CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 165/17

In the matter between:

ROSEMARY THÉRÉSÉ HUNTER	Applicant
and	
FINANCIAL SECTOR CONDUCT AUTHORITY	First Respondent
ABEL MOFFAT SITHOLE N.O.	Second Respondent
DUBE PHINEAS TSHIDI N.O.	Third Respondent
JURGEN ARNOLD BOYD N.O.	Fourth Respondent
KNOWLEDGE MALUSI NKANYEZI GIGABA N.O.	Fifth Respondent
and	
CASUAL WORKERS ADVICE OFFICE	First Amicus Curiae
RIGHT2KNOW CAMPAIGN	Second Amicus Curiae

Neutral citation: *Hunter v Financial Sector Conduct Authority and Others* [2018] ZACC 31

Coram: Mogoeng CJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ, and Theron J

Judgments: Khampepe J (majority): [1] to [61]
Froneman J (minority): [62] to [137]
Cachalia AJ (dissenting in part): [138] to [184]

Heard on: 13 February 2018

Decided on: 20 September 2018

Summary: Pension Funds Act — pension funds — orphan funds — pension funds cancellations project — locus standi — misjoinder — amendment of pleadings

Financial Sector Conduct Authority — public service — public functionary — unlawful conduct — duty to investigate — Ministerial Intervention — Treasury Regulation 33 — administrative action — Promotion of Administrative Justice Act

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. The third and fourth respondents' conditional counter-appeal is dismissed.
4. The application by Right2Know Campaign (R2K) for admission as amicus curiae is granted.
5. Condonation is granted for the late filing of the application for leave to appeal.
6. Condonation is granted for the late filing of the applicant's written submissions.
7. Condonation is granted for the late filing of the third and fourth respondents' written submissions.
8. Condonation is granted for the late filing of R2K's written submissions.

9. The applications for the admission of the further supplementary affidavits of Mr Mort are granted.
10. The applications by the applicant for leave to file an order and papers in related High Court proceedings are dismissed.
11. The costs orders of the High Court of South Africa, Gauteng Division, Pretoria and the Supreme Court of Appeal are set aside and replaced with no order as to costs.
12. There is no order as to costs.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Goliath AJ, Jafta J, Petse AJ and Theron J, concurring):

Introduction

[1] This is an application for leave to appeal against the whole judgment and order of the High Court of South Africa, Gauteng Division, Pretoria (High Court) and the Supreme Court of Appeal's dismissal of the application by Ms Rosemary Thérésé Hunter (Ms Hunter) to compel the Financial Sector Conduct Authority (FSCA) to procure an investigation into alleged irregularities that occurred during the implementation of the "cancellations project". More than 4600 pension funds without properly constituted boards were cancelled by the registrar in terms of section 27[1] of the Pension Funds Act[2] (PFA).

[2] The application is opposed by the first to fifth respondents. The third and fourth respondents brought a conditional counter-application in respect of the issue of

[1] Section 27(1) provides that:

> "The Registrar shall cancel the registration of a fund——
>
> on proof to his satisfaction that the fund has ceased to exist."

[2] 24 of 1956.

costs in the High Court. Casual Workers Advice Office (CWAO) has been admitted as the first amicus curiae. Right2Know Campaign (R2K) has brought an application to be admitted as second amicus curiae. For the reasons set out later, R2K is admitted as an amicus curiae.[3]

[3] After the hearing of this matter, Ms Hunter brought a further application for leave to file an order made by the High Court on 14 March 2018 and a founding affidavit in the same matter. The order set aside the cancellation of the registrations of 25 pension funds. This application is opposed by the respondents.

Parties

[4] Ms Hunter is the former deputy registrar of pension funds and deputy executive officer of the FSCA. Ms Hunter brought this application in the public interest and in compliance with what she understood to be her duty as a senior public official to take all reasonable steps to ensure that the registrar of pension funds and her employer at the time, FSCA, acted in compliance with their constitutional and statutory duties.

[5] The FSCA is a juristic person established in terms of section 2(1) of the Financial Services Board Act 97 of 1990. It was formerly known as the Financial Services Board, but was substituted with the FSCA by virtue of section 300(3) of the Financial Sector Regulation Act.[4]

[6] The second respondent is Mr Abel Moffat Sithole N.O., who is cited in his capacity as the chairperson of the board of the FSCA.

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[3] See [36].

[4] Section 300(3) of the Financial Sector Regulation Act 9 of 2017 (FSRA), which came into effect on 1 April 2018, provides:

> "The Financial Sector Conduct Authority must be substituted as a party in any pending proceedings, whether in a court, tribunal or before an arbitrator or any other person or body, that have been commenced but not finally determined immediately before the date on which this section comes into effect, for the Financial Services Board, the Directorate of Market Abuse, where applicable, or a registrar in terms of a financial sector law other than Banks Act."

[7] The third respondent is Mr Dube Phineas Tshidi N.O., who is cited in his capacity as the executive officer of the FSCA and the registrar of pension funds in terms of the PFA.

[8] The fourth respondent is Mr Jurgen Arnold Boyd N.O., who is cited in his capacity as a deputy executive officer of the FSCA. He was the deputy registrar of pension funds or acting deputy registrar when the cancellations project was implemented during the period between 2007 and 2013.

[9] The fifth respondent is Mr Knowledge Malusi Nkanyezi Gigaba N.O., the former Minister of Finance, who had political and legal oversight of the FSCA (Minister).

[10] The first amicus curiae is CWAO, a non-profit, independent organisation which provides advice and support to casual, contract, labour broker and other precarious workers for purposes of assisting such workers to defend and improve upon their rights in order to ensure social justice for such workers.

[11] The second amicus curiae is R2K, a voluntary association founded in 2010 to campaign for the free flow of information people require to fulfil their social, economic, political and ecological needs, and to live free from want, in equality and in dignity.

Factual background

[12] South Africa's retirement funding practice has changed fundamentally in recent decades. The most relevant change was occasioned by the decision of many employers to move their occupational retirement funding agreements from defined benefit funds to defined contribution funds. There was a shift from single employer or stand-alone occupational retirement funds to umbrella funds. The consequence of these transfers was that thousands of the original stand-alone funds subsequently

became what is commonly known as "orphan funds" – funds that do not have properly constituted boards and often have no assets or liabilities.

[13] In response to the large number of apparently "orphan funds", the fourth respondent initiated the cancellations project. This project involved the appointment of "authorised representatives" or trustees appointed in terms of section 26(2) of the PFA to manage the funds and facilitate the cancellation of the registration of the respective funds.[5] This process also involved the publication by the registrar of notices of the intention to cancel specified funds' registration in the Government Gazette, calling on all interested persons to object to the proposed cancellations by a specified date. The FSCA and the registrar facilitated the cancellation of the registration of approximately 6757 funds during the period from 2007 to 2013.

[14] Shortly after her appointment as deputy registrar of pension funds at the FSCA, Ms Hunter raised concerns regarding the manner in which the cancellations project was being conducted. Ms Hunter's conduct in probing the legality of the cancellations project brought her into conflict with her colleagues, supervisors and subordinates at the FSCA and resulted in disciplinary complaints being lodged against her. The registrar appointed Gobodo Forensic and Investigative Accounting (Gobodo) to conduct an investigation into the conduct of Ms Hunter. The Gobodo investigation found that Ms Hunter had intentionally implemented a practice of deliberately blind-copying internal FSCA correspondence to external recipients in order to conceal the wider distribution of correspondence relating to, amongst others, the cancellations project. Ms Hunter alleged that the Gobodo investigation was unjustified and gave

[5] Section 26(2) of the PFA provides:

> "Where a fund has no properly constituted board contemplated in section 7A and has failed to constitute a board after 90 days written notice by the registrar, or where a fund cannot constitute a board properly or where a board fails to comply with any requirements prescribed by the registrar in terms of section 7A(3), the registrar may, notwithstanding the rules of the fund, at the cost of the fund—
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> (a) appoint so many persons as may be appropriate to the board of the fund or appoint so many persons as may be necessary to make up the full complement or quorum of the board; and
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> (b) assign to such board such specific duties as the registrar deems expedient."

rise to considerable expenditure. She also alleged that the FSCA was guilty of financial misconduct for not investigating the commissioning of the Gobodo investigation. Ms Hunter therefore requested that the Minister intervene pursuant to Treasury Regulation 33.[6] The Minister declined to do so on the basis that it would be premature to intervene whilst there were ongoing internal investigations.

[15] Ms Hunter lodged an internal complaint with the FSCA (NCN 1) where she raised her concerns about the alleged unlawful conduct in respect of the cancellations project.[7] In response, the FSCA appointed former Judge of the Constitutional Court, Justice O'Regan, to chair an inquiry into Ms Hunter's NCN 1. The O'Regan report[8] found, amongst other things, that the registrar's appointment of the "authorised representatives" was unlawful but that the issue of the lawfulness of the appointment of the section 26(2) trustees was uncertain. Justice O'Regan recommended that the FSCA appoint an independent firm of auditors to conduct an investigation of a statistically significant sample of funds to determine the likelihood of material financial prejudice that may have occurred due to the manner in which the cancellations project was conducted. In her report, Justice O'Regan stated that no

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[6] Regulation 33 of the Treasury Regulations provides:

> "33.1Investigation of alleged financial misconduct [Sections 85(1)(b), (c) and (d) of the Public Finance Management Act 1 of 1999]
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> 33.1.1 If an employee is alleged to have committed financial misconduct, the accounting authority of the public entity must ensure that an investigation is conducted into the matter and if confirmed, must ensure that a disciplinary hearing is held in accordance with the relevant prescripts.
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> 33.1.2 The accounting authority must ensure that the investigation is instituted within 30 days from the date of discovery of the alleged financial misconduct.
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> 33.1.3 If an accounting authority or any of its members is alleged to have committed financial misconduct, the relevant executive authority must initiate an investigation into the matter and if the allegations are confirmed, must ensure that appropriate disciplinary proceedings are initiated immediately.
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> 33.1.4 The relevant treasury may, after consultation with the executive authority—
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> (a) direct that a person other than an employee of the public entity conducts the investigation;
>
> (b) issue any reasonable requirement regarding the way in which the investigation should be performed."

[7] Ms Hunter's NCN 1 was lodged in July 2014.

[8] This was finalised in November 2014.

evidence was placed before her that suggested that there were improper, dishonest or corrupt actions in administering and dealing with dormant pension funds.

[16] Pursuant to Justice O'Regan's recommendations, the FSCA appointed KPMG to conduct an investigation. Dissatisfied with the FSCA's response to her complaints, Ms Hunter lodged a second internal complaint (NCN 2) dealing with the FSCA's failure to properly deal with her allegations against the registrar.[9] KPMG investigated a sample of 510 cancelled funds and submitted its report in October 2015. In its report, KPMG indicated that it was unable to confirm that the information available to the registrar when taking the decision to cancel the funds in question was sufficient for a reasonable person in the position of the registrar to have concluded that the funds had ceased to exist. KPMG then recommended that a further investigation be conducted with a view to provide "a final determination and quantification of actual prejudice, if any".

[17] The FSCA was not satisfied with the KPMG investigation and report. In its view, KPMG merely calculated a statistical possibility of prejudice using a computer analysis of only the FSCA's records and based their assessment as auditors on the reliability of the evidence in possession of the FSCA that the funds no longer had any assets or liabilities. In its report, KPMG merely stated that it had calculated the indicative potential prejudice and that further investigation would have to be done to determine the actual prejudice, if any. KPMG reported to the FSCA that they had made an assessment of the "likeliness of potential prejudice" which it said was "a lower burden of certainty than prima facie". When the FSCA expressed its dissatisfaction, KPMG suggested that its report be referred to Justice O'Regan for consideration. The FSCA accordingly approached Justice O'Regan but she declined to review the report citing her lack of expertise in the field of pension law and recommended that the FSCA approach senior counsel who specialised in the field of pension law instead.

[9] Ms Hunter's NCN 2 was lodged in June 2015.

[18] The FSCA proceeded to appoint Mr Mort, an attorney specialising in pension funds, with the assistance of an experienced pension funds actuary, to review the KPMG report and advise the FSCA on the way forward. Mr Mort submitted his First Inspection Report on 7 June 2016 in which he concluded that, although some of the funds assessed had assets at the time of their cancellations, there was no evidence of any material financial prejudice having been sustained by any member, beneficiary or creditor of those funds. Mr Mort submitted his Second Inspection Report on 24 November 2016 in which he found that there was no indication that any section 26(2) trustee or authorised representative employed by an administrator had acted in a manner that conferred an improper advantage or benefit on their employer, being the pension fund administrators. The Third Inspection Report was issued on 21 December 2016 wherein Mr Mort found that despite certain areas of concern, it was apparent that there was an ongoing effort by the respective administrators to trace the beneficiaries of the unclaimed benefits.

Litigation history

High Court

[19] In the High Court Ms Hunter sought an order compelling the FSCA to unconditionally make the copies of the final O'Regan and KPMG reports available; compelling the FSCA to investigate the matters in Ms Hunter's NCN 1; and compelling the FSCA, alternatively the Minister, to investigate the matters referred to in Ms Hunter's NCN 2. Subsequent to the delivery of her replying affidavit and a mere six weeks before the hearing, Ms Hunter applied to amend her original notice of motion. In the amended notice of motion, Ms Hunter sought additional orders declaring that the respondents had acted unlawfully in the execution of the cancellations project and in handling her complaints in this regard. In addition, Ms Hunter elaborated on the exact matters which she wished to be investigated in the investigation she sought to compel in the original notice of motion. She also set out in great detail the exact manner in which the proposed investigation should be conducted and who would bear the costs of this investigation.

[20] The High Court held that Ms Hunter did not have the necessary standing in law to claim the relief sought in the original notice of motion or the amended notice of motion and therefore refused the application to amend the notice of motion and dismissed the main application.

[21] On the issue of costs, the High Court held that the application was not one of genuine constitutional import and thus the principle set out in *Biowatch,*[10] which requires that an unsuccessful party in proceedings against the state be spared from paying the state's costs in constitutional matters would not apply. The High Court ordered the FSCA to pay Ms Hunter's costs until 1 August 2016, and the second to fifth respondents to bear their own costs up to 1 August 2016. Ms Hunter was directed to pay the costs of the respondents from 2 August 2016.

Application for leave to appeal in the High Court and the Supreme Court of Appeal

[22] Both the High Court and the Supreme Court of Appeal dismissed Ms Hunter's application for leave to appeal with costs, on the grounds that there were no reasonable prospects of success and no other compelling reason why the appeal should be heard.

This Court

[23] In this Court, Ms Hunter contends that the FSCA has a duty to conduct an investigation into the alleged irregularities in the cancellations project particularly in view of the fact that there is substantial evidence of actual financial prejudice as a result of the project. Ms Hunter further contends that all other investigations conducted by the FSCA are inadequate and that this Court should make a supervisory court order compelling the FSCA to conduct a further investigation.

[10] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[24] The FSCA and second respondent submit that the manner in which the cancellations project was conducted was perfectly lawful and that Ms Hunter has failed to prove that there were any systemic irregularities. The FSCA and second respondent argue that although the appointment of the "authorised representatives" may have been unlawful, this did not affect the lawfulness of the registrar's decision to cancel the funds in terms of section 27 of the PFA. They therefore submit that the FSCA is under no obligation or duty to investigate the cancellations project. Even if there was such a duty, the first and second respondents submit that this duty has been properly discharged and there is no basis for Ms Hunter to demand a "bigger and better" investigation. The first and second respondents also contend that the structural supervisory relief sought by Ms Hunter is not competent.

[25] The third and fourth respondents submit that neither the relief claimed, nor the supposed cause of action pleaded in the founding affidavit, justified their joinder as parties to the proceedings as no relief was sought against them and seek a punitive costs order against Ms Hunter in this regard. The third and fourth respondents also seek to cross-appeal on the issue of costs in the High Court in the event that Ms Hunter is granted leave to appeal as they allege that the High Court arbitrarily deprived them of a substantial portion of their costs.

[26] The Minister contends that Ms Hunter failed to establish any culpable remissness on the part of the FSCA which warrants ministerial intervention. The Minister submits that the cancellations project is still being investigated and the employment grievances have been facilitated to exhaustion, and Ms Hunter's employment has run its full course. The Minister further submits that the Public Finance Management Act (PFMA)[11] issue does not arise as the expenditure incurred in procuring the services of Gobodo did not constitute an irregular expenditure and there was no other form of financial misconduct proven by Ms Hunter. Thus, Ms Hunter has not made out a proper case for structural relief at all, least of all one including the Minister.

[11] 1 of 1999.

[27] CWAO submits that the registrar did not adequately take into account the duty to consult the beneficiaries in conducting the cancellations project and that this failure was unlawful. CWAO seeks for this Court to recognise that the registrar has a proactive duty to consult with fund members and beneficiaries before taking a decision to cancel the fund, which includes the decision to search for the respective beneficiaries.

[28] R2K submits that, having regard to this Court's decision in *AllPay*,[12] the irregularities in the cancellations project cannot be overlooked merely because they may not have resulted in material financial prejudice. In addition, R2K contends that, because a public functionary bears a constitutional obligation to approach a court to set aside its own irregular administrative act that public functionary must first ascertain whether the particular circumstances of the identified irregularity trigger that obligation, which involves a duty to investigate. R2K also argues that the cancellations project has the potential to affect the right to receive a pension which finds expression in both the Constitution and international law. R2K therefore submits that the FSCA has not procured any investigation into the irregular process of the cancellations project, only its outcome. R2K submits that even if the investigations procured by the FSCA had indeed encompassed the procedural irregularities in the cancellations project, the FSCA would still not have complied with its constitutional obligations to investigate as section 7(2) of the Constitution requires the investigation to be competent, independent and transparent. Last, R2K submits that the obligation on the FSCA to have its irregularities investigated competently, independently and transparently is also reinforced by the IOPS Principles, Guidelines and Good Practices,[13] which the FSCA is obliged to observe.

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[12] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*AllPay*) at paras 22–4.

[13] International Organisation of Pension Supervisors (IOPS) Principles of Private Pension Supervision (revised in 2010), IOPS Guidelines for Supervisory Intervention, Enforcement and Sanctions (November 2009), and IOPS Good Practices for Governance of Pension Supervisory Authorities (November 2013).

Jurisdiction

[29] This application concerns the constitutional duties of a public functionary, the FSCA, to investigate allegations of irregularities in carrying out its constitutional mandate as well as issues of governance and accountability. This is clearly a matter that engages this Court's jurisdiction.

Legal standing

[30] Whilst Ms Hunter does not go into great lengths as to why she submits that she is acting in the public interest, in light of the generous approach adopted by this Court regarding legal standing in public interest matters, it is clear that Ms Hunter has standing in terms of section 38(d) of the Constitution. With her intimate knowledge and expertise, Ms Hunter is essentially seeking to redress the possible prejudice sustained by the vulnerable members of the respective cancelled funds and thus, this alone should enable her to bring this application in the public interest.

Leave to appeal

[31] As to leave to appeal, there is an important constitutional issue to be considered here, namely whether the FSCA has a constitutional duty to investigate alleged irregularities in the manner in which it cancelled thousands of pension funds. In addition, the application has reasonable prospects of success. It is in the interests of justice that leave to appeal be granted.

[32] In the third judgment, my brother, Cachalia AJ, concludes that Ms Hunter's application for leave to appeal should be dismissed on the basis that it is not in the interests of justice to grant leave in these circumstances. He holds that Ms Hunter's case, that the FSCA had a duty to investigate systemic irregularities in the cancellations project, was not properly made out in her founding affidavit or in argument before the High Court, and that her cause of action has mutated since it was first instituted. While Ms Hunter's pleadings have evolved to some extent over the course of the litigation, I am satisfied that the thrust of her case was sufficiently

pleaded in the papers and that the respondents had sufficient opportunity to respond thereto. It is therefore in the interests of justice for leave to appeal to be granted.

Condonation

[33] Condonation has been sought for the following:

(a) the late filing of the application for leave to appeal;

(b) the late filing of Ms Hunter's written submissions;

(c) the late filing of the third and fourth respondents' written submissions; and

(d) the late filing of R2K's written submissions.

[34] The respective parties have advanced good reasons for the late filing of their papers and the delay in all is slight. There was also no prejudice suffered by any of the parties as a result of the late delivery of the papers. It is therefore in the interests of justice to grant condonation for all.

Application for admission of supplementary affidavits

[35] It is in the interests of justice that the supplementary affidavits of Mr Mort be admitted by this Court as they provide essential updates on the current status of the investigation being conducted by the FSCA.[14] The affidavits also afford Mr Mort, the FSCA and the second respondent an opportunity to respond to the allegations made by Ms Hunter concerning Mr Mort in her written submissions and it is therefore only fair that they be admitted.

Admission of R2K as second amicus curiae

[36] R2K has raised sufficient new issues which have not been addressed by the other parties and which are helpful to this Court in considering this application. It is therefore in the interests of justice that it be admitted as second amicus curiae.

[14] In *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 39-41 this Court held that new evidence is admissible on appeal where it "might be of assistance in determining the appropriate relief to be granted".

Issues for determination

[37] The following issues arise for consideration—

(a) whether public functionaries have a general duty to investigate irregularities;

(b) whether the appropriate cause of action in this case was a review in terms of the Promotion of Administrative Justice Act[15] (PAJA); and

(c) whether the Minister was required to intervene in respect of Ms Hunter's governance complaint.

General duty on public functionaries to investigate irregularities

[38] The Constitution does not impose a general duty on public functionaries to investigate irregularities pertaining to the exercise of public power. The exercise of public power is controlled by means of review.[16] Central to a review claim is section 33 of the Constitution which guarantees administrative justice rights conferred on everyone.[17] PAJA is the legislation enacted to give effect to these rights. Ordinarily a review application must be brought in terms of PAJA.[18] However, in certain instances a review application may not be based on PAJA. This may arise from the fact that the impugned decision does not constitute "administrative action" as defined in PAJA.[19] In those circumstances, the exercise of public power can be challenged by way of a legality review in terms of section 1(c) of the Constitution, as a component of the rule of law.

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[15] 3 of 2000.

[16] *Pharmaceutical Manufacturers of South Africa: In re Ex parte President of Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 45.

[17] Section 33 (1) of the Constitution provides:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[18] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[19] *Masetlha v President of Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC).

[39] Before 1994 our law recognised three types of review, namely review of decisions of inferior courts; special statutory review and the common law review of administrative decisions.[20] With regard to administrative decisions, the common law and statutory reviews were the only options available to applicants who sought review. Statutory review could also be invoked only in circumstances where a specific statute made provision for a review. Unless specifically mentioned in a particular statute, there was no general duty on public officials to investigate irregularities in decisions they had taken. Nor was there a duty on those officials to apply for the review of invalid decisions.

[40] Although the legal standing of public officials to apply for the review of their own decisions was acknowledged in *Pharmaceutical Manufacturers*,[21] the duty on these officials to seek review was proclaimed later in decisions like *Khumalo* and *Kirland Investments.*[22] However, in *Khumalo* this Court went further in the special circumstances of that case to hold that officials in the public administration have a duty to investigate and correct unlawfulness.

[41] A question has arisen whether the FSCA had a duty to investigate alleged irregularities relating to the cancellation of pension funds. For the reasons that follow, it is not necessary to go into detail about the existence or otherwise, the basis and nature of the FSCA's duty to investigate. For the purpose of deciding this matter, the need to make a determination in relation to the applicability or otherwise of *Khumalo* does not arise.

[42] It suffices to say that the FSCA has self-evidently always recognised that it was duty-bound to investigate any alleged or potential irregularity and acted in line with its recognition of this responsibility, whenever circumstances so required. It was,

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[20] *Johannesburg Consolidated Investment v Johannesburg Town Council* 1903 TS 111 at 116 and *Nel N.O. v The Master* [2004] ZASCA 26; 2005 (1) SA 276 (SCA) at paras 22-4.

[21] *Pharmaceutical Manufacturers* above n 16.

[22] *Khumalo v MEC for Education KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) (*Khumalo*); and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 574 (CC) (*Kirland Investments*).

precisely for this reason that resources were generously deployed to not one, not two but at least three investigations with a view to determine whether irregularities that are potentially prejudicial to pensioners were committed in the cancellations process.

[43] The services of Justice O'Regan, KPMG and Mr Mort were enlisted in recognition of the existence of a duty to investigate. All these personalities and institutions are eminently well-suited to do justice to the assignment they were charged with. There can therefore be no doubt that the FSCA was intent on getting to the bottom of the problem. Not only were mistakes unearthed and highlighted, but Mr Mort also indicated in his last report that the administrators were involved in an ongoing process of trying to locate beneficiaries of unclaimed benefits.

[44] For these reasons, the FSCA has not only recognised and discharged its duty to investigate whatever is worthy of an investigation, but administrators have also embarked on the responsible exercise of ensuring that the interests of the admittedly vulnerable pensioners are not compromised.

[45] Crucially, public sector functionaries too deserve the space to carry out their duties free from outside interference that virtually amounts to unintended micromanagement. It ought to be enough that they have done what is reasonably necessary to achieve a process that would potentially yield a credible, transparent, inclusive and unbiased outcome. And this, they have done.

[46] The danger with the approach adopted by Ms Hunter is that it is very likely to yield a never-ending investigation. Investigations would be difficult to bring to finality as long as, in her view, something might just be uncovered. This observation must be understood within the context of the several credible investigations already conducted by people whose capacity to address actual or perceived irregularities is beyond doubt. One would therefore not be too hard on Ms Hunter by suggesting that even if another investigation were to be sanctioned by this Court, it may still not satisfy Ms Hunter's quest for "justice", as she sees it.

[47] These kinds of investigations must at some stage come to an end. Mr Mort's expertise is beyond reproach. Subject to some concerns that he has expressed, reasonably satisfactory investigations have now been conducted. And Ms Hunter must live with that reality. It seems to be irreconcilable with an assumption or acceptance that the FSCA is run by responsible and competent people to order them to conduct investigations additional to those already conducted.

PAJA review as the appropriate cause of action

[48] The key question is whether Ms Hunter's complaint about the cancellation of funds constituted administrative action referred to in section 33(1) of the Constitution.

[49] It cannot be gainsaid that the registrar's decision to cancel the "orphan funds" constitutes administrative action as defined in PAJA. In *Gijima*[23] this Court held:

> "[T]he right to administrative action that is lawful, reasonable and procedurally fair (section 33(1)) and the right of everyone whose rights have been adversely affected to be given written reasons (section 33(2)) are enjoyed by private persons, not organs of state. Therefore, when section 33(3)(a) stipulates that national legislation which provides for the 'review of administrative action' must be enacted, that can only be administrative action that relates to the rights enjoyed by private persons under section 33(1) and (2)."[24]

As a general rule, PAJA must therefore apply unless the review is brought by a public functionary in respect of its own unlawful decision. In this case, it is Ms Hunter (and not the FSCA itself) who seeks relief against the registrar's alleged unlawful decisions. Ms Hunter is not acting on behalf of the FSCA. She is acting in the public interest. Anybody who constitutes "the public" on whose behalf she has assumed the responsibility to act is entitled to challenge the fairness of the administrative action that has aggrieved her in terms of PAJA. She, having stepped straight into their shoes,

[23] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) (*Gijima*).

[24] Id at para 31.

enjoys all the rights and obligations they each would ordinarily have shouldered had they chosen to be litigants. PAJA must therefore apply to Ms Hunter's claim.

[50] In the circumstances, if Ms Hunter is of the view that the registrar's decision to cancel the registration of the respective funds was unlawful, the appropriate remedy would be to review that decision in terms of PAJA on the basis that those decisions were ones that a reasonable decision-maker could not reach rather than seeking relief in the form of a further investigation. This is not a case of the remedy of review being deficient and not affording Ms Hunter effective relief – she could easily have instituted a review application based on the unlawfulness mentioned in her founding affidavit. On the same score, if Ms Hunter is aggrieved that the FSCA has failed to give effect to the allegations contained in her NCN 1 and NCN 2, she should also have that decision reviewed.

[51] In terms of Rule 53 of the Uniform Rules of Court, service of Ms Hunter's founding papers would have triggered the FSCA's obligation to file a full record pertaining to the impugned decisions with the registrar of the High Court. She would then have had access to those records to assess whether there were irregularities supporting any grounds of review, and it would have been open for her to amend her papers in that regard. This would also have allowed the relevant court to be in a proper position to consider the lawfulness of the decisions, with the benefit of a Rule 53 record. As an attorney, Ms Hunter must have been aware of these procedural advantages which were available to her. But she chose to ride the wrong horse. Ms Hunter's appeal must accordingly fail.

Commissioning of Gobodo Report

[52] Ms Hunter's governance complaint regarding the commissioning of the Gobodo report and the Minister's alleged failure to intervene should similarly not be entertained. The decision to commission an investigation clearly constitutes administrative action which ought to stand until set aside by a competent court. Ms Hunter has not sought to review the decision and it would be inappropriate to

allow Ms Hunter to launch a peripheral attack on that decision in this Court. Ms Hunter's counsel conceded in oral argument that this decision could have been challenged by way of review proceedings. In light of this, the Court ought not to engage or consider this issue.

Third and fourth respondents' conditional counter-appeal

[53] The third and fourth respondents seek to cross-appeal on the issue of costs in the High Court in the event that Ms Hunter is granted leave to appeal as they allege that the High Court arbitrarily deprived them of a substantial portion of their costs. The third and fourth respondents submit that neither the relief claimed nor the cause of action pleaded by Ms Hunter justified their citation and joinder as parties to the proceedings.

[54] In my view, there was no misjoinder by Ms Hunter of the third and fourth respondents in the High Court. The allegations made by Ms Hunter regarding the need for an investigation by the FSCA directly implicated the third and fourth respondents. In any event, the third and fourth respondents did not formally object to their joinder in the High Court but instead chose to participate fully in the proceedings. The third and fourth respondents could also have merely abided by the outcome of the proceedings, thereby avoiding incurring any costs, and addressing the allegations made by Ms Hunter through the FSCA's papers. There is also no basis for a punitive costs order to be granted against Ms Hunter.

[55] In the circumstances, I am of the view that the third and fourth respondents' conditional cross-appeal should be dismissed.

Application for leave to file copies of the order and papers in a related matter

[56] After the hearing of this matter, Ms Hunter filed an application for leave to file copies of a High Court application brought by Liberty Group Limited (Liberty) against the registrar to set aside the cancellation of 25 funds, as well as the order

granting the setting aside of deregistration of those funds. Ms Hunter requests leave to place these additional documents before this Court without comment or argument.

[57] Although it is extraordinary and unusual for a litigant to file further papers after pleadings have closed and judgment has been reserved, this Court is entitled to admit the same provided that it is in the interests of justice to do so and it ensures full ventilation of the issues.[25] That being said, the additional papers that Ms Hunter seeks to have admitted consists only of Liberty's notice of motion and founding affidavit, as well as the High Court's order. There is no reasoned judgment for this Court to consider and this Court would, therefore, have to rely merely on the submissions made by Liberty in its founding affidavit. In my view, it would be severely prejudicial to the respondents if this Court were to admit what is in essence an additional affidavit containing new facts and evidence without allowing them an opportunity properly to respond thereto, which would require an additional hearing. In any event, the contents of the additional papers are not necessary for this Court to make a determination on the question before it – whether the FSCA has a duty to investigate the alleged irregularities and, if so, whether this duty has been discharged. It is, therefore, not in the interests of justice for this Court to admit the additional papers.

Costs

High Court and Supreme Court of Appeal

[58] The costs orders of the High Court and the Supreme Court of Appeal should be set aside because the application is one of genuine constitutional import. Clearly, a challenge to a public body's alleged failure to comply with its constitutional obligations is a matter of "constitutional import" and the principle set out in *Biowatch*[26] which provides that an unsuccessful party in proceedings against the state should ordinarily be spared from paying the State's costs in constitutional matters, should therefore apply.

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[25] See *N M Scrap (Pty) Ltd v Transnet Ltd* (2013) JDR 0858 (GSJ) at paras 15-6.

[26] *Biowatch* above n 10.

This Court

[59] For the same reasons as above, the principle set out in *Biowatch* should apply and no order as to costs should be made in this Court.

[60] Regarding the request by the first amicus curiae for costs to be awarded to it in respect of the opposition of the respondents to its application for admission as amicus curiae, there is no basis for this Court to make this order.

Order

[61] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. The third and fourth respondents' conditional counter-appeal is dismissed.
4. The application by the Right2Know Campaign (R2K) for admission as amicus curiae is granted.
5. Condonation is granted for the late filing of the application for leave to appeal.
6. Condonation is granted for the late filing of the applicant's written submissions.
7. Condonation is granted for the late filing of the third and fourth respondents' written submissions.
8. Condonation is granted for the late filing of R2K's written submissions.
9. The applications for the admission of the further supplementary affidavits of Mr Mort are granted.
10. The applications by the applicant for leave to file an order and papers in related High Court proceedings are dismissed.
11. The costs orders of the High Court of South Africa, Gauteng Division, Pretoria and the Supreme Court of Appeal are set aside and replaced with no order as to costs.
12. There is no order as to costs.

FRONEMAN J (Dlodlo AJ and Madlanga J concurring):

Introduction

[62] Do state organs and public functionaries have a duty to investigate their own potentially unlawful conduct? And if they do, when is the duty triggered? What is the nature and extent of the investigation required? The answer arrived at in this judgment is that whenever the attention of responsible functionaries is drawn to a potential irregularity they have a duty to launch a proportionate investigation into that potential irregularity. What is proportionate in any given case will depend on the seriousness of the potential irregularity and the basis upon which the allegation of impropriety is founded.

[63] Accountability, responsiveness and openness are fundamental to our attempt at a constitutional democratic government. That fundamental constitutional concern is what underlies the reasoning in this judgment and explains why I part ways with the judgment of Khampepe J (first judgment). The first respondent, the FSCA, is a public functionary and is bound to uphold the constitutional standards of accountability, responsiveness and openness in its own conduct. It has failed to do that.

[64] I agree that leave to appeal must be granted. On the facts, I conclude that the FSCA has not fulfilled its investigative duty in relation to the cancellations project, and that the appeal should succeed to that extent.

[65] It is necessary to deal briefly with the undisputed facts.

Facts

[66] For present purposes, only the essentials need to be repeated.

[67] The change from single employer to umbrella funds occasioned the large-scale cancellation of so-called "orphan funds" by the registrar under the PFA. During the period from January 2007 to September 2013 the registrations of approximately 6757 funds were cancelled. Soon after her appointment as deputy registrar of pension funds, Ms Hunter questioned the cancellation process. Her complaints called into question 4651 of the cancellations and gave rise to the O'Regan report, the KPMG report and the various Mort reports.[27] A sample of 510 of the 4651 funds was investigated.[28]

Standing

[68] I agree with the first judgment that Ms Hunter had standing to bring the application. It is important, however, to be clear about the nature of her application. The case does not involve an infringement of any individual fundamental right of the applicant. What she seeks, in the public interest, is to compel the FSCA to fulfil its constitutional duty to supervise and enforce the laws that protect the interests of pension beneficiaries and pension funds. Central to her case is the existence of a duty on the part of FSCA to investigate potentially unlawful state action committed under its remit.

Further application

[69] I also agree with the first judgment that it is not in the interests of justice to admit the additional papers submitted to this Court after the hearing had concluded. The Court was aware that other proceedings were ongoing and I take notice of their outcome. The contents of the affidavits and any other material in Ms Hunter's additional papers that were not already in the public domain do not take the present matter any further.

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[27] The reports are explained in [14] to [18]. In short, they were all aimed at investigating the extent to which cancellations made during the course of the cancellations project were mistaken or irregular. On the recommendation of Justice O'Regan, both KPMG and Mr Mort considered only a sample of the funds which had their registrations cancelled.

[28] First Inspection Report at para 43 and KPMG report dated 20 October 2015 at para 3.3.

Pleadings

[70] The third judgment by Cachalia AJ accepts the respondents' submission that the alleged duty to investigate is an entirely new cause of action, not advanced in the High Court, and that Ms Hunter should not be heard by this Court. I do not agree. There may be some superficial traction in the argument, but the real question is about prejudice and justice, not formalistic rules.[29]

[71] In application proceedings the parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.[30] Right from the start the respondents knew that as part of Ms Hunter's case she required an adequate investigation into the propriety of the cancellation of the funds. The third judgment says "the Judge [in the High Court] observed, correctly I think, that the relief sought in the original notice of motion was for an investigation into the cancellations project".[31] There would be no sense in seeking a sub-standard investigation. Ms Hunter must then have been seeking an adequate investigation into the cancellations project – an investigation that met the FSCA's constitutional duties.

[72] When she initially brought proceedings, Ms Hunter did not have the relevant information available herself and sought access to the O'Regan and KPMG reports in substantiation. These reports were made available and, because the FSCA was unhappy with the KPMG report, it also produced the Mort reports of its own accord. At the hearing before this Court the FSCA argued that the Court should be allowed to consider the affidavits from Mr Mort on the basis that this Court has held in *Mazibuko*

[29] See for example *Mokone v Tassos Properties CC* [2017] ZACC 25; 2017 (5) SA 456 (CC); 2017 (10) BCLR 1261 (CC) at para 61 on the interpretation of an Act and the appropriateness to avoid formalistic and technical grounds when the subject matter is "about averting abuse and injustice". Further see *Nabolisa v S* [2013] ZACC 17; 2013 (2) SACR 221 (CC); 2013 (8) BCLR 964 (CC) para 33 for notification; *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) (*KZN*) at para 28 which appears to be accepted by the majority and then explained in the concurring judgment of Froneman J; *Centre for Child Law v Minister for Justice and Constitutional Development* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) on standing; *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC) at para 30 where the best interests of a child principle is held to be more important than a formalistic approach to procedure.

[30] *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) (*Swissborough*) at 323G.

[31] See [157].

that new evidence is admissible on appeal where it "might be of assistance in determining the appropriate relief to be granted".[32]

[73] This new evidence should be admitted. The result is that the matter before us must be decided on the common cause facts provided by the FSCA, a classic example of the proper approach to evidence in applications in our law.

[74] Does it matter that the legal argument based on these facts may be different from those advanced in the High Court? No. Affidavits should not contain argument in any event.[33] It is an incident of the rule of law that a court should raise and decide a point of law arising from the facts even if the parties themselves did not. The only question is prejudice to any of the parties. I can see none. The FSCA has had ample opportunity to put all the facts at its disposal before court and the matter must be decided on an acceptance of those facts. Its legal argument is that, on those facts, there is no duty to investigate and, even if there was, the investigations already completed were sufficient to fulfil that duty.

A duty to investigate?

[75] I now turn to whether the FSCA had a duty to investigate the cancellation decisions.

[76] That starting point is a general statement in *Khumalo*[34] where this Court held that state organs are obliged to investigate potentially unlawful state conduct of their own making when it comes to their attention:

> "When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 [the Constitution] *lays a compelling basis for the founding of a duty on the functionary to investigate* and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on

[32] *Mazibuko* above n 14 at para 41.

[33] See *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 88-9 for a criticism of the practice of including legal submissions in affidavits.

[34] *Khumalo* above n 22.

> accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a)."[35]

[77] The first judgment holds that it is not necessary to determine the basis and nature of the FSCA's duty to investigate, nor to make a determination as to the applicability of *Khumalo*.[36] I do not agree.

[78] The principles of accountability, responsiveness and openness apply to the public administration in all its forms, not only those governed by the Public Service Act (Proclamation 103 of 1994). Section 195 is central to the issue in this case. It is the main pillar upon which the argument rests. Ms Hunter brought her case in an attempt to hold the FSCA accountable. She asked the Courts to scrutinise the registrar's compliance with his constitutional duties.

[79] The registrar is clearly a public functionary.[37] Moreover, section 195 sets out the basic values and principles governing public administration. It is those principles that are at issue. Section 195 and the passage quoted from *Khumalo* could scarcely be more relevant.

[80] That passage correctly and logically implies that there is a legal duty to investigate potential, as yet unproven, unlawful conduct. It is difficult to conceive of substantive reasons why, if public functionaries have a duty to undo unlawful conduct, the law should not require them to launch an investigation when the possibility of unlawful conduct is raised.

[81] The investigative duty set out in *Khumalo* does not require public functionaries to launch full-scale investigations into every allegation that is brought to their

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[35] Id at para 35.

[36] First judgment [40].

[37] Schedule 3 of the PFMA lists the FSCA as a "Public Entity". The same schedule also lists the Competition Commission as a public entity. All public entities or functionaries, whether listed in particular pieces of legislation, must comply with the constitutional standards of accountability, responsiveness and openness.

attention. Rather, public functionaries must launch a proportionate investigation into potential irregularities.

[82] Where the alleged irregularity is minor, an investigation might be very small indeed – perhaps just a phone call to check the correct position. Where an allegation is credible and the alleged irregularity is serious, a full-scale investigation might well be called for. When an allegation is completely spurious, it points to no potential irregularity at all and no investigation can rightly be required of a public functionary.

[83] The efficiency of public administration will not be materially undermined by the investigation of potential unlawful state conduct. Proportionate investigations aid efficiency, rather than undermine it.

[84] In short, whenever the attention of a responsible functionary is drawn to a potential irregularity, they have a duty to launch a proportionate investigation into it. What is proportionate in any given case will depend on the seriousness of the potential irregularity and the basis upon which any allegation is founded.

[85] In the present matter, the conclusion that an investigative duty exists is buttressed by considering the wording of the Constitution and the legislation that applies specifically to the FSCA.

[86] It is a founding value of our Constitution that our system of government, which includes the public administration, must be accountable, responsive and open. Section 1(d) of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Section 195(1) provides in relevant part:

> "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) Public administration must be development-oriented.
>
> (d) Services must be provided impartially, fairly, equitably and without bias.
>
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
>
> (f) Public administration must be accountable.
>
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

Section 195(2) provides that—

> "[T]he above principles apply to—
>
> (a) administration in every sphere of government;
>
> (b) organs of state; and
>
> (c) public enterprises."

[87] The values of accountability, responsiveness and openness are pervasive in all spheres of public life. In *Khumalo*, this Court stated:

> "It is the duty of the courts to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power."[38]

[38] *Khumalo* above n 22 at para 29. The importance of these values has been emphasised in many different spheres such as— procurement: *AllPay* above n 12 and *Minister of Transport N.O. v Prodiba (Pty) Ltd* [2015] ZASCA 38; 2015 JDR 1127 (SCA); parliamentary procedures: *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) (*EFF 2*); effective investigations: *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC); and the effect of corruption and maladministration on the vulnerable and marginalised: *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) (*Heath*).

[88] In the *EFF 1* judgment[39] the Chief Justice said:

> "One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck."[40]

He then cited *Nyathi*:[41]

> "Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy."[42]

[89] There is no real evidence here that the FSCA, or any of its employees, have been corrupt. While this is not a case about corruption and malfeasance, it is about whether the FSCA's apparently good faith attempts to investigate the cancellations project pass constitutional muster. The issue is whether they have been diligent

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[39] *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*EFF 1*).

[40] Id at para 1.

[41] *Nyathi v MEC for Department of Health, Gauteng* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC).

[42] *EFF 1* above n 39 at para 80 citing *Nyathi*. See also *Glenister* above n 38. There is also an important passage in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301(CC) at paras 73-8. See further *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 89. See further *AllPay* above n 12 at para 64 and *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening*) [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) at para 14.

enough. Complacency may be as great a danger as malice and could lead to maladministration and corruption. In the words of Chaskalson P:

> "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution. The appeal in the present case depends upon whether this has been done."[43]

[90] The vulnerability of pensioners requires similar vigilance. This has long been recognised in our law. Section 58(1) of the FSRA provides:

> "In order to achieve its objective, the Financial Sector Conduct Authority must—
>
> (a) regulate and supervise, in accordance with the financial sector laws, the conduct of financial institutions;
>
> (b) cooperate with, and assist, the Reserve Bank, the Financial Stability Oversight Committee, the Prudential Authority, the National Credit Regulator, and the Financial Intelligence Centre, as required in terms of this Act;
>
> (c) cooperate with the Council for Medical Schemes in the handling of matters of mutual interest;
>
> (d) promote, to the extent consistent with achieving the objective of the Financial Sector Conduct Authority, sustainable competition in the provision of financial products and financial services, including through cooperating and collaborating with the Competition Commission;
>
> (e) promote financial inclusion;
>
> (f) regularly review the perimeter and scope of financial sector regulation, and take steps to mitigate risks identified to the

[43] *Heath* above n 38 at para 4.

achievement of its objective or the effective performance of its functions;

(g) administer the collection of levies and the distribution of amounts received in respect of levies;

(h) conduct and publish research relevant to its objective;

(i) monitor the extent to which the financial system is delivering fair outcomes for financial customers, with a focus on the fairness and appropriateness of financial products and financial services and the extent to which they meet the needs and reasonable expectations of financial customers; and

(j) formulate and implement strategies and programs for financial education for the general public."

[91] In *Pepcor*[44] the Supreme Court of Appeal stated:

"The general public interest requires that pension funds be operated fairly, properly and successfully and that the pension fund industry be regulated to achieve these objects. That is the whole purpose which underlies the Act. Of course only a particular fund and the members of that fund may be directly affected by a particular decision of the registrar under section 14(1)(c). But that does not derogate from the fact that the function the registrar performs is performed in the public interest generally. In addition, the interests of the very persons affected by the decision require the registrar to perform his functions properly and to seek judicial review of his own decisions should he not have done so. The prejudice to the registrar in allowing a certificate improperly given in terms of section 14(1)(e), and transfers pursuant thereto, to stand consists in his not having had an opportunity to evaluate the true facts in arriving at decisions which he is required to make in the protection of the public interest generally, and the particular interests of those directly affected. His function is compromised.

. . .

The nature of the functions conferred on the [FSCA] by section 3(a) of the Financial Services Board Act, both in its original form and in its amended form, entitle and oblige the [FSCA] to seek the review by the High Court of decisions of the registrar under the Act which it considers to be invalid and which, if not reversed, would

[44] *Pepcor Retirement Fund v Financial Services Board* [2003] ZASCA 56; 2003 (6) SA 38 (SCA) (*Pepcor*).

prejudice the public interest. The [FSCA] has an administrative interest, on behalf of the public, in the proper exercise of the control vested in the registrar."[45]

[92] So too the High Court in *De Wet N.O.*:[46]

"The various statutory provisions to which I have referred . . . reflect that the registrar has very wide powers of supervision and control over pension funds. I have little doubt that it was thought by the Legislature to be in the public interest that such supervisory powers and duties should be conferred on the registrar. Many members of the public would belong at some stage or another to pension funds and the security of their pensions would be of vital importance to most of them. It is in the public interest that the administration of pension funds should ensure that members are fairly dealt with and that the receipt of their pensions is not placed in jeopardy.

I think it would be correct to say that one of the reasons why the Legislature has seen fit to grant extensive powers of supervision and control to the registrar is that the members of pension funds often do not have the knowledge, skill or resources to take adequate steps to protect themselves. Their right to do so is, of course, not taken away by the Pension Funds Act 24 of 1956, but this does not detract from the conclusion which, in my view, can fairly be drawn from the provisions of the Pension Funds Act 24 of 1956 and the Financial Institutions (Investment of Funds) Act 39 of 1984, namely that the registrar fulfils an important function as the guardian of the interests of members of pension funds."[47]

[93] The FSRA and the case law show the FSCA's functions of supervising and enforcing compliance with laws regulating financial institutions include a duty to ensure that the FSCA, and particularly the registrar, is acting lawfully. That duty is clear with regard to the cancellations project.

[94] The cancellations project was adopted as a policy applicable to cancellations effected by the registrar under the FSRA. If the registrar did not exercise her powers

[45] Id at paras 14 and 24.

[46] *Financial Services Board v De Wet N.O.* 2002 (3) SA 525 (C).

[47] Id at paras 175-6.

under the FSRA lawfully, she did not comply with it. This would be a failure of her required supervision and control over pension funds under the FSRA.

[95] There is another route to the same conclusion. The laws regulating financial institutions and the provision of financial services must include the Constitution and other public law governing the lawfulness of administrative action. That being so, the FSCA must supervise and enforce the registrar's compliance with the Constitution and other public law relating to lawfulness of administrative action.

[96] This suggests that the FSCA's supervisory and enforcement role compels it to investigate potential unlawfulness as well as ordinary compliance with laws regulating financial institutions and the provision of financial services. Since it has a duty to address unlawful action, it cannot simply let suspicions of unlawfulness lie. Its duty to set aside unlawful action entails a duty to investigate where the lawfulness of an action is questionable.

[97] Where a public functionary is alleged to have breached a constitutional duty, the courts provide a forum in which the alleged breach can be challenged. I turn then to how such a challenge should be brought.

Should Ms Hunter have brought a review under PAJA?

[98] I agree with the first judgment that decisions made to cancel "orphan funds" must be challenged by way of review under PAJA. However, the case brought before us was not a challenge to any such decisions.

[99] Ms Hunter argued that the FSCA failed to fulfil its constitutional duty to investigate potential irregularities. The relevant question is whether that duty must be enforced by way of PAJA review. Ms Hunter's challenge, and other challenges of the same type, could not be brought under PAJA. Therefore, legality review is the appropriate mechanism to challenge the FSCA's alleged failure to fulfil its duty to investigate.

[100] In *Gijima* we held that the constitutional right to lawful administrative action under section 33 of the Constitution is enjoyed only by private persons and that the bearer of obligations under the section is the state.[48] This does not mean that an organ of state cannot apply for review of its own decision, only that it cannot do so under PAJA. Its remedy lies in legality review.[49] In *Transnet Pension Fund*[50] we reaffirmed that a separate claim may lie, based on the same conduct, even though that conduct might also amount to administrative action under PAJA. The facts pleaded and arguments raised, were on their face at least, not based on administrative justice, but on the asserted application of the *KZN*[51] constitutional principle of unconscionable state conduct that is in breach of reliance, accountability and rationality.[52]

[101] If a responsible functionary whose attention is drawn to a potential irregularity has a duty to launch a proportionate investigation into that potential irregularity, that duty flows from constitutional and statutory principles of accountability, transparency and openness and not directly from an individual's constitutional right to lawful administrative action. Ms Hunter seeks to compel the FSCA, an organ of state, to fulfill that duty. She relies on the FSCA's own obligation, independent of PAJA, to fulfill that duty and to bring a legality review to correct any unlawful conduct that comes to light. PAJA does not apply.

[102] There is nothing new in the claim that public functionaries are obliged to investigate potential irregularities arising from their own actions. That principle is stated generally and unequivocally in *Khumalo*.[53]

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[48] *Gijima* at para 29.

[49] Id at paras 38-40.

[50] *Pretorius v Transnet Pension Fund* [2018] ZACC 10; 2018 39 ILJ 1937 (CC); 2018 (7) BLLR 663 (CC) (*Transnet Pension Fund*).

[51] *KZN* above n 29.

[52] *Transnet Pension Fund* above n 50 at para 39.

[53] I return to this point below.

[103] Ordinarily, functionaries will investigate and where necessary approach the courts to set aside irregularities by way of legality review. But what happens when a functionary refuses to investigate? What is the appropriate means to enforce the obligation?

[104] Must any such enforcement be by way of PAJA? One might think that the failure to investigate is a decision for the purposes of PAJA and it can be challenged on the usual grounds. I would demur. PAJA is not an adequate means by which to enforce the duty to investigate set out in *Khumalo*.

[105] PAJA review is not simply about whether there has been a decision made by a public functionary. To be reviewable administrative action, a decision must adversely affect the rights of any person and have direct, external legal effect. Even taking into account the comments of Nugent JA in *Grey's Marine*,[54] a failure to investigate does not meet that criterion. The legally effective decisions are those that stand to be investigated (in this case the cancellations). In a case like this, PAJA does not bite.

[106] It follows that the failure of a public functionary to investigate potential irregularities arising from its own actions is not PAJA-reviewable. But it would be wholly inadequate if the legal position ended there. It cannot be that public functionaries are under an obligation to investigate potential irregularities, but that there is no legal recourse against them when they fail to live up to that obligation.

[107] Recourse must then lie in legality review. Where an individual is concerned that a public functionary has failed to fulfil its duty to investigate potential irregularities, that individual may challenge the legality of the alleged failure in the courts outside the bounds of PAJA.

[108] It remains to apply the legal principles to the facts.

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[54] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) (*Grey's Marine*).

Application to the facts

[109] There have been several investigations into 510 of the 4651 cancellation decisions made in the course of the cancellations project. At this point, there is no real dispute that the FSCA has fulfilled its investigative duty with respect to those 510 cancellation decisions. However, Ms Hunter's allegations impugn the whole project. Consequently, we must ask whether the FSCA has fulfilled that duty with respect to the 4000 or so cancellations which have not been investigated. It is critical that we focus on the adequacy of the investigations in relation to those funds rather than the 510 about which there is no real dispute.

[110] The main argument offered by the respondents as to the sufficiency of the investigation was that an analysis of the sample showed that there was no need to investigate the other 4000 or so cancellations. In my view, that argument must fail. Two additional reasons motivate for further investigation of those funds. However, before I turn to those, I must address a preliminary point about the link between mistaken cancellations and unlawfulness.

The link between error and unlawfulness

[111] The investigations at issue sought to find mistakenly cancelled funds rather than unlawfully cancelled funds. There is good reason for that. The O'Regan report asked the FSCA to investigate whether the cancellations caused material prejudice. That was a pragmatic course since there would be nothing to be gained from reversing unlawful cancellations which caused no harm.

[112] Moreover, mistaken cancellations are the primary source of prejudice in the matter before us. Mr Mort noted that a mistaken cancellation is likely to prejudice the members of the fund unless it is reinstated.[55] So, as long as the administrators of a fund are aware of a wrongful cancellation, they can take steps to prevent prejudice to the fund members.

[55] Mr Mort says— "[t]he reinstatement of a fund does not indicate a likelihood of material financial prejudice; rather, that had the funds not been reinstated, there would have been a likelihood of material financial prejudice".

[113] The real danger is mistakenly cancelled funds where the error has gone undetected. For that reason, the investigations focused on mistaken cancellations rather than unlawfulness. In the analysis of both KPMG and Mr Mort, the prevalence of mistaken cancellations can be properly seen as proxy for the prevalence of unlawfulness.

[114] The mistaken cancellations can be reversed by review. If the mistakes can be reversed by the courts on review, they must have been unlawful.

[115] But there is more.

[116] The cancellations project is problematic. Three features of the project show that the potential for irregular decision-making abounds. First, unlawfulness within the process is admitted. Second, there is no doubt that a number of mistakes have been made – registrations have been cancelled where funds had not ceased to exist. Third, a number of questions have been raised about the adequacy of the process. I expand on each of these features below.

Unlawfulness within the cancellations project

[117] It is common ground that the cancellations project was infected by some unlawfulness. The FSCA appointed "authorised representatives" to assist with determining whether funds had ceased to exist. The FSCA did not have the power to make those appointments; they were unlawful. While the FSCA is correct that those unlawful appointments do not necessarily render the decisions made by the registrar unlawful, it cannot be said that the FSCA's unlawful acts are harmless, wholly unimportant or should be condoned by this Court. At the very least, the unlawful appointment indicates that the FSCA had a lax approach to lawfulness in the cancellations project.

Mistakes in the cancellations project

[118] It is common cause that those investigations unearthed a number of mistaken cancellations – decisions made to cancel a fund when it had not actually ceased to exist. There was some debate about whether those false positives constituted systemic irregularities. The question of "systemic irregularities" is a red herring. However, the sample of funds investigated by KPMG and Mr Mort is central to the debate about mistaken cancellations and it is important to understand the role of the sample in the case at hand.

[119] A sample of cancellations was investigated on the recommendation of the O'Regan report. The purpose of analysing a sample is to draw conclusions about the whole population of cancellations from the results found in the sample analysed. It is a time saving exercise. If no mistakes are found in a representative and sufficiently large sample, then it is reasonable to conclude that there are no (or very few) mistakes in the population. If mistakes are pervasive in the sample, it is likely that they are pervasive in the population.

[120] Ideally, we would be in a position to say that a certain proportion of the cancellations in the sample were mistaken, therefore it is likely that a similar proportion of all the cancellations were mistaken. Were that proportion zero, the task of this Court would be very easy – no investigation would be necessary.[56] Unfortunately, we are in no such position.

[121] Both KPMG and Mr Mort considered a sample of 510 cancelled funds. Of those funds, many were mistakenly cancelled. It is difficult to be certain about the precise number.

[122] Counsel for Ms Hunter argued that 136 of the sample of 510 cancellations were mistaken. He implored the Court to generalise from that number and work on the

[56] I note that if the sample was flawed and told us nothing at all about the unexamined funds, then there would be all the more reason to investigate those funds; the only way to find out if cancellation errors are present is to scrutinise the funds or a sample thereof.

basis that more than 25% of the unexamined cancellations – more than 1000 cancellations – were made in error. However, the numbers presented to this Court do not bear scrutiny. Even the lowest number presented by counsel for Ms Hunter is not evidenced in the affidavits; the 76 cancellations referred to in Mr Tshidi's affidavit do not obviously form part of the sample.

[123] This is what we know about mistakes in the cancellations project:

(a) In the sample of 510, there had been 21 "reinstated funds" at the time of the KPMG report.

(b) Mr Mort found further errors which were corrected. We do not know how many.

(c) Before Ms Hunter took office 76 cancellations were "reinstated". We do not know if any of those cancellations formed part of KPMG's sample.

(d) The High Court, pursuant to an application by Liberty, set aside 23 cancellations.

[124] In light of those facts can it really be said that the investigation of 510 funds shows that no further investigation is necessary? I think not. The possibility of mistakes in the cancellations that have not yet been examined is obvious. Those mistakes are a proxy for unlawfulness. And the duty to investigate potential irregularities is clear.

[125] The claim that there are very few mistakes does not assist the respondents. The sample suggests, at a minimum, that approximately 4% of the unexamined funds had their registrations cancelled by mistake. That is well over 100 mistakes. That many potential irregularities cannot simply be ignored. The number is not trivial and the effect of the mistakes is not inconsequential. Mr Mort himself implied that mistaken cancellations are prejudicial to members of the affected funds unless those mistakes are rectified. Moreover, the prejudiced members are likely to be pensioners – some of the most vulnerable people in our society.

[126] It is therefore necessary to investigate all the cancelled funds. The FSCA's view that "there is no need to investigate the deregistered funds further at this point" is untenable.

The adequacy of the cancellations process

[127] The process by which cancellations were made was questioned both by KPMG and in a note produced by Mr Maharaj and Mr Prinsloo (the Maharaj note). KPMG took particular issue with the evidence available to the registrar at the time of cancellation. The Maharaj note took issue with the speed of the cancellations and whether the correct procedure was followed.

[128] Counsel for Ms Hunter described these as "qualitative" reasons for the FSCA to investigate the cancellations project. We are not in a position to accept (or reject) the truth of those factual allegations since they are disputed by the parties. However, the fact that the allegations have been made suggests a need to investigate further. In particular, the allegations made by the Maharaj note have not been met.

[129] Counsel for the FSCA suggested in oral argument that the Maharaj note proceeds on a mistaken assumption. He said that the timings of the cancellations merely indicate the dates and times that the cancellations were put through on the system and not the time it took the registrar to substantively consider and approve the cancellations. That argument is unsubstantiated by any evidence in the record.

[130] Two further points are worth noting. First, Mr Maharaj and Mr Prinsloo held important positions within the FSCA. They were well placed to understand the significance of the timing of registrations and the processes that were meant to be followed in the cancellations. Second, the Maharaj note addresses more than merely timing. It notes that a number of cancellations were made before notices were posted in the Government Gazette and points out that there was a workflow to be followed (presumably concerned with putting cancellations through the system as well as

deciding whether the cancellations were warranted). They conclude that the workflow was probably not followed in every case.

[131] The fact remains that credible allegations have been seriously made by people who have significant knowledge of the cancellations project. Those allegations go to the correctness of cancellations throughout the project, not merely to errors within the sample. That is a reason to investigate all of the funds for mistaken cancellations.

Conclusion

[132] The prevalence of mistakes, the presence of unlawful behavior, and the questions raised about the adequacy of the cancellation process, taken together, show that the FSCA had a duty to investigate the cancellations project. They go further than establishing a general duty to investigate the project; they show why the FSCA had a duty to investigate all the decisions made in the cancellations project. The FSCA's argument that the investigation of the sample was a sufficient investigation of the deficiencies in the whole of the project is without merit.

[133] The FSCA must investigate all of the cancelled funds with a view to determining which were mistakenly cancelled.

[134] The appeal must succeed to the extent that further investigations are required.

[135] The relief sought against the Minister in respect of the third respondent's conduct is truly a review based on alleged unlawful conduct. It should have been brought under PAJA.

Remedy

[136] A supervisory order is clearly not appropriate in this case. The FSCA must be ordered to investigate all the cancelled funds in order to determine which were

mistakenly cancelled. The mistaken cancellations must be rectified in a lawful manner. The process and outcome must be made public.

Order

[137] In the circumstances, I would have upheld the appeal and in doing so, set aside and replaced the High Court order with one compelling the FSCA to investigate all the cancelled funds in order to determine which were mistakenly cancelled and thereafter rectify such mistakes in a lawful manner and in a process that is made public and transparent.

CACHALIA AJ:

[138] I have had the pleasure of reading the first and second judgments. I gratefully adopt their exposition of the facts. In this judgment I discuss only those facts relevant to the conclusion to which I have come. The first judgment holds first, that there is no legal source for a duty on the part of the FSCA to investigate Ms Hunter's allegations regarding the cancellations project;[57] and second, that the cancellation of the funds constituted administrative action in terms of PAJA, which required Ms Hunter to have instituted a PAJA review of the cancellation decisions to address her concerns rather than seeking relief in the form of a mandamus.[58] The second judgment, on the other hand, finds that once a public entity's attention is drawn to a potential irregularity, it has a duty to investigate that potential irregularity.[59] The second judgment concludes that an individual may challenge the legality of the failure of a public entity to fulfil that duty outside the bounds of PAJA, just as Ms Hunter has sought to do.[60]

[139] In my view it is unnecessary and inappropriate to decide the application for leave to appeal on the grounds relied upon in the two judgments. Ms Hunter has,

[57] See [38] to [39].

[58] See [48] to [49].

[59] See [62].

[60] See [107].

quite simply, not made out a case in her founding affidavit for the relief she now seeks in this Court. I would accordingly dismiss her application for leave to appeal against the judgment of the High Court because it is not in the interests of justice to grant leave to appeal in these circumstances.

[140] Ms Hunter's central hypothesis advanced in this Court was that there were systemic irregularities in the way in which the cancellations project was executed. This, she said, led to the likelihood of financial prejudice to interested parties, which the FSCA had a duty to investigate, but resisted doing so. Ms Hunter submits that this Court must now order what amounts to an unprecedented and far-reaching court-supervised investigation into the cancellations project because the FSCA does not acknowledge these irregularities and has no commitment to remedying them.

[141] In what follows I shall demonstrate that Ms Hunter's central hypothesis – the FSCA's duty to investigate systemic irregularities in the cancellations project – does not get out of the starting blocks; this case was not made out in her founding affidavit or in argument before the High Court. Instead it is impermissibly made for the first time in the founding affidavit in the application for leave to appeal in this Court. In fact Ms Hunter's case has mutated since it was first instituted. Her counsel, Mr Budlender has, as I shall demonstrate in due course, unconvincingly sought to portray this mutation as a mere "refinement of her case".

The unlawfulness case

[142] The relief Ms Hunter sought in her original notice of motion, when she instituted proceedings on 19 January 2016, was for the FSCA to procure an investigation into the matters referred to in her NCN1 attached to the founding affidavit, by a suitably qualified individual or organisation and report to her on its outcome. The ground relied upon to support this relief was her allegation that the "authorised representatives" and section 26(2) trustees did not have the power to apply for the cancellation of the "orphan funds" or to provide the registrar with evidence for him to exercise his power under section 27(1) to cancel the registration of the funds.

Put simply, her attack was aimed principally at the lawfulness of the project, not that there were other systemic irregularities requiring an investigation.

[143] The FSCA met the unlawfulness case convincingly by showing that section 27(1) gives the registrar a broad power to cancel the registration of an "orphan fund" without any application for its cancellation and regardless of the source of the evidence that the fund has ceased to exist. Section 27(1)(a) provides that "[t]he registrar shall cancel the registration of a fund . . . on proof to his satisfaction that the fund has ceased to exist". All that is required before a fund is deregistered is for the registrar to be subjectively satisfied that the fund has ceased to exist and that his conclusion is one that a reasonable registrar of pension funds could reach. Once this is established a court will pay due respect to his decision.

[144] In her application for leave to appeal to this Court, Ms Hunter for the first time contended that there are two other requirements for the cancellation of a registration of a fund. The first is that the registrar may only rely on evidence he has verified independently. The second is that he may only cancel the registration of a fund if he is able to determine from information in the FSCA's records what has happened to its assets and liabilities. But there is no justification for reading these further requirements into section 27(1). I did not understand Ms Hunter to persist with the argument that the registrar had unlawfully exercised his power to cancel the registration of the funds.

Background facts and litigation history

[145] This brings me to Ms Hunter's central hypothesis: the FSCA's duty to investigate the alleged irregularities in the cancellations project. To understand how Ms Hunter got here, a brief digression into the facts and the litigation history is necessary. Ms Hunter's main relief in the High Court was aimed at securing the disclosure of the O'Regan and KPMG reports, which the FSCA had withheld from her.

[146] The O'Regan report arose from an FSCA resolution on 17 September 2014 to appoint Justice O'Regan to investigate Ms Hunter's complaints. After receiving submissions from Ms Hunter, Mr Boyd and Mr Tshidi, Justice O'Regan gave her report. She recorded, but did not express a view on the debate between the parties about the lawfulness of the cancellations. She recognised, with respect sensibly, that the important question was not whether the registration of funds had been lawfully cancelled, but whether it is likely that anyone had suffered material financial prejudice as a result of their cancellation, which was Ms Hunter's primary concern. She thus recommended that the FSCA appoint a firm of auditors to investigate this question based on a statistically significant sample of funds. It bears mentioning that no evidence of any improper, dishonest or corrupt conduct was placed before her.

[147] The FSCA appointed KPMG to conduct this investigation on 18 December 2014. KPMG did so and rendered a final report on 20 October 2015. The exercise turned out to be an expensive mistake.

[148] KPMG misunderstood its mandate. Justice O'Regan intended the auditors to "design and implement a thorough investigation" to assess whether there is a "likelihood of *material* financial prejudice" through the cancellation of the registration of funds. What was envisaged, therefore, was a fact-finding exercise. Instead the report assessed the "likeliness of *potential* prejudice" which the auditors said, was "a lower burden of certainty than . . . prima facie". The method employed was to calculate the statistical possibility of prejudice from the FSCA's records without having established all the facts. KPMG used a sample of 510 cancelled funds for this purpose. It found that 500 of these funds had insufficient information to conclude that the fund had ceased to exist.

[149] KPMG did not investigate the issue that Justice O'Regan had considered necessary: the likelihood of any material financial prejudice caused by the cancellation of any fund. It made no factual findings. The report it produced resolved nothing. This notwithstanding, it is significant that the FSCA did not simply abandon

its quest to solve the problem but sought further guidance from Justice O'Regan. She advised the FSCA, on 1 December 2015, to approach senior counsel familiar with pension law to assist further.

[150] The FSCA acted on her advice by engaging Mr Mort, an experienced attorney and pension fund specialist. Mr Andrew, a pension fund actuary, assisted him. The FSCA asked them to review the KPMG report. They rendered an assessment report on 25 April 2016 in which they were highly critical of it.

[151] The registrar appointed Mr Mort as an inspector in terms of section 2(1) of the Inspection of Financial Institutions Act[61] to conduct the investigation into whether material financial prejudice was caused by the cancellation of the funds. In the High Court the FSCA included two inspection reports by Mr Mort in its answering papers to demonstrate that it had indeed acted on Ms Hunter's concerns regarding the cancellations project and to inform the Court that the investigation was ongoing.

[152] Mr Mort's First Inspection Report, dated 7 June 2016, was produced six months after Ms Hunter had instituted the present proceedings. Mr Mort had inspected nine of the cancelled funds in the KPMG sample. These represented 46% of the value of the total indicative financial prejudice (TIFP) as determined by KPMG. Mr Mort found that five of them had assets when they were cancelled and their registrations had to be reinstated. The report also states that, subject to minor confirmations, which were not expected to indicate any financial prejudice, the TIFP indicated in the KPMG summary in respect of the nine investigated funds was found not to exist.

[153] Ms Hunter filed her replying affidavit on 30 June 2016, a month before her employment contract came to an end, on 31 July 2016. She dismissed Mr Mort's investigation as a "regrettably, transparent" attempt by the FSCA to discredit what she

[61] 80 of 1998.

considered were the credible findings in the KPMG report, implicitly impugning his professional integrity. She also expressed the view that as a single inspector, he would not be able to conduct a proper investigation of the remaining 500 funds in the KPMG sample within the remaining period of her employment. This was despite the fact that in her original notice of motion Ms Hunter had asked for an "individual or organisation" to conduct an investigation into the cancellations project. Mr Mort was appointed with Mr Andrew to support him, which was even more than she had asked for initially.

[154] After delivering her replying affidavit, and six weeks before the hearing, on 20 October 2016, she filed an amended notice of motion seeking, in addition to the relief in her original notice of motion, further extensive and complex relief running into five pages. This included—

(a) the appointment of forensic investigators by the FSCA in consultation with the Minister to investigate the merits of her two complaints and more;

(b) that the investigation covers each of the 500 funds and determines whether the cancellation of the registration of each fund was effected "lawfully and properly" and if not whether any fund or interested person suffered material financial prejudice;

(c) that the investigators provide written reports on, among other things, whether the investigation should be extended to cover any other cancelled funds; and

(d) that the High Court supervise the process, make findings and grant orders as the issues arise before it.

[155] The High Court dismissed this application, but Ms Hunter appears to persist with the substance of the relief claimed in this Court.

[156] Mr Mort filed his Second Inspection Report on 24 November 2016. He found no indication that any section 26(2) trustee, or authorised representative employed by

an administrator, had acted in a way that conferred an improper advantage or benefit on their employer. The report was handed to the Judge during the hearing in the High Court. He recorded that the report showed that Mr Mort had completed investigating 63% of the funds in the sample and that his investigation was continuing.

[157] The Judge observed, correctly I think, that the relief sought in the original notice of motion was for an investigation into the cancellations project. This suggested that there was no investigation under way. But this is not so. At that stage Justice O'Regan and KPMG had completed their investigations. Mr Mort's investigation had not yet begun; he was commissioned only four months after Ms Hunter had instituted these proceedings. When the matter was heard and shortly afterwards, when the Court delivered its judgment, on 14 December 2016, the investigation had not been completed.

[158] The Judge understood the applicant's case, again, in my view correctly, as seeking to put an end to the alleged unlawful conduct of the FSCA and their employees in their execution of the cancellations project and to compel them, and the Minister, to comply with their constitutional obligation to act "lawfully" and to fulfil their duties in the applicable legislation and FSCA policy documents being—

(a) the FSCA's Compliance Policy and Compliance Charter;
(b) the policies and procedures comprising the FSCA's Fraud and Corruption Strategy;
(c) the Public Finance Management Act read with Treasury Regulation 33; and
(d) the Protected Disclosures Act.[62]

[159] But faced with a comprehensive refutation of each of her pleaded causes of action, Ms Hunter abandoned them. During the hearing she contended that she no longer asked the Court to find as a fact that the FSCA or its employees had breached any of these laws or policies but only to establish through an investigation whether

[62] 26 of 2000.

this was so. The High Court was therefore right to observe that Ms Hunter "[had] failed to set out with the required measure of particularity, facts and conclusions of law to rely on any of the statutory provisions stated in her affidavits and those in argument" to justify an order premised on a general obligation to investigate her complaint.[63]

[160] The Judge also dealt with a further argument offered in reply on Ms Hunter's behalf, which was that once the FSCA had accepted the O'Regan report, it was obliged to appoint, not Mr Mort, but forensic investigators to conduct an investigation as contemplated in her amended notice of motion. He rejected the submission – again, correctly – as the FSCA has not been called upon to answer this case either.

[161] Following the High Court judgment, Mr Mort continued his investigation. On 21 December 2016 he produced a supplement to his Second Inspection Report, which addressed some outstanding information in that report. He concluded that no member, beneficiary, or creditor had apparently been exposed to any material financial prejudice.

[162] Mr Mort produced his Third Inspection Report on the same date. This report was not included in the papers. However, in the FSCA's answering papers in this Court, Mr Mort acknowledged, with reference to the report, that while there were areas of concern, it was also apparent that there was an ongoing effort by administrators of cancelled funds to trace the beneficiaries of unclaimed benefits.

[163] Mr Mort says that his investigation of the sample of audited funds showed that, in the main, those certifications were correctly given. The number of funds that should not have been deregistered constituted a small percentage of the total deregistered. This occurred because of errors by administrators incorrectly certifying that there were no assets and liabilities. When detected, the registrar was notified, steps were taken to reinstate the funds concerned and they were thereafter monitored.

[63] *Hunter v Financial Services Board* (2017) JDR 0011 (GP) (High Court judgment) at para 27.

However in none of the cases was there any evidence of material financial prejudice. His conclusion was that there was no need to investigate the remaining deregistered funds any further. He added that this decision – whether or not to continue the investigation – was not his, but the registrar's to make. We were not told whether the registrar has made any decision in this regard, a point to which I shall revert.

[164] It must be emphasised that evidence regarding developments after the High Court judgment is inadmissible for the purposes of determining the merits of the new dispute, in other words, whether there was a duty to investigate the cancellations project. The reports were given to the registrar and placed before this Court to update it on the investigation and to assist it in the assessment of the remedies Ms Hunter now seeks, in particular, whether the FSCA should be ordered to terminate Mr Mort's investigation and replace it with another. They may be admitted only for this limited purpose.

In this Court

[165] In her founding affidavit in this Court, Ms Hunter goes much further than merely dismissing Mr Mort's investigation and implicitly impugning his professional integrity, as she did in her replying affidavit in the High Court. She now accuses him explicitly of having conspired with the FSCA to "bury" her allegations and KPMG's findings of likely prejudice, and to obscure the FSCA's failure to conduct a proper investigation. Mr Mort is also accused of bias in favour of the FSCA. These allegations are groundless and scandalous. But apart from this, Ms Hunter made no case to set aside the FSCA's decision to appoint Mr Mort and Mr Andrew on the ground that it was made for an ulterior purpose. During the hearing in this Court, counsel wisely did not persist with this line.

[166] Ms Hunter also attacks Mr Mort's investigation on another ground: that it did not meet "the requirements required by law, recommended by Justice O'Regan and accepted by the board of the FSCA". But again, this is incorrect. Section 27(1) only requires the registrar to have "proof to his satisfaction that the fund had ceased to

exist" before he cancels the registration. There is no further legal requirement that he is obliged to investigate material financial prejudice. The FSCA sensibly accepted Justice O'Regan's recommendation to investigate this issue. Whether it was legally obliged to do so need not be decided. But, having accepted the recommendation, how to implement it was solely within its power. It appointed Mr Mort and Mr Andrew to conduct the investigation. That decision stands unless and until set aside by a court.

[167] The case made in this Court for the first time, and on which the entire appeal regarding the cancellations project rests, is that the FSCA had a duty to investigate systemic irregularities in the cancellations project. The foundation for Ms Hunter's case, as was pointed out earlier, was for the FSCA to procure an investigation into the lawfulness of the cancellations project, not into any other systemic irregularities in it.

[168] The facts relied upon to support this new and different case are the following. A total of 6757 funds were cancelled over a period of approximately ten years. Of these 4515 were the "orphan funds" with which we are concerned. KPMG investigated a sample of 510 on Justice O'Regan's recommendation. Mr Mort used the same sample for his investigation.

[169] To support this case, counsel for Ms Hunter submitted that 139 of the cancelled funds in the sample had to be reinstated. This equates to 27% of the sample. The 139 was made up as follows—

(a) 76 which were reversed by Mr Boyd before Ms Hunter's appointment;

(b) four which were set aside by the FSCA Appeal Board;

(c) a further 29 which are evident from an annexure to Ms Hunter's founding affidavit;

(d) 23 other funds managed by Liberty, mentioned in Mr Mort's First Inspection Report; and

(e) the remaining seven that were referred to in Mr Mort's Second Inspection Report.

[170] It is contended that 139 reinstated funds represents a high percentage of erroneously cancelled funds in the sample and indicates that these were not isolated mistakes but confirmation of a systemic flaw. But she seems to have cobbled together these figures by scouring through affidavits (other than her own founding affidavit), supporting annexures and Mr Mort's first two inspection reports to make this case now. And then impermissibly seeks to draw the inference of a systemic flaw in argument before this Court, when this case was not made out in the first instance. However, as observed in the second judgment, the figures that Ms Hunter relies upon are not all supported by the record. The 76 funds reinstated prior to Ms Hunter's employment at the FSCA do not appear to be part of the sample of the 510 funds investigated by KPMG, and subsequently Mr Mort. The sample only included 21 previously reinstated funds, and it is also not clear whether these 21 previously reinstated funds are included in the 76 referred to by Ms Hunter. If they were, and expressed as a percentage, they would constitute only 4% of the reinstated funds, which is hardly a basis to ask the Court to order a full scale supervised investigation into all the remaining funds.

[171] It is trite that an applicant must make out her case in her founding affidavit. This means she must spell out the facts and the issues in dispute. This is for the benefit of the Court, but also primarily, for the respondent so that it knows the case it must meet and the evidence required to be adduced in its affidavits.[64] The issue in this Court became the duty of the registrar to institute an investigation, other than Mr Mort's, based mainly on the quantitative analysis of the number of erroneously cancelled funds in the sample. But this was not identified in the papers as an issue in dispute, nor was it supported by any evidence and neither was it the relief asked for. In fact, the original relief – that an investigation be ordered – remains the primary relief asked for.

[172] Furthermore it is not proper for an applicant in motion proceedings to make its case on documents annexed to the papers and to ask a court to draw inferences or

[64] *Swissborough* above n 30 at 323G.

arrive at conclusions when the relevant evidence from those documents is not properly canvassed in the affidavits. The reason is manifest: the other party may well be prejudiced because evidence may have been available to refute the new case on the facts. In *National Director of Public Prosecutions v Zuma*, the Supreme Court of Appeal held that "[a] party cannot be expected to trawl through documents and speculate on the possible relevance of some facts contained in them".[65] This is precisely the FSCA's complaint, and what Ms Hunter expects this Court to do. As Mr Trengove submitted on behalf of the FSCA, if this was indeed Ms Hunter's case, the FSCA would have addressed it in their affidavits. The prejudice to the FSCA is evident. It is no wonder that the High Court observed that "the applicant had failed to set out with required particularity, facts and conclusions of law . . . in her affidavits"[66] to sustain her cause of action.

[173] The second judgment recognises that the record does not support the percentage of erroneous cancellations presented by Ms Hunter. It nonetheless holds that, based on the following facts gleaned from various parts of the record, an investigation is warranted—

(a) in the sample of 510, there had been 21 "reinstated funds" at the time of the KPMG report;

(b) Mr Mort found further errors which were corrected, but the number does not appear in the record;

(c) 76 cancellations were "reversed" before Ms Hunter took office; and

(d) 23 cancellations were set aside by the High Court pursuant to an application by Liberty. This emerged from a further application to admit this evidence after the application was argued in this Court.

[174] These then are the "facts" upon which the second judgment bases its conclusion that the possibility of mistakes in the cancellations that have not yet been examined is "obvious" and that those mistakes are "a proxy for unlawfulness". It

[65] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 47.

[66] High Court judgment at para 27.

therefore holds that the potential irregularities in the cancellations project as a whole cannot be ignored, and it is therefore necessary to investigate all of the cancelled funds.

[175] The short answer to the second judgment is that neither the factual nor legal basis for these conclusions was properly ventilated in Ms Hunter's papers before the High Court. The FSCA was simply not called upon to deal with the facts or respond to the legal conclusions it draws. It is grossly unfair and prejudicial to the FSCA for this Court to determine an entirely new and different case not made out in the High Court – not even obliquely – and to do so sitting simultaneously as a court of first instance and a final court of appeal.

[176] Furthermore, even if there were obvious mistakes in the cancellations project it does not follow that this warrants a broader investigation into the entire cancellations project. The bulk of the mistakes – 72 of them – were corrected before Ms Hunter's appointment, which suggests that the FSCA has systems in place to detect and correct errors. This is also apparent from the 21 reinstated funds referred to in the KPMG report, there being no suggestion that the reinstatements were as a result of this report. The same is true of the seven reinstatements mentioned by Mr Mort. It is unclear on what basis the second judgment has regard to the 23 cancellations that were set aside following another High Court application instituted by Liberty, but this is immaterial.

[177] It must also be emphasised that when Ms Hunter asked for an investigation into the cancellations project in her founding affidavit, she had not seen the O'Regan and KPMG reports. Nor was she aware that the FSCA had acted on Justice O'Regan's recommendation to appoint a pensions expert to review the KPMG report. The FSCA had in fact, acceded exactly to what Justice O'Regan had recommended, by appointing Mr Mort. Furthermore, his investigation had not been completed when the High Court adjudicated the matter.

[178] Mr Mort, who was assisted by Mr Andrew to take the investigation further, has now, after the dispute was decided in the High Court, completed his investigation into the sample of 510 funds. He concluded that there was no likelihood of material financial prejudice to interested parties and that there are ongoing efforts by administrators of cancelled funds to trace beneficiaries of unclaimed benefits. He therefore believes that there is no need for a further investigation. Ms Hunter simply ignores this and the second judgment overlooks it. I pause to mention that in her proposed amended notice of motion in the High Court she had asked for no more than an initial investigation to cover the 510 funds in the sample, not all the cancelled funds, which she now seeks in this Court. It is now up to the registrar to decide on an appropriate course of action. If any party has legitimate concerns about the decision he ultimately makes in this regard, the correct approach will be for that party to institute administrative review proceedings against that decision. Whether this would require an applicant to institute review proceedings, either under PAJA or by way of another legality challenge, is neither necessary, nor appropriate to decide. It was also not an issue between the parties, and the Court has not had the benefit of proper legal argument on what is an important administrative law dispute.[67]

Governance complaint

[179] Both the first and second judgments dismiss Ms Hunter's governance complaint against the FSCA and the Minister. I agree with their conclusions. I would refuse Ms Hunter application for leave to appeal this part of the High Court's order as well. It is therefore unnecessary to consider Ms Hunter's second complaint any further.

Conclusion

[180] To sum up: Ms Hunter commenced her litigation seeking to procure an investigation into the lawfulness of the cancellations project. The grounds relied upon to support this relief was her allegation that the "authorised representatives" and

[67] *Cape Town City v Aurecon* [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC) at paras 34-5; *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 82.

section 26(2) trustees did not have the power to apply for cancellation of the "orphan funds" or to provide the registrar with evidence for him to exercise his power under section 27(1) to cancel the registration of the funds. Her complaint was therefore aimed at the lawfulness of the project, not that there were systemic irregularities requiring an investigation. The FSCA met the unlawfulness case squarely by showing that section 27(1) allows the registrar to cancel the registration of an "orphan fund" without any application for its cancellation and regardless of the source of the evidence that the fund has ceased to exist. But it went further and instituted an investigation by Mr Mort and Mr Andrew into the likelihood of material financial prejudice following the O'Regan report.

[181] Ms Hunter's case has now changed fundamentally in an attempt to establish a duty to investigate potential unlawfulness of the cancellations project based on a quantitative analysis of a number of reversed cancellations, and what she believes was an inadequate investigation by Mr Mort. Aside from the fact that some of the facts she relied upon in this Court are questionable or at least unclear, this was not an issue in her founding affidavit in the High Court (this could not have been the case, because Mr Mort's investigation had not even begun). The respondents were therefore not called upon to answer this case. It is grossly unfair to expect them to do so for the first time in this Court.

Costs

[182] This brings me to the question of costs. I accept that Ms Hunter's primary purpose in instituting these proceedings was to compel the FSCA and the Minister to act lawfully in compliance with their constitutional and statutory duties. She sought to do so in the public interest. The *Biowatch* principle therefore applies.[68] But she also made unsubstantiated allegations and unjustifiably impugned the integrity of various officials in the course of her employment-related complaints. Ms Hunter's groundless attack against Mr Mort, which was not pursued in this Court, would ordinarily have constituted grounds for an adverse costs order against her.

[68] *Biowatch* above n 10 .

[183] However, the FSCA has abandoned the costs orders in its favour in both the High Court and the Supreme Court of Appeal, and does not ask for any costs against Ms Hunter in this Court. It has also indemnified Mr Tshidi and Mr Boyd in regard to any costs they have incurred to answer the allegations that were made against them. Ms Hunter's case against the Minister was misconceived from the start, but was ultimately founded on the alleged failure of the FSCA to fulfil its duties. In the circumstances, I accept that she should not be made to pay for the costs of any of the respondents. I also agree that there is no basis at all for the amicus curiae to ask for a costs order in its favour.

[184] In the result I would dismiss the application. Save as aforesaid, I concur in paragraphs 3-11 of the order of the first judgment.

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