



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
- (3) REVISED **NO**

DATE: **1 August 2022**

SIGNATURE:.....

Case No. 15703/2021

In the matter between:

DEIGHTON, MICHAEL EDWARD

APPLICANT

(Respondent in leave to appeal)

And

FINANCIAL SECTOR CONDUCT AUTHORITY

FIRST RESPONDENT

AND FOUR OTHERS

(Applicants in leave to appeal)

JUDGMENT

MILLAR J

1. This is an application for leave to appeal against a judgment and order handed down by me on 8 July 2022. The order was as follows:

- “1. It is declared that the investigation and/or action undertaken against the applicant pursuant to the Respondents’ investigation instruction dated 26 October 2020 is unlawful on the basis that it is procedurally unfair;*
- 2. The investigation instituted and pursued by the Respondents against the Applicant in terms of the Financial Services Regulation Act, 9 of 2017, is reviewed and set aside on the basis that it violates the requirements of procedural fairness.*
- 3. If the first Respondent chooses to proceed afresh with the investigation against the Applicant, then that must only be done provided that:*
 - 3.1 the third, fourth and fifth respondents are removed and take no further part in the investigation and/or action against the applicant.*
 - 3.2 The investigation against the Applicant is conducted in accordance with the principles of natural justice, procedural fairness, and section 3(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), with due regard to the findings made by the Court in this judgment as regards the requirements of fairness as applied to the facts of this case.*
- 4. The Respondents are to pay the costs of this application, on the scale as between party and party which costs are to include the costs consequent upon the employment of two counsel, jointly and severally, the one paying, other/s to be absolved’.*

2. On 20 July 2022, the 5 respondents in the main application, applied for leave to appeal that judgment and order.

3. The application was brought on the basis that the court had erred on 5 grounds:

- 3.1 The 1st was that the entire application had been brought prematurely.
 - 3.2 The 2nd was that PAJA (Promotion of Administrative Justice Act) did not apply.
 - 3.3 The 3rd was that there was no basis for the order excluding the 3rd, 4th and 5th respondents from any further participation in the investigation relating to the applicant.
 - 3.4 The 4th ground was that there had been no duty on the respondents to provide the applicant with any documents in advance.
 - 3.5 The 5th ground was that there were reasonable prospects of success and other compelling reasons for the granting of leave to appeal.
4. The 1st, 2nd, 3rd and 4th grounds were the pillars upon which the respondents had opposed the main application. The judgment deals with the evidence considered and findings made in respect of these grounds.
 5. I do not intend to repeat what is set out in the judgment herein save to say that in respect of the 3rd ground, having found as I did in paragraph 66¹, the conclusion drawn in paragraph 69 that:

“69. It is indisputable that if a person is to be questioned upon specific documents and the law compels him to answer fully and truthfully and to the best of his knowledge and, to ensure that his responses are neither false nor misleading even by omission, that natural justice demands that he ought to be given those documents beforehand to ensure that his responses meet the standard expected of him by the law.”

¹ ‘66. However, central to the conduct of the investigations by the FSCA is that the person or persons appointed to conduct the investigations must have ‘appropriate skills and expertise’. This provision is particularly important given the wide powers granted to the investigators. Most significantly are the provisions of Section 139.’ (footnotes referred to in that paragraph omitted).

And the findings in paragraphs 74 and 75, to my mind, clearly and unequivocally set out the basis for the granting of the order excluding the 3rd to 5th respondents from any further participation in investigation proceedings relating to the applicant.

6. The test for the granting of leave to appeal, applicable to the present application is set out in S 17(1)(a) of the Superior Courts Act ² as follows:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard; including conflicting judgments on the matter under consideration;

7. Is there a reasonable prospect that another court would come to a different conclusion or is there some other compelling reason for leave to appeal to be granted?
8. Having regard to the specific facts in the main case, I am of the view that the issue to be considered at its heart is whether another court would view the manner in which the respondents sought to conduct the investigation in respect of the applicant as being fundamentally fair.
9. I was also urged to grant leave to appeal on the basis that various other statutory bodies which conduct investigations and interrogations in the same or similar manner of that the FSCA, would be impacted and that there would be ramifications in consequence of the judgment, were leave to appeal not granted. I was referred to:

² Act 10 of 2013

- '5.5.1 *the Competition Commission (in terms of Chapter 5 of the Competition Act 89 of 1998);*
- 5.5.2 *the National Credit Regulator (in terms of Part B and Part C of Chapter 7 of the National Credit Act 34 of 2005);*
- 5.5.3 *the National Consumer Commission (in terms of Part B of Chapter 3 of the Consumer Protection Act 68 of 2008);*
- 5.5.4 *the South African Revenue Service (in terms of inter alia Chapter 5 of the Tax Administration Act 28 of 2011);*
- 5.5.5 *the International Trade Administration Commission (in terms of Part E of Chapter 4 of the International Trade Administration Act 71 of 2002); and*
- 5.6 *almost every Commission of Inquiry established under section 84(2)(f) of the Constitution.'*
10. It is self-evident that every statutorily established body is required to conduct itself in a constitutionally compliant way and must recognize that *'every citizen is equally protected by law'*³ and the rights afforded by the Constitution, and in particular those rights set out in Sections 33 (Right to just administrative action), 34 (Access to courts) and 35 (Arrested, detained and accused persons).
11. I have considered all the grounds upon which this application for leave to appeal has been brought, the reasons for granting the judgment and order of 8 July 2022, as well as the arguments advanced on behalf of the parties and I am of the view that there is neither a reasonable prospect that another court would come to a different conclusion nor any other compelling reason for the granting of leave to appeal.

³ Preamble to the Constitution of the Republic of South Africa 1996

12. In the circumstances I make the following order:

12.1 The application for leave to appeal is dismissed.

12.2 The respondents (applicants for leave to appeal) are ordered to pay the costs.

A MILLAR

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON:	26 JULY 2022
JUDGMENT DELIVERED ON:	1 AUGUST 2022
COUNSEL FOR THE APPLICANT:	ADV. M DU PLESSIS SC
REFERENCE	MR. PARSEE
COUNSEL FOR THE RESPONDENTS:	ADV. G MARCUS SC
INSTRUCTED BY:	RW ATTORNEYS
REFERENCE:	MR. L GROOME