationship between Effective Barter and EBN was to be is not clear. Nor does it matter. The fact that a party has not bought or even does not own goods does not in our law disentitle him from selling them*. *Vacua possessio* has to be given and that was done. *But the truth is no doubt, that in selling to the two traders EBN was acting as the agent of Effective Barter*. That fact would not in itself deprive it of a beneficial interest in the goods, if other circumstances vested such an interest in it. In this connection it is important that *it was EBN and not Effective Barter that assumed liability* to Tek to provide the funds necessary to re-imburse Absa after payment under the letters of credit.

What contractual arrangements did EBN make to cover itself against this and other exposures? *EBN was to receive possession* of one of the original bills of lading upon Daewoo being paid its FOB price, and EBN was to be notified of the arrival of the goods. *The bill of lading was a document of title which entitled EBN to receive possession of the goods*. After that it would deliver to the two traders and receive the price from them. *This money could be utilised to settle its indebtedness for the letters of credit and other amounts, such as payments to Mirror and Excellence*. The main payment that EBN was to make (the payment to Daewoo) was not to be made against receipt of the purchase price from the traders. It was to be made before such receipt. The evidence of Absa's Rebuzzi is clear that the amount payable to Daewoo might be paid while the goods were still on the water and that is what happened. If the goods should for some reason not have been delivered in South Africa, *EBN would not have had the means to obtain payment from the traders, and may even have been liable to them in damages*. No wonder that Mrs Bennett was driven to concede that receipt of the goods not only relieved EBN of the burden of collecting money in Hong Kong, but also served as security for its being re-imbursed its outlays. EBN thus had a lively interest in the goods."[154] (Emphasis added.)

[186] The above quoted passage makes it clear that:

[154] Id at paras 23-4.

(a) EBN Trading was found to be an agent of the owner of the goods;

(b) EBN Trading had a legal entitlement to possession of the goods;

(c) EBN Trading had a legal entitlement to dispose of (sell) the goods;

(d) the undertaking to purchase the goods were addressed to EBN Trading, not the owner;

(d) EBN Trading could, to an appreciable extent, legally do with the proceeds of the sale as it pleased; and

(e) EBN Trading could be held liable in respect of the goods.

[187] It will be recalled that "beneficial interest" as interpreted in this judgment connotes a severance of interests that comprise ownership. These include, amongst others, the right or entitlement to dispose of the thing owned; the right or entitlement to the fruits; the right or entitlement to possession; and that the owner usually bears liability in respect of the thing owned. These entitlements or rights (and obligations) are exactly what EBN Trading enjoyed despite the fact that it was not the owner of the goods. Thus it is hardly surprising why the Court found EBN Trading to have a beneficial interest in the goods. This finding is not a departure from the term's base legal meaning – it accords with it.

[188] Understood thus, *EBN Trading* provides very little, if any, support for the second judgment's interpretation.

[189] In addition to the above, the second judgment's interpretation of "beneficial interest" is defective in another respect – it renders the provision irrational. If section 22A and the Ownership Regulations are concerned with who may legally exercise *control* over a community pharmacy to the detriment of patients' interests (which the second judgment appears to accept),[155] then on the second judgment's interpretation the Ownership Regulations would be irrational because shareholders of a

[155] Second judgment at [285] read with [242].

company cannot and do not control the assets of the company (which include businesses run by the company).[156]

[190] Notwithstanding all of the above deficiencies, the second judgment advances its position as the panacea for all of the issues that are said to arise from my approach.[157] This, however, is not true. Contrary to what the second judgment holds, as will become clear below, the approach adopted in the second judgment gives rise to the same or similar "absurdities" as those which are said to arise from my approach.

[191] The second judgment holds that beneficial interest as used in the Ownership Regulations connotes shareholding. It holds that "[i]f shareholding [qualifies] as a beneficial interest in an operating company's business, *a person who owns shares in the operating company could be said to have a 'direct beneficial interest' in the business*, while *a person who owns shares in the holding company of the operating company could be said to have an 'indirect beneficial interest' in the operating company's business*".[158]

[192] It will be recalled that regulation 6(d) has two parts: the first part prescribes who may own or have a beneficial interest in a community pharmacy. The second imposes conditions under which persons so authorised can own or hold their beneficial interest in a community pharmacy. Beneficial interest appears both in the first and second part of the provision. It is noteworthy that when beneficial interest appears in the first part it is not qualified by the phrase "direct or indirect"; that qualification only appears in the context of the condition of ownership or holding the beneficial interest. This must logically mean that the beneficial interest referred to in the first part of the regulation must be a *direct* beneficial interest. I cannot imagine it being an indirect

[156] *Francis George Hill Family Trust v South African Reserve Bank* [1992] ZASCA 50; 1992 (3) SA 91 (A) at 97.

[157] Second judgment at [245], my Colleague Rogers J states that "[i]f . . . a 'beneficial interest' can include the interest conferred by shareholding, these *problems vanish*" (emphasis added).

[158] Second judgment at [269].

beneficial interest, nor can I imagine the term covering both a direct and indirect beneficial interest (that would render the use of the phrase in the condition superfluous).

[193] The above, in effect, means that the conditions in regulation 6 do not apply to a holder of an *indirect* beneficial interest in a community pharmacy – those conditions only apply to an owner or a holder of a *direct* beneficial interest.[159] In other words, a holder of an *indirect* beneficial interest in a community pharmacy, unlike an owner or a holder of a *direct* beneficial interest, *can* own or have a direct or indirect beneficial interest in a manufacturing pharmacy. Stated in the terms of the second judgment's interpretation of "direct or indirect beneficial interest": the shareholder (C) of a shareholder (B) of a company (A) that owns a community pharmacy *can* own or have a direct or indirect beneficial interest in a manufacturing pharmacy. And the shareholder (D) of (C) can also own or have a direct or indirect beneficial interest in a manufacturing pharmacy. This is because (C) and (D) would be holders of indirect beneficial interests in a community pharmacy and, as demonstrated above, the conditions imposed by regulation 6(d), on owners or holders of *direct* beneficial interests, do not apply to holders of indirect beneficial interests.

[194] Understood thus, on the second judgment's interpretation, the Clicks Entities' current structure may violate regulation 6(d), because on this interpretation Investments is a holder of a direct beneficial interest and its shareholder (New Clicks) has a direct beneficial interest in a manufacturing pharmacy (by virtue of being a shareholder of Unicorn, a company that owns a manufacturing pharmacy). Yet, all it would take for the Clicks Entities to comply with regulation 6(d) would be to insert a company between Investments and Retailers – Investments would thus become a holder of an *indirect* beneficial interest and then it and its shareholder would be free from the condition imposed by regulation 6(d).

[159] The alternative is to say that no person can have an indirect beneficial interest in a community pharmacy. This would obviously be irrational. On the second judgment's interpretation of "direct or indirect beneficial interest", the provision would particularly be irrational because it would permit a pharmacy-owning company to have a shareholder that has shares in several other companies on the same level, but would not permit that shareholder to have a shareholder.

[195] As both my approach and the second judgment's approach may arguably give rise to similar "absurdities", I see no point in dealing with or debunking the "absurdities" that are said to arise from my approach. To do so would be an exercise in futility. The debate should, instead, focus on the law on ownership and beneficial interest, and the proper interpretation of section 22A and regulation 6(d).

Other problems with the second judgment's approach

[196] In answer to the argument advanced on behalf of the Clicks Entities that ICPA's interpretation of regulation 6 could lead to absurd results (prohibiting trivial shareholding), the second judgment proposes the incorporation of a "quantitative limit".[160] The second judgment says that "[i]t might be unfair for the corporate owner of a retail pharmacy to be penalised for the conduct of its direct or indirect shareholders unless those shareholders are in a position to exercise some control over the operating company". As such, the second judgment holds that beneficial interest must be one "giving the holder an element of control similar to ownership".[161] The second judgment thus holds, broadly, that the question whether or not there is a beneficial interest will depend on the number of shares held – the holder must have shares that confer control upon the holder.

[197] The imposition of a quantitative limit is however inconsistent with the express wording of regulation 6 of the Ownership Regulations. It is also clear from the Ownership Regulations that such a qualification is inconsistent with its scheme. On the second judgment's interpretation, such a quantification limit would mean, for example, that a prohibited person can have a beneficial interest (that is, shares) in a community pharmacy as long as it is not the sole or majority shareholder; or that it can have shares in a pharmacy-owning company as long as that person is not the sole or majority shareholder. That plainly does not avert the mischief sought to be averted by the second

[160] Second judgment at [285]. ICPA rejected this quantitative qualification.

[161] Id.

judgment. The inclusion of this quantification limit is also problematic because it would have us read in the words "substantial or significant" before "beneficial interest". This would be tantamount to legislating. In the result, the absurdity of prohibiting trivial shareholding persists and continues to present a significant obstacle in the way of the second judgment's approach.

[198] The second judgment accepts that its interpretation of beneficial interest, in order to avoid unfair results, may require that there be a degree of control.[162] It explains that this is because there may be a temptation "in their running of the community pharmacy, to place the commercial interests of the manufacturing pharmacy above the best interests of the community pharmacy's clients".[163] I agree that control lies at the centre of section 22A and regulation 6. This holding, however, runs counter to the second judgment's reasoning. It is trite that a shareholder, regardless of whether it holds a minority or majority shareholding, cannot manage the business of the company nor can it bind the company in contract. Simply put, a shareholder has no control over a company, its business or its affairs; it cannot cause a company to do anything, let alone further the interests of the shareholder. This is true irrespective of whether the shareholder is an actual shareholder or whether the shares are held by one on behalf of another. In order to adopt that position, we would have to disregard trite principles of company law.

[199] It will be recalled that I indicated that the question whether the Regulations exceed the bounds of section 22A, and thus the question of *ultra vires*, depended on the interpretation of "beneficial interest". In particular, it depended on whether the resultant interpretation was akin to ownership or close to it, or whether it was far removed from it. As shareholding is far removed from ownership, it must follow that the second judgment's interpretation is *ultra vires*. Not only is it *ultra vires* for exceeding the bounds of section 22A, it is also irrational. It is trite that shareholders do not have the

[162] Second judgment at [285].

[163] Second judgment at [242].

right or entitlement to exercise control over the assets of the company. If that is accepted, as it should be, and the second judgment accepts that the regulation and section 22A may require a degree of control,[164] it is hard to conceive how prescribing who may have shares in a company can achieve the purpose of preventing undesirable control.

[200] A pointer to what the Minister had in mind in making the Ownership Regulations can be found in the Regulations Relating to the Registration of Persons and the Maintenance of Registers.[165] Regulations 49 and 59 of these Regulations may be of some relevance to the present discourse. Regulation 49 provides:

> "An applicant in terms of regulation 48, who wishes to carry on the business of a retail pharmacy or at any time after its registration carries on the business of a retail pharmacy, must include a clause in its Articles of Association which prohibits the alienation or disposal or transfer of its *shares* or any direct or indirect *beneficial interest* in such company to any person not entitled to conduct a retail pharmacy or derive a direct or indirect financial benefit from conducting such pharmacy business." (Emphasis added.)

[201] Regulation 59, which applies to close corporations, is similarly worded and provides:

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[164] Second judgment at [285].

[165] Regulations Relating to Registration of Persons and the Maintenance of Registers, GN R1160 *GG* 21754, 20 November 2000. According to section 1 of the Act, any regulation, including both the Ownership Regulations and the Registration Regulations form part of the Act. Furthermore, the Registration Regulations apply to persons authorised to own pharmacies in terms of sections 22 and 22A of the Act (and thus to persons subject to the Ownership Regulations). They are thus *in pari materia*. See, amongst others, regulation 50 of the Registration Regulations. In *Arse v Minister of Home Affairs* [2010] ZASCA 9; 2012 (4) SA 544 (SCA) at para 19, the Supreme Court of Appeal held:

> "Where two enactments are not repugnant to each other, *they should be construed as forming one system and as re-enforcing one another*. In *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* it was said:
>
> > 'Where different Acts of Parliament deal with the same or kindred subject-matter, they should, in a case of uncertainty or ambiguity, be construed in a manner so as to be consonant and inter-dependant, *and the content of the one statutory provision may shed light upon the uncertainties of the other*.'" (Emphasis added.)

> "An applicant in terms of regulation 58, who wishes to carry on the business of a retail pharmacy or any time after its registration carries on the business of a retail pharmacy must include a clause in its association agreement which prohibits the alienation or disposal or transfer in terms of sections 34, 35, 36, 37 or 39 of the Close Corporations Act, 1984, of any *member's interest* or any direct or indirect *beneficial interest* in the close corporation to any person not entitled to carry on the business of a retail pharmacy or derive a direct or indirect financial benefit from conducting such pharmacy business." (Emphasis added.)

[202] It appears then that to the Minister, shareholding and beneficial interest are distinct concepts. It would also seem that the concept of "financial benefit" is not foreign to the Minister. Viewed collectively and holistically, it would seem that where the Minister wants to prohibit (a) interests conferred by shareholding, (b) beneficial interests, or (c) financial interest, the Minister does so in unambiguous terms.

[203] Lastly, the second judgment holds that the *ultra vires* hurdle can be overcome by giving "own" a broader meaning, one that encompasses economic benefits.[166] As stated, that cannot be done. If the Legislature chose to include "beneficial interest" in section 13(4) and to exclude it in section 22A, it must follow that it did not intend "own" and "ownership" to bear a broader meaning. Second, the second judgment suggests that we could source the Minister's power to prescribe who may have a beneficial interest in a pharmacy, from section 49(1).[167] That is not possible. The Ownership Regulations explicitly state that the Minister relied on sections 22 and 22A. Our courts have repeatedly held, in the context of administrative action, that where an administrator relies on a particular provision to perform an act, and later discovers that the provision that he relied upon does not empower him to do what he did, he cannot seek refuge in reliance on an entirely different section for that power.[168]

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[166] Second judgment at [278].

[167] Second judgment at [280].

[168] *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) (*Harris*) at para 18.

[204] In sum, the difference in the divergent approaches adopted in the two judgments is this. The second judgment's interpretation of beneficial interest as being a proscription against who may have shares in a company that owns or has a beneficial interest in a community pharmacy (or who may have shares in a company that has shares in a company that owns or has a beneficial interest in a community pharmacy), obviously falls well outside the scope and bounds of ownership, and thus section 22A. On this definition, regulation 6(d) would plainly expand section 22A and thus be *ultra vires* and void. On the other hand, the interpretation advanced in this judgment – which holds that beneficial interest is a component of ownership where there is a severance of legal interests, rights, entitlements or powers – would mean that the Ownership Regulations do not enlarge or cut down section 22A.

Do the Clicks Entities contravene regulation 6(d) and section 22A?

[205] Absent any control, thus, it must follow that Clicks Group (a holding company), based on the above trite principles, cannot cause Retailers (a subsidiary of a subsidiary of a subsidiary) to exercise preference in respect of the medicines produced by Unicorn (a subsidiary of a subsidiary). Any suggestion that Clicks Group can cause Retailers to give preference to the medicines produced by Unicorn would fly in the face of well-established principles of company law. If then we accept that Clicks Group cannot cause Retailers to give preference to medicines produced by Unicorn, it is unclear to me why my interpretation of beneficial interest is objectionable. In law, neither Investments, New Clicks, nor Clicks Group can manage the business of Unicorn or Retailers, nor can they bind them in contract.

[206] For these reasons, I hold that, on a proper interpretation of regulation 6(d), neither Unicorn, nor Retailers, nor any other company in the Clicks Group have contravened regulation 6(d). The majority decision of the Supreme Court of Appeal in this regard is unassailable. That brings me to the last aspect for consideration, the constitutional challenge.

Constitutional challenge

[207] It will be recalled that ICPA's constitutional challenge is based on the alleged infringement of patients' rights to have access to quality and affordable medicines, guaranteed in section 27 of the Constitution. ICPA contends that the interpretation of section 22A advanced by the Clicks Entities violates the right to access to health care services entrenched in section 27 of the Constitution because, on this interpretation, the state would have failed in its duty to adopt reasonable and rational measures to realise the right to quality and affordable medicines.

[208] The approach for assessing whether a legislative provision infringes a right entrenched in the Bill of Rights is now trite: first, it must be determined whether the impugned provision limits the right in question; if the right has indeed been limited then, second, that limitation must be subjected to a limitations analysis in terms of section 36 of the Constitution. If, however, there is no limitation, then that is the end of the matter.

[209] In the present case, it must be determined whether, objectively viewed, section 22A limits section 27 of the Constitution. The question can be phrased thus: does section 22A constitute a failure to adopt reasonable and rational measures to realise the right to quality and affordable medicines? If it does, then there is a limitation; if it does not, then the constitutional challenge must fail.

[210] It is argued that, on the Clicks' Entities' interpretation of "beneficial interest" (a term which appears in regulation 6(d) and not section 22A) section 22A constitutes the failure referred to above because it facilitates a situation where a community pharmacy could place the commercial interests of the manufacturing pharmacy above the best interests of the community pharmacy's clients. It appears that the risk emerges because, on the "narrow" interpretation of beneficial interest in regulation 6(d), section 22A permits the following situations. First, it permits a situation where X, a natural person, could own a community pharmacy and simultaneously own all the shares in and be the sole director of a company, C, that owns a manufacturing pharmacy. Second, it permits

a situation where X could own all the shares in and be the sole director of a company, C1, which owns a community pharmacy, and could own all the shares in and be the sole director of another company, C2, which owns a manufacturing pharmacy. Third, X could own all the shares in and be the sole director of a company, C3, which in turn owns all the shares in C1 and C2.

[211] As regards the first situation, that outcome is not a product of section 22A, but rather a product of the Minister's failure to make Ownership Regulations proscribing that situation. It will be recalled that the Minister has the power to prescribe who may own a pharmacy – manufacturing or community. The Minister could have avoided the first situation by simply stating, in regulation 2, that:

> "The State or any person may, subject to the provisions of regulation 7(a), own a manufacturing pharmacy in the Republic, *on condition that* such a person or in the case of a body corporate, the shareholder, director, trustee, beneficiary or member, as the case may be, of such body corporate is not the owner, director or holder of any direct or indirect beneficial interest in a community pharmacy."

Irrespective of the definition of beneficial interest, the first situation would thus have undeniably been averted.

[212] Assuming that the situations described in the second and third scenarios are, as ICPA contends, an infringement of section 27(1)(a) of the Constitution, the Minister could have proscribed said situations within the confines of section 22A. The Minister could have simply stated:

> "Any person may, subject to the provisions of regulation 7, <u>*own*</u> a community pharmacy, *on condition* that such a person or body corporate is not part of a corporate group or a group of companies that has, as one of the companies within the group, a company that operates a manufacturing pharmacy business."

[213] On this phrasing, the Minister would have lawfully prescribed who may own a pharmacy in terms of his powers to prescribe who may own a pharmacy. In terms of

his powers to impose conditions, he would have prohibited such an owner from being part of a corporate group that has, as one of the companies, a company that operates a manufacturing pharmacy business. All of this would have been perfectly lawful.

[214] Furthermore, as it cannot be said that shareholders have a beneficial interest in the assets or business of a company, it cannot be said that the shareholding arrangements in the second and third situations could cause the owner of a community pharmacy to place the commercial interests of the owner of the manufacturing pharmacy above the best interests of the community pharmacy's clients, thus compromising the right to access to health care services. What can be said to give rise to the risk, however, is the directorship.

[215] That brings me to the situation of having the same directors. It is trite that the directors are the mind of the company. They manage the business affairs of the company and can bind it in contract. It would clearly be problematic for two separate entities to have "the same mind". One can see how,[169] where two companies share the same mind, the directors of a community pharmacy, in their running of the community pharmacy, could place the commercial interests of the manufacturing pharmacy above the best interests of the community pharmacy's clients and, thus, how permitting such a situation could compromise the right to access to health care services.

[216] While having the same directors, on the face of it, seems problematic, regulation 6 does not prohibit it. In other words, it allows for a company that owns a manufacturing pharmacy to have the same directors as that of a company that owns a community pharmacy, irrespective of whether or not the two companies are in the same corporate group. The site of this problem, however, is not section 22A; it is plainly the Minister. The Minister could have prohibited this in terms of section 22A. The Minister, under regulation 6, could have stated that:

[169] I confine myself strictly to "how". "Why" directors would do this, is something that I do not wish or need to engage with. I do so consciously to avoid debates about whether directors can, or are required to, act to further the interests of shareholders.

> "Any person or body corporate may, subject to the provisions of regulation 7, <u>*own*</u> a community pharmacy, *on condition* that such a person or body corporate:
>
> (a) is not part of a corporate group or a group of companies that has, as one of the companies within the group, a company that operates a manufacturing pharmacy business; or
>
> (b) does not have, as a director, a person who is a director of a company that owns or has a direct or indirect beneficial interest in a manufacturing pharmacy."

[217] The above would have prevented a situation of overlapping minds and thus would have averted the risk of a community pharmacy placing the interests of the manufacturing pharmacy above those of the clients of the community pharmacy. Evidently, the problems identified in situations two and three above are not a result of section 22A but rather the Minister's failure to make appropriate regulations.

[218] In light of the above, it cannot be said that section 22A limits section 27 of the Constitution. Thus, there is no need for a section 36 analysis.

Conclusion

[219] 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. The majority in the Supreme Court of Appeal cannot be faulted in its conclusion that the High Court had erred in reviewing and setting aside the DDG's decision. Had I commanded the majority, I would have granted leave to appeal and dismissed the appeal.

[220] In respect of costs, ICPA asked that, even if they are unsuccessful in the appeal, the Supreme Court of Appeal's adverse costs order ought to be set aside. They rely on *SMEC*[170] for this submission. That case does not assist them. There, the question of

[170] *SMEC South Africa (Pty) Ltd v The City of Cape Town* [2022] ZAWCHC 131.

costs was considered in view of *Biowatch*[171] in the context of a review application. The Court held:

> "[T]he fact that a PAJA review is constitutional litigation does not mean that the applicant will always be insulated from costs, because *Biowatch* is subject to exceptions, such as where the litigation is 'frivolous or vexatious, or in any other way manifestly inappropriate.'"[172]

[221] The Court, regarding itself as bound by this Court's decision in *Harrielall*,[173] found that the applicant, SMEC, was entitled to *Biowatch* protection against costs.[174] There, however, SMEC, a private party, was litigating against an organ of state, the City of Cape Town. This case is between two private parties. Costs must therefore, as usual, follow the outcome.

ROGERS J (Zondo CJ, Kollapen J, Madlanga J and Mbatha AJ concurring):

[222] I have had the pleasure of reading the judgment of my Colleague Majiedt J (first judgment). I agree, for the reasons given in the first judgment, that this Court has jurisdiction and that leave to appeal should be granted. I disagree, however, that the appeal should be dismissed. In my view, it should succeed.

[223] The first judgment deals fully with the facts. I need only emphasise the following by way of introduction to my judgment. Clicks Retailers (Pty) Ltd (Retailers) owns and operates community pharmacies. Unicorn Pharmaceuticals (Pty) Ltd (Unicorn) owns and operates a manufacturing pharmacy. Clicks Investments (Pty) Ltd (Investments) owns all the shares in Retailers. New Clicks South Africa (Pty) Ltd (New Clicks) owns

[171] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[172] *SMEC* above n 170 at para 136.

[173] *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2018 (1) BCLR 12 (CC).

[174] *SMEC* above n 170 at para 143.

all the shares in Unicorn and Investments. The Clicks Group Ltd (Clicks Group) owns all the shares in New Clicks.

[224] The Independent Community Pharmacy Association (ICPA) presented these simple facts, which were undisputed, when it lodged its complaint with the Deputy Director-General (DDG). ICPA contended that Retailers and Unicorn held beneficial interests, at least indirectly, in each other. In the context of the undisputed corporate structure, ICPA could not have been claiming that Unicorn held shares in Retailers or that Retailers held shares in Unicorn. According to ICPA's complaint, the alleged contravention was created "by the vertical integration of the subsidiaries of [Clicks Group]". If, as ICPA was evidently contending, the holding of shares can constitute a "beneficial interest" in the pharmacy business owned by a company, the complaint must have been made on the basis that Clicks Group owned all the shares in New Clicks; that New Clicks simultaneously owned all the shares in Unicorn and Investments; and that Investments in turn owned all the shares in Retailers. This was correctly the focus of attention when ICPA took the DDG's dismissal of its complaint on appeal to the Appeal Committee.

[225] The Ownership Regulations,[175] were promulgated in terms of sections 22 and 22A of the Act.[176] Section 22(1) provides that a "person authorised in terms of section 22A to own a pharmacy" must apply to the Director-General (DG) in the prescribed way for a licence for the premises at which the business is to be carried on. Section 22A reads:

> "**Ownership of pharmacies**.– The Minister may prescribe who may own a pharmacy, the conditions under which such person may own such pharmacy, and the conditions upon which such authority may be withdrawn."

[226] Regulation 6 of the Ownership Regulations reads:

[175] Ownership Regulations above n 2.

[176] Act above n 1.

> "**6. Ownership of community pharmacies.–** Any person may, subject to the provisions of regulation 7, own or have a beneficial interest in a community pharmacy in the Republic, on condition that such a person or in the case of a body corporate, the shareholder, director, trustee, beneficiary or member, as the case may be, of such body corporate—
>
> (a) is not prohibited by any legislation from owning or having any direct or indirect beneficial interest in such a pharmacy;
> (b) is not an authorised prescriber;
> (c) does not have any direct or indirect beneficial interest in or on behalf of a person contemplated in paragraphs (a) and (b); or
> (d) is not the owner or the holder of any direct or indirect beneficial interest in a manufacturing pharmacy."

[227] This case turns on the meaning of the expression "beneficial interest" in the opening part of regulation 6 and in paragraph (d) of that regulation. I have, in keeping with the High Court and the dissenting judgment in the Supreme Court of Appeal, concluded that it should be interpreted as including an interest held by way of shareholding. The judgment of the majority in the Supreme Court of Appeal finds favour with my Colleague. He makes the point, with which I agree, that because in regulation 6 ownership and beneficial interest are separated by the disjunctive "or", they are distinct concepts.[177] My Colleague holds that sections 22 and 22A of the Act do not empower the Minister to prescribe who may have a "beneficial interest" in a pharmacy, only who may "own" a pharmacy. This means, according to the first judgment, that the provisions in the Ownership Regulations prescribing who may have a "beneficial interest" in a pharmacy may be *ultra vires*.

[228] Recognising, however, that there is no challenge to the validity of the Ownership Regulations, the first judgment seeks to give a meaning to "beneficial interest". My Colleague states that "one could interpret 'beneficial interest' to mean something

[177] First judgment at para [126].

very close to ownership, something akin to 'beneficial ownership'".[178] He states that "beneficial ownership" of, and "beneficial interest" in, property are not unrelated or different. Thus understood, "beneficial interest", according to the first judgment, means "a legal right or entitlement to the benefits of ownership".[179] This comes about, according to the first judgment, where there is a severance of some of the rights, entitlements and powers collectively comprising ownership, with the result that "legal title" vests in one person and the "beneficial interest" in another.[180]

[229] Elsewhere, the first judgment identifies the purpose of regulation 6 as being to prevent persons from being able to "control" community pharmacies where this would be undesirable. In the case of regulation 6(d), the harm would arise because the person who owns or has a beneficial interest in the community pharmacy "uses the control that they derive from their ownership or beneficial interest" to prefer the products of the manufacturing pharmacy.[181] It is control of the community pharmacy, rather than control of the manufacturing pharmacy, that matters.[182] This leads to the proposition that the severance contemplated by "beneficial interest" in regulation 6 must, at a minimum, entitle the holder to "have the right, entitlement or power to exercise control over the pharmacy business".[183]

[230] By way of anticipating matters with which I deal more fully below, the first judgment's interpretation does not avoid the supposed *ultra vires* interpretation adopted in my judgment. My Colleague appears to prefer the interpretation set out in his judgment on the basis that his interpretation is less *ultra vires* than mine (although he does not put it this way). Put differently, "beneficial interest" as interpreted in the first judgment is thought to be closer to "ownership" than "beneficial interest" as

[178] Id at para [115].

[179] Id at para [162].

[180] Id at paras [136], [147] and [151].

[181] Id at para [149].

[182] Id at para [150].

[183] Id at para [153].

interpreted in my judgment, even though neither interpretation is covered by the Minister's power to prescribe who may "own" a pharmacy. Whether the first judgment's interpretation is closer, economically, to "ownership" than my interpretation is debatable, but it does not matter. *Ultra vires* is not a matter of degree. The first judgment's interpretation does not dispose of the supposed problem which it places at the forefront of its analysis, namely the word "own" in section 22A.

Ownership and "beneficial ownership"

[231] Since the first judgment equates holding a "beneficial interest" to having "beneficial ownership", I must at the outset say something about the term "beneficial ownership". Of the English law I say nothing, because English property law is very different from ours. In South Africa, ownership is a real right over a thing.[184] A person may become an owner by taking delivery and having possession of the thing personally or through an agent. Where the thing is in the possession of an agent, the owner is still the owner in the true and fullest sense. The owner is not a "beneficial owner" and the agent is not a "nominal owner". There is only one person in whom the real right vests.

[232] The expression "beneficial ownership" tends to be encountered in those cases where the law requires the thing to be registered in the name of a person. Sometimes the registration has no effect on ownership. For example, the person in whose name a car is registered does not, solely by virtue of registration, have ownership of the car.[185] It is different in the case of land. Save in certain exceptional circumstances, not here relevant, the person in whose name the land is registered is in law the owner. The registered owner and another person may have an agreement that all the benefits of ownership will be passed on to the other person and that the registered owner will take

[184] See *Erlax Properties (Pty) Ltd v Registrar of Deeds* [1991] ZASCA 187; 1992 (1) SA 879 (A) at 884I-J; *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd* [2010] ZASCA 164; 2011 (2) SA 157 (SCA); [2011] 3 All SA 29 (SCA) at para 31; and *Staegmann v Langenhoven* 2011 (5) SA 648 (WCC) at paras 16-19.

[185] See, for example, *Akojee v Sibanyoni* 1976 (3) SA 440 (W) at 442C-E; *Absa Bank Ltd v Knysna Auto Services CC* [2016] ZASCA 93 at paras 7-8 and 11; *Smit v Kleinhans* [2021] ZASCA 147 at para 11; and *Sithole N.O. and Another v Sachal & Stevens (Pty) Ltd and Another* [2021] ZAWCHC 194 at para 17.

instructions from the other person. Although one might call the other person a "beneficial owner", that person is not in law the owner, and his or her rights are not real rights akin to ownership. That person simply has personal contractual rights against the registered owner.[186] So one should not be seduced by the loose expression "beneficial ownership" to regard that person as a species of "owner".

[233] Another class of property which is subject to a statutory system of registration are shares in companies. It is in connection with shares that one most often comes across a distinction between "nominal ownership" and "beneficial ownership". Caution is needed here. A person in whom a personal right vests is not the "owner" of the personal right. Although we commonly say that a person "owns" shares in a company, one should be wary of attaching legal significance to this expression, because a share in a company is a bundle of incorporeal personal rights against the company,[187] and cannot strictly be "owned".[188] This bundle of rights, like other personal rights, is transferred by cession.[189]

[234] The legal significance of share registration depends on the details of company legislation. This case is not the occasion to delve into the details. The legislation may

[186] The Full Court judgment in *Lucas' Trustee* above n 100 illustrates the point. Lucas was the registered owner of land, which he had agreed to hold for the benefit of Ismail and Amod. The rights of Ismail and Amod against Lucas were held to be personal, so that on Lucas' insolvency the land fell into his insolvent estate, with Ismail and Amod having only concurrent personal claims against the estate. *Mahomed v Insolvent Estate Du Toit* 1957 (3) SA 555 (A) was another case where an attempt to argue that "equitable ownership" resided elsewhere than in the registered owner failed. Hoexter JA, at 563G-H, said that the correctness of *Lucas' Trustee* had never been questioned in later cases and that there was no doubt about its correctness. See also *Fischer v Ubomi Ushishi Trading CC* [2018] ZASCA 154; 2019 (2) SA 117 (SCA) at para 19.

[187] *Liquidators Union Share Agency v Hatton* 1927 AD 240 at 250-1; *Ocean Commodities* above n 116 at 288H; *De Leef Family Trust v Commission for Inland Revenue* [1993] ZASCA 46; 1993 (3) SA 345 (A) at 356D-I. See also De la Harpe et al "Shares" in De la Harpe et al (eds) *Commentary on the Companies Act of 2008* Original Service (2018) vol 1 at Int-86 to Int-89.

[188] See commentary on section 91 of the now-repealed Companies Act 61 of 1973 in Blackman et al above n 121 at 5-172-1. It is for this reason that a claim to shares in a company does not fit the mould of a *rei vindicatio*: *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 447H (*Oakland Nominees*); *Ocean Commodities* above n 116 at 289H-290A. Corbett JA in *Ocean Commodities* said, at 289B-C, that "beneficial owner" in this setting was, juristically speaking, "not wholly accurate" but was a "convenient and well-used label to denote the person in whom, as between himself and the registered shareholder, the benefit of the bundle of rights constituting the share vests".

[189] *Botha v Fick* 1995 (2) SA 750 (A) at 762A-H. See also De la Harpe et al (2018) above n 187 at Int-9 and cases there cited.

have the effect that the company need not concern itself with anyone other than the registered holder of the shares.[190] However, in this country registration of shares, unlike the registration of land, does not determine "ownership". If, as between the registered holder and a third party, the latter "owns" the shares, the personal rights comprising the shares vest in the third party, but the enforcement of those rights may have to take place through the registered holder, given that the company is not legally bound to recognise anyone other than the registered holder. A legal regime could notionally have the effect that the legal rights comprising the shares vest in the registered holder, with the third party merely having personal rights against the registered holder.[191] In either of these situations, there is only one "owner" of the shares, or – more accurately – only one person in whom the rights comprising the shares vest. There is not one "nominal owner" and another "beneficial owner". The nomenclature of "nominee" and "beneficial owner" in this field is, for purposes of South African law, imprecise, and is a relic of the English law of constructive trusts which does not form part of our law.[192]

[235] In the case of trusts, the trustees are sometimes said to have "bare ownership", or not to have "beneficial ownership", of the assets belonging to them, because they must administer the assets for the benefit of the trust beneficiaries. This does not mean that anyone else is the "beneficial owner" of the trust assets. Except in the rare case of a *bewind* trust,[193] the trustees are the only "owners" of the assets, even though they do not personally enjoy the benefits of ownership. The beneficiaries of the trust are not the owners of the trust assets. In a discretionary trust, a particular beneficiary might

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[190] *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 666C-667A; *Oakland Nominees* above n 188 at 453A-B; and *Ocean Commodities* above n 116 at 289A-B.

[191] This might be the case if, for example, a company's memorandum of incorporation prohibited nominee registration: De la Harpe et al (2018) above n 187 at 2-1147.

[192] Blackman et al (2012) above n 121 at 5-171 to 5-172-1; De la Harpe et al (2018) above n 187 at Int-68 and 2-1149 to 2-1154. In South African law, the person styled a "beneficial" owner in accordance with the nomenclature of English law is simply the "owner" (or more accurately the person in whom the rights comprising the shares vest): Borrowdale "The Transfer of Proprietary Rights and Shares: A South African Distillation out of English Roots" (1985) 18 *CILSA* 36 at 36-8.

[193] In a *bewind* trust, ownership of the assets vests in the beneficiary, with the trustee's function being one only of administration. In such a case, the beneficiary is the true owner: Cameron et al above n 120 at 272-7; Palmer "Trusts" in *LAWSA* 3 ed (2022) vol 43 at para 180 fn 4. See also *Genesis Medical Scheme v Registrar of Medical Schemes* [2017] ZACC 16; 2017 (6) SA 1 (CC); 2017 (9) BCLR 1164 (CC) at para 29 fn 50.

never get a benefit from the assets. Even where a trust beneficiary becomes vested with the right to a trust asset, the beneficiary's right is a personal right to compel the trustees to perform their trust obligations by delivering the asset to the beneficiary. Only upon such delivery does the beneficiary become the owner of the asset.[194] Although trust beneficiaries are not usually described as "beneficial owners" of trust assets, if that expression is used, it does not mean that they are in law the owners of the assets.

[236] To sum up, in South African law the expression "beneficial ownership" is imprecise. The exact legal rights enjoyed by the "beneficial owner" depend on the circumstances. Unless a person is in law the owner, to call them a "beneficial owner" merely conveys that they have personal rights against the owner entitling them to some or all of the benefits which accrue to the actual owner. "Beneficial ownership" is not a species of ownership. The rights comprehended by the expression are located in the field of personal rights, not real rights.

[237] From this it follows that the first judgment's interpretation of "beneficial interest" connotes the interest held by a person who does not "own" the pharmacy business but who has a personal right (for example, a right created by contract) to claim the benefits of ownership from the owner. This is, of course, quite different from the severance that comes about where real rights such as servitudes are subtracted from full ownership. In the latter case, the holders of ownership and the servitude both have real rights.

Interpretation of regulation 6

Purpose and the Constitution

[238] The first judgment stresses the "plain meaning" of words in the process of interpreting statutes. Although interpretation has to start somewhere, the search for the meaning of a statutory provision is a unitary exercise, taking into account the text to be

[194] Palmer id at para 194.

interpreted, the broader context in which it appears, and the purpose of the provision.[195] The role which these components play is, in turn, modulated by constitutional values, in particular the injunction in section 39(2) of the Constitution that, when interpreting legislation, every court must promote the spirit, purport and objects of the Bill of Rights. A "plain meaning", based on no more than the disputed text, does not enjoy a primacy which other considerations must fight to displace.

[239] The first judgment criticises my judgment for starting with the interpretation of regulation 6 rather than section 22A. This is said to be putting the cart before the horse. The metaphor, in my respectful view, is inapt. Interpretation, as I have just said, is a unitary exercise in which all relevant factors are considered holistically. I have considered all relevant factors holistically, including section 22A. An exposition of multiple factors has to be set out sequentially. The exposition is the end-product of having wrestled with all the relevant factors and settled upon an interpretation. When I start, as I do, with the purpose and text of regulation 6(d), I already know what I think about the role that section 22A plays in the process of interpretation.

[240] To this I must add that this case is ultimately about the interpretation of regulation 6. The issue is whether the conduct of Retailers' community pharmacies and Unicorn's manufacturing pharmacy falls foul of that regulation. Section 22A is part of the broader context within which regulation 6 must be interpreted. In assessing that aspect of context, one has to grapple with the interpretation of section 22A itself.

[241] With this caveat, I start the holistic exercise of interpretation by considering the purpose of regulation 6 and the implications for that purpose of adopting one interpretation or the other. I do so because, for reasons I set out later, a "beneficial interest" in a pharmacy business is, semantically and in its context, reasonably capable of meaning an interest by way of shareholding in a company that owns a pharmacy business. Purpose can thus be expected to play a vital role.

[195] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at para 65.

[242] In a general sense, the purpose of regulation 6 is to identify who may own or have a beneficial interest in a community pharmacy. Regulation 6 does so negatively, by stating who may *not* own or have a beneficial interest in a community pharmacy. Each of the four exclusions has a purpose. In the case of paragraph (d) of regulation 6, the purpose is manifestly to avoid any temptation, on the part of those in charge of the community pharmacy, to place the interests of a related manufacturing pharmacy above the best interests of the community pharmacy's clients. If the Minister had been content to rely on the ethical duty of community pharmacists to place the best interests of their clients above the commercial interests of a related manufacturing pharmacy, regulation 6(d) would not have been enacted.

[243] Suppose that a pharmacist – I shall call her X – owns a community pharmacy. In terms of regulation 6(d), X may not also own a manufacturing pharmacy. If X instead owns all the shares in a company, C, that company may not simultaneously own a community pharmacy and a manufacturing pharmacy. This is uncontentious. Regulation 6(d) prohibits these situations because X and C may be tempted, in their running of the community pharmacy, to place the commercial interests of the manufacturing pharmacy above the best interests of the community pharmacy's clients.

[244] Now take a slight variation. If, as the first judgment holds, a "beneficial interest" in a pharmacy does not include the holding of shares in a company that owns a pharmacy, regulation 6(d) would permit the following: X could own a community pharmacy and could own all the shares in and be the sole director of a company, C, that owns a manufacturing pharmacy. This would be permitted because C would not own or have a beneficial interest in the community pharmacy, and X's shareholding in C would not be a beneficial interest in C's manufacturing pharmacy. By the same token, X could own all the shares in and be the sole director of a company, C1, which owns a community pharmacy, and could own all the shares in and be the sole director of another company, C2, which owns a manufacturing pharmacy. Or X could own all the shares in and be the sole director of a company, C3, which in turn owns all

the shares in C1 and C2. The perverse incentives in these situations are identical to those discussed in the previous paragraph. To prohibit the one set of ownership structures but to allow the other set would be irrational and would defeat the purpose of avoiding conflicts of interest.

[245] If, however, a "beneficial interest" can include the interest conferred by shareholding, these problems vanish, since all of the structures described above would fall foul of regulation 6(d). That such an interpretation would better serve regulation 6(d)'s purpose seems to me to be clear. It would also prevent regulation 6(d) from being susceptible to review on grounds of irrationality.

[246] "Beneficial interest" must have the same meaning wherever it appears in regulation 6. In terms of regulation 6(a), a person may not own or have a beneficial interest in a community pharmacy if that person is prohibited by any legislation from owning or having any direct or indirect beneficial interest in a community pharmacy. The obvious purpose is that a prohibited person should not be in charge of a community pharmacy. Section 13(4) of the Act provides in that regard that a person who has been suspended from practising as a pharmacist, or who has been removed from the register of pharmacists, shall not be entitled to remain or be registered as the owner of a pharmacy "or hold any beneficial interest in a pharmacy". Unless "beneficial interest" in section 13(4) includes shareholding, a pharmacist who has been removed from the register of pharmacists because of improper or disgraceful conduct could, in terms of that section, own all the shares in a company which owns a community pharmacy.

[247] The first judgment appears to acknowledge that "beneficial interest" in section 13(4) may need to be interpreted as covering an interest through shareholding. If "beneficial interest" is semantically capable of that meaning in section 13(4), it is also semantically capable of that meaning in the Ownership Regulations, and it is an interpretation that accords with the purpose of the Ownership Regulations. Moreover, the condition in regulation 6(a), including its reference to "direct or indirect beneficial

interest", must have been formulated with section 13(4) in view, since the latter section is the only legislative provision which prohibits a person from owning or holding a beneficial interest in a pharmacy.[196]

[248] The preference for a more generous interpretation is fortified by the Constitution. I have already mentioned the injunction in section 39(2) of the Bill of Rights. Section 27(1) of the Bill of Rights guarantees to everyone, among other things, the right to have access to health care services. In terms of section 27(2), the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. The dispensing of medicines by community pharmacies is an important part of health care services. An interpretation which promotes more effectively the best interests of the clients of community pharmacists should be preferred over one which gives greater scope for perverse commercial incentives. There is nothing in the spirit, purport or objects of the Bill of Rights which pulls in the other direction.

[249] Since regulation 4, which deals with the ownership of institutional pharmacies in private facilities, is formulated in exactly the same terms as regulation 6, the first judgment's interpretation would also be at odds with the purpose of regulation 4 and would expose regulation 4 to attack on grounds of irrationality.

[250] The first judgment expresses the view that, because a company is managed by its directors, perverse incentives do not arise where the same shareholder controls a company operating community pharmacies and another company operating a manufacturing pharmacy, as long as the operating companies do not have common directors. However, and as the first judgment acknowledges, regulation 6 does not preclude the two operating companies in this instance from having common directors. But even if it did, the view expressed in the first judgment strikes me as artificial. First,

[196] Regulation 6(a), in the case of a corporate owner, also strikes at a "shareholder" of the corporation, so regulation 6(a) would preclude X from being a shareholder of a company owning a community pharmacy, even if section 13(4) did not do so. However, the efficacy of the prohibition in section 13(4) cannot be made to depend on whether or not the Minister has by regulation extended the prohibition to persons not covered by the section.

as a matter of law, the shareholder determines who the directors are. Second, in reality a holding company can and often does exercise significant influence over the way its subsidiaries conduct business. There is evidence of this here. In the Clicks Group's Integrated Annual Report for 2018, the group reported that "private label and exclusive brands offer differentiated ranges at higher margins", with the target being "to grow private label to 25% of total health and beauty sales; currently 22%". According to ICPA, Unicorn medicines are only available at Clicks pharmacies. Clicks pharmacists are supplied with a conversion tool to help them identify the Clicks own-brand products for various over-the-counter medicines. ICPA alleges that the performance contracts of Clicks pharmacists incentivise them to maximise the sales of Unicorn medicines.[197]

[251] The first judgment's emphasis on control as the essential feature of "beneficial interest" is not, in my opinion, justified by the language of regulation 6, even though it will usually be present on my interpretation of the regulation. If the lawmaker's intention was that controllers of community pharmacies should not have interests in manufacturing pharmacies, why did the lawmaker not say so by using the word "control" in the introductory part of regulation 6 rather than "own or have a beneficial interest"? On the first judgment's approach, which is that a shareholder is not in a position to "control" the company's business, why does regulation 6, in the case of a company, also include a "shareholder" in the range of persons to whom the conditions apply? If there is an arrangement by which control vests in a person other than the owner, do the restrictions still apply to the owner, as the language of regulation 6 would indicate, and if so why?

[252] According to the first judgment, the concern in regulation 6 is not with control of the manufacturing pharmacy but control of the community pharmacy. If so, why is the same expression "beneficial interest" used not only in the introductory part of regulation 6 but also in regulation 6(d)? Unless "beneficial interest" means different

[197] In the "Internal Process Performance Objectives" part of the performance contract matrix, a weighting of 10% is given to the target of 32% for "Pharmacy Private Label (Sch 1 & 2 + Unicorn)".

things in different places in the Ownership Regulations, the first judgment's approach does not account for the full context in which the expression features in the Ownership Regulations. In order for a person to have a perverse incentive to promote a manufacturing pharmacy's medicines at a related community pharmacy, the only interest the person would need to have in the manufacturing pharmacy is a financial interest, yet the first judgment does not recognise this as a "beneficial interest". If financial benefit is not the defining characteristic, the first judgment's interpretation appears to be novel, since I am not aware that the expressions "beneficial interest" and "beneficial ownership" have ever been used in any context to connote the interest of a person who does not reap the financial benefits of the asset concerned.

The text of regulation 6

[253] The phrase "beneficial interest" is made up of two simple words, both of which can bear wide meanings. The expression is used in regulation 6 in relation to pharmacies, that is, pharmacy businesses. What does it mean to have an "interest" in a business? A natural meaning is a relationship which causes the person's fortunes to be affected by the fortunes of the business. A shareholding in a company that owns a pharmacy business is just such a relationship. The value of the shareholding and the dividends it yields go up or down according to whether the business thrives or flounders. If I own all the shares in a company that conducts a pharmacy business, and someone asks me if I have an interest in a pharmacy business, we would both be surprised if I said no.

[254] The notion that a shareholding gives rise to an "interest" in the company's business is not controversial. In *Stellenbosch Farmers' Winery*,[198] the expression "financial interest" in relation to a business was held to include shares in a company which owns the business. The Australian case of *Now.com.au*[199] dealt with a provision which prohibited non-pharmacists from owning a pharmacy business or having a

[198] *Stellenbosch Farmers' Winery* above n 42.

[199] *Now.com.au* above n 132.

"pecuniary interest, direct or indirect" in a pharmacy business. The Court held that shareholding in a company which conducted a pharmacy business could in appropriate circumstances be a "pecuniary interest" in the business.[200]

[255] *Princess Estate*,[201] which enjoys some attention in the first judgment, did not hold that "interest" or "beneficial interest" could not be interpreted to include an interest by way of shareholding. The Court said that "beneficial interest" was a "difficult phrase";[202] and that, although shareholders have no legal right to the property of a company, "they may in a certain sense be considered to have a 'beneficial interest' in the property".[203] That case was about the meaning of the expression in a particular statute. For reasons which have no relevance to the present case, the Court held that "beneficial interest" should be taken in its "narrowest sense".[204] The question is whether the "narrowest sense" is appropriate in the context of the Ownership Regulations, having regard to the purpose of regulation 6(d) and constitutional imperatives.

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[200] Id. The legislation at issue was the Pharmacy Act, 1964 (New South Wales). The relevant prohibition was contained in section 25 of that Act (quoted in para 3 of the judgment). In 2006, a definition of "pecuniary interest" was added into the 1964 Act (the definition is quoted in para 4 of the judgment). However, this definition only came into operation on 7 September 2006, which predated the impugned acquisition by the defendant of the shares in the pharmacy-owning company, SDS (see para 89 of the judgment). In terms of a savings provision, the new definition did not render unlawful a holding of a pecuniary interest lawfully held before the definition came into force (see para 5 of the judgment). So what the Court said about "pecuniary interest" was unaffected by the new definition and involved an interpretation of the phrase with due regard to the purpose of the legislation. The Court, at paras 70-1, stated:

> "A shareholder in a position to control a single business subsidiary company and whose conduct indicates an intention to do so to its probable financial benefit holds a pecuniary interest in the subsidiary's business.
>
> I also agree with the submission [by the plaintiff] that the legislative scheme does operate so that a person is considered as having a pecuniary interest in the business of a pharmacy 'if he or she has a sufficient number of shares with the appropriate rights attached to them which presently provide the potential and may from time to time actually provide a flow of money generated by the activity to the person in question'."

[201] *Princess Estate* above n 9.

[202] Id at 1075.

[203] Id at 1076.

[204] Id at 1081.

[256] In the United States, many conflict-of-interest statutes prohibit public officials from being interested in contracts concluded by the public bodies they serve. The language of the prohibitions varies slightly: "interested", "individually interested", "financially interested" or "beneficially interested". Almost always the statutes prohibit the official from being interested "directly or indirectly". These prohibitions are seen as codifying a common law prohibition against conflicts of interest.[205] There is a plethora of cases holding that such prohibitions preclude an official from being a shareholder of a contracting company, in other words, that such an official is "interested, directly or indirectly" in the company's contracts.[206] Sometimes the rigour of the prohibition is ameliorated by excluding remote interests, including small shareholdings.[207]

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[205] See, generally, Maess and Naffky "Municipal Corporations" in West (ed) *Corpus Juris Secundum* (Thomson Reuters, Eagan 2011) vol 64 at § 1185-1190; Oaks et al "Conflicts of Interest in Government Contracts" (1957) 24 *University of Chicago Law Review* 361; and Kaplan and Lillich "Municipal Conflicts of Interest: Inconsistencies and Patchwork Prohibitions" (1958) 58 *Columbia Law Review* 157.

[206] See, for example, *President & Trustees of City of San Diego v San Diego & Los Angeles Railroad Co* 44 Cal 106 (1872) (*San Diego*); *Northport v Northport Townsite Co* 27 Wash 543 (1902) (*Northport*); *Independent School District No. 5 ex rel. Moore v Collins* 15 Idaho 535 98 P 857 (1908); *Norbeck & Nicholson Co v State* 32 SD 189 142 NW 847 (1913) (*Norbeck & Nicholson Co*); *State v Kuehnle* 85 NJL 220 (1913) (*State v Kuehnle*); *State of North Dakota v Robinson* 2 NW 2d 183 (1942); *Fraser-Yamor Agency Inc v County of Del Norte* 68 Cal App 3d 201 (1977) (*Fraser-Yamor Agency Inc*); *Bartley Incorporated v Town of Westlake* 237 La 413 (1959); and *Thomson v Call* 38 Cal 3d 633 (1985). See also Maess and Naffky id at § 1190 (and see the fuller discussion in the earlier edition: by Ludes et al "Municipal Corporations" in Ludes et al (eds) *Corpus Juris Secundum* (West Publishing Co., St Paul 1950) vol 63 at § 991(b)); and Oaks et al above n 205 at 364.

In *Norbeck & Nicholson Co* at para 7, the Court, citing *Northport* and *San Diego*, said:

> "The interest of a stockholder of a corporation is within the reason of the rule prohibiting an officer from being interested, directly or indirectly, in a contract with the state or municipality, of which such stockholder is a public officer. This point was also directly in issue in the *Northport* case. In *San Diego v. San Diego Co.*, 44 Cal. 106, the court said: 'To hold, therefore, that one intrusted with property in a fiduciary capacity may rightfully bargain in reference to it with a corporation in which he holds stock would be to ignore all the evils which the rule in question was intended to prevent.'"

In *State v Kuehnle*, at 225-6, the Court said:

> "That the owner of a controlling interest in a corporation may often be as much concerned in its contracts as if they were his own, is obvious, and although the interest of the holder of a single share in a great corporation like the United States Steel Corporation or the Pennsylvania railroad may be so slight as to be imperceptible, no harm can come from holding that he too is concerned within the meaning of the statute, since he cannot be criminally liable unless there is a corrupt intent."

[207] Washington State's Revised Code (RCW) § 42.23.030 provides that no municipal officer shall be "beneficially interested, directly or indirectly" in an implicated contract. One could surely not doubt that such a prohibition includes a contract between the municipality and a company of which the municipal officer is a shareholder. This is indeed clear from § 42.23.040, which excludes, among other remote interests, a shareholding of less than 1% of the shares of a corporation or cooperative which is a contracting party. In the Californian statute considered in

[257] The simple point to be deduced from these cases is that it is not a misuse of language to describe shares in a company as an "interest" in the company's business, assets or contracts, even though the business, assets or contracts do not vest in the shareholder.

[258] The word "beneficial" points to an interest which is to the benefit or advantage of the person who holds it. In *EBN Trading*[208] the question was whether a company, EBN, was an "importer" as defined in the Customs and Excise Act.[209] This in turn depended on whether EBN was "beneficially interested" in the imported goods. The Court referred to dictionary definitions of "beneficial" and "benefit" as meaning, respectively, "of benefit" and "advantage, profit, . . . pecuniary profit". Since the relevant contractual arrangements gave EBN an interest in the goods that was "both advantageous and profitable" to it, it was found to be an importer.[210]

[259] Shares in a company are beneficial to the shareholder. If the company's business thrives, the value of the shares will go up and they will yield higher dividends. Shares may become valueless if the company's business fails, but shareholding has as its purpose to derive benefit from the company's business. The downside is normally

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Fraser-Yamor Agency Inc id, where the prohibition was against being "financially interested" in a contract, the statute excluded shareholdings lower than 3%.

In *Johnson v Martignetti* 374 Mass 784 (1978), which concerned direct or indirect interests in liquor licences, a shareholding of less than 10% was excluded. In that case, the defendants complained that the statute's proscription of direct or indirect holdings was void for vagueness. The Court, at 789, rejected this:

> "[T]he meaning of the statute's proscription against direct or indirect holdings of more than three licences is readily ascertainable . . . Section 15A of c. 138 indicates that, with regard to the granting of liquor licenses, the broad legislative concern with direct or indirect licence holdings is, more specifically, the concern with business entities which have a 'direct or indirect beneficial interest' in a licensed establishment. The terms of § 15A suggest a definite guideline as to the meaning of this phrase. The section provides that a holding of less than 10% of the outstanding voting stock of a corporation owning a liquor licence does not constitute a direct or indirect beneficial interest within the meaning of the statute. The logical, reasonable inference is that a holding of more than 10% of the voting stock of an establishment owning a liquor licence would tend to support an inference that there was a 'direct or indirect interest' under c. 138's statutory scheme."

[208] *EBN Trading* above n 133.

[209] 91 of 1964.

[210] *EBN Trading* above n 133 at para 24.

limited by the amount the person paid for the shares, because shareholders do not usually have to make good a company's losses. Of course, not every shareholding yields financial benefits for the registered member, because that person may be a nominee for someone else. In that case, the "beneficial interest" vests in the person for whom the registered member is a nominee.

[260] Shares in a company are beneficial to the shareholder mainly because of the financial advantages they confer. So, when "interest" is used with reference to shareholding, there is not a big difference between calling the interest "financial", "pecuniary" or "beneficial". However, if the shareholding is large enough, there may be an additional benefit, namely control.

[261] Thus far, I have taken the components "beneficial" and "interest" separately. In combination, words may become a term of art with a well-recognised, and perhaps special or limited, meaning. The expression "beneficial interest" has not in this country become a legal term of art. Even the expression "beneficial owner" is not in our law a term of art, because it is an inexact expression borrowed from concepts of English law which do not have counterparts here. In *Princess Estate*,[211] the Court said, of the legislation there under consideration, that the borrowing of the expression "beneficial interest" from English law, where it had a technical meaning, was "very unfortunate".[212] The only sphere in which this inexact label of convenience crops up with any frequency in our law is in the case of shares registered in the name of a nominee for the benefit of a third party. As I have explained earlier, in that case the third party is usually the "owner" of the shares, or is – more accurately – the person in whom the bundle of rights comprising the shares vest. The nominee is not a "nominal owner" or a person with "bare dominium". There is only one "owner".

[211] *Princess Estate* above n 9.

[212] Id at 1076.

[262] In the context of regulation 6, it would not have made sense to use "beneficial interest" in the sense in which "beneficial ownership" is used in relation to shares, because regulation 6 is not concerned with beneficial interests in shares but with beneficial interests in pharmacy businesses. But assuming for purposes of argument that "beneficial ownership" is a legal term of art, it is noteworthy that the Minister did not use that term. Instead the Minister chose the expression "beneficial interest". The first judgment seems to me to treat the two expressions as synonymous, but there is no reason why they should be. In both expressions, the common word "beneficial" excludes a mere nominee. But the other words in the expressions, "ownership" in the one, "interest" in the other, are different. The word "interest" is wider than "ownership".

[263] The expression "beneficial interest" appears four times in regulation 6. Thrice it is contrasted with ownership.[213] So, in the context of the Ownership Regulations in general, and in regulation 6 specifically, a "beneficial interest" in a pharmacy business must, on the face of it, mean something other than ownership of the pharmacy business. To the extent that "beneficial ownership" connotes the person who is in law the true owner of the business, it is covered by the reference to ownership. The addition of "or beneficial interest" would add nothing if "beneficial interest" were equated with beneficial ownership. It is not possible in our law to have one person as the "nominal owner" of assets comprising a business and another person as the "beneficial owner" of the assets. There is simply an "owner".

[264] Can there sensibly be a distinction between nominal holding and "beneficial ownership" in relation to a pharmacy business, such as is sometimes said to exist where shares are registered in the name of a nominee? The assets which make up a pharmacy business are not assets of a kind that need to be registered in order to be held or owned, and the business as such does not have to be registered. What section 22

[213] The same contrast is drawn in regulations 2 to 5. These regulations deal with the ownership of, respectively, manufacturing or wholesale pharmacies (regulation 2), institutional pharmacies in public health facilities (regulation 3), institutional pharmacies in private facilities (regulation 4) and consultant pharmacies (regulation 5).

of the Act requires is that the premises from which a pharmacy is conducted must be licensed. Only the owner of the business – that is, a person authorised to own a pharmacy business in terms of section 22A – may apply for the premises to be licensed. This must mean the true owner. There is no register of pharmacy businesses such as would warrant a distinction between a registered nominal holder of the business and a beneficial owner. If X and Y have a private understanding that Y is the owner of a pharmacy business, then X holds the business as an agent for Y, and Y is in law the owner of the business. X could not be described as an owner, nominal or beneficial, and X could not in his or her own name apply for a section 22 licence. Section 22 would not permit X to pretend to be the owner.

[265] In my view, therefore, "beneficial interest" in regulation 6 cannot sensibly mean beneficial ownership, because a pharmacy business does not lend itself to nominal holding or nominal ownership and because the Act is concerned with the actual owner, not with a pretence of ownership. The Minister would have had no reason to draw a distinction between nominal holders and beneficial owners of pharmacy businesses. In legislation concerned with, among other things, conflicts of interest, a broader meaning must have been in mind, in line with the usage in the American statutes previously mentioned. The context is quite different from *Princess Estate*, which was concerned with an exemption from transfer duty.[214]

[266] There is support for this in the rest of the Ownership Regulations. Regulations 7 and 8 deal with applications for licences in terms of section 22. They are framed with reference to ownership, and make no mention of "beneficial interest".[215] The word "owner" in these regulations must mean the true owner. Regulations 7 and 8 do not

[214] The statutory provision under which the applicant in that case claimed exemption was item 24 of Schedule 2 of the Stamp Duties and Fees Act 30 of 1911, which stated that that no stamp duty was payable on transfer deeds in respect of "transfers whereby no change of beneficial interest in the property transferred is effected".

[215] Regulation 7 is headed "Conditions for the ownership of pharmacies". Regulation 7(1) commences: "A person who may own a pharmacy in terms of section 22A of the Act and who applies for a licence in terms of section 22 of the Act shall provide the Director-General with . . .". Regulation 8 is headed "Licensing of pharmacy premises". Regulation 8(1) starts thus: "A person desiring to own a pharmacy in terms of section 22A of the Act shall . . .".

contemplate that a person with a "beneficial interest" in a pharmacy may apply for a section 22 licence. Clearly a person who is the true owner, that is the "beneficial owner" in the sense in which that term is used in the first judgment, is entitled to apply for a licence in terms of section 22A read with regulation 8, because that person would be the "owner". The words "or beneficial interest" do not feature in regulations 7 and 8 because the holder of a "beneficial interest" is not in any sense an "owner" and thus cannot apply for a section 22 licence.

[267] We also know from regulations 4 and 6 that a "beneficial interest" may be "direct or indirect".[216] The words "direct or indirect" cannot, in my view, be sensibly applied to beneficial ownership. Counsel for the Clicks Entities suggested in argument that "indirect" could apply to the case where X holds a pharmacy business as a nominee for Y who holds the business as a nominee for Z as beneficial owner. The idea that the Minister had such a peculiar set of holding arrangements in mind beggars belief, even if a pharmacy business lent itself to being held or owned "nominally". But even in this fantastical arrangement, Z would not be an "indirect" beneficial owner. If X holds assets as an agent for Y who holds them as an agent for Z, the real right of ownership vests in Z. There is no other owner. X and Y are not nominal owners, they are mere agents. To call Z the "indirect beneficial owner" would imply that someone else was the "direct beneficial owner", which would obviously be untrue.

[268] It is the same in the case of shares, the only situation where one often encounters the language of beneficial ownership. If X is the registered shareholder as a nominee for Y, and if Y is in turn a nominee or agent for Z, the personal rights comprising the shares vest in Z, and Z is thus the "owner" of the shares. The rights comprising the shares do not vest in either X or Y, and neither of them is a "nominal owner" of the shares.

[216] Paragraphs (c) and (d) of regulation 4 are identically worded to paragraphs (c) and (d) of regulation 6.

[269] "Direct or indirect", on the other hand, could sensibly qualify "beneficial interest" if the latter expression were understood to mean an interest in a business other than ownership. In particular, a beneficial interest in the form of shareholding can be direct or indirect. If shareholding can qualify as a beneficial interest in an operating company's business, a person who owns shares in the operating company could be said to have a "direct beneficial interest" in the business, while a person who owns shares in the holding company of the operating company could be said to have an "indirect beneficial interest" in the operating company's business.

[270] The first judgment expresses the view that, because the words "direct or indirect" only appear in paragraph (d) of regulation 6 and not also in the introductory part of regulation 6, the "beneficial interest" in the introductory part must be a "direct" beneficial interest. Even if that were right, it would not affect the outcome in this case, because Investments would have a "[direct] beneficial interest" in Retailers' community pharmacies and regulation 6 precludes such a company's "shareholder" (here, New Clicks) from having a "direct or indirect beneficial interest" in Unicorn's manufacturing pharmacy. I respectfully doubt, though, that the first judgment's interpretation is right. Neither side contended that the scope of "beneficial interest" in regulation 6 was affected by whether or not it was qualified by the words "direct or indirect", even though the question was raised in oral argument. The first judgment's interpretive logic is similar to the maxim that the express inclusion of one thing impliedly excludes the other.[217] This maxim, while sometimes useful, is not a rigid rule;[218] it has been described as "a valuable servant but a dangerous master", always to be applied "with great caution".[219] If the Minister had this distinction in mind when framing the regulations, I would have expected her to have used the word "direct" in the introductory part of regulation 6 rather than leaving it to implication.

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[217] In Latin, "*inclusio* [or *expressio*] *unius est exclusio alterius*".

[218] *National Director of Public Prosecutions v Mohamed N.O.* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 40 (*Mohamed N.O.*), cited with approval in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at 463I-464B fn 35.

[219] *Mohamed N.O.* id and *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* [2020] ZACC 14; 2021 (3) SA 1 (CC); 2020 (10) BCLR 1204 (CC) at para 50.

[271] It is clear that in regulation 6(c), and in the identically worded regulation 4(c), "direct or indirect beneficial interest" must refer to, or at least include, direct and indirect shareholdings, because an interest "in . . . a person" can only mean an interest in a corporate body. This shows that the Minister had shareholding in mind when using the expression "beneficial interest". And it would be strained and implausibly subtle to suppose that the Minister intended "beneficial interest" to include shareholding when speaking of an interest in a person but to exclude shareholding when speaking of an interest in a business.

Section 22A

[272] As I read the first judgment, section 22A is the main reason that causes my Colleague to shrink from giving a broader meaning to "beneficial interest", a broader meaning that would better serve the purpose of regulation 6. Section 22A is undoubtedly part of the context in which regulation 6 must be interpreted, because the Minister states that she made the Ownership Regulations in terms of sections 22 and 22A. I also accept that if regulation 6 is reasonably capable of two interpretations, and if the one interpretation (but not the other) would result in the regulation being *ultra vires*, the other interpretation must be preferred. And, of course, as the first judgment points out, the formulation of the Ownership Regulations cannot influence the interpretation of the principal Act, in particular the interpretation of section 22A.

[273] The first judgment stresses that section 22A empowers the Minister to prescribe who may "own" a pharmacy. That is the word which, according to the first judgment, places a brake on a wide interpretation of "beneficial interest". If the Minister, in prescribing who may have a "beneficial interest" in a pharmacy business, was going beyond a prescription of who may "own" a pharmacy business, regulation 6 (and indeed regulations 2 to 5)[220] would be *ultra vires*.

[220] See above n 213.

Does the first judgment's interpretation solve the problem?

[274] In my respectful view, there are several difficulties in the way of the first judgment's reasoning. The first is the unstated premise that my Colleague's interpretation is *intra vires* section 22A while mine is *ultra vires*. Accepting for the moment the first judgment's point of departure, namely that the Minister may only prescribe who may "own" a pharmacy business, what interpretation does the first judgment offer? If by "beneficial interest" my Colleague means, as I understand him to mean, the benefits of ownership unaccompanied by the real right of ownership, this supposed "beneficial ownership" is not ownership at all. It consists of personal rights which the "beneficial owner" has against the actual owner. The first judgment's interpretation of "beneficial interest" is even further removed from ownership if it exists solely by virtue of control, which might or might not be accompanied by a right to share in the financial rewards of the controlled business.[221] From this it follows that if my interpretation is *ultra vires* section 22A, so is his.

[275] If, on the other hand, by "beneficial interest" my Colleague means that the business actually belongs to the holder of the beneficial interest, even though it is held in the name of a nominee, the holder of the "beneficial interest" would actually be the "owner". On that approach, "beneficial interest" is not being interpreted, it is being ignored, because what it supposedly addresses is already covered by the word "own". And for reasons I explained earlier, it is not plausible that the Minister had in mind the situation in which a pharmacy business was held in the name of a nominee. So either the first judgment's interpretation falls into the same trap as mine supposedly does or it fails to offer an interpretation of which the regulation is reasonably capable.

[276] My Colleague postulates, with reference to his interpretation of sections 13(4) and 22A, that all the provisions in the Ownership Regulations prescribing who may

[221] A person, as I understand the first judgment, could have control of a community pharmacy by virtue of a management contract or perhaps by virtue of a contract entitling that person to be appointed as the sole director of the company owning the community pharmacy. The person would not need to have a financial interest in the community pharmacy, since his or her financial benefit would be derived from the manufacturing pharmacy whose products he or she would promote at the community pharmacy.

have a "beneficial interest" in a pharmacy could be *ultra vires*. Absent an attack, however, on the Ownership Regulations, the one thing an interpreter cannot do is to decline to give effect to words out of concern that they are *ultra vires*.[222] The first judgment suggests that, absent a challenge to the Ownership Regulations, one could interpret "beneficial interest" as meaning "something very close to ownership, something akin to 'beneficial ownership'".[223] However, if section 22A only empowers the Minister to prescribe who may "own" a pharmacy business (understanding "own", in its ordinary legal sense of a real right in a thing), the first judgment's suggestion does not solve the problem. Once one concedes that "beneficial interest" must mean something other than ownership in law, there is, in my respectful view, every reason to prefer the interpretation adopted in this judgment over the one given in the first judgment.

Is my interpretation ultra vires?

[277] The second difficulty is the premise that my interpretation is *ultra vires* section 22A. Where a litigant attacks the validity of a regulation, a court must, within bounds, prefer an interpretation of the regulation which does not lead to its invalidity.

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[222] This flows from the principles set out in *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) as expounded in various judgments of this Court, including *Merafong City Local Municipality v Anglo Gold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) and *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (*Tasima*). In *Tasima*, Khampepe J said this at para 147:

> "No constitutional principle allows an unlawful administrative decision to 'morph into a valid act'. However, for the reasons developed through a long string of this Court's judgments, that declaration must be made by a court. It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality. Therefore, until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence."

See also *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation)* [2017] ZACC 43; (2018) 39 ILJ 311 (CC); 2018 (2) BCLR 157 (CC). In that case there was also a contention that the respondents' interpretation of the regulations in issue was *ultra vires* the empowering legislation and was also unconstitutional for other reasons. It is unclear whether the majority judgment found the regulations to be *intra vires* but what is clear is that the majority declined to enter into the question whether the regulations were otherwise unconstitutional, holding that no proper constitutional challenge had been advanced. The majority stated, at para 45, that the applicant could still bring the constitutional challenge by way of appropriate proceedings in the High Court. The concurring judgment found, at paras 95-6, that there might well be merit in the *ultra vires* contention but that the case advanced by the applicant was about the interpretation of the regulations, not whether they were *ultra vires*. The dissenting judgment held that the *ultra vires* attack had been properly raised and concluded that the regulations were indeed *ultra vires*.

[223] First judgment at para [115].

Here, however, there is no attack on the validity of regulation 6, despite the fact that the two competing interpretations were in play from the beginning. The result is that neither the High Court nor the Supreme Court of Appeal nor this Court has been called upon to decide definitively that any particular interpretation will cause the regulation to be *ultra vires*, and the Minister has not been required to defend the validity of the regulation on any particular interpretation. So, if all other considerations favour a particular interpretation, this Court should not, in my view, reject it on the basis of *ultra vires* concerns unless it is clear that the preferred interpretation will cause the regulation to be *ultra vires*.

[278] There are several possible answers which might be put up to the *ultra vires* concerns. The first is that "own" in section 22A could be given not its common law meaning of the real right of dominium, but rather a broader meaning, such as would cover any interest by which a person directly or indirectly reaps the economic benefits of a pharmacy business. On that broader interpretation, both my interpretation and my Colleague's interpretation would be *intra vires*, and section 22A would cease to play a significant part in the interpretation of regulation 6.

[279] The second, not very different from the first, is to invoke the principle that the conferring of an express power is accompanied by an implied power to do whatever is reasonably ancillary to the proper carrying out of the express power; and that a power can be regarded as reasonably ancillary to the express power if the true object which the lawmaker had in mind would be defeated if the ancillary power was not implied.[224] If the purpose of the power conferred by section 22A could be circumvented by interposing one or more companies between the ultimate shareholder and the pharmacy business, the power to regulate such arrangements could be regarded as reasonably ancillary to the express power conferred by section 22A.

[224] *Makoka v Germiston City Council* 1961 (3) SA 573 (A) at 581H-582B. See also *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* [2016] ZASCA 17; 2016 (3) SA 317 (SCA); 2016 (4) BCLR 487 (SCA) at para 95; *Johannesburg Municipality v Davies* 1925 AD 395 at 403; and *Middelburg Municipality v Gertzen* 1914 AD 544 at 552-3.

[280] The third, which is similar to the second but which avoids the need for an implied power, is not to treat section 22A as the sole source of the Minister's power to make the Ownership Regulations. It is true that the Minister only mentioned sections 22 and 22A in the preamble to the Ownership Regulations. However, if – in the context of regulating ownership in its ordinary sense pursuant to section 22A and to avoid circumvention – the Minister saw the need also to regulate the holding of "beneficial interests", the Minister had that power in terms of section 49(1)(q). In terms of that section, the Minister can make regulations concerning "generally, all matters which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved". If there were a frontal challenge to the Ownership Regulations, reliance on section 49(1)(q) might be defeated with reference to this Court's judgment in *Harris*,[225] to which the first judgment makes reference, but this is not necessarily so.[226]

[281] The final possible answer is this. Even if, as a matter of form, regulation 6 might appear to be *ultra vires*, it is not in doubt that a regulation with exactly the same effect as my interpretation could be formulated without falling foul of section 22A, even on

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[225] *Harris* above n 168.

[226] In *Harris*, id, the Minister had issued a notice under a provision of an Act which allowed the Minister to determine national policy, including policy for the determination of the age of admission to schools. The Minister issued a notice which was not a policy but purported to be a legally binding rule. In order to save the notice, the Minister relied on a provision of another Act which allowed him to determine age requirements for the admission of learners. Different statutory procedures applied depending on whether a promulgated notice constituted a guiding policy or binding legislation. This Court distinguished *Latib v The Administrator, Transvaal* 1969 (3) SA 186 (T) at 190-1, where it held that, unless there is a direction in the statute requiring that the section in terms of which a proclamation is made should be mentioned—

> "then, even though it is desirable, nevertheless there is no need to mention the section and, further, that, provided that the enabling statute grants the power to make the proclamation, the fact that it is said to be made under the wrong section will not invalidate the notice."

This Court, at para 17, said that the applicability of this line of reasoning "must depend on the particular facts of each case, especially whether the functionary consciously elected to rely on the statutory provision subsequently found to be wanting". In *Harris* at para 18, there was no suggestion in the affidavits filed by the Minister of an administrative error. In the present case, the Minister was not in error when she referred to sections 22 and 22A, since those provisions do substantially cover the content of the Ownership Regulations. The question is whether a modest supplementation of the Ownership Regulations, in terms of the residual power conferred by section 49(1)(q), was intended or could be relied on by the Minister if there was a frontal challenge to the Ownership Regulations. The immediately preceding paragraph (p) of section 49(1) governed the making of regulations pursuant to sections 22 and 22A: "any matter which, in terms of any provision of this Act, is required to be or may be prescribed by regulation". There is no difference in the consultation and notice-and-comment procedures to be followed where regulations are made under the various paragraphs of section 49(1).

the narrow interpretation of "own" in that section. This is because section 22A confers on the Minister the power not only to prescribe who may "own" a pharmacy but also "the conditions under which such person may own such pharmacy". Subject to considerations of legality, there is no limit on the content of such conditions. Counsel for the Clicks Entities, in defending section 22A from constitutional attack, themselves made the point that section 22A would enable the Minister to make a regulation outlawing exactly what ICPA says regulation 6(d) outlaws. Only a modest reorganisation of the regulation would be needed to make the "beneficial interest" in the opening part of regulation 6 a condition on which a person may "own" a pharmacy.[227] Should a regulation be regarded as *ultra vires* because it has been formulated in one way rather than another, even though both formulations have the same substantive effect?

[282] For these reasons, and even if my Colleague's interpretation avoids the supposed *ultra vires* objection from which mine is said to suffer, it is by no means clear that on my interpretation regulation 6 would be *ultra vires*.

Other grounds of invalidity besides ultra vires

[283] A final difficulty I have with the first judgment's *ultra vires* reasoning is that the *ultra vires* doctrine is not the only basis on which a regulation might be invalid. The preference for an interpretation which avoids unlawfulness applies to all grounds on which a regulation might otherwise be invalid. As I have shown, the narrow interpretation of "beneficial interest" would result in regulation 6 being irrational and thus open to proceedings to have it set aside as invalid.

[227] For example, the opening part of regulation 6 could be reframed thus:

> "Any person may, subject to the provisions of regulation 7, own a community pharmacy in the Republic, on condition that such person, or any person having a beneficial interest in the community pharmacy, or in the case of a body corporate the shareholder, director, trustee, beneficiary or member as the case may be of such body corporate –"

Supposed absurdity

[284] Counsel for the Clicks Entities submitted that ICPA's interpretation of regulation 6 could lead to absurd results. Companies with subsidiaries conducting community pharmacy businesses or manufacturing pharmacy businesses might be listed on the stock exchange. An investor might own a small quantity of shares in each listed company. If the investor's shares constituted beneficial interests in the community and manufacturing pharmacy businesses of the relevant subsidiaries, regulation 6(d) would be violated.

[285] For several reasons, this is not a powerful consideration. First, although counsel for ICPA disavowed any quantitative limit in defining "beneficial interest", there might be a case for incorporating a quantitative limit. "Beneficial interest" is used alongside "own". In that context, it could be argued that the "beneficial interest" is one giving the holder an element of control similar to ownership. This was a feature of the interpretation of "pecuniary interest" in the Australian case of *Now.com.au*.[228] It might be unfair for the corporate owner of a retail pharmacy to be penalised for the conduct of its direct or indirect shareholders unless those shareholders are in a position to exercise some control over the operating company.

[286] Second, the principle that the law does not concern itself with trivialities[229] can play a role in the interpretation of statutes,[230] and counsel's example might be held to fall outside the ambit of regulation 6 on this basis. The authors of an article on New York's legislation regulating conflicts of interest by public officials[231] question whether the authorities justify the proposition that even an insignificant shareholding in the contracting company is a ground of disqualification:

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[228] *Now.com.au* above n 132.

[229] The Latin maxim is *de minimis non curat lex*.

[230] Compare Greenberg "Statutory and Legislative Process" in *Halsbury's Laws of England* 5 ed (LexisNexis, London 2018) at para 759: "Unless the contrary intention appears, an enactment by implication imports the principle of legal policy expressed in the maxim *de minimis non curat lex*…"

[231] Kaplan and Lillich above n 205.

> "If the issue should come squarely before a New York court it is quite possible that the word 'interest' in conflicts of interest statutes, when applied to the financial interests of stockholders, would be judicially construed to mean 'substantial interest'. Such an approach would allow a public servant to retain his 10 shares of American Telephone and Telegraph."[232]

[287] Third, small indirect shareholdings in listed companies are not the only cases in which regulation 6(d) could conceivably apply to insignificant interests with perhaps unintended consequences. If a community pharmacy business and a manufacturing pharmacy business were each the subject of joint ownership by multiple pharmacists, a junior pharmacist might have a very small ownership fraction in each business. Or the "shareholder" contemplated in the opening part of regulation 6 could have a very small shareholding in the community pharmacy business.

[288] There is no need to decide how such situations should be addressed, because all the shareholdings at stake in this case are 100% shareholdings.

Conclusion on the merits

[289] I thus reach the conclusion that "beneficial interest" in regulation 6 includes an interest by way of shareholding. It follows that New Clicks has at all material times had a beneficial interest in Retailers' community pharmacies as well as in Unicorn's manufacturing pharmacy. I thus need to consider whether, as the first judgment holds, the terms of ICPA's complaint precluded it from obtaining relief from the DDG and Appeal Committee and whether the latter functionaries had any power to impose a sanction in respect of the violation of regulation 6(d).

[232] Id at 180.

Procedural matters

The evolution of ICPA's complaint

[290] In its complaint to the DDG, ICPA contended that Retailers and Unicorn had beneficial interests in each other. That was wrong, but the error lay in drawing a wrong legal conclusion from uncontested facts. The full group structure of the Clicks Entities was described in the complaint, and the manner in which conflicting beneficial interests could come about on ICPA's interpretation of the Ownership Regulations was plain from the uncontested information in the complaint. Indeed, ICPA said that the facts set out in its complaint gave "a clear picture of the perversities that are created by the vertical integration of the subsidiaries of Clicks Group".

[291] The fact that, in pursuing its appeal, ICPA shifted its focus to the correct levels of the structure (New Clicks and Clicks Holdings) was not, in my view, drastic or startling. The DDG's reasoning highlighted the flaw in the way ICPA had framed its complaint. There was no prejudice to the Clicks Entities in allowing the Appeal Committee to consider the revised way in which ICPA put its case. The Appeal Committee dealt with the revised case, and Retailers did not object. Although in the appeal Retailers took a number of preliminary objections, ICPA's shift in focus was not one of them. In its submissions to the Appeal Committee, Retailers' counsel dealt squarely with the revised way in which ICPA put its case. This is thus not a basis to non-suit ICPA.

The sanctioning powers of the DDG and Appeal Committee

[292] ICPA did not expressly identify the statutory provision under which its complaint was lodged. In essence, ICPA was requesting the DDG to act against the Clicks Entities on the basis that the relevant pharmacy businesses of Retailers and Unicorn were being conducted in contravention of regulation 6. The legislation does not specifically provide for such a complaint but it does empower the DG to act where a pharmacy is being conducted in contravention of the legislation. A request for the DG to exercise these powers can be described as a complaint, and the refusal by the DG to exercise

these powers would constitute administrative action and might also be subject to an internal appeal.

[293] The first source of power for the DG to act is section 22(10), to which is allied a right of appeal in terms of section 22(11). Those provisions read:

> "(10) The Director-General in consultation with the council may close a pharmacy which is being conducted in contravention of this Act . . . or which does not comply with the licensing conditions, after giving notice to the owner or the responsible pharmacist, and affording the owner or the responsible pharmacist an opportunity to furnish reasons to the Director-General why the pharmacy should not be closed.
>
> (11) Any person aggrieved by a decision of the Director-General or the council, as the case may be, may within the prescribed period, in the prescribed manner appeal against such decision to an appeal committee appointed by the Minister."

[294] In section 1, "this Act" is defined as including any regulation made under the Act. The Ownership Regulations are such regulations. If a pharmacy business is being conducted in contravention of the Ownership Regulations, the DG thus has the power to act in terms of section 22(10). In response to ICPA's complaint, the DDG held that the relevant pharmacy businesses of the Clicks Entities were not being conducted in contravention of regulation 6 and he thus refused to act against them. ICPA, being aggrieved by the decision, appealed in terms of section 22(11).

[295] The second source for the DG's remedial powers is regulation 9, which empowers the DG to withdraw a pharmacy licence in various circumstances. One of those circumstances, in paragraph (a) of regulation 9, is if the licensee "has failed to comply with any conditions of ownership or the licensing requirements in terms of the Act and these regulations". A refusal to act in terms of regulation 9 is arguably not subject to an appeal in terms of section 22(11) but it does not matter, because ICPA directed its review application at the DDG's decision as well as the Appeal Committee's decision.

[296] As I have said, ICPA did not formulate its complaint specifically with reference to the statutory provisions. ICPA alleged, on the merits, that the relevant pharmacies were being operated in contravention of regulation 6. It asked the DDG to address this by "revoking" Unicorn's manufacturing pharmacy licence and Retailers' community pharmacy licences obtained after 30 May 2012. The remedy sought by ICPA appears to be sourced in regulation 9 rather than section 22(10). However, it would have been open to the DDG, if he found that regulation 6 was being contravened, to act in terms of section 22(10). In the real world, there may not be much difference between (a) closing a pharmacy because it is being conducted in contravention of the law and (b) withdrawing the pharmacy's licence because it is being conducted in contravention of the law. If a pharmacy is closed, the licence is worthless. Conversely, once the licence is withdrawn, the pharmacy has to close.

[297] Since regulation 6 is directed at the operations of community pharmacies, I do not think that the DDG had any power to close Unicorn's manufacturing pharmacy or withdraw its licence. Regulation 6(d) is a component of the conditions for conducting a community pharmacy. It is not a regulation directed at the conducting of manufacturing pharmacies.

[298] It is different in the case of Retailers' community pharmacies. Regulation 6 sets out the conditions under which a person such as Retailers may own community pharmacies. Section 22(10) and regulation 9(a) talk about the conduct of a pharmacy in contravention of the Act and a failure by the licensee to comply with conditions of ownership. This does not mean, in my view, that the licensee should itself have committed the conduct which results in the contravention or failure. A contravention or failure may be brought about by the conduct of another person. This is because the lawful conduct of a pharmacy business is made conditional on states of affairs which, among other things, relate to the conduct not of the owner of the pharmacy itself but of persons associated with the owner.

[299] This is clear from the uncontentious parts of regulation 6. If a company owns a community pharmacy, and its shareholder or director is covered by any of paragraphs (a) to (d) of regulation 6, the company will be conducting the community pharmacy in contravention of the law and there will be a failure to comply with the ownership conditions. This failure would be brought about by the conduct of the shareholder or director in question, not the company. A company does not in law control the behaviour of a shareholder or director. A shareholder or director of such a company who chooses to acquire a beneficial interest in a manufacturing pharmacy is not acting as an agent of the company. Precisely the same analysis would apply to the similarly framed regulation 4.

[300] Regulation 9(a) must be interpreted in such a way as to enable the DG to act if a pharmacy is being conducted in circumstances where the conditions of ownership are not being met. If regulation 9(a) only operates where the owner itself has done something to breach the ownership conditions, the references in regulations 4 and 6 to "shareholder, director, trustee, beneficiary or member" would have no teeth; there would be no way for the DG to act against the state of affairs which these regulations prohibit. Exactly the same applies where an owner is conducting a community pharmacy business in circumstances where a person who has a "beneficial interest" in the community pharmacy business also has a "beneficial interest" in a manufacturing pharmacy business.

[301] In my view, section 22(10) should be similarly interpreted. The lawmaker in section 22A conferred on the Minister the power to prescribe who may own pharmacies as well as the conditions on which such ownership is permitted. The lawmaker must have been aware that such conditions could include conditions relating to states of affairs involving persons associated with the owner.

[302] Section 22(10) requires the owner of the community pharmacy to be heard before a closure decision is taken. Retailers was heard on the merits of the complaint, both before the DDG and the Appeal Committee. Because those functionaries found that

regulation 6 was not being contravened, they did not reach the stage of considering a closure of community pharmacies. If, following this judgment, the DDG is required to consider closure, he or she would have to afford Retailers an opportunity to be heard on the question.

[303] For these reasons, I conclude that, if the DDG and Appeal Committee had found, as they should have done, that Retailers' community pharmacies were being conducted in contravention of regulation 6(d), there would have been a power to withdraw Retailers' community pharmacy licences or to close those pharmacy businesses. This would not, I should add, be limited to community pharmacies licensed after 30 May 2012. New Clicks, by acquiring a beneficial interest in Unicorn on 30 May 2012 while it also had a beneficial interest in Retailers, caused the conduct of all Retailers' community pharmacies to fall foul of regulation 6(d).

[304] To the extent that the first judgment suggests a finding by the DDG and Appeal Committee that there would have been no power to revoke Retailers' licences, even if the conduct of its pharmacy businesses fell foul of regulation 6(d), I do not understand them to have expressed any such view. They did not reach that question, because they found that there was no contravention of regulation 6(d). In any event, this Court is not bound by the views of the DDG and Appeal Committee.

[305] ICPA accepts that it is not for this Court to decide what sanction the DDG should impose. The matter must be remitted to the DDG, as the High Court ordered. Immediate closure or withdrawal of Retailers' community pharmacy licences would be very drastic. It may well be that the DDG would afford Clicks an opportunity to regularise the position, for example by divesting itself of the manufacturing pharmacy. Of course, if the authorities conclude that my interpretation of regulation 6 gives rise to unintended consequences, the Minister can amend the Ownership Regulations. In order to be of assistance to the Clicks Entities, such an amendment would have to make clear that a holding company may simultaneously hold 100% of the shares in a community pharmacy company and in a manufacturing pharmacy company. A regulation to that

effect might become the subject of legal challenge but that would be a fight for another day.

Conclusion and order

[306] I would thus uphold the appeal by substituting, for the Supreme Court of Appeal's order, an order in that Court dismissing the Clicks Entities' appeal with costs, including the costs of two counsel. That would have the effect of reinstating the High Court's order. In this Court, the Clicks Entities (the first to fifth respondents) should pay ICPA's costs, including the costs of two counsel. In regard to costs, I agree with the first judgment that this case is not covered by *Biowatch.*

[307] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel.
3. Subject to 4 below, the order of the Supreme Court of Appeal is set aside and replaced with the following order:

   "The appeal is dismissed with costs, including the costs of two counsel."
4. The remittal in paragraph 4 of the High Court's order shall be to the Director-General of the Department of Health (being the third respondent in the High Court and the eighth respondent in this Court).

For the Applicant:	A Cockrell SC and J De Waal SC instructed by Vanderspuy Cape Town
For the First to Fifth Respondents:	W Trengove SC and L Sisilana instructed by Cliffe Dekker Hofmeyr Incorporated