

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**Case number: A 294/2021**

**Court *a quo*: 78587/2018**

**Date of hearing: 15 February 2023**

**Date delivered: 02 May 2023**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

**In the matter between:**

**THE PRUDENTIAL AUTHORITY OF  
THE SOUTH AFRICAN RESERVE BANK**

**Appellant**

**and**

**MAMPHE DANIEL MSIZA  
ADVOCATE TERRY MOTAU SC**

**First Respondent**

**Second Respondent**

**JUDGMENT**

**Swanepoel J:**

**INTRODUCTION**

[1] This is an appeal against an order handed down by the Court *a quo*, which read:

“1. The adverse findings, remarks and conclusions by the first respondent in the report titled “THE GREAT BANK HEIST” contained in paragraphs 72; 73; 80; 81 and 90 are reviewed and set aside.

2. The first respondent's failure to afford the applicant the right to procedural fairness (audi) prior to the release of the report titled "THE GREAT BANK HEIST" is unlawful and unconstitutional and violated the applicant's right in terms of section 34 of the Constitution.

3. The second Respondent is ordered to pay the costs including costs of two counsel where engaged."

[2] The appellant is a regulatory authority within the Reserve Bank, which has been established by virtue of the provisions of section 32 of the Financial Sector Regulation Act, 9 of 2017 ("the FSR Act"), with the mandate (inter alia) to regulate and supervise financial institutions that provide financial products. The application before the Court *a quo* stemmed from a report produced by the second respondent (also referred to as "the investigator") at the appellant's behest, relating to the alleged mismanagement of the VBS Mutual Bank ("VBS"). The report contained certain adverse statements regarding first respondent's alleged involvement in the widespread looting of the bank.

[3] On 13 April 2018 the appellant appointed second respondent to investigate the alleged mismanagement of the bank in terms of section 135 (1) of the FSR Act. The appellant required second respondent to establish whether or not:

[3.1] any of the business of VBS was conducted with the intent to defraud depositors or other creditors of the bank, or for any other fraudulent purpose;

[3.2] VBS business conduct involved questionable and/or reckless business practices or material non-disclosure, with or without the intent to defraud depositors and other creditors;

[3.3] there had been any irregular conduct by VBS shareholders, directors, executive management, staff, stakeholders and/or related parties.

[4] Second respondent conducted a wide-ranging investigation which included formal interviews with some 30 witnesses. First respondent was not interviewed, and

was not given an opportunity to answer to the allegations made against him. On 30 September 2018 second respondent produced a report titled “The Great Bank Heist”, which, as alluded to above, implicated first respondent in the illegal activities at VBS, and found that there had been widespread looting of the bank. Second respondent made the following relevant recommendations:

[4.1] That damages claims be instituted against the beneficiaries of the corruption, theft and fraud in order to recover the stolen money;

[4.2] That criminal charges be brought against those persons identified as being implicated in the scheme.

[5] First respondent took umbrage at the findings made against him, and brought an application in the Court *a quo* in which he sought an order<sup>1</sup>:

[5.1] Declaring the adverse findings and remarks and/or conclusions against first respondent in the report to be prejudicial and unconstitutional;

[5.2] Reviewing and setting aside all adverse findings, remarks and conclusions against him;

[5.3] Expunging the remark made in paragraph 80 to the following effect:

*“It is clear that Msiza intervened on numerous occasions when his political influence was required. I have little doubt that Matsepe, despite his self-importance and bluster, in fact works for Msiza.”*

[5.3] Expunging paragraphs 72, 73, 80, 81 and 90 from the report;

[5.4] Declaring that the second respondent’s failure to give first respondent an opportunity to answer to the allegations is unlawful and unconstitutional;

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<sup>1</sup> First respondent’s amended notice of motion dated 20 February 2019

[5.5] Declaring second respondent's failure to afford first respondent the opportunity to be heard to be unlawful and unconstitutional in that it violated applicant's rights in terms of section 34 of the constitution.

[5.5] Directing second respondent to make a public apology;

[5.6] Costs.

[6] There was some controversy in the papers relating to the filing by second respondent of a redacted record, but it is no longer relevant to this judgment.

[7] At the hearing of the matter in the court *a quo* first respondent apparently did not persist with the relief sought in respect of the expunging of the offending paragraphs, nor the relief in regard to the redacted record and the apology. First respondent persisted in seeking an order reviewing and setting aside the findings, conclusions and remarks that related to first respondent's conduct, and also in seeking an order that the findings, remarks and conclusions were unconstitutional and prejudicial to the first respondent.

### **THE COURT A QUO**

[8] First respondent argued in the Court *a quo* that the remarks and findings made in connection with him were false and had caused him to suffer serious reputational damage. He was, he said, a businessman who now faced financial ruin as a result of the report, and that the report had also damaged his good name as a politician. First respondent said that his constitutional right to free trade had been infringed as a result of the false allegations. He argued that the rules of natural justice required second respondent to give him an audience, so that he could answer to the allegations and put his side of the story. It is on the basis, that he had not been given the right of *audi alteram partem*, that first respondent alleged that the investigation had been procedurally unfair.

[9] First respondent contended that second respondent was exercising a public power or performing a public function, and that his conduct was therefore reviewable

in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 (“PAJA”), alternatively in terms of the Constitution, the rule of law and the principle of legality. It was first respondent’s contention that second respondent had not given him the opportunity to answer to the allegations against him, and as fair administrative action includes the right to be heard, the procedure used was procedurally unfair and reviewable under section 6 (2) (c) of PAJA, or under the principles of legality.

[10] The appellant argued that, of the paragraphs sought to be impugned, only paragraph 80 contained any remark or finding in respect of first respondent. The remainder of the paragraphs simply recorded the evidence presented to the second respondent by the witnesses. Such evidence, the appellant argued, could not be reviewed as they did not entail the exercise of a public power and the simple recording of evidence was not an administrative action. The statements had as a matter of fact been made by the witnesses, and could not be deleted, set aside or expunged, so the appellant argued.

[11] Furthermore, appellant argued, even if the second respondent’s *prima facie* views and findings were reviewable, which it continued to deny, then they would only be reviewable under the doctrine of legality, and not under PAJA.

[12] The Court *a quo* identified three issues for determination:<sup>2</sup>

[12.1] The primary issue was whether the paragraphs complained about and which contain findings, remarks and conclusions regarding the first respondent were reviewable under the Constitution and PAJA, or under the principle of legality, and, more specifically, whether second respondent’s failure to give first respondent an opportunity to be interviewed had infringed on first respondent’s right to be heard;

[12.2] A peripheral issue was whether first respondent’s right to access to information had been infringed by the filing of a redacted record;

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<sup>2</sup> Paragraph 41 of the judgment

[12.3] Finally, whether the answering affidavit contained inadmissible hearsay, in that the information therein contained was not within the personal knowledge of the appellant.

[13] The issues in 12.2 and 12.3 above are no longer relevant to this judgment. Having considered a number of authorities, and more specifically the judgment in *Magidiwana and Others v President of the Republic of South Africa and Others* [2013] ZACC 27 the Court *a quo* came to the following conclusion:<sup>3</sup>

“Even if *Magidiwana supra* concerned a commission of enquiry and that here we are dealing with an investigation, it is important in the interests of justice to extend the principle of the rule of law and natural justice even to those individuals who are suspected like in this instance of wrongdoing by the investigator, being the individual’s right to be heard before adverse findings, remarks and conclusions are made in investigations such as the one envisaged in sections 136 and 137 of the FSR Act.....It was contended for the applicant that a case had been made out in terms of PAJA as well as the Constitution. While it was contended for the second respondent that the investigation and the findings that followed did not amount to administrative action, it was conceded that at most public power was exercised. From the above case law it is evident that public power is reviewable and, whether an administrative action stems from the PAJA or the exercise of public power both entail a requirement that a fair procedure encompasses a right to be heard.”

[14] The Court *a quo* declined to decide whether the report was reviewable under PAJA or under the principle of legality, and said that whatever the case may be, second respondent was exercising a public power which was reviewable. The Court *a quo* consequently granted the relief in the terms set out above.

[15] It is necessary, I believe, to analyse exactly what findings were, in fact, made in the report. In paragraph 80 second respondent remarked that first respondent had

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<sup>3</sup> At paras 53 and 54

intervened on numerous occasions when his political influence was required. Second respondent believed that one Matsepe, a protagonist in the goings on at VBS, worked for first respondent. The other paragraphs sought to be expunged merely record the evidence given to second respondent, and contain no findings or conclusions whatsoever. Second respondent's recommendation was simply that those persons implicated in the report should be reported to the prosecuting authorities, and should be civilly pursued.

### **IS THE REPORT REVIEWABLE UNDER PAJA?**

[16] In argument before us, first respondent persisted in the argument that it was not necessary to decide, as the Court a quo held, whether the review lay under PAJA, or under the principle of legality. In my respectful view that approach is incorrect. As a starting point a Court must decide whether a review is available under PAJA. PAJA was specifically enacted to give effect to section 33 of the Constitution, and review under PAJA is not identical to a review under legality. Only once the Court determines that conduct is not administrative action, and thus not reviewable under PAJA, can it then be considered whether the conduct is reviewable under the legality principle.

[17] The questions before us are the following:

[17.1] Was the action of the second respondent, in making certain remarks relating to the first respondent's conduct, reviewable either under PAJA, or under the principle of legality?

[17.2] If second respondent's actions are reviewable, then should they be reviewed?

[18] An investigator appointed in terms of section 135 (1) of the FSR Act has the powers set out in section 136 (1) (a) of the FSR Act:

"136 (1) (a) An investigator may, for the purposes of conducting an investigation, do any of the following:

- (i) By written notice, require any person who the investigator reasonably believes may be able to provide information relevant to the investigation to appear before the investigator, at a time and place specified in the notice, to be questioned by the investigator;
- (ii) By written notice, require any person who the investigator reasonably believes may be able to produce a document or item relevant to the investigation, to-
  - (aa) produce the document or item to an investigator, at a time and place specified in the notice; or
  - (bb) produce the document or item to an investigator, at a time and place specified in the notice, to be questioned by an investigator about the document or item;
- (iii) question a person who is complying with a notice in terms of subparagraph (i) or (ii) (bb);
- (iv) require a person being questioned as mentioned in subparagraph (i) or (ii) (bb) to make an oath or affirmation, and administer such an oath or affirmation;
- (v) examine, copy or make extracts from any document or item produced to an investigator as required in terms of this paragraph;
- (vi) take possession of, and retain, any document or item produced to an investigator in terms of this paragraph;
- (vii) give a direction to a person present while the investigator is exercising powers in terms of this paragraph, to facilitate the exercise of such powers."



[19] The FSR Act does not expressly require an investigator to produce a report, but without a report being produced by the investigator, the appellant cannot achieve its purpose in appointing the investigator in the first place. It is therefore implicit in the investigator's appointment that he should produce a report on his findings.

[20] PAJA provides that all administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.<sup>4</sup> Any administrative action may be judicially reviewed.<sup>5</sup> The starting point for any review application is, therefore, whether the conduct complained about is administrative action within the definition of PAJA. If it is not, the conduct is not reviewable under PAJA.

[21] Administrative action is defined as follows:

“Administrative action means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include.....”

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<sup>4</sup> S 3 (1) of the PAJA

<sup>5</sup> S 6 (1)

[22] The latter part of the above text has been highlighted as, I believe, the nub of the case in deciding whether PAJA applies, lies in determining whether the investigation and the production of the report adversely affected the first respondent's rights, and whether it had a direct external legal effect.

[23] The Court a quo held that the investigator violated both the prescripts of section 33 of the Constitution and the provisions of PAJA. This cannot be correct, in my view. PAJA was enacted to give effect to section 33 which gives every person the right to lawful, reasonable and procedurally fair administrative action<sup>6</sup>, and which required the enactment of legislation to give effect to that right.<sup>7</sup> A party seeking a review is not entitled to go behind the provisions of PAJA and to rely directly on s 33 of the Constitution, as this would “*undermine the very purpose for which it was enacted*”.<sup>8</sup>

[24] For conduct to be reviewable under PAJA, the conduct has to fall within the definition of ‘administrative action’, and whether the conduct is administrative action is to be decided on the facts of each individual case. In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems 2011 (1) SA 327 (CC) at [37]* Mogoeng J (as he was then) wrote:

“Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.”

[25] A very similar case to this matter was that of *The Companies and Intellectual Property Commission v Moola and Others* [2017] ZAGPJHC 102 (30 March 2017). The facts were the following: The applicant (“CIPC”), relying on a report produced by two inspectors appointed in terms of section 169 (2) of the Companies Act, 2008, applied for an order declaring the respondents to be delinquents in terms of the

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<sup>6</sup> S 33 (1) of the Constitution

<sup>7</sup> S 33 (3) of the Constitution.

<sup>8</sup> State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2017 (2) SA 63 (SCA) para 33

Companies Act. In turn, the respondents sought a review of a decision of the two inspectors, who had recommended that the application be brought. The respondents argued that the decision fell to be reviewed under PAJA.

[26] The late Van der Linde J made the following two points:

[26.1] Not all conduct of the administration, including decisions, is reviewable under PAJA. He eloquently explained that the administration in action is not to be conflated with administrative action.

[26.2] If the decision by the inspectors and the CIPC was not one that “*adversely affects the rights of any person and which has direct external legal effect*”, then it would not be reviewable under the PAJA.

[27] In *Moola* the inspectors had recommended that the matter should be referred to the National Prosecuting Authority for consideration of criminal charges, and that the CIPC should consider a delinquency application. None of those decisions, the Court held, had final effect. The CIPC could still decide not to prosecute the respondents, and the CIPC could ultimately have decided not to bring the delinquency application. The Court relied upon a dictum in *Corpco 2290 CC t/a U-Care v Registrar of Banks* [2013] 1 ALL SA 127 (SCA) where the following was said:

“A decision to investigate and the process of investigation, which exclude a determination of culpability, could not adversely affect the rights of the appellants in a manner that has a direct and external effect.”

[28] A more liberal approach to this question was taken in *Oosthuizen’s Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga 2008 (2) SA 570 (T)* where Fabricius AJ (as he was then) approved of the proposition that a preliminary decision may adversely affect the rights of a party. This approach can be contrasted with that of the Constitutional Court in *Viking* (supra) where Mogoeng J said that it is unlikely:

“.....that a decision to investigate and the process of investigation, which excludes a determination of culpability, could adversely affect the rights of any

person, in a manner that has a direct and external legal effect.” (my emphasis)

[29] In this case second respondent did not make any definitive finding, other than to express his personal view on the evidence. The investigator decided nothing, made no finding on culpability, and the appellant may or may not implement his recommendations. There is no direct, external legal effect on the first respondent.

[30] Given the above, it follows that the investigator’s report did not constitute ‘administrative action’ in terms of PAJA, and is not reviewable thereunder.

### **REVIEW UNDER THE PRINCIPLE OF LEGALITY**

[31] A last question still remains: Is second respondent’s report reviewable under the principle of legality (which is an instance of the rule of law), which requires all public power to be exercised in accordance with the law, and not arbitrarily or unlawfully? In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) Chaskalson P said<sup>9</sup>:

“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”

[32] In *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 49 the Court held:

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<sup>9</sup> At para 85

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.”

[33] In *Minister of Defence v Motau* 2014 (5) SA 69 (CC) at para 69 the court explained the rationality test as follows:

*“For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given. It is also well established that the test for rationality is objective and is distinct from that of reasonableness.”*

[34] More recently, the Constitutional Court has expanded the notion of rationality (which is ever-expanding in scope) to include the requirement of procedural fairness in some instances. In *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) the issue was the President’s decision to pardon certain offenders under a special dispensation, without having given the victims an opportunity to be heard. Ngcobo CJ made the point that a Court may not interfere with the means selected by the functionary to achieve its purpose simply because it disapproved thereof, or believed that there were better means to be adopted. A Court can only interfere where the means adopted were not rationally related to the objective sought to be achieved. The Court held that the purpose of the special dispensation was nation-building and reconciliation, and that the exclusion of the victims from the process of consideration was irrational. For that reason, the decision not to give the victims an audience was procedurally unfair and thus not rationally related to the outcome sought to be achieved.

[35] Also, in *Competition Commission of SA v Telkom Ltd* [2010] 2 ALL SA 433 (SCA) the Court pointed out that procedural fairness is an element of natural justice (in that case, the absence of bias). It is therefore imperative that the exercise of any public power must be in accordance with the laws of natural justice, which includes the right to be heard, in appropriate circumstances.

[36] In *Masuku v Special Investigating Unit and Others* [2021] ZAGPPHC the Applicant brought an application to review a report of the SIU concerning certain irregularities in the procurement of personal protective equipment. The report was a first report which addressed the conduct of the applicant in the interim. Although the applicant was not implicated in the irregularities, the report pointed to a dereliction of duty, and it recommended to the Premier that administrative action should be taken against applicant. The applicant was subsequently dismissed, which moved him to apply for the review of the report. It was accepted that the report was not reviewable under PAJA, and that the review was brought on the basis of legality.

[37] The Court had to determine two questions. The first was whether the report of the SIU entailed the exercise of public power which would be reviewable under the principle of legality, and secondly, if it were, whether the recommendation was rationally connected to the purpose which the SIU sought to achieve, which was to enquire into allegations of irregularity and corruption.

[38] The Court referred to Prof. Cora Hoexter<sup>10</sup> who makes two points. Firstly, to determine whether a public function has been exercised, one looks to the source of the power exercised, and the impact of the power on the public, and, secondly, what is and is not a public power must be determined on a case-by-case basis.

[39] With reference to *DPP v Freedom under Law 2014 (4) SA 298 (SCA)* the Court said that policy considerations in each case would be the chief determinant of what acts and decisions may be reviewed under the principle of legality. The Court then went on to say:

[21] “The ‘source’ of the SIU’s power to investigate and to report is, plainly, statutory. What of its impact on the public? True enough, the report of the SIU imposed no sanction. Yet it cannot cogently be said that the report had no influence or impact on persons caught up in the investigations or that a report

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<sup>10</sup> C. Hoexter, “A matter of Feel? Public Powers and Functions in South Africa” chapter 7 p 149 in Elliot, Varutas and Starks (eds) *The Unity of Public Law? Doctrinal, theoretical and comparative perspectives* (2018) Hart, London

could never be causally connected with a harm suffered by a person affected by the report.

[22] Dr Masuku is undoubtedly adversely affected. It is accepted by both parties that the Premier based his decision to remove Dr Masuku as MEC on the contents of the report. Moreover, apart from the ignomy of the removal, Dr Masuku's reputation as a public office bearer has been dented. Whether in the long run, his political career will suffer remains to be seen, but in the short run, his political career has clearly been truncated."

[40] The Court went on to say:

"There can be no doubt that the SIU report has had prejudicial consequences for Dr Masuku, as is evidenced by his loss of office, unlike the position in which N found itself in Rhino. But the example of Dr Masuku goes beyond his personal mishap; it is a significant illustration that should a statutory body, (even when no decision-making authority can be compelled to adopt it), express criticism of a person implicated in its realm of activity, material harm can flow therefrom. It is therefore wholly appropriate, as a matter of principle and of policy, that accountability for its actions should be recognized and thus, the ripeness of the report to be reviewed under the expanding scope of the principle of legality is demonstrated."<sup>11</sup>

[41] As in the *Masuku* matter, the investigator in this case did not take any steps against first respondent. In *Masuku* the applicant was accused of a dereliction of duty. In this case the report unarguably implicated first respondent in the VBS scandal, and it was recommended that he be reported to the prosecuting authorities. It is not in dispute that the report had a serious impact on the second respondent's reputation, his business, and his political career. In my view, therefore, the report is subject to review under the principle of legality on the same grounds as set out in *Masuku*.

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<sup>11</sup> At para 28

[42] The further question is then whether the procedural complaint, that the first respondent was not afforded *audi alteram partem*, renders the investigator's conduct irrational.

[43] As Cora Hoexter<sup>12</sup> points out (in the context of review under PAJA), the proper exercise of a discretion or choice depends on the decision maker being apprised of the facts:

“Procedural fairness in the form of *audi alteram partem* is concerned with giving people an opportunity to participate in the decisions that will affect them, and -crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants but is also likely to improve the quality and rationality and administrative decision making and to enhance its legitimacy.”<sup>13</sup>

[44] Although the above passage refers to PAJA reviews, Hoexter further says<sup>14</sup> the following relating to review under legality:

“As I have suggested elsewhere, however, it is difficult to think of a decision whose rationality would not be enhanced by an impartial hearing of both sides, and this gives huge scope for the development of the procedural fairness requirement identified in *Albutt*. Furthermore, there is nothing to stop procedural fairness from being acknowledged as an aspect of lawfulness in appropriate cases or, more simply, as an independent requirement of the principle of legality. Indeed, as Ebersohn AJ acknowledged recently, the principle of fairness is ‘inherent’ in the rule of law.”

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<sup>12</sup> Administrative Law in South Africa, 2<sup>nd</sup> Ed p 362

<sup>13</sup> At p 363

<sup>14</sup> At 420



[45] Furthermore, Hoexter referred to *Janse van Rensburg NO v Minister of Trade and Industry NO 2001 (1) SA 29 (CC)* where Goldstone J said<sup>15</sup> (before the commencement of PAJA):

“Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.”

[46] Was the decision in this case, not to give first respondent an audience, rationally connected to the outcome sought to be achieved by the appointment of the investigator? The purpose of the investigation was to gather evidence of possible wrongdoing at VBS Bank, and to establish whether any bank officials or ‘related persons’ were involved in any wrongdoing.<sup>16</sup> Although the appointment refers to the appointment of second respondent as investigator, the terms of the appointment do not only require him to investigate, but to establish whether there were irregular transactions, and who was involved in those transactions. The word “establish” has been variously defined as meaning “to put beyond doubt”<sup>17</sup>, “to discover or get proof of something”<sup>18</sup>, to discover something is true<sup>19</sup>, and “show something to be true or certain by determining the facts”<sup>20</sup> The investigator’s mandate clearly extended beyond merely investigating the allegations.

[47] One should also, in my view, consider the nature of the investigator’s powers<sup>21</sup>, which include the power to require any person by notice to appear before him, or to produce any document, at a time and place set out in the notice, the power to question any person under oath or affirmation, the power to examine, copy or

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<sup>15</sup> At para 24

<sup>16</sup> See: para 3 above for the investigator’s terms of reference

<sup>17</sup> Merriam-Webster Dictionary

<sup>18</sup> Cambridge Dictionary

<sup>19</sup> Collins Dictionary

<sup>20</sup> Oxford Dictionary

<sup>21</sup> S 136 of the FSR Act

make extracts from any document, and to take possession of and retain any document, and the wide powers to enter and search any premises without consent. Furthermore, any person appearing before the investigator is entitled to be legally represented during such questioning.

[48] The aforesaid powers are akin to those of a commission of enquiry, which may summon and examine witnesses under oath or affirmation, and call for the production of documents.<sup>22</sup> In my view, therefore, it follows that the purpose of the investigation in this case was more than simply the gathering of evidence. The second respondent had wide powers to hold an enquiry, and he was then required, having ascertained the facts, to establish whether irregular transactions had occurred, and who was responsible for those transactions.

[49] I can hardly see that one can reach a conclusion on the involvement of the different actors, and establish who was involved in the scheme, unless one hears the evidence of all relevant witnesses, which includes giving first respondent an opportunity to state his case in answer to the allegations made against him. In my view, given the investigator's mandate, he should have given the second respondent the opportunity to be heard. It therefore follows that, in my view, the investigator's actions were not rationally related to the outcome sought to be achieved.

[50] Moreover, it seems to me that to deprive a person of his right to be heard, in an instance where the report will clearly have a direct influence on his professional and personal life, is contrary to the basic rights of dignity, equality and freedom of trade which are embodied in the Bill of Rights. This is, in my view, a case where the rule of law and the principle of legality required the first respondent to be given the opportunity to be heard, and to state his case. That is not to say that in each case where there is an investigation which entails the exercise of a public power the audi alteram partem rule will apply. Its application will necessarily be dealt with on a case-by-case basis, and on the facts of each case.

[51] In these circumstances I would dismiss the appeal.

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<sup>22</sup> S 3 of the Commissions Act, 8 of 1947

**PA VAN NIEKERK AJ (DISSENTING) VAN DER WESTHUIZEN J (CONCURRING WITH VAN NIEKERK AJ)**

[52] I have read the judgment of Swanepoel J. I agree with the judgment insofar as it was held that the impugned portions of the report are not reviewable under PAJA as set out in paragraphs [16] to [30] of the judgment.

[53] I disagree that the remaining impugned portions of the report as contained in paragraphs 72, 73, 80, 81 and 90 of the report are reviewable under the principle of legality. My reasons follow hereunder.

[54] It is established law that Administrative Action as defined in PAJA<sup>23</sup> is reviewable under PAJA whereas the exercise of public power (also referred to as executive function) is reviewable under the principle of legality. The exercise of public power (executive function) is susceptible to legal challenges founded on the rationality standard which in turn is founded in the principle of legality.<sup>24</sup>

[55] In the FITA judgement the Full Bench of this Court, relying on various judgements dealing with the principle of legality, conveniently sets out the constitutional principles underlining the rationality requirement for the exercise of public power. In paragraphs [16] to [26] of that judgment the relevant principles for purposes of this matter can be extrapolated which are:

[55.1] the exercise of public power (or executive action) must be performed in terms of an empowering provision;

[55.2] it must not be exercised arbitrarily but must be rationally connected to the purpose for which the power was given;

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<sup>23</sup> Promotion of Administrative Justice Act, Act no. 3 of 2000 ("PAJA")

<sup>24</sup>Fair-Trade Independent Tobacco Association v President of South Africa & Another 2020 (6) SA 513 (GP) par. [5] ("FITA judgment")

[55.3] the question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry;

[55.4] the enquiry does not extend to an interrogation of whether other or better means could have been used to achieve the purpose for which the power was given.

[56] From the synopsis of the various judgments dealing with the issue of the rationality standard as set out in the FITA judgment referred to in paragraph [51] *supra* the following quotes in the FITA judgment are important namely:

*“[18] The enquiry does not, as explained by the Constitutional Court in Albutt v Centre for the Study of Violence and Reconciliation & Others, extend to an interrogation of whether other or better means could have been used to achieve the purpose for which the power was given:*

*“[51] The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objectives sought be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the constitution”. “*

And

*“[20] In simple terms, the rationality standard requires that a decision taken by the executive ought to be in line with the purpose for which the power was given and if the requisite synergy between the decision and purpose is absent, the decision cannot be held to be rational and therefore falls short of*

*the constitutional standard espoused by our APEX Court. Importantly, in order to pass the test for rationality, there must be a rational connection between the impugned decision and the purpose sought to be achieved through such decision”.*

[57] It is common cause that Second Respondent (“*the Investigator*”) conducted the investigation in terms of the empowering provisions as contained in Section 135(1) of the Financial Sector Regulation Act no. 9 of 2017 (“*FSA*”) and which resulted in the report. The prevention of financial crime, confidence in the financial system, and the efficiency and integrity of the financial system are but three of the various stated objects of the Act<sup>25</sup>. Appellant is established in terms of Section 32 of FSA and the object of Appellant in terms of Section 33 of FSA is to:

[a] promote and enhance the safety and soundness of Financial Institutions that provide financial products and securities services;

[b] promote and enhance the safety and soundness of market infrastructure;

[c] protect financial customers against the risk that those Financial Institutions may fail to meet their obligations; and

[e] assist in maintaining financial stability.

[58] Appellant is a Financial Service Regulator in terms of Section 1 (Definitions) of FSA. Section 251(1)(a) of FSA direct Appellant to achieve its objects in terms of the FSA for which purpose Section 251(b) of FSA direct Appellant to collect and use information to the extent that Appellant determines it is necessary to properly perform the obligations and duties referred to in paragraph (a) of Section 1 of FSA. Succinctly put, Appellant is a “*watchdog*” appointed to guard over the financial sector, *inter alia* protecting the public against fraud conducted within the financial service sector which may destabilise the financial sector and/or prejudice public

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<sup>25</sup> Section 7 FSA

interests. For those purposes Appellant may appoint an Investigator in terms of Section 134 of FSA to carry out an investigation. The powers afforded to the Investigator for purposes of the investigation are the discretionary powers set out in Sections 135, 136 and 137 of FSA.

[59] In summary, the provisions of FSA in relation to the purpose of FSA, the purpose and functions of Appellant in terms of FSA, and the appointment of an Investigator in terms of the provisions of FSA can succinctly be summarised as follows:

[59.1] Appellant (a “*regulator*”) is obliged to facilitate the objects of FSA which includes financial stability and prevention of financial crime, and the protection of the public;

[59.2] For such purposes Appellant may appoint an Investigator with the object of gathering information;

[59.3] The powers afforded to the Investigator are discretionary powers, and the object of the powers are to facilitate an investigation;

[59.4] From the empowering provisions it is clear that the investigator is not mandated or empowered to arrive at any decision and/or to determine the value of any evidence and/or to make a determination of culpability.

[60] The Investigator was appointed by Appellant in terms of a certificate, a copy of which was attached to the Founding Affidavit in the application as Annexure “MM3”, and the relevant part of which reads:

*“The purpose and primary objective of the investigation will be to establish whether or not –*

*1. any of the business of VBS was conducted with the intent to defraud depositors or other creditors of the bank, or for any other fraudulent purpose;*

2. VBS's business conduct involved questionable and/or reckless business practices or material non-disclosure, with or without the intent to defraud depositors and other creditors; and

3. there had been any irregular conduct by VBS's shareholders, directors, executive management, staff, stakeholders and/or related parties."

[61] In paragraph [46] of the judgment of Swanepoel J it is held that the appointment of the Investigator does not only require him to investigate, but to establish whether there were irregular transactions and who was involved in those transactions. By reference to different definitions of "*establish*", the judgement concludes that the Investigator's mandate clearly extended beyond merely investigating the allegations.<sup>26</sup> I disagree that in this instance the mandate of the Investigator extended to anything more than an investigation, for the following reasons:

[61.1] The empowering provision for the appointment of the Investigator is Section 134 of FSA which refers to the purpose of appointment being "... *carrying out an investigation*";<sup>27</sup>

[61.2] The purpose of such investigation is not to make a determination, but to gather information to enable Appellant to comply with its objects in terms of the Act;

[61.3] The discretionary powers awarded to the Investigator in terms of Section 136 of FSA enables the collation of information which may or may not constitute *prima facie* evidence. The empowering provision appointing the Investigator being Section 134 of FSA read with the powers of the Investigator as set out in Sections 135, 136 and 137 of FSA clearly relates to an "*investigation*" and nothing more.

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<sup>26</sup> Judgment Swanepoel J, par. [64] last sentence

<sup>27</sup> FSA Section 134(1)

[62] I am therefore of the view that the reference to “*establish*” in the appointment certificate of Appellant did not elevate the investigative function of the Investigator into that of a fact finder and/or bestowed upon the Investigator any judicial and/or *quasi*-judicial function. As such, any opinion expressed by the Investigator in the report relating to the involvement of any person or institution in maleficence uncovered during the course of the investigation by the collation of information in the form of documentary evidence and *viva-voce* evidence do not “*establish*” a factual finding but constitutes nothing more than the conveyance of a *prima facie* view expressed by the Investigator to Appellant with the intent to enable the Appellant to achieve its objects in terms of the provisions of FSA. It is clearly within the absolute discretion of Appellant, with due regard to its powers and functions in terms of FSA, to deal with the information collated by the Investigator in the course of the investigation in the manner which Appellant deems fit.

[63] In my view the issue of whether or not the impugned portions of the report is reviewable under the principle of legality should be considered against the aforesaid background regarding the status of the information contained in the report and the applicable principles relating to the review of executive power or public function.

[64] The conclusion of Swanepoel J namely that the appeal should be dismissed follows a finding that the impugned statements are reviewable under the principle of rationality and that the failure to afford the First Respondent an opportunity to state his case in answer to the allegations made against him were not rationally related to the outcome sought to be achieved.<sup>28</sup> This follows after it was held in the judgment that the Investigator’s mandate extended beyond merely investigating the allegation, and that the powers of the Investigators are akin to those of a Commission of Enquiry<sup>29</sup>.

[65] In paragraph [57] to [59] *supra* I have dealt with the empowering provisions in terms whereof the Investigator was appointed and concluded that the reference to “*establish*” as set out in the notice of appointment of the Investigator do not elevate

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<sup>28</sup> Judgment Swanepoel J, para. [42] – [50]

<sup>29</sup> Judgment Swanepoel J, para. [46] and [48]



the powers and function of the Investigator into anything more than an investigation and therefore disagree that the powers of the Investigator are akin to that of a Commission of enquiry. It was pointed out by Sutherland ADJP, that although there are similarities between a SIU and a Commission of Enquiry, they are not clones and there are material differences.<sup>30</sup> “*Establish*” must be taken in the context of the empowering provision, which in this case clearly did not bestow a power to determine culpability. Even where a report of a Special Investigating Unit explicitly stated that it “*establish*” that a certain individual conducted financial transactions in a “*grossly negligent*” manner, it was held that the fact that the “*findings*” were prima face, not binding, and could be determined in any subsequent proceedings, resulted in the fact that the affected person was not granted an opportunity to participate it was held not to be arbitrary and/or irrational.<sup>31</sup>

[66] Insofar as consultation with interested parties by decision-makers are concerned, it was held:

*“There is no general duty on decision-makers to consult interested parties for a decision to be rational under the rule of law. See: Minister of Home Affairs & Others v Scalabrini Centre & Others 2013 (6) SA 421 (SCA) paras 67 and 72. But there are circumstances in which rational decision-makers requires consultation with interested parties. The cases of Albutt v Centre for the Study of Violence and Reconciliation & Others 2010 (3) SA 293 (CC) (2010)(5) BCLR 391; [2010] ZACC4 and Scalabrini provide instances thereof.”*

The authorities referred to by Swanepoel J in paragraphs [34] to [45] of the judgement are not in support of his statement that the notion of rationality has been expanded to include the requirement of procedural fairness in some instances, or the right to be heard in some instances. The authorities referred to by Swanepoel J applied the rationality standard as set out in paragraph [56] *supra* and the application of the rationality standard was determinative whether a party should have been afforded an opportunity to be heard. In the matter of Albutt, with due regard to the

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<sup>30</sup> Par.[25] of Masuku judgment referred to in par. [36] of the judgment of Swanepoel J.

<sup>31</sup> National Treasury and Another v Kubukeli 2016 (2) SA 507 (SCA) para. 25 - 27

objective of the empowering provision (national building and reconciliation) it was found that the failure to consult affected parties were irrational.<sup>32</sup> Clearly, where there are competing interests affected by a decision-maker when exercising a public power, failure to consult with one or more of the affected parties holding competing interests may be irrational in the context of the objective of the provision but a review of such a decision will not be conducted on the basis of a failure of procedural fairness as required under a PAJA review, but will be reviewed under the principle of a lack of rationality.

[67] It therefore follows that I am of the view that the Investigator conducted an investigation and insofar as any comments and/or views expressed and/or reference made in the reports to First Respondent, such were made in the context of the information obtained during the investigation with the purpose and intent to serve the objects of the investigation which are set out in the notice of appointment of the Investigator and which must be read in the context of the relevant provisions of FSA referred to *supra*.

[68] In my view the impugned portions of the report can be placed into the following two categories:

[68.1] Paragraphs 72, 73, 81 and 90 are recordals of information obtained by the Investigator from sources implicating First Respondent in maleficence;

[68.2] Paragraph 80 of the report is the expression of an impression, based on available evidence to the Investigator that a certain type of co-operation (or relationship) existed between First Respondent and another party implying involvement in maleficence by First Respondent.

[69] The aforesaid impugned portions of the report are based on evidence obtained from various individuals and copies of electronic communications. In Heads of Argument filed on behalf of the Appellant it was submitted that the recordal of evidence and testimony of a third party do not entail a finding or a decision by the

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<sup>32</sup> Judgment Swanepoel J., par. [34]

Investigator and consequently cannot found a review. It was further submitted in such heads of argument:

*“In addition, the relevant testimony and whatsapp evidence exists in fact and cannot be set aside or expunged. An order reviewing and setting the impugned statements aside not only has no practical effect; it is also incompetent. Its purpose and effect would be to remove from the record material that was factually placed before the Investigator, and to distort the contents of the report. A court cannot effectively re-write the report to exclude material and relevant evidence in this way.”*

I agree with this submission for the following reasons:

[69.1] The Investigator is empowered and enjoined by FSA to do exactly what Second Respondent did namely to gather information consisting *inter alia* in the form of evidence of third parties and electronic communication, and to then include such information in a report to Appellant. The impugned portions of the report includes such information. Such information or evidence can only be struck from the report if the act of inclusion thereof by the investigator in itself do not pass the rationality test under the principle of legality.

[69.2] It is not the case of First Respondent that the act of the investigator of inclusion of such evidence in the report is irrational, but the complaint of First Respondent is namely that the fact that he is implicated in the report without having been granted an opportunity to state his case (as referred to by Swanepoel J) is irrational.

[70] A process of investigation which excludes a determination of culpability is unlikely to affect the rights of a person that has a direct, external legal effect. Mogoeng J (as he then was) held as follows:<sup>33</sup>

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<sup>33</sup> Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & Another 2011 (1) SA 327 (CC) at [37]

*“Whether or not administrative action which would make PAJA applicable has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.*

*[38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the Organ of State decides to do and actually does with the information it has become aware of which could potentially trigger the application of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in another manner that has a direct and external legal effect”.*

The impugned portions of the report are clearly information which squarely fits into the description of the kind of facts referred to in the judgement of Mogoeng J (as he then was) quoted *supra*. However, in the Masuku judgement <sup>34</sup> Sutherland ADJP held as a matter of principle and policy, that accountability for a report of the SIU should be recognised where the report had serious prejudicial consequences of a person implicated therein, and that such report is reviewable under the expanding scope of the principle of legality<sup>35</sup>

[71] In my view, the mere recordal of evidence of witnesses who implicated First Respondent as contained in paragraphs 72, 73, 80 and 90 of the report do not seriously prejudice First Respondent to the extent that the implicated person in the *Masuku* judgement was prejudiced. In my view, should the reasonable person read those portions of the report, it will be appreciated that it is not a factual finding but a recordal of evidence. Considering the analysis of the nature of the impugned portions of the report as contained in paragraphs 72, 73, 81 and 90 of the report, I am of the view that it is not reviewable under the principle of legality for the reasons as aforesaid.

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<sup>34</sup> Judgement, Swanepoel J, par. [36]

<sup>35</sup> Masuku judgement, par. [25] to [28]

[72] Insofar as paragraph 80 of the report contains the recordal of a certain inference drawn by the Investigator, I hold a similar view. I am also of the view that a reasonable person who reads such expressed view by the Investigator will realise that it is not a factual finding or determination of culpability, but merely the expression of a *prima facie* view based on available information. I also hold the view that such recordal does not cause the serious prejudice such as suffered by the implicated person in the Masuku judgement. I am therefore of the view that paragraph 80 of the report is also not reviewable under the principle of legality.

[73] However, insofar as it may be found that First Respondent is prejudiced by the impugned portions of the report to the extent that the report is reviewable under the principle of legality, in my view the fact that the Investigator did not interview First Respondent and/or afforded the First Respondent an opportunity to “*state his case*” do not render the references to First Respondent in the report as irrational, with due regard to the means employed by the Investigator and the objectives of the Investigator for the following reasons:

[a] On the version of the First Respondent as advanced in the papers (which changed in certain respects substantially from the Founding Affidavit to the Replying Affidavit when regard is had *inter alia* to the issue of the amount of R780 000.00 paid into the bond by Matsepe) he clearly would have denied all allegations and he would have maintained that he is innocent. Does that mean that the investigator should then have accepted the version of First Respondent and removed all reference to him from the report, notwithstanding *prima facie* evidence to the contrary? To argue so, having regard to the objective of the investigation and the relevant empowering provisions, would in itself be so irrational that it behoves no further argument. The Investigator was mandated to investigate, not adjudicate conflicting versions.

[b] There are a number of witnesses referred to in the report that provided information on the complicity of first Respondent in maleficence supported by documentary evidence and records of electronic evidence. For the

investigator to form a prima facie view of the involvement of First Respondent in the course of the investigation based on the available information obtained from various sources, which substantially collaborate such view as expressed by the investigator in paragraph 80 of the report is not irrational.

[c] In my view the following quote of Lord Denning in the matter of *Moran v Lloyds* as approved in *Langa & Others v Hlope* 2009 (4) SA 382 (SCA) par. 40 is relevant namely:

*“Today we have to deal with a modern phenomenon. We often find that a man (who fears the worst) turns around and accuse those – who hold a preliminary enquiry – of misconduct or unfairness or bias or want of natural justice. He seeks to stop the impending charges against him. It is easy enough for him to make such an accusation. Once made, it has to be answered .... so he gets which he most wants – time to make his dispositions – time to put his money in a safe place – time to head of the day when he has to meet the charge, and who knows? If he can stop the preliminary enquiry in its tracks, it may never start up again.*

*To my mind the law should not permit any such tactics. They should be stopped at the outset. It is no good for the tactician to appeal to ‘rules of natural justice’. They have no application to a preliminary enquiry of this kind. The enquiry is made with a view to seeing whether there is a charge to be made. It does not decide anything in the least. It does not do anything which adversely affects the man concerned or prejudices him in any way. If there is, there will be a hearing, in which an impartial body will look into the rights and wrongs of the case. In all such cases, all that is necessary is that those who are holding the preliminary enquiry should be honest men – acting in good faith – doing their best to come to the right decision”.*

[74] In this regard, I am of the view that the matter of *Treasury v Kubukeli* 2016 (2) SA 507 (SCA) and more specifically paragraphs [25] to [27] is on all fours with the matter *in casu*.

[75] It follows from the foregoing that applying the objective test in respect of the issue of legality, i.e. whether the means is rationally linked to the purpose for which the empowerment was given, that the Second Respondent's failure to afford the First Respondent an opportunity to be heard was not irrational, and thus pass the test under the issue of legality. The appeal accordingly stands to be upheld.

[76] In the circumstances the following order is granted:

1. The appeal is upheld with costs including the costs of two counsel;
2. The order of the court **a quo** is set aside and substituted with an order:

*"The application is dismissed with costs, such costs to include the costs consequent on the employment of two counsel".*

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|                              | <b>Adv. I Goodman</b>     |
|                              | <b>Adv. L Kutumela</b>    |
|                              | <b>Adv. R Tshetlo</b>     |

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| <b>COUNSEL FOR FIRST<br/>RESPONDENT:</b> | <b>Adv. W Mokhare SC</b> |
|                                          | <b>Adv. C Lithole</b>    |

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| <b>ATTORNEY FOR RESPONDENT:</b> | <b>Maluleke Inc.</b> |
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| <b>DATE HEARD:</b> | <b>15 February 2023</b> |
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| <b>DATE OF JUDGMENT:</b> | <b>02 May 2023</b> |
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