

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024-052800

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
08/06/2026	
DATE	SIGNATURE

In the matter between:

COUNCIL FOR MEDICAL SCHEMES

Applicant

and

SPECIAL INVESTIGATING UNIT

Respondent

JUDGMENT

MBONGWE, J:

INTRODUCTION

- [1] This is an opposed review application brought by the Council for Medical Schemes ("CMS") against the Special Investigating Unit ("SIU").
- [2] The Applicant seeks to set aside the SIU's report dated 4 December 2023, together with its findings and recommendations, on the alleged grounds that the SIU exceeded its mandate, acted irrationally, and violated principles of procedural fairness.
- [3] The Respondent opposes the application, contending that its report is investigative in nature, not determinative, and therefore not reviewable under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). It further submits that the report is rational, lawful, and within the scope of Proclamation R29 of 2019.

APPLICANT'S CASE

- [4] The Applicant argues that the SIU exceeded its mandate by investigating systemic and structural issues within CMS rather than confining itself to corruption or maladministration in regulatory interventions.
- [5] It contends that the SIU made adverse findings against board members and Dr Kabane without affording them the right to be heard, thereby breaching the *audi alteram partem* principle.

- [6] The Applicant submits that the SIU's recommendations, including referrals for criminal prosecution and disciplinary action, are irrational, arbitrary, and *ultra vires*.
- [7] It further argues that the CMS, as the institution against which the proclamation was issued, has locus standi to challenge the report, and that joinder of individual members is unnecessary since they were implicated in their official capacities as Council members.

RESPONDENT'S CASE

- [8] The SIU contends that its report is investigative, not determinative, and therefore lacks the "direct, external legal effect" required for review under PAJA.
- [9] It submits that its recommendations are rationally connected to the purpose of the investigation, namely, to identify maladministration, improper and/or unlawful conduct and propose remedial measures.
- [10] The SIU argued that it acted squarely within its mandate under Proclamation R29 of 2019.
- [11] The Respondent further contended that the CMS lacks locus standi to litigate on behalf of individuals such as Dr Kabane and former Council members, none of whom have been cited nor have instituted review proceedings themselves. It consequently raised non-joinder as a bar to the relief sought.

ANALYSIS

On PAJA

- [12] The jurisprudence in *Grey's Marine*¹, *Motau*², and *Prudential Authority v Msiza*³ establishes that investigative reports lacking finality and binding effect do not constitute administrative action under PAJA. The SIU's report, being advisory and subject to acceptance or rejection by the Minister, NPA, or CMS, falls within this category.

On Legality

- [13] Even where PAJA does not apply, exercises of public power remain subject to legality review. The SIU's report demonstrates a rational connection between the investigation authorised by the President and the recommendations made. Procurement irregularities, complaint-handling failures, and maladministration were identified, and referrals were made to competent authorities. This satisfies the rationality standard.

On Mandate

- [14] The proclamation expressly authorised investigation into maladministration and related matters, including those incidental or ancillary thereto. It would be artificial to confine the SIU to narrow acts while ignoring systemic weaknesses that enabled misconduct. The SIU acted within its mandate.

¹ *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA).

² *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC).

³ *Prudential Authority v Msiza* [2023] ZAGPPHC 2098.

On The Scope of the Mandate of the SIU

[15] The Scope of the Mandate of the SIU is set out in the Proclamation of R29 of 2019, and the relevant portion of the Proclamation empowers:

“... the Special Investigating Unit to investigate, as contemplated in the Act, any alleged:

- (a) *serious maladministration in connection with the affairs of the Council;*
- (b) *improper or unlawful conduct by employees or officials of the Council;*
- (c) *Offence referred to in Parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), and which offences were committed with the affairs of the Council; or,*
- (d) *unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof,*

which took place between 1 January 2014 and the date of publication of this Proclamation or which took place prior to 1 January 2014 or after the date of publication of this Proclamation, but is relevant to, connected with, incidental or ancillary to the matters mentioned in the Schedule or involve the same persons, entities or matters investigated under authority of this Proclamation, and to exercise or perform all the functions and powers assigned to or conferred upon the said Special Investigating Unit by the Act, in relation to the said matters in the Schedule.” (emphasis)

On Procedural Fairness

[16] While the Applicant raises *audi alteram partem* concerns, the SIU's role is investigative, not determinative. The duty to afford hearings arises at the stage

where disciplinary or prosecutorial decisions are made, not at the investigative stage.

On *Locus Standi* and Non-Joinder

- [17] The CMS has standing to challenge findings directed at its institutional functioning. However, insofar as relief is sought to protect the personal interests of Dr Kabane and former Council members, the Applicant lacks *locus standi*. Those individuals, have a direct and substantial interest and ought to have been joined.

THE SCOPE OF THE SIU'S MANDATE

- [18] Counsel for the Applicant submitted that a strict and narrow interpretation must be given to the SIU's mandate. He emphasised that reference must always be made not only to the Proclamation, but essentially to the Schedule. In his submission, the SIU exceeded its authority by investigating systemic and structural issues within CMS rather than confining itself to maladministration in regulatory interventions. Reliance on authorities underscoring the principle that statutory powers must be construed restrictively, including *United Watch & Diamond Co v Disa Hotels Ltd*⁴ and *Amalgamated Engineering Union v Minister of Labour*⁵ was misplaced on the facts of the present matter.

- [19] Counsel for the Respondent, on the other hand, argued that the SIU is entitled to rely on the SIU Act in addition and, in particular, section 4(a)–(d), which empowers it to investigate maladministration, unlawful expenditure, irregular acquisitive acts, and corruption-related offences. She submitted that the Act provides the framework within which proclamations must be understood, and

⁴ *United Watch & Diamond Co v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415A.

⁵ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

that the Proclamation cannot be interpreted so narrowly as to disable the SIU from addressing systemic failures encountered in the course of its investigation. In support, she referred to *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa*⁶, *Democratic Alliance v President of South Africa*⁷, and *Affordable Medicines Trust v Minister of Health*⁸, all of which affirm that public power must be exercised lawfully, rationally, and within the scope of the enabling legal instrument.

ANALYSIS

[20] In my view, the SIU Act as the enabling statute, and the Proclamation must be read together. To interpret the SIU's written mandate in the manner contended for by counsel for the applicant would be to ignore the express language of section 4(a)–(d) and the Proclamation itself. The argument that any authority given must be confined to the wording in the schedule is contrived. The Schedule he referred to directs investigations to aspects of maladministration, whereas the Proclamation directs investigations to both maladministration and improper and unlawful conduct. The SIU's investigation of serious maladministration and corruption affecting public institutions was, consequently, well within its mandate and cannot be faulted.

[21] The Constitutional Court has consistently held that the exercise of public power must be rationally related to the purpose for which it was conferred. In *Motau*⁹, the Court reaffirmed that legality requires every exercise of public power to be rational. Similarly, in *Grey's Marine*¹⁰ Nugent JA explained that administrative

⁶ *Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

⁷ 2013 (1) SA 248 (CC).

⁸ 2006 (3) SA 247 (CC).

⁹ *Ibid* 2.

¹⁰ *Ibid* 1.

action must have direct, external legal effect to be reviewable under PAJA. The SIU's investigative role, by contrast, is preliminary and advisory.

- [22] Once the SIU lawfully investigates procurement and maladministration, it cannot turn a blind eye to systemic weaknesses that enabled the misconduct and corruption or other forms of misconduct. To do so would undermine the very purpose of the SIU Act and the prescripts of the Proclamation. The systemic recommendations made to CMS were recommendations for consideration, not binding commands. They are consequently not reviewable.
- [23] I therefore reject the Applicant's contention that the SIU exceeded its mandate and conclude that the Respondent acted within the scope of both the Proclamation and the SIU Act.

PROCEDURAL FAIRNESS: THE AUDI ALTERAM PARTEM PRINCIPLE

- [24] The Applicant contends that the SIU made adverse findings against members of the CMS board and Dr Kabane without affording them an opportunity to be heard. It submits that this omission violates the *audi alteram partem* principle, a cornerstone of natural justice entrenched in both the common law and section 33(1) of the Constitution. Counsel for the Applicant relied on *Masetlha v President of the Republic of South Africa*¹¹, where the Constitutional Court held that fairness requires that a person whose rights or interests may be adversely affected by administrative action must be afforded a hearing. He also referred to *Albutt v Centre for the Study of Violence and Reconciliation*¹², which emphasised that procedural fairness is context-dependent but requires a meaningful opportunity to respond.

¹¹ 2008 (1) SA 566 (CC).

¹² 2010 (3) SA 293 (CC).

- [25] Further reliance was placed on *Du Preez and Another v Truth and Reconciliation Commission*¹³, where the Appellate Division held that even investigative committees must act fairly when their findings may accuse or condemn individuals. Similarly, in *Chairman, Board on Tariffs & Trade v Brenco Inc*¹⁴, the Supreme Court of Appeal affirmed that fairness often requires an opportunity to make representations before a decision is taken.
- [26] The Respondent disputed that any duty of *audi alteram partem* arose at the investigative stage. Counsel for the Respondent submitted that the SIU's role is investigative and advisory, not determinative. The SIU does not finally pronounce on guilt or impose binding consequences; its recommendations are subject to acceptance and implementation or rejection by competent authorities such as the Minister of Health, the NPA, or CMS itself. In support, she referred to *Prudential Authority of the South African Reserve Bank v Msiza*¹⁵, where the Court held that an investigator's report was not administrative action because it "decided nothing, made no finding on culpability" and left the authority free to accept or reject its recommendations. Likewise, in *Mthembu v Special Investigating Unit*¹⁶, the Court confirmed that SIU reports are preliminary and non-binding, and therefore not subject to PAJA review.
- [27] In the context of reviews, the *audi alterum partem* principle applies where a decision has direct, external legal effect on rights. The SIU's report, however, is investigative and advisory. It does not itself impact on public rights or impose sanctions. Any binding consequences would arise only if and when the Minister, the NPA, or CMS acts upon the recommendations.

¹³ 1997 (3) SA 204 (A).

¹⁴ 2001 (4) SA 511 (SCA).

¹⁵ [2023] ZAGPPHC 2098.

¹⁶ [2024] ZAGPPHC 865.

- [28] This distinction is consistent with the jurisprudence in *Grey's Marine*¹⁷ and *Motau*¹⁸, which emphasise that administrative action under PAJA requires finality and direct external legal effect. The SIU's report lacks these qualities.
- [29] While fairness is a constitutional value, its content depends on context. At the investigative stage, the SIU is not obliged to afford implicated individuals a full hearing. That duty arises at the disciplinary or prosecutorial stage, where binding consequences may follow.
- [30] Accordingly, I reject the Applicant's contention that the SIU's report is invalid for want of *audi alterum partem*. The duty to afford a hearing lies with the authorities the SIU report is intended for and handed to who may act upon its recommendations.

LOCUS STANDI AND NON-JOINDER

- [31] The Applicant contended that it has standing to challenge the SIU's report because the Proclamation was issued against the institution itself, not against individuals. Counsel argued that the SIU made systemic recommendations aimed at augmenting the administration of CMS, which fall squarely within the ambit of the Council. Reliance was placed on *United Watch & Diamond Co v Disa Hotels Ltd*,¹⁹ where the Court held that locus standi requires a sufficiently direct and substantial interest in the subject matter of the litigation.

¹⁷ Ibid 1.

¹⁸ Ibid 2.

¹⁹ 1972 (4) SA 409 (C).

- [32] In my view, the joinder of individual members of the board of the applicant was necessary as those implicated have direct and substantial interests that may be prejudicially affected. The failure to cite those members in these proceedings or to obtain and attach their confirmatory affidavits would be fatal to this application. The matter of *Amalgamated Engineering Union v Minister of Labour*²⁰, remains the cornerstone for standing and joinder, and well as that of *ABSA Bank Ltd v Naude NO*²¹, where the Supreme Court of Appeal restated the test for non-joinder – substantial interest and prejudice. The contention of misjoinder was appropriately raised in *Judicial Service Commission v Cape Bar Council*²² and *Pheko v Ekurhuleni City*²³, both of which emphasise that joinder is required only where a party has a direct interest in the matter and may be impacted by the order given. In *ABSA Bank Ltd v Naude NO*²⁴, Schoeman AJA confirmed that if an order cannot be sustained without prejudicing the interests of third parties not joined, then those parties must be joined.

CONCLUSION

- [33] The SIU report is not reviewable under PAJA as it does not constitute administrative action.
- [34] On legality review, the report is rational and lawful, and the SIU acted within its mandate.
- [35] The application must therefore fail.

²⁰ 1949 (3) SA 637 (A).

²¹ 2016 (6) SA 540 (SCA).

²² 2013 (6) SA 170 (SCA).

²³ 2015 (5) SA 600 (CC).

²⁴ Ibid 21.

COSTS

[36] The general rule is that costs follow the result. The Applicant has failed to establish that the SIU's report is reviewable under PAJA, or that it is irrational under the principle of legality. The Court has further found that the SIU acted within its statutory mandate, and that the application suffers from material non-joinder insofar as it seeks to vindicate the personal interests of individuals named in the report.

[37] In these circumstances, the application must be dismissed. The Respondent has been put to the expense of opposing proceedings that were misconceived. There is no reason to depart from the ordinary rule that costs follow the results. The Respondent is accordingly entitled to its costs, including the costs of two counsel.

ORDER

[38] In the result, the following order is made:

1. The application is dismissed.
2. The Applicant is ordered to pay the costs of the Respondent, including the costs of two counsel one of whom is senior counsel on scale C.


MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For Applicant: **JA MOTEPE SC**
With: **I HLALETHOA**
Instructed by: **Diale Mogashoa Attorneys**

For the Respondent: **F NALANE SC** (absent)
With: **J MAISELA**
Instructed by: **Saljee Govender Van Der Merwe Inc.**

Date of Hearing: 06 May 2026
Date of Judgement: 08 June 2026

THIS JUDGEMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTATIVES AND UPLOADED ONTO CASELINE ON 08 June 2026.