IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

APPEAL CASE NO: A304/2022

***A quo* CASE NO: 15703/2021**

In the matter between:-

FINANCIAL SECTOR CONDUCT AUTHORITY	First Appellant
THE FINANCIAL SECTOR REGULATOR	Second Appellant
ALEXANDER PASCOE	Third Appellant
PRINISHA PILLAY	Fourth Appellant
DAVID LOXTON	Fifth Appellant

VS

MICHAEL EDWARD DEIGHTON	Respondent

Coram: Kooverjie J

Heard on: 22 November 2023

Delivered: 7 February 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 7 February 2024.

Summary: A midstream review can be instituted at the investigation stage of proceedings provided that grave injustice can be shown.

Procedural fairness principles at investigation stage should be distinguished from those at adjudication stage.

Procedural fairness bears a flexible interpretation. Firm principles cannot be imposed when deliberating the aspect of fairness.

ORDER

It is ordered:-

1. The appeal succeeds.

JUDGMENT

KOOVERJIE J (Nyathi J and Retief J concurring)

[1] The appellants in this matter, namely the Financial Sector Conduct Authority ("FSCA"), the Financial Sector Regulator as well as the investigators persist in the appeal on the basis that the court *a quo* erred in its order and judgment. The core grounds of appeal were the following, namely:

1.1 the review application instituted by the respondent ("Mr Deighton"), was premature and incompetent;

1.2 the provisions of the Promotion of Administrative Justice Act ("PAJA") does not apply;

1.3 there was no basis in law to furnish Mr Deighton with the documents in advance of his interviews;

1.3 there was no basis for excluding the third to the fifth appellants from further involvement in the investigation going forward.

[2] The court *a quo,* after having heard the review application, set the investigation aside on the basis that it was procedurally unfair. Consequently the court, *inter*

alia, ordered that the investigation be conducted afresh and that the third to fifth respondents be removed from the investigation. The court concluded that the investigation be conducted in terms of Section 3(2) of PAJA and in accordance with the principles of natural justice.

CASE BEFORE THE COURT *A QUO*

[3] The facts have been set out in detail in the judgment of the court *a quo* and I do not deem it necessary to repeat same. At the heart of the dispute between the parties is whether the investigation process could be challenged midstream on the grounds of procedural unfairness.

[4] FSCA appointed investigators to investigate possible contraventions in terms of Section 81 of the Financial Markets Act No. 19 of 2012 ("FMA") for a period 2017 to 2018 in respect of the Tongaat Hulett Group in respect of certain financial misstatements made.

[5] Mr Deighton became subject of the investigation due to his position as a senior executive of the Tongaat Hulett Group. He was the managing director of a subsidiary of the Group, Tongaat Hulett Developments (Pty) Ltd in this period. Certain findings that emanated from the Price Waterhouse Coopers Report ("the Report"), identified that senior executives were involved in irregular and undesirable accounting practices that resulted in revenue being recognized in prior reporting period.

[6] The nub of Mr Deighton's grievance is that he was forced to participate in the investigation and respond to questions without being afforded prior access to documents which the investigators relied on. It was argued that it was pertinent for him to be afforded prior access to such documents in order for him to properly prepare and respond informatively.

[7] Mr Deighton perceived that substantial injustice would arise if the court (on review) did not intervene at this stage of the proceedings. Section 136 to 140 of the Financial Sector Regulation Act (FSRA) bestows extensive powers on investigators. Mr Deighton indicated that his refusal to respond may subject him to criminal sanctions. The legal argument proffered was that the conduct of the investigators constituted public power which has to be tested in terms of PAJA and/or legality.

[8] Finding in support of Mr Deighton, at paragraph [72], [73], and [76] the court *a quo* stated*:*

> *"72. If Mr Deighton were to have acquiesced and allowed the tribunal to have conducted the investigation in the manner that it sought to do, it would be difficult, if not impossible for him, in the event of an adverse finding made against him by the FSCA, to appeal such finding.*
>
> *73. The finding would have been premised upon an investigation in respect of which the procedure was manifestly unfair and in respect of which he had acquiesced and committed himself on oath to responses which would themselves have formed the basis of the adverse finding. Any subsequent attempt to clarify or supplement any answer that he had given, could only*

occur in circumstances in which he would have to admit to having breached at the very least, either of or both sections 139(3) and (5)….

76. The appropriate time to have brought this application was when it was brought to wait until the process was complete and then after having acquiesced to responding under oath with the knowledge that the response may possibly be neither complete nor misleading would be absurd."

[9] The court *a quo* further upheld the respondents' contentions, namely that:

9.1 FSCA's investigators were attempting to submit Mr Deighton to "gotcha" questioning – expecting him to answer questions about complex transactions that occurred years ago based on voluminous bundles of documents without offering him sufficient time to review those documents.

9.2 Investigations conducted in terms of FSCA has serious consequences. Mr Deighton was forced to answer questions emanating from the voluminous documents and he could be manipulated into giving answers that could later be used against him.

9.3 There was been no proper tenable explanation regarding the confidentiality of the documents, more particularly whether or not all of the documents were confidential and whether a specific confidentiality regime could have been arranged between the parties.

9.4 Mr Deighton should have been afforded a reasonable opportunity to review the documents that he would be questioned upon.

9.5 Mr Deighton was willing to participate in the investigation.

[10] The court *a quo*, relying on ***John v Rees***[1], found that natural justice demanded that Mr Deighton ought to be given the documents beforehand and to ensure that his responses meet the standard expected of him by law. In this manner he would be able to respond truthfully and to the best of his knowledge thus ensuring that his responses are neither false nor misleading.[2]

[11] It was emphasized that rules of natural justice apply to investigators as well, which proposition I do not dispute. Reference was made to the ***Pergamon Press Limited***[3] matter, which stated:

"… while conceding that the proceedings decided nothing in themselves, Lord Denning warn against underestimating the significance of the inspectors' task: They have to make a report which may have wide repercussions. They may, if they think fit, make findings of facts which are very damaging to those who they

[1] [1970] CH 345 at 402 C-E

[2] The passage quoted from ***John v Rees*** at page 402 C-E was the following:
"It may be that there are some who decry the importance to courts attached to the observance of the rules of natural justice. "When something is obvious" they may say "why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard?" The result is obvious from the start. Those who take this view do not, I think, do themselves justice. As anybody who has anything to do with the law well knows, the path of the law is true with examples of open and shut cases which, somehow were not; of unanswerable charges which, in the event were completely answered; of inexplicable conduct which is fully explained; are fixed and unalterable determinations that by discussion, suffered a change, nor are those with any knowledge of human nature were forced to think for a moment likely to underestimate the feelings of resentment of those who find that the decision against them has been made without them being afforded an opportunity to influence the cause of events."

[3] [1970] All ER 535 CA at 539

name. They may accuse some; they may condemn others; they may ruin reputations or careers. They report mainly to judicial proceedings. It may expose persons to criminal proceedings or to civil actions … seeing that they work and they report mainly to such consequences, I am clearly of the opinion that the inspectors must act fairly."

[12] Accordingly the court *a quo* concluded at paragraph [75]:

> *"75. The failure of the panel, at both interviews to appreciate the consequences of their refusal to allow Mr Deighton prior access to the documents upon which he was to be interrogated, having regard to the particularly serious consequences of any subsequent possible adverse finding against him, is to my mind manifestly unjust."*

ANALYSIS

[13] In considering the court *a quo's* judgment, I find that it erred in applying the fundamental principles pertaining to procedural fairness. More particularly, the court *a quo* in principle erred in the following manner, namely:

13.1 in finding that the provisions of PAJA was applicable;

13.2 failing to apply the "contextual fairness" test when evaluating procedural fairness. Consequently it failed to distinguish fairness principles at investigation stage and those at an adjudicative stage; and

13.3 not appreciating that the review would only be permissible if Mr Deighton demonstrated “grave injustice”.

(i) Applicability of PAJA

[14] The determination in accordance with PAJA was flawed. The court *a quo* erred in this regard as it has been affirmed that PAJA does not apply to investigations. The Supreme Court of Appeal upheld this principle on various occasions.[4]

[15] ***Viking Pony*** is authority for the proposition that it is only in instances where there is a determination of and a pronouncement of culpability, that a matter would be reviewable. The Constitutional Court pronounced that:

“Detecting a reasonable possibility of a fraudulent misrepresentation of facts … would not 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 wich could potentially trigger the applicability of PAJA. It is unlikely that the decision to investigate and the process of investigation which excludes the determination of culpability could adversely affect the rights of any person in a manner that has a direct external legal effect.”[5]

[16] Consequently the court at paragraph [39] stated:

[4] Corpclo 2290 CC t/a U-Care and Another v Registrar of Banks [2013] 1 All SA 127 (SCA), paragraph [26] Simelane NO v Seven Eleven Corporation SA (Pty) Ltd 2003 (3) SA 64 (SCA) and Competition Commission v Yara 2013 (6) SA 404 (SCA)

[5] Viking Pony African Pumps (Pty) Ld t/a Tricom Africa v Hidro-Tch Systems (Pty) Ltd and Another 2011(1) SA 327 (CC) paragraph [38] (my emphasis)

"If the City was about to pronounce on the culpability of Viking, Hidro-Tech and Viking would have to be afforded an opportunity in terms of PAJA to make whatever representations they wish to make …"[6]

(ii) Premature review

[17] A further contention that the review was instituted prematurely was raised by the appellants. A matter should not go to court before a decision is final or at least ripe for adjudication. In ***Rhino Oil***[7] the Supreme Court affirmed that:

"As a general rule, a challenge to the validity of an exercise of public power that is not final in effect is premature."

[18] Mr Deighton from the outset, appreciated that the investigation process was not finalized and that no decision was made by FSCA. It is common cause that the process is currently at the investigation stage. He further appreciated that procedural adjudication should be avoided and proceedings should be finalised before proceeding to court. However, he claimed that exceptional circumstances demanded that the court intervene at this stage.

[19] Notably at the hearing both counsel also accepted the proposition that investigators are required to act fairly and that the midstream review could be entertained in circumstances where grave injustice is prevalent.

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[6] Paragraph [39] of Viking Pony

[7] Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms 2019 (6) SA 400 (SCA) at paragraph 33
Hoexter et al supra at page 840

[20] I am mindful that our authorities have pronounced that courts should be slow to interfere in unconcluded proceedings. It is only in the rarest of cases that intervention is justified. I have been referred to various decisions of our higher courts who frown upon intervention in unconcluded proceedings. The Constitutional Court has cautioned against piecemeal litigation.[8]

(iii) Distinction between investigative and adjudicative functions

[21] The fundamental principle recognized by our courts is that a distinction between the investigation stage and the adjudication stage must be drawn when determining procedural fairness.

[22] At the investigation stage the interested party is only required to know the essence of the case that has to be met.[9] Persons affected merely have a right to know the substance of the case they have to meet.[10] It is at the decision-making stage where persons are afforded a full opportunity to consider all the documents and/or be afforded a hearing. Such persons would be entitled to make the necessary representations against any preliminary adverse findings made against them.

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[8] Magistrate, Stutterheim v Mashiya 2004 (5) SA 209 (SCA)
Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (AD)
Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others 2020 (1) SA 327 para 108

[9] Novartis SA (Pty) Ltd and Others v Competition Commission and Others (CT 22/CR/B/JUN 01, 2.7.2001 paragraphs [7] and [35]-[61]
I have further taken note of the approach affirmed by our courts, namely various matters starting with ***Park-Ross (1998)***, ***Brenco (2001)*** to the more recent matter of ***Msiza (2023)***

[10] Prudential Authority of the South African Reserve Bank v Msiza [2023] ZAGPPHC 313 (2 May 2023)

[23] The underlying principle for the distinction to be drawn is to ensure that public bodies are not unduly restrained in their work when the exercise of their powers carry no serious or final consequences for affected parties.

(iv) The "contextual fairness" test

[24] Hoexter and Penfold[11] elaborated that:

"Procedural fairness is a principle of good administration that requires sensitive rather than heavy handed application. Context is all important: The content of fairness is not static but must be tailored in the particular circumstances of each case. There is no room now for the all-or-nothing-approach to fairness that characterise our pre-democratic law, an approach that tender to produce results that are either orally burdensome for administration or entirely unhelpful for the complainant."

[25] This illustrates that there are no single set of principles that exist when applying the rules of natural justice. Flexibility is required when applying the principles of fairness. In ***Novartis*** the court cited with approval the authority of ***Brenco*** as well as the dicta of ***Re Pergomon Press***[12] where it was stated:

"In the application of the concept of fair play there must be real flexibility so that very different situations may be met without producing procedures unsuitable to the object in hand."

[11] Cora Hoexter and Glenn Penfold Administrative Law in South Africa Third Edition 2021 at page 501 (and my emphasis)
[12] [1970] 3 ALL ER 535 (CA), (cited with approval in Brenco)

[26] When the court in ***Simelane***[13] was required to have regard to the statutory prescripts of the Competition Act (89 of 1998) it weighed the functions of the Competition Commission and those of the Competition Tribunal. The court once again upheld the principles enunciated in ***Brenco*** and ***Novartis***. It examined the particular facts in the said matters and appreciated the multi-staged process involved that eventually led to the decision-making process.

[27] The court explained that the role of the Commission is investigative whereas the Tribunal is adjudicative. The Commission receives a complaint, investigates and then determines whether it should be referred to the Tribunal. It is the Tribunal that determines whether the complaint is well-founded and then decides what steps are to be taken.[14]

[28] The court in ***Simelane*** further affirmed the approach in ***Novartis***, and stated:

"The demands of fairness will depend of the context of the decision viewed within the procedural context in which it arises. An essential feature of the context is the empowering statute which creates the discretion as regards to both its language and the shape of the legal and administrative system within which the decision is taken…."

[13] Simelane NO and Other v Seven-Eleven Corporation SA (Pty) Ltd and Another 2003 (3) SA 64 (SCA) and Competition Commission v Yara (South African) (Pty) Ltd and Others 2013 (6) SA 404 (SCA)
[14] Competition Commission of South Africa v Telkom SA Ld and Another the SCA affirmed the approach in Simelane.

[29] I noted that in their respective arguments, both parties accepted the "contextual fairness" principle. However counsel for the respondent went at length to distinguish the facts herein from the authorities cited aforesaid. For instance, a contention was raised that in ***Brenco*** a request was made for all the evidence whereas Mr Deighton herein, only sought specific documents. Such factual anomalies, in my view, are not plausible. The general principle of "contextual fairness" approach must be tested in each instance.

[30] In terms of this "contextual fairness" test, the respondent failed to appreciate that the facts and circumstances must be adjudged in a nuanced way. The distinction in the fairness principles between the two processes is a fundamental exercise. This would inevitably include consideration of the particular circumstances, the applicable statutory framework, the nature of the investigating body's functions and powers and the potential impact on the affected person.

[31] The argument that was continuously enhanced on behalf of Mr Deighton was that the investigators' very decision not to grant Mr Deighton prior access to the documents had an adverse effect and consequently serious repercussions at the decision-making stage. It was argued that the investigation phase cannot be separated from the adjudication phase. This manner of reasoning remains flawed as the statutory context was not taken into account.

[32] The respondent particularly relied on the ***Earthlife Africa***[15] and the ***Save the Vaal***[16] matters. It was pointed out that our courts have acknowledged certain instances where a preliminary decision could have serious consequences at the final decision-making stage. In such cases it was found that the *audi alteram partem* rule should be afforded at the stage of the preliminary decision.

[33] It was pointed out that in ***Earthlife Africa*** the court held that a multistage process, involving an investigation that leads to a recommendation and culminating in a decision, should be viewed holistically and should be seen as affecting rights at each stage. Hence the investigation followed by the eventual decision cumulatively may constitute administrative action. [17]

[34] For instance the issues for consideration in ***Save the Vaal*** was whether the preliminary decision taken would have a direct effect and in ***Earthlife***, whether the approval would have a direct effect. Again I emphasize that the contextual approach finds application.

[35] The appellants further contended that the respondent's reliance on the ***Mamasedi*** matter was ill conceived in the said circumstances of this matter. The proposition in ***Mamasedi***, that the investigative process must be viewed holistically together with the adjudicative process. It was pointed out that since the adjudicative process has not been finalised in the current matter, the holistic approach could

[15] Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism 2005 (3) SA 156 C at paragraph [35]
[16] Director: Mineral Development Gauteng Region vs Save the Vaal Environment 1999 (2) SA 709 SCA at paragraph [17]
[17] Minister of Defence & Military Veterans v Mamasedi 2018 (2) SA 305 SCA paragraphs [14] to [15]

not be considered. ***Mamasedi*** was further distinguishable in that the application for review was premised on the final decision of the Chief of the South African Defence Force. It was not a midstream review.

[36] I reiterate that the facts have to be considered against the backdrop of the relevant legislation. In this matter the court *a quo* did not have regard to the statutory scheme as envisaged in the FSRA. Notably the appellant went at length to discern the internal processes availed to aggrieved persons in terms of the FSRA and highlighted that the functions and duties of the investigators are delineated from those of the decision makers. The FSRA makes provision for FSCA to appoint investigators to investigate contraventions of financial sector laws. The investigators conduct the investigation independently and not FSCA. Once the investigation report is compiled, FSCA is required to consider the report and make a decision which includes the imposition of sanctions.

[37] It is common cause that the investigators were appointed in terms of Section 135(1) of the FSRA and their powers are set out in Section 136(1)(a) thereof.[18]

[18] Section 136(1)(a) reads:

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 a 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 a document or item to an investigator, at the time and place specified in a notice; or

(bb) produce a document or item to an investigator, at the time and place specified in a notice, to be questioned by the investigator about the document or item;

(iii) question a person who is complying with a notice in terms of (1)(i) or (ii)(bb) to make an oath or affirmation and administer such oath or affirmation;

(iv) …

[38] On this aspect, I find it apt to refer to the majority decision of the Appeal Court in ***Msiza***[19] (who disagreed with the minority view pertaining to the role of the investigators). At paragraph [59] the court held:

"FSCA may appoint an investigator with the object of gathering information. The powers afforded to the investigation are discretionary powers and the object of the powers are to facilitate investigation. From the empowering provisions it is clear that the investigator is not mandated or empowered to arrive at any decision and/or determine the value of the evidence and/or make a determination on culpability."[20]

Further at paragraph [61] the court remarked:

"The investigator is merely required to carry out an investigation. The discretionary powers awarded to an investigator in terms of Section 136 of the FSRA enables the collation of information which may or may not constitute prima facie evidence."

[39] There must be an appreciation that the FSRA delineates the functions and powers of the investigators from that of the FSCA officials responsible for decision-making at the FSCA. Section 134 read with the powers of the investigator as set out in Section 135, 136 and 137 of the FSRA relates to the

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(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) gave direction to a person present while the investigator is exercising power in terms of this paragraph, to facilitate the exercise of such powers.

[19] South African Reserve Bank v Msiza and Another 2023 JDR 163 GP at paragraph [59] **
[20] Paragraph [59]

investigation process. ***Msiza*** appreciated the distinction between the investigation phase and the decision-making phase.

[40] At paragraph [62] the court found that the investigators were not bestowed with a judicial or quasi-judicial function:

"As such any opinion expressed by the investigator in a 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 prima facie view expressed by the investigator to the appellant with the intent to enable the appellant to achieve its objects in terms of the provisions of the FSA.[21] *It is clearly within the absolute discretion of the Appellant with due regard to its powers and functions in terms of the FSA, to deal with the information collated by the investigation in the course of the investigation in a manner which the appellant deems fit."*

[41] Moreover in terms of Section 91 of the FSRA, the FSCA is required to comply with the provisions of PAJA which would include affording a person a proper hearing and access to the documents relied upon. As a matter of practice, FSCA makes provisions for processes that affords any affected person a full opportunity to be heard and make representations:

41.1 firstly, it issues a notice of the proposed administrative action setting out the Authority's preliminary findings, a clear statement of the proposed

[21] my emphasis

decision, the reasons for it as well as referring to the documentation upon which the decision is based;

41.2 the notice of proposed administrative action invites the affected person to make representations, to dispute any of the information contained in the notice, and, in appropriate circumstances, to appear before the Authority;

41.3 only after considering the affected person's representations does the Authority make a final decision, which sets out its reasons and informs the affected person of his or her internal remedies under the FSRA.

[42] It is at this stage that the decision-making phase is initiated as contemplated in Section 218 of the FSRA. If a decision remains adverse, the aggrieved person has a further internal remedy and that is to approach the Tribunal to reconsider the FSCA's decision.

[43] In fact, in ***Simelane***, at paragraph [61], the court similarly recognized the multi-staged procedures adopted by FSCA:

"… In our view the applicants are emphasizing form over substance. On the basis of its investigation the Commission determines whether or not a prohibited practice has occurred. If the Commission determines that a prohibited practice has occurred, it cannot impose a fine or any other remedy. It must refer the complaint to the Tribunal. Referring a complaint to the Tribunal is not determinative of the complaint. All it means is that the respondent will have to face a hearing before the Tribunal where it will be given an opportunity to respond to the allegations that it has engaged in a prohibited practice. Even where the

Commission decides not to refer the complaint, this decision is also not determinative of the complaint - in terms of Section 51(1) of the Act the complainant has the right to refer the complaint to the Tribunal directly. We repeat that we have stated that a decision by the Commission to refer a complaint is merely one of the steps in the resolution of the complaint; it may be the most important one but it is not determinative of the complaint. The respondent gets an opportunity to state its case before the Tribunal. The decision of the Tribunal is determinative of the complaint as a whole and that is why the Act entitles the Respondent in Tribunal proceedings to the principle of natural justice…."

[44] Notably the Constitutional Court, in ***Koyabe***, announced that statutory processes cannot merely be ignored. At paragraph [35], it expressed:

"Internal remedies are designed to provide immediate and cost effective relief, giving the Executive an opportunity to utilize its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation …"

Aggrieved or affected parties are obliged to exhaust the statutory remedies available to itself before its runs to court.[22] More recently the Constitutional Court in ***Speaker of the National Assembly***[23] once again affirmed the principle as set out in ***Viking Pony***.

[45] In ***Seven-Eleven*** the court expressed at paragraph [60] that fairness is not compromised by denying natural justice prematurely, but is only compromised if it is ultimately denied.[24]

[22] Koyabe and Others v Minister of Home Affairs and Others 2010 (4) SA 327 (CC)
[23] Speaker of the National Assembly v Public Protector and Others 2023 (3) SA 1 (CC) paragraph 91
[24] page 77 of the Seven-Eleven matter

[46] The Financial Services Tribunal, in the ***JPR Michaels*** matter[25], acknowledged that the investigative stage does not involve any decision making. In the said matter it was emphasized that FSCA is the final body responsible to adjudicate decisions and the decision taken at investigation stage is not adjudicative. In the context of statutory interpretation, Chapter 9 of the FSRA pertains to, *inter alia*, the information gathering process and investigations. It could not have been the intention of the legislator to have equipped investigators with adjudicative powers, if one has regard to the multi-facetted processes put in place in the FSRA.

[47] Consequently the Tribunal exercises an appeal jurisdiction. It would conduct the appeal (reconsideration) in the fullest sense. It is not restricted by the FSCA's decision. It has the power to conduct a complete re-hearing and make a fresh determination on the matter. This would include procedural irregularities.[26] It emphasized that FSCA is the body responsible for the adjudicative decision and the decision taken at determinative stage is not adjudicative.

GRAVE INJUSTICE

[48] Having set out the fundamental approach regarding procedural fairness, the next enquiry would be if a case for "grave injustice" is made. Intervention of a court is

[25] JPR Michaels v Financial Sector Conduct Authority, case no A25/2023, decision of Financial Services Tribunal dated 1 November 2023

[26] Nichol and Another v Registrar of Pension Fund and Others 2008 (1) SA 383 (SCA)
JSE Limited v The Registrar of Security Services, a decision of the then Appeal Board of the Financial Services Board
MET Collective Investments (RF) (Pty) Ltd v Financial Sector Conduct Authority, case no. A23/2019 dated 29 July 2020, decision of the Tribunal

only permissible in the case of grave injustice, the pertinent issue that remains – is whether Mr Deighton's circumstances are such that warrants the intervention of this court.

[49] The enquiry would proceed based on the principle of legality which requires that public power must be exercised in accordance with the law and not arbitrarily or unlawfully. A midstream review would be permissible if it is found that the investigators had acted vexaciously or oppressively towards Mr Deighton. Although the court *a quo* did not uphold the allegations of biasness on the part of Mr Loxton, it found that the conduct of the investigators, by withholding the documents from Mr Deighton, was manifestly unfair.

[50] The court *a quo's* acknowleged that Section 132 read with Section 139 offers protection against self-incrimination. It placed emphasis on the fact that since Mr Deighton was compelled to respond to the questions and was required to answer fully and truthfully to the best of his knowledge, and thereby not allowed to interfere or hinder the investigation except for a lawful reason,[27] he would compromise himself if he allows the investigators to continue in their manner of investigation.

[51] In applying the legality test, the exercise of public power must be rationally related to the purpose for which the power was given. The test is objective.[28] Put in another way, the decisions must be rationally related to the purpose for which the

[27] Section 139(1) to (4) of the FSRA
[28] Minister of Defence v Motau 2014 (5) SA 69 (CC) at paragraph [61]

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.[29]

[52] In analyzing the facts, the following cannot be disputed, namely that Mr Deighton was afforded representation of his lawyers throughout the investigative process; he was given fair notice of his interview; the investigators furnished him with a detailed list in advance of the twelve issues that were intended to be covered; he was also informed of his rights, including the protection regarding self-incriminating evidence as contemplated in Section 140 of the FSRA; he was represented by his attorney and counsel; the investigators further made it clear to Mr Deighton that he would be afforded an opportunity during the interview to consider each document put to him. In fact the investigators advised him that they would afford him an opportunity to consult in private with his legal representatives, if he so requests.[30] Moreover the investigators expressed their willingness to adjourn or postpone the interview at his request. His legal advisors had sight of the documents during the interview. On Mr Deighton's own version, he alleged that he was advised what the focus of the investigation would be, namely: regarding the various financial misstatements in the financial statements and the early recognition of sales revenue from the sale of land.

[29] Pharmaceutical Manufacturers Association of South Africa and Another: in re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at paragraph [88]

[30] Annexure 'FS7', Volume 1 paragraph [10] and paragraph [69] (SUP3A), Volume 2, page A146 line 34 to 37

[53] One of the arguments advanced by Mr Deighton was that he was no longer employed with the company and therefore had no access to any documents relevant to the investigation. This could not be a determining factor as Mr Deighton would be furnished with the documents the investigators intend on relying in their investigation. An undertaking was made that he would be allowed to consider the documents in the presence of his legal representatives and consult with them. Under these circumstances there can be no grave injustice.

[54] In fact Mr Deighton was particularly informed of the issues that were to be canvassed with him, particularly his involvement in specific land sales transactions and the publication of the annual financial statements.

[55] The aspect regarding him as a “suspect” was also clarified with him. He was advised that the main object of the investigation was to elicit information from him in accordance with the statutory powers prescribed in Section 136(1)(a) of the FSRA. Section 136(1)(a)(i) merely makes reference to “any person who the investigator reasonably believes may be able to provide information relevant to the investigation (including the PWC report).

[56] He was particularly advised that furnishing him with the copies of documents would present a risk to the investigation. During the interview Mr Pascoe informed Mr Deighton’s attorney that he would be entitled to the documents if the FSCA makes a decision to proceed with the enforcement action (adjudication stage).

[57] In my view, Mr Deighton's fear that substantial injustice would arise does not advance a case of grave injustice. Mr Deighton is entitled to challenge an adverse decision, if any. His grievance would then be addressed by the Tribunal.

[58] I repeat that an undertaking was made by the investigators that he could adjourn at any stage of the investigation process to consult with his legal team and to consider his response. His argument that he was confined to time or prevented from evaluating his response is untenable. The respondents' further argument, that a piecemeal revelation of the documents prejudiced Mr Deighton and that he should be given an opportunity to consider the documents in his own time together with his legal representatives and to do so holistically is not plausible at this stage of FSCA's document collation and investigation process as envisaged in Chapter 9 of the FSRA.

CONCLUSION

[59] In summary, applying the "contextual fairness" test, I reiterate that Mr Deighton failed to appreciate the following:

59.1 firstly, that the multistage process is initiated with the investigation phase. In the event that a preliminary decision is being made, Mr Deighton would be entitled to the documents. It may even result that no adverse finding is made against Mr Deighton's conduct;

59.2 secondly, Mr Deighton was informed that the documents were of a sensitive nature and considered to be privileged at the time the investigation was initiated. It was explained that other executives have also been implicated;

59.3 thirdly, Mr Deighton failed to appreciate the fairness standard envisaged at the investigation phase;

59.4 although the investigation was initiated the substantive aspects were not dealt with. Various housekeeping matters were discussed with Mr Deighton, which included the nature of the questions that he would be faced with and the issues that would be canvassed with him. Eventually extensive debate ensued concerning the accessibility of the documents.

[60] In the absence of a clear illegality the requirement of prejudice may be a significant obstacle to overcome.[31] Clearly Mr Deighton has not been prejudiced. Applying the fairness standard at investigation stage, the refusal to allow Mr Deighton prior access does not fall short of the standards demanded by the Constitution. In my view, the decision not to furnish Mr Deighton with documents was rationally related to the investigation process.

[61] In ***Phahlane***, the court refused to entertain a midstream review pertaining to incomplete disciplinary proceedings. The court found that the applicant failed to demonstrate the requisite prejudice to justify the midstream review. The court

[31] Hoexter supra at page 584

explained that it was not enough to suggest that the midstream review would obviate a need for the review at a later stage.[32]

CONFIDENTIALITY OF THE DOCUMENTS

[62] Counsel for the appellant correctly argued that the aspect of confidentiality only comes into play if a finding is made that Mr Deighton was entitled to the documents.

[63] At this particular stage of the investigation the documents were sensitive and the disclosure thereof had the tendency to compromise their investigation.

REMOVAL OF THE INVESTIGATORS

[64] The court *a quo* ordered that all three investigators be removed. Its finding was evidently premised on the fact that they flouted the rules of natural justice. I have noted that the court *a quo* did not make a finding of bias against Loxton, neither did it made an adverse finding against the two investigators, nor was it contended that Pascoe and Pillay be removed as investigators. Consequently the order of the court *a quo* pertaining to their removal remains incompetent.[33]

COSTS

[32] Lieutenant-General Phahlane v National Commissioner of the South African Police Services 2020 JDR 0938 GP, paragraph [30]
[33] Fisher and Another v Ramahlele and Others 2014 (4) SA 614 (SCA) at paragraphs [13] and [14]

[65] At the hearing, both parties accepted the proposition that the ***Biowatch***[34] principle is applicable unless this court in the exercise of its discretion finds that Mr Deighton's review application was improper and frivolous.

[66] It is trite that if a litigant raises his constitutional rights in litigation against the State, in good faith, is entitled to the ***Biowatch*** protection even if it is to protect only his/her interests.

[67] In exercising my judicial discretion, I find that Mr Deighton was entitled to vindicate his constitutional rights. The application was neither frivolous nor instituted in bad faith. There is no reason why the respondent should be penalized with costs. Our courts have emphasized that judicial officers should caution themselves against discouraging parties who are entitled to test their constitutional rights. In the premises, even though the respondent has not succeeded, he should not be lambasted with a costs order.

[68] In conclusion the appeal succeeds.

[34] Biowatch Trust v Registrar Genetic Resources, and Others 2009 (6) SA 232 (CC)

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H KOOVERJIE

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

_____

J S NYATHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered.

_____

L A RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the appellants:	*Adv. G Marcus SC*
	Adv. M Mbikiwa
Instructed by:	*RW Attorneys*

Counsel for the respondent:	*Adv. M du Plessis SC*
	Adv. P Olivier
Instructed by:	*Larson Falconer Hassan Parsee*
Date heard:	*22 November 2023*
Date of Judgment:	*7 February 2024*