IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

29 September 2023
DATE

SIGNATURE

CASE NO: 007529/22

In the matter between:-

MUNICIPAL EMPLOYEES' PENSION FUND	First Applicant
AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LTD	Second Applicant
AKANI PROPERTIES (PTY) LTD	Third Applicant
MUNGHANA LEISURE AND TOURISM (PTY) LTD	Fourth Applicant
MARGRET MAGDALINA LE GRANGE	Fifth Applicant

ZAMANI ERNEST EPHRAIM LETJANE	Sixth Applicant
NTHABELENG REFILWE MOTSOHI	Seventh Applicant
JACK BRUCE MALEBANE	Eighth Applicant

VS

THE FINANCIAL SECTOR CONDUCT AUTHORITY	First Respondent
UNATHI KAMLANA NO	Second Respondent
BRANDON TOPHAM NO	Third Respondent
GERRIT JACQUES BRUWER NO	Fourth Respondent

Coram: Kooverjie J

Heard on: 29 August 2023

Delivered: 29 September 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 29 September 2023.

SUMMARY: The law is settled.

1. The obligation to produce the record follows automatically once a review application has been instituted. The only exception is when a jurisdictional dispute arises.

2. Privileged documents and information should be disclosed if they have a bearing on the “decision” subject to review and are relevant to the said decision-making process.

ORDER

It is ordered that:-

1. The Rule 30A application is granted.

2. The respondents shall deliver the record of proceedings within 10 court days of this order, and dispatch to the Registrar the record of the decision sought to be reviewed, corrected or set aside (including all correspondence, reports, memoranda, documents, evidence and other information which were before the respondents when the decision subject to review in the main application under the above case number was made), together with such reasons which the respondents are required by law to give or desire to make, and notify the applicants’ legal representatives that they have done so.

3. The respondents, jointly and severally, the one paying the others to be absolved, shall pay the costs of this application, including the costs of two counsel.

JUDGMENT

KOOVERJIE J

THE INTERLOCUTORY APPLICATION

[1] In this Rule 30A(2) application, the applicants seek an order compelling the respondents to comply with the Rule 53(1)(b) of the Rules of court, namely to furnish the record.

[2] The interlocutory relief sought is:

"1. Declaring that the respondents have failed to comply with Rule 53(1)(b) of the Rules and the applicants' notice in terms of Rule 30A dated 15 September 2022;

2. Directing that the respondents deliver the record of the proceedings … and to dispatch to the Registrar the record of the decision sought to be reviewed, corrected or set aside, which includes all correspondence, reports, memorandum, documents, evidence and other information which were before the respondents when the decision (subject to a review in the main application… together with such reasons which the respondents were required by law to give or desired to make, and to notify the applicants' legal representatives that they have done so."

ISSUE FOR DETERMINATION

[3] The issue for determination is crisp. This court is required to determine whether or not the applicants are entitled to the record as contemplated in Rule 53(1)(b) of the Uniform Rules of Court.

[4] Rule 53(1)(b) reads:

> *"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —*
>
> *(a) …*
>
> *(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so."*

THE REVIEW APPLICATION

[5] The respondents obtained a search and seizure warrant order on 27 June 2022, granting them access to various documents and information listed in the warrant.

According to the applicants, this resulted in a *"wholesale confiscation of the applicants' information which the respondents were not entitled to"*.

[6] The relief sought in the review application is, firstly, to set aside the decision of one or more of the respondents to institute the *ex parte* application under case number 31400/22 (the decision). The applicants further seek to set aside the court order under the case number dated 27 June 2022. The applicants challenge the court order in terms of Section 138 read with Section 137(1)(a)(ii)(aa) of the Financial Sector Regulation Act,[1] (FSRA).

[7] The "court order" has further been challenged on a procedural basis. It was argued that the Financial Sector Conduct Authority (FSCA) was required to notify the applicants of their intention to institute the warrant application as the applicants have at all times been furnishing the respondents with the requested documents and information. It was pointed out that the respondents have already been furnished with the most of the information and documents listed in the warrant. The warrant simply constituted an abuse of process.

[8] The applicants seek the restoration and return of the documents and information seized by the respondents on the basis that the execution of the warrant was unlawful.

[9] The respondents refuse access to the record on the basis that the application for review was legally incompetent as the "decision" does not fall within the purview

[1] 9 of 2017.

of an administrative decision as defined in PAJA[2] and neither is it a legality review. Consequently it was argued that the rights of the applicants have not been adversely affected which has a direct legal and external effect.

[10] In the review application, I have noted that Mr Bruwer is cited in his official capacity as an investigator appointed by FSCA in terms of Section 134(1) of FSRA.

ANALYSIS

[11] The applicants persist with their argument that the respondents have no option but to file the record since a review application has been instituted. The respondents, on the other hand, contend that the request for the said record is unfounded as the "decision" is not reviewable. And so it was submitted that this is not a case where it is accepted that the decision is, in principle, reviewable.

[12] For the reasons set out below, I find the respondents' reasoning untenable. As a matter of fact, a review application was instituted, no matter how flawed it may be. Whether the decisions and order are reviewable or not will eventually be determined by the court hearing the "review application".

[13] The wording of Rule 53 is confined to dealing with decisions of public institutions of those performing judicial, quasi-judicial or administrative functions. Although previously the said institutions' decisions were reviewed in terms of the common

[2] Promotion of Administrative Justice Act 3 of 2000 (PAJA)

law, with the advent of our Constitution, our courts have been empowered beyond the confines of PAJA to scrutinize the exercise of public power for compliance with constitutional prescripts. Hence reviews under this Rule are brought either under PAJA or under the principle of legality.

[14] At this point, I deem it appropriate to set out the definition - "administrative action" as defined in PAJA. It reads:

"Administrative action is any decision taken or failure to take a decision by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a Provincial Constitution; or

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

(b) a natural juristic person, other than an organ of state, when exercising a public power performing a public function in terms of an empowering provision;

(c) which adversely affects the rights of any person and which has a direct, external legal effect…."[3]

[15] The respondent's core contention was that the "decision" that is sought to be reviewed does not constitute administrative action under PAJA nor is it a review that offends the principle of legality. It was pointed out that the decision to investigate and the process of such investigation including a decision to institute proceedings to obtain the warrant does not include a determination of culpability

[3] my emphasis

and does not affect the rights of any person in a manner that has a direct and external legal effect. It was further argued that the court order, whereby the warrant was granted, does not constitute administrative action. Hence PAJA does not apply.

[16] On the former issue, the respondents pointed out that the "decision" in issue was one taken by the fourth respondent in his capacity as an investigator and was certainly not a decision of the FSCA[4]. Although it is not in dispute that Mr Bruwer was appointed in terms of the FSRA as an investigator by the FSCA, the applicants do however persist with the argument that the "decision" was one taken by the FSCA.

[17] The high water mark of the applicants' case is firstly that once a review application is instituted, the filing of the record is automatic. Secondly, whether the decision constitutes an administrative action, is not ripe for determination at the "record seeking stage" of the proceedings. Such enquiry requires a deliberation on the merits of the matter. This entails that the full and relevant facts are to be placed before court seized with a review application. Such court will then be able to make an informed finding.

[18] The applicant's reasoning was principally premised on Section 34 of the Constitution which entitles a litigant, to a justiciable dispute, decided in a fair public hearing before a court with all the issues being ventilated.[5]

[4] Financial Sector Conduct Authority
[5] Helen Suzman Foundation matter CC par 14

[19] The respondents, in supporting their propositions that the "decision" to institute the *ex parte* proceedings is not the exercise of public power or function and does not affect the rights of the applicants, referred to the authorities of ***Viking Pony***, ***Corpclo*** and ***Wingate-Pearse***.[6] Furthermore it was argued that the "decision" is incapable of being reviewed in terms of the principle of legality.

[20] The respondents relied on paragraph 37 of the *Viking Pony* matter to support their core argument. The court said:

> *"PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person and which has a direct, external legal effect. This includes action that has a capacity to affect legal rights. Whether or not administrative action, which should make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of the case."*[7]

[21] It is my view that, in fact, the said authorities instead belabour the point the applicants advanced all along. The courts, in the said authorities, namely ***Viking Pony***, ***Corpclo*** and ***Wingate-Pearse*** appreciated that a determination cannot be made without the relevant facts before a court. It was emphasized that regard must be had to the specific facts in each matter and a determination as to whether or not the decision is one as envisaged in PAJA cannot be made in the abstract.

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[6] Viking Pony 2011 (1) SA 327 CC par [37], Corpclo 2290 CC t/a U-Care v Registrar of Banks [2013] 1 All SA 127 (SCA) at paragraph [26]; and Wingate-Pearse 2019 (6) SA 196 G-J paragraph [41]

[7] My emphasis.

[22] I agree with the applicants that the said authorities are distinguishable from the circumstances and facts of this matter. From the outset, it must firstly be pointed out that none of the said authorities relied upon, constituted reviews before court, and secondly, the facts themselves are distinguishable.

[23] The Constitutional Court in ***Viking Pony*** was seized with an appeal of a decision from the Supreme Court of Appeal. The court therein considered the interpretation of the Preferential Procurement Regulations[8]; more particularly, Regulation 15(1). In essence, the court was required to, *inter* alia, interpret the word "act" in the said section. The Constitutional Court defined the word to "act" to mean "conducting an appropriate investigation which was designed to respond to the complaint lodged". The court said:

"detecting a reasonable possibility of a fraudulent misrepresentation does not constitute administrative action."

It concluded by stating that:

"It is unlikely that a decision to investigate and the process of investigation, which excludes a determination for culpability, could itself adversely affect the rights of any person in a manner that has a direct and external legal effect."[9]

As alluded to above, the court was however cautious when it expressed that *"regard must always be had to the facts of each case."*

[24] In ***Corpclo*** the Supreme Court of Appeal was also seized with an appeal where it was required to determine whether Section 81 of the Banks Act[10] which prohibited

[8] Preferential Procurement Regulations, 2001, Government Gazette 22549 GN R725, 10 August 2001 (regulation).
[9] Paragraphs [33] – [38] of Viking Pony

the appellant from continuing a business practice, was in contravention of Section 11(1) of the said Act. Section 11(1) empowered the Registrar of Banks to inspect the appellant's business. The issue was whether the Registrar's decision constituted administrative action in terms of PAJA.

[25] The court determined therein that the Registrar's decision to investigate and institute proceedings against the appellant for an interdict in terms of Section 81 of the Act is not an administrative action as envisaged in PAJA. ***Corpclo***, endorsed the ***Viking Pony*** approach. The court repeated:

"Whether or not administrative actions for the purposes of PAJA applicable, has been taken; cannot be determined in the abstract. Regard must always be had to the facts of the case."[11]

[26] Although the courts in the said authorities were seized with the issue as to whether the decision to investigate constituted administrative actions, they were alive to the fact that such determinations can only be made upon having regard to the facts of each matter.

[27] In summary, my understanding of the proposition expressed in the said authorities is firstly, that it is only upon a conspectus of the full facts that one is able to make an informed decision, and secondly, the facts of each matter has to be considered when determining if, in fact, the decision constitutes a PAJA decision or not.

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[10] Act 94 of 1990
[11] Corpclo, paragraph [26] & Viking Pony paragraph [37]

[28] I am mindful that no jurisdictional dispute has been raised in the present matter. In such circumstances, our courts have buttressed the proposition that a ruling must firstly be made on the issue of jurisdiction. The Constitutional Court in the ***Competition Commission of South Africa v Standard Bank*** ruled that when matters of jurisdictional issues arise, it is necessary for the court, firstly to make a determination of jurisdiction before ordering the filing of the record.[12] The majority judgment of the Constitutional Court held that it was not prudent for a court to adjudicate a review application before the issue of jurisdiction was settled.

[29] It cannot be gainsaid that in the present matter a review application has been instituted. In this regard, I am guided by the principle enunciated by the Supreme Court of Appeal, in the ***Competition Commission v Computicket*** matter,[13] where it was stated:

"The obligation to produce a record automatically follows upon the launch of an application, however ill-founded that application may later turn out to be."

[30] It is settled law that a litigant's constitutional rights must be recognized. The production of the record fulfills the fundamental constitutional purpose. It gives substance to the applicant's right of access to court under Section 34 of the Constitution. In the ***Democratic Alliance*** matter[14] the court appreciated that:

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[12] *Competition Commission of South Africa v Standard Bank of South Bank of South Africa Ltd; Competition Commission of South Africa v Standard Bank of South Africa Ltd; Competition Commission of South Africa v Waco Africa (Pty) Ltd and Others* 2020 (4) BCLR 429 CC at paragraphs 118-119

[13] Competition Commisison v Computicket (Pty) Ltd 2015 [1] CPLR 15 (SCA) at paragraph [20]

[14] Democratic Alliance and Others v NDPP and Others 2012 (3) SA 486 (SCA) at paragraph [37] see also Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC) at paragraph [14]

"Without the record the court cannot perform its constitutionally entrenched review function, with a result that a litigant's right in terms of Section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed."

[31] Our courts have also expressed that the production of the record is not dependent on the merits of the review.[15] This, once again, supports the argument raised by the applicants that, at this interlocutory stage of the proceedings, the merits in the main review application are irrelevant. An informed determination can only be made by the court hearing the main review application and as it would have the full benefit of all the relevant facts to arrive at an informed decision.

[32] In ***Turnbull-Jackson***[16] the court remarked on the purpose of a record:

"Undeniably, Rule 53 record is an invaluable tool in the review process. It might help: shed light on what happened and why, give the light to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of the as yet not fully substantiated grounds of review, in giving support to the decision maker's stance; and in the performance of the reviewing court's function."

[33] In ***Helen Suzman***,[17] the Constitutional Court emphasized the importance of a full record. At paragraph [15] the court said:

[15] Competition Commission v Computicket matter
[16] *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 CC at paragraph [37]
[17] *Helen Suzman Foundation v The Judicial Service Commission* 2018 (4) SA 1 CC at paragraph [14]

"The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision maker. Equality of arms requires that the parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them a 'substantial disadvantage vis-à-vis their opponents'."

[34] Hence, the production of the record is a substantive requirement. In ***General Council of the Bar v Jiba***[18] the court said:

"Therefore compliance with Rule 53 regarding time frames and providing a complete record is not just a procedural process, but is a substantive requirement which serves to ensure that the substance of the decision is properly put to the fore and early stage. Any attempt to frustrate this should be met with displeasure of our courts."

[35] It should be appreciated that at this stage of the interlocutory proceedings I do not have the benefit of the full papers. Rule 53 makes provision for the applicants to file a further supplementary affidavit, which will then be followed with the answering and replying papers. A myriad of factors would have to be considered, and in all probability, would include whether the decision constitutes a legality review, and whether the decision is that of the FSCA and/or that of the fourth respondent.

[18] *General Council of the Bar v Jiba* 2017 (2) SA 122 GP at par [112]

[36] Having perused the contents of the main review application, I have noted allegations pertaining to FSCA's involvement, in particular various information and documents had been furnished to the FSCA over a period of time and numerous discussions were held between FSCA and the MEPF[19]. However the matter is only ripe for hearing when the said allegations together with the anticipated responses are before the review court.

[37] In conclusion, I find that the respondents are obliged to file the record.

IS THERE A RECORD

[38] In their papers, the respondents pointed out, *inter alia*, that there is no record since the "decision" was taken in consultation with senior counsel and which deliberations are privileged. The applicants contended that this defence was an afterthought as same was never raised in previous interactions with the respondents. It was raised for the first time in the answering papers.

[39] During argument, counsel for the respondents did not further advance their argument on this point. In fact, counsel persisted with the argument that the "decision" to institute the *ex parte* proceedings is not reviewable at all. Since the review is a non-starter, the respondents are not obliged to file a record. It was also contended that the documents and information upon which the "decision" was based, appear in the application presented to court for the warrant order and which the applicants have access to.

[19] Municipal Employees Pension Fund

[40] The applicants, on the other hand, maintain that certain information which influenced the “decision”, have not been disclosed as yet. In particular, it was argued that the FSCA had a hand to play and in fact made the “decision”.

[41] In this regard, I find the Constitutional Court’s decision in ***Helen Suzman*** of guidance. Therein the majority remarked that confidential information does not, *per se*, render the non-disclosure thereof. The court emphasized that if the information or documents have a bearing on the “decision” and are relevant, disclosure should be made. Such information may bring to bear reviewable irregularities.

[42] On the facts in ***Helen Suzman***, the Constitutional Court ruled that the JSC’s own practice of distilling reasons for a decision on the deliberation, was enough indication that they were relevant. It remarked that there would be a real risk if an applicant, on review, is denied access to material that might have assisted his case. In these circumstances, it would lead to unfairness.

[43] In fact, the Supreme Court of Appeal, in ***Helen Suzman***, even though it ruled that the JSC’s deliberations do not automatically form part of the record, remarked that the extent of the record must depend on the facts of each case. It would depend on the specific facts of each matter. It is acknowledged that in certain

circumstances the decision maker may be required to produce the private/privileged deliberations.[20]

[44] In the present proceedings, on the respondents' own version, I have noted that the allegation was made that the decision to apply to court for the warrant was arrived at after private deliberations with counsel.

[45] I have however not been placed with the full facts, particularly to the extent the deliberations are privileged. The respondents, in their papers, merely claimed that the deliberations are privileged. Such deliberations may have a bearing on the "decision" to institute the warrant application. There may be evidence therein which identify reviewable irregularities. I therefore see no reason why same cannot be disclosed, if they have relevance.

[46] The fact that deliberations may in a given case occur privately does not detract from their relevance as it may contain evidence that led to the impugned decision.[21] In my view, the respondents' concerns on the privileged information could surely be dealt with by way of suitably framed confidentiality regime. This will enable a process whereby the said information and/or documentation would be divulged only to a category of persons agreed to between the parties.

[47] I have noted that the documents seized in terms of the warrant remain under custody of an independent third party under an Escrow Agreement. As an

[20] *Helen Suzman* SCA paragraph 39
[21] See *also City of Cape Town v South African National Roads Agency Ltd and Others* 2015 (6) SA 535 (WCC)

alternative, there is no reason why the privileged deliberations with counsel can also not be dealt with in a similar manner.

[48] As alluded to above, the purpose of Rule 53(1)(b) is to ensure that any challenge to the proceedings sought to be reviewed should be properly pleaded and well considered. The Rule affords the applicants an opportunity to amend its papers and consequently make provision for the answering and replying papers to be filed.[22]

COSTS

[49] The applicants seek a punitive costs order against the respondents. It is settled law that this court has a judicial discretion to grant such an order in circumstances that warrant such orders.

[50] The remaining issue is whether punitive costs are justified. As a general rule, a court would not order a litigant to pay the costs of another litigant on an attorney and client scale, unless exceptional circumstances exist. This would entail circumstances where the motives were vexatious, reckless, malicious or frivolous or if a party acted unreasonably or in a reprehensible manner.

[51] In these circumstances, in granting such orders, a court, in principle, would express its displeasure in respect of the conduct of one of the parties. On the facts before me, this is not such a case.

[22] *Jiba*, paragraph 111

[52] In ***Plastic Converters Association of South Africa***[23] the court stated the scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.

[53] I take cognisance of the fact that there may be merit in the respondents' contentions. For instance, the review court may find that the "decision" to institute the *ex parte* application does not fall within the purview of PAJA. This aspect as well as the other grounds raised on review would still have to be ventilated before the review court. In these circumstances, a punitive costs order is not justified.

H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

[23] *Plastic Convertors Association of South Africa v National Union of Metalistors of SA* (2014) 37 ILJ 2815 (LAC)

Appearances:

Counsel for the Applicants:	*Adv A Franklin SC*
	Adv P McNally SC
	Adv T Mafukidze
Instructed by:	*Webber Wentzel Attorneys*
Counsel for the Respondents:	*Adv EL Theron SC*
Instructed by:	*Norton Rose Fulbright*
Date heard:	*29 August 2023*
Date of Judgment:	*29 September 2023*