



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

CASE NO.: 9946/2022

In the matter between:

DUNCAN ERNEST KORABIE

Applicant

and

**THE JUDICIAL COMMISSION OF INQUIRY INTO
ALLEGATIONS OF STATE CAPTURE, CORRUPTION
AND FRAUD IN THE PUBLIC SECTOR, INCLUDING
ORGANS OF STATE**

First Respondent

RMM ZONDO N.O.

Second Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

This judgment is delivered on Tuesday, 20 September 2022 by email transmission to the applicant.

JUDGMENT

DOLAMO et SLINGERS JJ

INTRODUCTION

1. This is an application, brought on an urgent basis, for the review and setting aside of the findings of the State Capture Commission (**'the Commission'**) against the applicant. This Commission came to be commonly known as the "*Zondo Commission*". The impugned findings are contained in Part IV of Volume 1 of the Commission's report that was handed to the President of the Republic of South Africa on 29 April 2022. The report in question deals with the findings of the Commission relating to the affairs of the state owned diamond company Alexkor SOC and its activities, vis-à-vis, the Richtersveld Community, where the applicant was involved as the community's legal advisor and as a board member of one of its companies. Richtersveld is an area in the Northern Cape which is rich in minerals, mainly diamonds.
2. The Commission was established by the then President of the Republic of South Africa, Honourable Jacob Zuma, in terms of section 84(2)(f) of the Constitution of the Republic of South Africa (**'the Constitution'**). The purpose of the Commission was to investigate allegations of state capture and malfeasance. Guided by the report of the public protector, the Commission was to inquire into, make findings, report on and make a recommendation concerning whether and to what extent and by whom attempts were made through any form of inducement of any gain whatsoever nature to influence members of the national executive office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of

any boards of state owned enterprises (SOE's). The Commissions Act¹ (**'the Act'**) applied to the Commission.

3. In terms of the Act, the Commission was empowered to make regulations in order to enable it to conduct its work meaningfully, effectively and to facilitate the gathering of evidence by conferring on the Commission powers as may be necessary, including the power to enter and search premises, secure the attendance of witnesses and compel the production of documents. Regulation 3.3 is of particular relevance to the present enquiry and provides that:

'3.3 If the Commission's Legal Team intends to present to the Commission a witness, whose evidence implicates or may implicate another person, it must, through the Secretary of the Commission, notify that person ('implicated person') in writing within a reasonable time before the witness gives evidence:

3.3.1 that he or she is, or may be, implicated by the witness's evidence;

3.3.2 in what way he or she is, or may be, implicated and furnish him or her with the witness's statement or relevant portions of the statement;

3.3.3 of the date when and the venue where the witness will give the evidence;

3.3.4 that he or she may attend the hearing at which the witness will give evidence;

3.3.5 that he or she may be assisted by a legal representative when the witness gives evidence;

3.3.6 that, if he or she wishes:

3.3.6.1 to give evidence himself or herself;

¹ Act 8 of 1947.

3.3.6.2 *to call any witness to give evidence on his or her behalf; or*

3.3.6.3 *to cross-examine the witness;*

i. he or she must, within two weeks from the date of notice, apply in writing to the Commission for leave to do so; and

3.3.7 *that the Chairperson will decide the application.'*

4. The applicant's involvement in the Richtersveld community was the precursor to the Commission making a recommendation in its report that he be investigated. He came into focus as a result of allegations of fraud levelled against Alexkor, which had formed a joint venture with the Richtersveld community to explore the mineral riches in the area. The joint venture was to award a tender to an independent contractor to mine and market the joint venture's diamonds. The applicant was part of the tender committee.
5. Applicant started acting as an attorney for the Richtersveld community in 2013. The community had formed a Communal Property Association (**'CPA'**) which managed the affairs of the community after a successful land claim in 2007. In terms of a settlement agreement that was concluded between the community, the government of the Republic of South Africa and Alexkor the land as well as its mineral rights were given back to the community. As a result, several companies were established to deal with the affairs of the community, including the Richtersveld Mining Company (**'RMC'**) which dealt specifically with the community's mineral rights. RMC, in turn, formed what was referred to as a Pooling and Sharing Joint Venture (**'PSJV'**) with Alexkor to explore the land and marine mining rights held by each, respectively. The joint venture with Alexkor, in which the latter held 51%, was unincorporated.

6. According to the applicant, the joint venture was initially successful, but things turned sour when the community realized that it was not deriving substantial or any benefits from the PSJV. Disagreements ensued, which led to numerous court cases, with some of the community members siding with Alexkor. This led to serious divisions in the community. As the community's legal advisor these disagreements had an effect on the applicant in his personal life. He has had burglaries at his legal practice's offices and his residence and strange and suspicious vehicles followed him whenever he travelled to or from Richtersveld.
7. During or about 2013 he was instructed by the CPA to assist in revising some of the community's entities, presumably to enhance their effectiveness. For this purpose it became necessary to reconstitute some of the boards of directors dealing with the affairs of the community. These boards had to have independent directors as well as directors from the community. The applicant avers that he was approached to avail himself for appointment on a temporary basis as an independent director of RMC. He agreed and was appointed to the board on 22 November 2013. On the other hand RMC was represented on the PSJV by 3 directors. Most of the business or activities of the PSJV, such as the mining and marketing of the diamonds, were outsourced. The independent contractors who rendered these services were appointed pursuant to a tender process which was supposed to be fair, equitable, transparent, competitive and cost-effective, as required by the provision of section 217 of the Constitution. One Willie Vries, a director of RMC, was one of the three representative of RMC on the tender committee.
8. In 2014 the contract for the mining and marketing of diamonds sourced at Alexkor

expired. A new tender for a new service provider was accordingly published. A stand-in service provider was appointed in the interim for a period of 6 months which was to expire on 31 December 2014. A list of 35 bidders was prepared and a tender committee meeting was scheduled for 11 December 2014 in Johannesburg to choose one successful tenderer who would be the new service provider. The applicant was requested on the 9th December 2014 to attend the tender committee meeting as Vries, the representative of RMC on the committee, was not available. He was further advised that all the necessary documents relating to the shortlisting would be made available at the meeting in Johannesburg. . The applicant does not say by whom he was requested to attend the tender committee meeting. He nevertheless flew to Johannesburg on the 11th November 2014. On arrival at the venue of the meeting he met with Mr. Rafique Bagus (**'Bagus'**), the chairperson of the tender committee as well as a representative of Alexkor board on the PSJV, together with Dr. Roger Paul (**'Paul'**), Mr Mervyn Carstens (**'Carstens'**), Ms Zarina Kellerman (**'Kellerman'**), the chief legal advisor of Alexkor, and Mr Raygen Phillips (**'Phillips'**), the secretary of the joint venture.

9. Before the start of the meeting Bagus drew aside applicant and Paul and informed them that only one tenderer, Scarlett Sky Investments 60 (Pty) LTD (**'SSI'**) provided for local beneficiation of the diamonds and a concomitant significant community investment. Applicant listened to Bagus but offered no comment. During the meeting, members of the tender committee were provided with documentation relating to the bidders. None of these bidders impressed the applicant. Only SSI provided for appropriate social investment and direct community benefits. As with

the other tenderers, applicant was not entirely persuaded that SSI could be appointed and raised a number of queries relating to its bid. As a result, the committee did not deliberate on the merits of the bids nor scored them. The meeting was adjourned on the understanding that due diligence would be conducted on the bidders. Applicant, avers that he retained his score-card which he was supposed to use to score the different bidders.

10. On 17 December 2014, Applicant received a call from Paul, who informed him that he had received a call from Bagus. According to Paul, Bagus had recommended that SSI be appointed, given the fact that the interim contractor's term would be expiring at the end of January 2015. Later the same day applicant also received a call from Bagus who made the same recommendation that SSI be appointed. Applicant raised with Bagus the possibility of making a conditional appointment of SSI subject to a due diligence being conducted on the company. A due diligence report would then have to be submitted to the tender committee and, if the latter was satisfied, a permanent appointment could be made. Applicant subsequently received an invitation to attend the tender committee's meeting which was scheduled for 23 January 2015. At the meeting Bagus tried to place the appointment of SSI on the agenda with a view to persuading the meeting to approve its appointment as the successful bidder. According to applicant, he vehemently objected to making such an appointment until a due diligence process has been conducted and a final recommendation to the Tender Committee had been made and received. With the support of the rest of the members of the tender committee his view carried the day and Bagus was compelled to withdraw his proposal.

11. At this stage, we mention that the Applicant filed no confirmatory affidavits to cure the hearsay evidence which characterised his founding affidavit. Furthermore, he provided no explanation why no confirmatory affidavits were filed to cure the hearsay evidence.
12. During or about March 2015 applicant was informed by Vries that the PSJV has appointed SSI through a round-robin board resolution during February 2015. Vries further informed the applicant that he (Vries) was advised that the applicant had also agreed to such appointment. Applicant disputed this version and advised Vries that he had only agreed to a conditional appointment of SSI pending a due diligence investigation. Applicant thereafter heard nothing further about this matter until his resignation as a director of RMC, with effect from 27 January 2015. Applicant later conducted his own investigation and discovered that SSI was a shelf company until very shortly before its bid was submitted. Its directors at the time, Messrs Kuben Moodley and Daniel Nathan, were appointed shortly after the bid was submitted. This company had no track record in the diamond industry, nor was it a diamond license holder which was one of the prerequisites for tendering for the services required by PSJV.
13. As a result of his discovery of these improprieties, applicant was instructed by RMC to lodge a complaint with the office of the public protector. The written complaint was lodged with the office of the public protector during March 2015. He also lodged a separate complaint against Kellerman. In his subsequent correspondence with the office of the Public Protector, the applicant was advised that the office of the Public Protector was uncertain whether it had jurisdiction to deal with the complaint. He

was also advised that the complaint lodged with the Johannesburg office could not be located and he had to resubmit it. He decided to lodge the complainant with the Cape Town office on 11 September 2015.

14. During October 2015 the applicant and other members of the RMC were invited to a meeting with the Minister of Public Enterprises (**‘the Minister’**) to discuss the complainants of the Richtersveld community. This meeting was held on 28 October 2015 and was attended by representative from the local Land Claims Commission, the Department of Rural Development and Land Reform, Alexkor board and members of the CPA Committee. At this meeting the Minister gave an undertaking that all outstanding monies, due and owed to the CPA, would be paid in December 2015. Consequent upon this undertaking the complaint lodged with the Public Protector was withdrawn. It was agreed that this complaint will be referred for investigation by the audit and risk committee of Alexkor. According to the applicant no monies were paid to the CPA as agreed nor was there any indication that the matter was investigated as promised. Instead, according to the applicant, Kellermann was appointed a legal advisor to the then Minister of Mineral and Energy Resources. As a result of this development the applicant resubmitted his complaint to the Public Protector

15. In the meantime, the legal wranglings regarding the affairs of the CPA continued. Litigation, *inter alia*, was brought in this division in terms of which a Mr. Matthews was challenging the appointment of the directors of RMC. Matthews was successful in his bid to have these directors removed and on 2 September 2014 this court granted an order reinstating him as the sole director of RMC. However, leave to

appeal to the full bench of this division was granted. That appeal was heard and dismissed by the full bench during July 2016. After his resignation as a director of RMC applicant continued in his role as the attorney of the CPA and the community. The strained relationship between the CPA, the community of Richtersveld, on the one hand, and Alexkor continued to deteriorate with many of the disputes ending up in court litigation. Applicant alleged that the Richtersveld community was deprived of the use and enjoyment of the benefits of the natural resources extracted by Alexkor from its land. This situation has eventually led to the CPA being placed under administration and the applicant's mandate terminated.

16. We now turn to the events that led to the applicant bringing this application to review and set aside the findings of the State Capture Commission.

17. On or about 3 January 2021, the applicant received correspondence from the Commission enclosing a rule 3.3 notice. The correspondence contained a link to the annexures referred to in the notice and the applicant was requested to access same. The applicant however was unable to access the link and advised the Commission of his difficulty. The correspondence of 3 January 2022 have not been placed before this court. On 12 January 2022, after again failing to access the link, the applicant advised the Commission that he wished to testify before it. Applicant, however, did not attach any proof of this alleged communication nor indicated the medium through which he communicated with the Commission. On 18 January 2021 the applicant received from the Commission another letter enclosing a rule 3.3 notice. The letter read as follows:

'Re: REQUEST FOR INFORMATION REQUIRED FOR PURPOSES OF THE

**JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE,
CORRUPTION
AND FRAUD**

1. *Our investigation in respect of the above Commission refers.*
2. *The Commission's investigations into allegations of state of capture, corruption and fraud involving several public entities and other organs of State pursuant to the Commission's Terms of Reference remains ongoing.*
3. *It has come to the attention of the Commission that additional information and/or evidence that is relevant to the Commission's investigation into state capture, corruption and fraud is in your possession and/or under the control of your office.*
4. *This information/ evidence is listed in Annexure "A" (**"the information"**).*
5. *The Commission urgently requires access to the Information in electronic format, on or before **26 January 2021***
6. *In order for the Commission to discharge its mandate without any limitations, it is hereby placed on record that none of the reports, supporting information or evidence in your possession or under the control of your office, be withheld, tampered with or destroyed to handover to the Commission.*
7. *It is understood that some of the information may be confidential. To this end, the Commission assures you that it will protect its confidentiality during the process of conducting its investigations.*
8. *Should you require any further information in the above regard, please direct the same to:*

Mr Peter Bishop

Cell phone: 0834432406

Email: peterb@commissionsc.org.za

18. The above letter attached Annexure "A" which enclosed various questions directed to the applicant. Paragraph 1.14 of Annexure "A" read as follows:

'Rule 3.3 notices were sent to you as early as November 2020 to January 2021 from the Commissions Secretary relating to Craythorne's affidavit, Mr Peter Bishop's affidavit and Mr Albert Torres. When preparing this affidavit as requested, please to do so in conjunction with your responses required in terms of the notices.'

19. The applicant was under no illusion that the communication from the Commission was in relation to the affairs of the Richtersveld community and Alexkor. On 2 March 2021 the applicant received a telephone call from a Mr. Peter Bishop (**'Bishop'**) who introduced himself as an investigator at the Commission. Bishop indicated that he was aware that the applicant wished to testify before the Commission and inquired whether applicant had received the request for information from the Commission that had been forwarded to him. Bishop further inquired whether the applicant was still in possession of his complaint to the public protector and whether he stood by that complaint, all of which he confirmed. This conversation was later confirmed in an email. According to the Applicant, this was the last he heard from the Commission.

20. It is apparent from paragraph 1.14 of Annexure "A", attached to the letter of 18 January 2022, that correspondence was sent to the applicant during November

2020. Unfortunately, neither this correspondence, nor any of the rule 3.3 notices sent to the applicant were provided to the court.

21. Applicant was later alerted by an acquaintance to the findings of the Commission where his name was mentioned and a directive given that further investigation be launched against him and the others in relation to the tender that was awarded to the SSI. He confirmed the findings of the Commission when he himself read the report.

22. The findings and recommendations relating to the applicant are the following:

'398. In the light of the preceding discussion and analysis the following recommendations are made:

398.3 It is recommended that the board of Alexkor and the PSJV investigate whether Mr Bagus, Dr Paul and Mr Korabie (the members of the tender committee) were in breach of their fiduciary duties as contemplated in section 76 of the Companies Act by making a misrepresentation to the board regarding SSI's compliance with the tender requirements with a view to an application to declare them delinquent in terms of section 162(5)(c) of the Companies Act.

398.4 It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Bagus, Dr Paul and Mr Korabie (the members of the tender committee) for fraud or a contravention of section 214(1)(b) of the Companies Act by deliberately making a misrepresentation regarding SSI's compliance with the tender requirements.

398.8 It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Bagus, Mr Korabie, Dr Paul and other persons who purported to act as board members of the PSJV for contempt of the court order issued by the Western Cape High Court on 4 September 2014.'

23. This led the applicant to bring this urgent application wherein he sought an order:

- (i) reviewing, correcting and setting aside the adverse findings and recommendations relating to the applicant set out in Part IV, Volume 1 of the first and/or second respondents' report submitted to the third respondent;
- (ii) directing the first and/or second respondent to publish a correction, within 10 days of the date of the order, of Part IV Volume 1 of the said report withdrawing the adverse findings and recommendations in respect of the applicant;
- (iii) directing the first and second respondents, (and only in the event of the third respondent opposing the application, the respondents jointly and severally) to pay the costs of the application on an attorney own client scale; and
- (iv) granting the applicant further and /or alternative relief.

24. The application was originally set down for hearing on the urgent roll on 18 July 2022 when it was postponed to 23 July 2022. On 23 July 2022, the matter was postponed to 28th July 2022 for this court.
25. On 28 July 2022 correspondence was sent to the applicant, advising that no proof of service of the application appeared to be on file. The applicant advised that he had furnished a service affidavit which addressed these concerns. On 5 August 2022, further correspondence was addressed to the applicant which advised that the Minister of Justice and Constitutional Development was not joined to the application and that this appeared to be a non-joinder. The applicant responded to the correspondence of 5 August 2022 in a letter dated 22 July 2022, but which was emailed on 11 August 2022. He advised that the Commission was not subject to either the authority or the control of the Minister, nor was the Minister responsible for the Commission. The applicant went on to state that the Minister nor the Justice Department had any involvement in the decision-making, finding or recommendations of the Commission. Therefore, in his view, it was not necessary to join the Minister to these proceedings. As a result of the decision we have reached, it is not necessary to engage with the correctness of the applicant's approach to the joinder of the Minister.
26. On Friday, 29 July 2022 the applicant, together with senior counsel appeared before us. At this stage the applicant was informed that the matter could not proceed as the court was not afforded sufficient time to read the voluminous record. The court was also informed that, unfortunately, the applicant's senior counsel would not be

available after 29 July 2022. However, the applicant's counsel proposed that, as the matter was unopposed, it could be determined on the papers at a later date without the need for hearing oral argument.

27. Although it was agreed that the matter would be determined on the papers, the applicant was invited to make further submissions. The applicant declined this invitation. On 26 August 2022 the court convened and the applicant was present in court. The invitation to make further submissions was again extended to the applicant, and was again declined. Thereafter, the court adjourned to consider the application.

28. As seen from paragraph 22, the recommendations at issue were not solely applicable to the applicant, but were equally applicable to Paul and Bagus- as the members of the tender committee. Therefore, it cannot be disputed that they have a direct and substantial interest in the relief being sought by the applicant and that they may be prejudicially affected by the court's decision pertaining to the relief sought. Consequently, the joinder of Bagus and Paul to these proceedings was a matter of necessity and not one of mere convenience.² Not only were Paul and Bagus not joined to these proceedings, but the application was also not served on them. Therefore, at face value, it appears that they were not even informed of the application and given the option to make common cause with the applicant.

29. The failure to join Paul and Bagus constitutes a non-joinder. It is trite that our courts would not deal with matters where a third party that may have a direct and

² *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA)

substantial interest in the litigation was not joined to the suite or where no adequate steps could be taken to ensure that its judgement will not prejudicially affect that party's interests.³

30. The applicant seeks to review the recommendations in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 (**'PAJA'**), and contends that it falls foul of section 6(2)(c), 6(2)(b), 6(2)(e)(iii), 6(2)(e)(iv), 6(2)(f)(ii), 6(2)(h) and 6(2)(i) thereof. Furthermore, the applicant avers that *'... the impugned decision is in any event susceptible to review in terms of the principle of legality.'*

31. In his heads of argument, the applicant proceeds on the basis that the recommendations constitute administrative action as defined in PAJA, and that they fall to be reviewed and set aside for non-compliance with the provisions of PAJA. No argument, however, is advanced in the applicant's written heads of argument for the recommendations to be set aside in terms of the principle of legality.

32. As the application was initially instituted as an urgent application, we now turn to examine whether a case has been made out for urgency.

33. Rule 6(12) provides that:

'(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure

³ *Watson NO v Ngonyama and Another* 2021 (5) SA 559 (SCA); *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Old Mutual Life Assurance Company (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (SCA); *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 (4) SA 212 (SCA)

(which shall as far as practicable be in terms of these rules) as it deems fit.

(b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is [sic] averred render [sic] the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.

(c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.

34. In his affidavit, the applicant states that the unfounded adverse findings and recommendations against him constitute an egregious and continuing violation of his right to dignity and interferes with his right to practice his occupation and profession as a legal practitioner. However, the applicant does not set out how and in what manner the recommendations violate his right to dignity, nor does he set out how and why it interferes with his right to practice his occupation and profession as a legal practitioner. The applicant also makes the bald allegation that he has suffered severe and ongoing psychological distress which impedes his ability to properly perform his professional duties.⁴

35. In addressing the urgency of the matter, the applicant's affidavit is somewhat ambiguous. He states that many of his established clients have accepted his response to the findings and recommendations and continue to support him, but

⁴ No corroborating medical certificates or affidavits are furnished. The diagnosis of psychological distress appears to be a self-diagnosis.

there are many others who have taken a dim view thereof. Although the applicant states that his practice had started to show the effects of the business he has lost, he presents no facts on which to base this conclusion. The court is not informed whether the business the applicant lost consists of existing clients leaving his practice or a reduction in new business. More importantly, no facts nor evidence are presented which establishes that the loss of business is linked to and/or caused by the recommendations of the first and second respondents.

36. The applicant states that his social situation was equally negatively affected as his alleged link to the Guptas⁵ spread far and wide in his community and he has had to withdraw from any meaningful social life because the situation became unbearable. The court is not informed why the situation became unbearable nor of any specific instances which show how the recommendations caused the applicant to withdraw from the social life.

37. The applicant is also desirous of having this application finalised to pre-empt any risk of being prosecuted because of the impugned recommendations. However, there is no indication that a prosecution has been or will be instituted.

38. The applicant's affidavit is phrased in general and vague terms, and is not supported by facts and/or evidence. Furthermore, the applicant has not set out any reasons why he would not be able to get substantial redress if the matter was heard in the normal course.

⁵ The Gupta family featured prominently in the Commission and were alleged to be the primary beneficiaries thereof.

39. Therefore, having regard to the nature of the relief sought and the reasons furnished for urgency, together with the provisions of Rule 6(12), we have not been convinced that the applicant has established urgency.

40. PAJA defines administrative action as:

'any decision taken, or any failure to take a decision, by-

an organ of state, when –

exercising a power in terms of the Constitution, or a provincial constitution; or

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

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, ...'

41. PAJA defines a decision as

'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –

making, suspending, revoking or refusing to make an order, award or determination; giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; issuing, suspending, revoking or refusing to issue a licence,

authority, or other instrument' imposing a condition or restriction; making a declaration, demand or requirement ;retaining , or refusing to deliver up, an article; or doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly'

42. We turn now to the issue of whether the impugned recommendations constitute administrative action.

43. In *New Clicks South Africa (Pty) Ltd v Tshabalala- Msimang NO 2005 (2) SA 530 (C)*, the court addressed the definition of *administrative action* and held that a decision must have a *direct legal effect* to constitute administrative action. The requirement of direct legal effect requires finality in the administration of rights, which would exclude preliminary steps in multi-staged decisions, and would include any conduct preparatory to the taking of a decision.

44. In *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*⁶, the court stated that *'the phrase "direct, external legal effect" was borrowed from German federal law. The allusion to the word "direct" refers to decisions that are final; the word "external" to those that affect not only the decision-maker but also other parties, and the word "legal" overlaps with the requirements that rights must be affected.'*

45. In *Corpco 2290 CC t/a U- Care v Registrar of Banks*⁷, it was stated that a decision to investigate and the process of investigation, which excludes a determination of

⁶ 2017 (2) SA 63 (SCA)

⁷ [2013] 1 All SA 127 (SCA)

culpability, could not adversely affect the rights of the appellants in a manner that has a direct and external effect and therefore, it did not constitute administrative action.

46. In *Companies and Intellectual Property Commission v Yacoob*⁸ the court agreed with the decision of *Corpclo* that a recommendation that a matter be referred to a court for determination would ordinarily imply that no direct external legal effect could yet have resulted, nor could any rights have been adversely affected. The court went on to hold that a recommendation by inspectors to consider applying to court for a delinquency order does not constitute administrative action because it is not direct, external and does not adversely affect rights.

47. In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another*⁹ the constitutional court held that it was 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.

48. The findings of the Commission do not evince the characteristics of an administrative act as defined in PAJA and the subsequent judicial interpretation. The first decision was to recommend the investigation into whether the applicant, together with Bagus and Paul, breached their fiduciary duties as contemplated in section 76 of the Companies Act with a view to an application to declare them

⁸ 2017 JDR 0740 (GJ)

⁹ 2011 (1) SA 327 (CC)

delinquent. As seen from *Companies and Intellectual Property Commission* and *Corpclo* cases, a recommendation to apply to court for an order of delinquency had no external direct legal effect and did not adversely affect any rights. Furthermore, the decision to investigate and the process of investigation could exclude a determination of culpability. Therefore, such a decision is not final, nor can it be said to constitute a decision adversely affecting the Applicant's rights. In the circumstances, it cannot be said that this recommendation constitutes an administrative decision which may be reviewed in terms of PAJA.

49. The second decision was to recommend that law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution for fraud or a contravention of section 214(b) of the Companies Act. Similarly, the third decision was the recommendation to law enforcement agencies to conduct such further investigations as many be necessary with a view to the possible prosecution of the applicant, Bagus and Paul for contempt of court of the order issued by the Western Cape High Court on 4 September 2014.

50. Neither the second nor third decision can be said to constitute final decisions. The impugned decisions do not amount to decisions to investigate, as in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another*, but merely constitute a recommendation to investigate. These recommendations may not be accepted nor acted upon. They are neither final in character nor can it be said that they adversely affect the applicant's rights. If the

recommendations are accepted and investigations are undertaken, the process of investigation could exclude a determination of liability on the part of the applicant.

51. In the circumstances, the second and third decisions do not constitute administrative actions susceptible to review in terms of PAJA.

52. We turn now to the issue of whether the application is ripe for hearing.

53. In terms of the doctrine of ripeness, a complainant should not go to court before the offending action or decision is final or ripe for adjudication. In terms of this doctrine there is no point in wasting the court's time with half-formed decisions whose shape may yet change, or where no decision was actually taken.¹⁰

54. The doctrine of ripeness ensures that courts address issues which have crystallised and not with prospective or hypothetical issues.¹¹

55. In *Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms (Pty) Ltd and Another*¹² the doctrine of ripeness was applied to an application for review based on the principle of legality. In this matter the court stated the general rule that a challenge to the validity of public power that is not final in effect is premature and an application for review cannot succeed on that account. It also accepted Baxter's suggestion that the *'appropriate criterion by which the ripeness of the action in*

¹⁰ Cora Hoexter & Glenn Penfold *Administrative Law in South Africa*, 3rd edition, Juta, pg 840; *Netshimbupfe and another v Mulaudzi and others* (563/17) [2018] ZASCA 98 (4 June 2018)

¹¹ *Ibid*; *Clear Enterprises (Pty) Ltd v SARS* (757/10) [2011] ZASCA 164 (29 September 2011)

¹² 2019 (6) SA 400 (SCA)

*question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not.*¹³

56. If Baxter's criterion is applied to the impugned recommendations, it cannot be said that the applicant has suffered prejudice of that it is inevitable that he will suffer prejudice irrespective of whether or not the action is complete. All three decisions entail the recommendation that investigation takes place. These investigations, should they occur, may exculpate the applicant, by establishing that there are no valid grounds on which he may be held culpable.

57. In *Law Society of South Africa and Others v President of the Republic of South Africa and Others*¹⁴ it was held that processes must be left to run their normal courses before the courts intervene. This, the court went on to say, was particularly so where appropriate checks and balances are in place to secure the rights of those who might otherwise have been disadvantaged by actual or perceived irregularities. In the present matter, appropriate checks and balances are in place to secure the rights of the applicant. The nature of an investigation is to unearth the true facts. It is very probable, that if the recommendations for further investigations are accepted, that the applicant will be approached to provide his version to the complaints resulting in the recommendations. However, even if the applicant is not approached during the course of the investigation, he will be entitled to present any explanation he deems relevant if a court application is made in terms of section 162(5)(c) of the Companies Act, 71 of 2008. Similarly, if a prosecution is instituted in terms of

¹³ Lawrence Baxter *Administrative Law* (1984) at 720

¹⁴ 2019 (3) SA 30 (CC)

section 214(1)(b) of the Companies Act, the applicant will be presented with an opportunity to present his case before a finding is made in terms of section 214(1)(b). The same would apply should the applicant be prosecuted for contempt of court.

58. Therefore, having regard to the doctrine of ripeness, the lack of prejudice suffered by the applicant and the checks and balances in place in the form of further investigations and/or court proceedings, we are of the view that the application is not ripe for hearing at this stage.

59. In the circumstances, the applicant has not made out a case for the relief he seeks and the application is dismissed.

M J DOLAMO
JUDGE OF THE HIGH
COURT

H SLINGERS
JUDGE OF THE HIGH
COURT