IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

11 August 2020
DATE

SIGNATURE

CASE NUMBER: 78587/2018

In the matter between:

MAMPHE DANIEL MSIZA	**APPLICANT**
and	
ADVOCATE TERRY MOTAU SC (N.O)	**FIRST RESPONDENT**
THE PRUDENTAL AUTHORITY OF SOUTH THE SOUTH AFRICAN RESERVE BANK	**SECOND RESPONDENT**

JUDGMENT

TLHAPI J:

INTRODUCTION

[1] The applicant seeks to review and set aside and have declared as prejudicial and unconstitutional, adverse findings made against him in an investigation which was commissioned by the second respondent. The first respondent was appointed to conduct such investigation. The applicant invoked the provisions of section 33 and 38(a) of the Constitution read with the provisions of PAJA. The relief sought is the following:

"1. It is declared that the adverse findings and/or negative remarks and/or conclusions made by the first respondent against the applicant in the report titled "THE GREAT BANK HEIST" are prejudicial to the applicant and unconstitutional.

2. The adverse findings and or remarks and/or conclusions made by the first respondent against the applicant in the report "THE GREAT BANK HEIST" are reviewed and set aside.

3. The following finding/remarks/conclusion in paragraph 80 of the first respondent's report is expunged /deleted from the record:

"It is clear that Msiza intervened on numerous occasions when his political influence was required. I have little doubt that Matsepe, despite his self-importance and bluster, in fact works for Msiza."

4. It is directed that the following paragraphs are expunged/deleted from the first respondent's report and the first respondent should take such steps necessary to expunge/delete the following paragraphs from the report:

4.1 paragraph 72

4.2 paragraph 73

4.3 paragraph 80

4.4 paragraph 81

4.5 paragraph 90 "

[2] The first respondent is cited in his official capacity and the application was opposed, only the second respondent deposed to an answering affidavit.

[3] Having received the record of proceedings in terms of Rule 53 of the Uniform Rules of Court the applicant amended its notice of motion and filed an amended notice of motion and supplementary affidavit in terms of Rule 53(4). Paragraphs 1 – 4 of this notice of motion are similar to the initial one and the following prayers were added:

"5. It is declared that the first respondent's failure to afford the applicant the right to procedural fairness (*audi)* prior to the release of the report titled "THE GREAT BANK HEIST" is unlawful and unconstitutional.

6. It is declared that the findings, remarks and conclusions made by the first respondent against the applicant in the reports are unlawful and unconstitutional.

7. It is declared that the first respondent's failure to afford the applicant opportunity to be heard during the investigation phase is unlawful and unconstitutional in that it violated the applicant's rights in terms of section 34 of the Constitution.

8. It is declared that the first respondent's failure to file the full (un-redacted) record is unlawful and unconstitutional in that it violated the

applicant's rights in terms of section 34 of the Constitutional.

9. The first respondent is directed to make a public written apology to the applicant."

BACKGROUND

[4] VBS Mutual Bank ("VBS") was established in 1982 and initially operated as the Venda Building Society which had various branches in Limpopo. The financial services it offered consisted mainly of taking deposits from 'retail depositors, burial societies, and served the communities around Limpopo. During 2014 VBS changed its traditional reliance on small depositors and it adopted a strategy where large short term deposits from municipalities were accepted in a scheme titled the "commission-agent" scheme. Deposits made by municipalities into VBS ''attracted payment of a "commission" or "consultation fee" to those individuals responsible for soliciting such deposits, be it municipal officials or consultants. VBS received deposits of some R3.4 billion from municipalities.

[5] As a result of the scheme and mismanagement within VBS, an amount of about R2 billion was siphoned from accounts held with the bank. Upon the recommendation of the second respondent the Minister of Finance placed VBS under curatorship. This was occasioned by a liquidity crisis faced by VBS over a period of eighteen months before such curatorship. VBS was unable to repay deposits made with it when legally obliged to do so. As a consequence of the curator's report the first respondent was appointed in terms of section 134 of the Financial Sector Regulation Act 9 of 2017 ("FSR ACT").

[6] The first respondent's mandate was to investigate certain allegations of impropriety in the VBS Bank and, powers for investigation were conferred in terms of section 136 of the FSR Act coupled with section 139, which obliged a person to

cooperate with the investigation. The investigations took various forms and, in the process certain individuals from within VBS and outside were interviewed. They were the source of information which revealed the names of certain individuals in the activities which were being investigated. The applicant was mentioned in the report compiled by the first respondent and his complaint is against certain content in the report relating to him.

[7] Apart from being a businessman, the applicant avers that he has been a member in good standing of the African National Congress ("the ANC") for a period spanning 35 years. He was appointed to certain positions of the ANC in the Limpopo Province, as a member of the ANC's PEC in 2014; as Provincial Treasurer replacing the late Ms Thembi Nendomudzi in 2015 and he was re-elected into the same position during 2018. After taking up the position as Provincial Treasurer, in late 2016 or early 2017 he was introduced to senior executives of the VBS bank, in particular the Chairman thereof by His Excellency King Toni Ramabulana Mphephu. It was at this meeting where the Chairman gave a presentation of the Bank's profile, its track record as a bank which affirmed mainly black owned businesses and, at times advancing bridging finance to entrepreneurs to enable them to execute on their involvement in ventures with government entities such as municipalities. The Bank also provided short term loans to municipalities which were in financial distress.

[8] The applicant contends that he was immensely impressed by this portrayal of a growth trajectory and a vision of launching black people 'as serious players in the financial services sector.' It was also from 2014 when municipalities started investing with VBS Bank. Prior to 2017 neither the Auditor -General ("AGSA") which annually audited the municipalities nor Treasury, which received monthly budget statements from municipalities in term of section 7 of the Municipal Finance Management Act 56 of 2003 ("MFMA"), regarded these investments as unlawful. In as far as the Vhembe District Municipality was concerned the Provincial Treasury of the ANC and COGSTA had seconded to municipality the Chief Financial Officer and Municipal

Manager who made investments with VBS Bank. The applicants stated that he made a conscious decision to support this emerging Black Bank and took out a bond for an immovable property, which loan he is presently servicing.

[9] The applicant contended that section 136 to 140 of the FSR Act was intended to ensure fairness in the investigation and, in the gathering of evidence from those supplying about those individuals allegedly implicated in such improper conduct. This he contended obliged the first respondent to observe the rules of natural justice to afford anyone implicated, the opportunity to appear in person to deny of admit the allegations in the evidence so gathered.

[10] This application was launched as a result of adverse findings/remarks and conclusions drawn by the first respondent, as appeared in his report annexed as "MDM1." The applicant contends that the said report was scandalous and, as a result he has suffered serious reputational damage as a citizen of the Republic, as a father, husband, political figure, a businessman. The report also caused untold distress to his family friends and colleagues. His wife and children have been tormented by the false defamatory claims and he fears for his personal safety. The findings, that he was 'the "kingpin of the "so called Commission agent" scheme and that one Kabelo Matsepe worked for him, that he had used his political influence on numerous occasions were false.

[11] The applicant contended that reference to him as 'kingpin' who has 'facilitated bribes to municipal officials with no 'shred of empirical evidence' infringed his constitutional right to freedom of trade as a businessman and, he has a 'reasonable apprehension of the prospect of financial ruin and loss of confidence by financiers and potential business partners if the adverse remarks/ findings are not expunged. The first respondent should have foreseen that a damage to his good name would affect his standing as a businessman and dent his standing as a political figure. As a result of the report and negative media coverage he has been subjected to attack by

some individuals in the veterans' league and youth league of the ANC in Limpopo; and to scrutiny by the integrity commission of the ANC; there were groups who picketed outside the head office of the Province in Limpopo, all calling for his resignation and /or his expulsion. The applicant stated that he was disappointed by the transgressions at the VBS bank and, he felt that his trust and confidence in what would have been a great success story was betrayed by the conduct of some of the executives at VBS.

THE VBS INVESTIGATION REPORT

[12] The report was published on 5 October 2018 on the website of the Reserve Bank. The applicant avers that for a few days thereafter the first respondent was engaged in giving audio and visual interviews in the media and that he accessed some of them. He was particularly perturbed by one interview held with Steven Grootes on SAFM on 12 October 2018. He contends that as investigator and having submitted his report to the second respondent the first respondent could not *ex post facto* justify his report on his findings, he was *functus officio.*

Impugned paragraphs of the report

[13] According to the applicant his name was mentioned in the report and an insinuation made as a wrongdoer in the subheading "the commissions and bribes paid" and the first respondent, in his interview with Steven Grootes confirmed that the applicant was implicated.

[14] Paragraphs 67 deals with the evidence of Mr Ramavhunga which reflects on Banks paying commissions to middlemen who bring business to the bank, however, the first respondent fails to mention whether he rejects the notion that middlemen were paid a commission by big banks for soliciting deposits from a "client" and, that

such commissions do not constitute a bribe. Gundo Wealth Solutions ("Gundo") was one such middleman for the VBS Bank and for other banks such as Standard Bank, Sanlam, Liberty, Absa Bank and First National Bank. The applicant contended that the first respondent in his interview with Steven Grootes wished to embellish his report by stating that the commissions were bribes. It is not clear whether the first respondent suggested in this interview that other institutions were paying bribes through commission earned by Gundo. Furthermore, there were other VBS middlemen referred to in the report and the first respondent does not explain why he singled out only one going by the name Matsepe, as having received commissions and, the report does not mention how many municipalities Matsepe had introduced and was paid a commission.

Irrationality

[15] At paragraph 72 the first respondent states that following upon a publication in the Citizen on 22 May 2018, Mukhodobwane, although stating that he was in fear for his life, he reluctantly named applicant as the kingpin in the commissions scheme. At para 80 the first respondent accepts Mukhodobwane's version despite evidence at para 74 by Matsepe which tells the story on how he was introduced to VBS. This showed that applicant was not instrumental in introducing Matsepe to VBS. Instead Matsepe's introduction to VBS came about when his intervention was sought by the Municipal Manager of Capricorn District Municipality ("Capricorn") in a matter about the release of certain monies invested by Capricorn with VBS. In paragraph 78 the report states that Matsepe was introduced by one Matodzi to do consulting for the VBS and, this entailed introducing other municipalities at a commission calculated at 2% per annum per transaction. It was Matsepe's company, Moshate Investments Group (Pty) Ltd ("Moshate") which was contracted as the middle man. The applicant contends that the first respondent has not reported on anything which linked him to VBS and Matsepe and the municipalities which made investments with VBS. Therefore, the finding that Matsepe worked for him, and that he, applicant, played a

significant role in soliciting these deposits and that he used his political influence, was irrational.

Paragraphs 81 -91

[16] It is recorded by the first respondent at para 81 that according to the evidence of Ramavhunga, Matsepe was introduced by the applicant (Msiza). This contradicts Matsepe's own evidence. No explanation is given why Ramavhunga's evidence is preferred.

[17] The applicant contends that nowhere in the details relating to the bribes paid to municipal officials as appears in para 82 to 86 is his name mentioned or is he implicated. The applicant denies knowledge of these transactions. After the Limpopo Elective Conference of June 2018 he released a media statement. The statement was specifically incorporated into the founding affidavit. It details among other things his response to the allegations and his complaint about not having been given opportunity to state his version by the first respondent and the media.

[18] The applicant states that he knows Matsepe, that they originate from the same area Ga-Sekhukhune and that they conducted business together which precedes Moshate's involvement with VBS. Moshate and VBS' relationship is regulated by a contract which was alluded to by the first respondent in para 78. He denies any financial interest with Moshate, he denies that Matsepe worked for him. The findings and remarks regarding commission agent scheme and of him being the kingpin were irrational and fall to be set aside.

WhatsApp messages

[19] The applicant contends that the whatsapp messages retrieved from Matsepe's phone dealt with in paras 88 to 90 of the report were messages

exchanged between Matsepe and other persons other than himself, therefore any remarks or findings reliant upon these messages amounted to inadmissible evidence and such findings were irrational.

Procedurally unfair conduct / Sections 6(2)(c) and 6(2)(a)(i)(ii) of PAJA

[20] The applicant contends that the first respondent's remarks /findings and conclusions in his report fall to be reviewed and set aside in terms of the sections relied upon of PAJA stated above and in terms of the Constitution. The first respondent failed to observe the *audi alteram partem* rule.

[21] The applicant contends that the first respondent failed to ensure that he was procedurally fairly treated as required by section 33 of the Constitution, and section 3 of PAJA. The first respondent failed to comply with the FSR Act in as far as it related to him in particular sections 136 and 139, which empowered the first respondent to invite persons and to collate evidence. Furthermore, the first respondent was biased against him as appeared in the answers he gave *ex post facto, to questions posed by Steven Grootes on* SAFM on 12 October 2018. The applicant refers to three questions about (i) what the first respondent found against the applicant and what role he played;(ii) if he thought applicant had broken the law; (iii) the reason why applicant was not interviewed.

[22] The applicant contended that the first respondent had conceded that he had consciously decided not to afford him an opportunity to be heard. He maintained that the content of the replies to the questions given by the first respondent were not in his report and; the outcome of the investigation was therefore " predetermined and motivated by political consideration." The excuse given that he would be answerable to the prosecuting authorities fails to take cognizance of the damaging nature of the remarks and findings.

SUPPLEMENTARY AFFIDAVIT

The incomplete record

[23] The first respondent filed his reasons and record in terms of Rule 53 of the Uniform Rules of Court on 11 December 2018. The applicant contended that the record was redacted, in particular in respect of those portions which related to him. A request was made for a complete record and the missing pages were identified. In reply by the respondents' attorneys he was informed that he had no entitlement to the redacted portion of the record, inclusive of the missing pages of the transcript, because they did not relate to him and that they had no relevance to the matter.

[24] He contended that it was inconceivable that where the entire investigation was geared at finding wrongdoings in persons like himself who is described as being the kingpin, that the redacted parts would have nothing to do with him. The applicant contends that the content of the letter was untrue and the denial to the complete record without any justification was prejudicial to him and, violated his right to access to information as entrenched in section 32 (1) of the Constitution.

[25] According to the applicant there was no basis in law for the respondent to file a redacted record. It was not for the first respondent to determine what was relevant or not to him to exercise his rights. His right to access to the record had nothing to do with the Promotion of Access to Information Act 2 of 2000 but it stemmed from Rule 53 read with sections 32, 33 and 34 of the Constitution.

The first respondent's reasons.

[26] The first respondent's reasons and the transcript of the record which were filed do not explain or give reasons why despite his name being referred to on several occasions, he was not entitled to defend himself. The applicant contends that

he had to be afforded an opportunity to rebut any oral or documentary evidence placed before the first respondent, before negative findings against him were made. He maintained that it was not within the prerogative of the first respondent to suggest that his evidence or representations would not have carried weight. He contended that the obligation to be given an opportunity to rebut evidence against him arose as soon as the first respondent became aware that he was being implicated by witnesses and documentary evidence. If the first respondent was pressed for time, he would have at the very least made written representations for consideration by him. His basic Constitutional right to procedural fairness as enshrined in section 33 of the Constitution and section 6 of PAJA was thereby infringed. He was advised that he was not obligated to respond to such negative findings and that they carried no weight. Therefore, any belated attempt to justify the findings had to be rejected by the court.

[27] The applicant reiterated the prejudice and suffering endured by him personally and by members of his family, the daily public torment, harassment, as a result of the negative findings and reference to him as the kingpin of the scheme. He was continuously being subjected to unfair and extremely negative media coverage and public platforms where he is referred to as the VBS looter. His reputation as a hard working businessman has been destroyed. It was very painful to see the ANC integrity commission adopting the same attitude of denying him the opportunity to be heard, thereby forcing him to step down from his position with the ANC without due process. This was despite the presence of many leaders in the ANC who still hold office while facing allegations of serious impropriety. The applicant alleged a political conspiracy behind the continued attack against him and questioned the reasons for the investigation.

[28] According to the applicant, had he been approached by the first respondent he would have co-operated in order to give explanations, such as those pertaining to the history behind his business and family association with Mr Matsepe and, the

reasons behind the nominal payment to his bond account from one of Mr Matsepe's entities. He denied having taken any money from VBS nor did he receive any payment from any source not due to him. No reasons were furnished why the evidence of those witnesses who did not implicate him was rejected. The applicant contended that the first respondent's findings and remarks were irrational, not borne out by the evidence and instead were 'deducted from inferences and innuendoes."

[29] The answering affidavit was deposed to by Mr Kuben Naidoo Deputy Governor of the South African Reserve Bank and Chief Executive Officer of the second respondent. He was responsible for the appointment of the first respondent to conduct the investigation into VBS. The first respondent had to establish certain facts and to follow up with recommendations on steps to be taken. He had to establish whether or not:

> "business was conducted to defraud depositors or any creditors of the bank or any other fraudulent conduct;
> VBS' business conduct involved questionable and/or reckless business practices or material non-disclosure, with or without the intent to defraud depositors and other creditors; and
> there had been any irregular conduct by VBS shareholders, directors, executive management, staff, stakeholders and/or related parties;"

Interviews as contemplated in section 136 of the FSR Act were conducted with several individuals; the forensic investigators analysed documents and data stored on cell phones, computers, financial transactions and bank statements of those implicated in the misappropriation to funds, as well as the analyses of documents obtained during search and seizure operations at the VBS' offices and branches.

[30] As a consequence of the investigation the first respondent compiled a report in which he concluded that there was large scale looting of monies deposited with

the bank; bribes were paid to directors of VBS and other parties; VBS went on a drive to attract substantial deposits from municipalities and state entities, which included payments of commissions to those responsible for soliciting the said deposits; the banking systems of VBS were manipulated to create fictitious deposits in favour of Vele Investments Limited ("Vele"), its associates and related parties; and overdrawn facilities running into millions of Rands enjoyed by Vele's associates were obliterated and, the said associates went on a massive spending spree at the expense of VBS' depositors. Overall, 53 persons were identified in the investigation as having "gratuitously" received payment from VBS to the tune of R1 894 923 674.

[31] The *prima facie* findings made of involvement against the applicant, as recorded in the report were based on information provided by certain individuals. The information is alleged to be supported by cogent documentary evidence, including bank statements which reflect amounts received by the applicant or companies associated with him. In the report it was suggested that the applicant was implicated in the commission agent scheme and it is said that the WhatsApp messages sent between the applicant and Mr Matsepe confirm receipt of monies emanating from the municipalities and the distribution of payments to consultants and municipalities.

[32] Of importance and material to the complaint says Mr Naidoo, is to draw a distinction between the said inferences or *prima facie* conclusions and statements made to the investigator. Furthermore, he does not persist or expand his complaints based on bias, rationality and reasonableness in the supplementary affidavit. He has also not responded to the substance of the *prima facie* findings and reasons for them to make substance of his complaint as one challenging procedural fairness, by attacking the alleged incomplete record.

The Record of Complaint

[33] It is contended that this complaint was without merit and should have been

raised in terms of Rule 30 or Rule 30A of the Uniform Rules of Court, on the basis that the record filed was irregular or that it failed to comply with the requirements of Rule 53. Further, it is stated that the applicant accepted the record as it stood. He failed to object to the adequacy of the record and filed his supplementary affidavit instead. The applicant has also not suggested that Rule 53 was inadequate to protect his constitutional rights, it was contended that he was barred by the principle of subsidiary to rely directly on section 32 or 34 of the Constitution and the provisions of section 7 of PAJA.

[34] According to Mr Naidoo there was compliance with the requirements of Rule 53 and that in terms thereof, applicant was entitled to the record and reasons underpinning the impugned statements. He contended that the applicant was not entitled to any documentations and statements not related to him and, that there were no constitutional violations entailed in this approach. He contended that even if the record was incomplete it was reasonable and justifiable under the law of public interest and privilege to limit access because (i) the investigations had triggered criminal investigations and follow-up proceedings against those implicated, (ii) any disclosures might prejudice the investigations and proceedings and compromise witnesses (iii) the second respondent was entitled to safeguard itself against risks associated with disclosure. It was contended that the applicant was therefore not entitled to the relief sought in prayer 8 of the amended Notice of Motion.

The Review Relief

[35] It is contended that the review relief is not properly sought and/or cannot be completely granted in that the relief sought was incompetent, as it seeks to expunge statements made to the investigator during interviews with individuals mentioned therein, as well as WhatsApp messages and or conversations made in their respective capacities. Their recordal and production does not entail the exercise of public power or administration or involve the exercise of a discretion that can be

reviewed. It was not contended that the statements were not made during interviews and that the transcript of WhatsApp messages were not disclosed to the investigator, and if the complaint was against the disclosures and making of statements, then his recourse was against those responsible but not by way of review. Furthermore, that the investigator's *prima facie* views and conclusions 'had no direct external legal effect' that would render them reviewable as administrative action or at all.'

[36] It was stated that the *prima facie* views were non-binding and there was always indication in the report that acts of criminality had been discovered in the affairs of VBS which had to be referred to prosecution and, recommendations were made for further investigation by law enforcement authorities for crimes reported. If the recommendations were accepted by the authorities, then an investigation by them according to their statutory and constitutional mandates would follow. It was contended that if any proceeded against the applicant, he would only then have an opportunity to vindicate his rights. The impugned statements were therefore not reviewable under PAJA or the doctrine of legality. However, should the impugned statements be found to be reviewable that would only be the case under the doctrine of legality, which entails issues on rationality, bias and lack of constitutionality. It was further contended that the applicant had other remedies available in seeking damages for defamation against the person interviewed or the Authority if the law permitted the latter. Consequently, the relief under 1,2,3 and 6 of the amended notice of motion stands to be dismissed.

Rationality and reasonableness of impugned statements

[37] The second respondent addressed the content of the information collected during the investigation and on which it states there were rational and reasonable grounds for making the impugned statements. The second respondent invites the applicant to deal with these issues and evidence in his replying affidavit. The impugned statements were with regard to:

- The applicants mortgage facility and his interest in Moshate: Mojovax (Pty) Ltd ("Mojovax") is a company where the applicant and his wife are directors. A mortgage was obtained from VBS for R9,5 million and it is alleged that the process of the grant of the facility was hurried by the CEO of VBS, Ramavhunga because "*its very important that we are diligent about this, its for the Limpopo treasury TG*", e.g no proper application was made and an incomplete application form was found during the course of investigation. Furthermore, it is contended that there was evidence which was revealed from the bank statements of Moshate that the applicant was associated with Matsepe and that he had an interest in Moshate. Moshate's bank statements reveal that soon after it was paid by VBS, payment was by Moshate to Mojovax. These payments were made intermittently between 11 July 2017 to 29 March 2019. A further connection is said to be established in the emails and WhatsApp messages between VBS treasurer Mukhodobwane and Matsepe

- The applicants involvement in the scheme: It was contended that the WhatsApp messages between the applicant and Matsepe and between the latter and other municipality employees, mayors and managers; the evidence in the interviews of Ramavhunga and Nemabubuni and Matsepe the evidence of;

<u>Bias and the unfair Procedure</u>

[38] It is contended that the applicant failed to set out the basis for the alleged bias nor set out the grounds on which such bias was apprehended.

It was stated that the investigation did not constitute administrative action but was at most the exercise of public power. In as far as the procedure was concerned, the investigation was a preliminary step which did not attract legal consequences. Section 136 of the FSR Act did not obliged the investigator to interview every person mentioned or implicated in the course of investigation.

Furthermore, it was contended that the applicant failed to prove that the failure to afford him a hearing rendered the findings and impugned statements irrational, they were merely recommendations that further investigations had to be conducted and, the failure the afford the applicant a hearing during the investigation did not infringe any constitutional rights.

[39] In reply the applicant stated that he had not sought any order against the second respondent and, that the allegations in the answering affidavit did not fall within the personal knowledge of Mr Naidoo. His evidence amounted to hearsay. The first respondent had not filed a confirmatory affidavit.

[40] The applicant denies that the findings were related to evidence either oral of documentary obtained from the witnesses only. He reiterates his right to have been called to rebut any '*prima facie finding*' against him. The findings against him were conclusive and even if *prima facie* they were hurtful and had the effect of damaging his dignity and reputation and those findings were clearly stated in paragraph 37 of the answering affidavit. He gave an example of the conclusions reached about Moshates's payment of some of Mojovax bond repayments, that he would have explained that those payments were for setting up Matsepe's company BAUBA 911 and other operations. The applicant contended that the second respondent had

misconstrued the issues. He reiterated that the challenge was not against what was said by those interviewed, that is, the recorded evidence, it was against the findings, remarks and conclusions arrived at by the first respondent without ?????/

THE ISSUES

[41] Primarily, the issue is whether the paragraphs complained about which contain what is described as findings, remarks and conclusions are reviewable under the Constitution and PAJA, on the basis that the first respondent had made adverse findings against the applicant without affording him an opportunity to be heard. Another issue is whether the applicants right to access to information was infringed under section 32 of the Constitution and thus hampered his desire to vindicate his constitutional rights through this application thereby undermining section 34 of the Constitution. Furthermore, applicant contends that the issues complained about are not within the personal knowledge of the second respondent and, that an attempt by the second respondent in the answering affidavit to answer those allegations amounted to hearsay and were therefore inadmissible. The remaining orders sought will depend upon a finding on these issues.

THE INVESTIGATOR'S MANDATE (FIRST RESPONDENT)

[42] The first respondent was appointed as one who had the appropriate skills by the second respondent (the financial sector regulator), in terms of sections 134 and 135 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act"), to exercise as an investigator any power or perform any duty in terms of the Act. He was given wide powers, to mention but a few, being the power to investigate as provided for in sections 136, which includes the power to collect information; to require any person who is reasonably believed to have information to provide same either orally, under oath or affirmation; to produce documentation, to take possession and retain such documents, and, which includes the right of an individual who is being questioned to have legal representation. Section 137 provides for search and seizure with or

without consent and also by means of a warrant for purposes of securing any information that may assist in the investigation. The first respondent exercised these powers on behalf of the second respondent. Evidence and documents including WhatsApp messages were secured from those employed by VBS and information was according to the record also obtained from individuals who were not in the employ of VBS.

Are the findings, remarks and conclusions reviewable

[43] It was contended for the applicant that the findings, remarks and conclusions were reviewable under sections 6(2)(a(i)(ii) of PAJA and the Constitution, primarily on the basis that the first respondent had made adverse findings against the applicant without affording him an opportunity to be heard. On the other hand. it was contended for the second respondent that the findings, remarks and conclusions were merely a recordal of witness statements and, a summation of WhatsApp messages and bank statements which did not constitute decisions to be reviewed or set aside under PAJA or the doctrine of legality. In this regard it was contended for the second respondent that the first respondent merely expressed a *prima facie* view and made recommendations neither of which were binding on the Authority. In order to answer the above question the following one below needs to be considered.

Can the applicant insist upon a procedurally fair procedure and does the FSR Act contemplate the involvement of the applicant in the investigation stage?

[44] It was contended for the applicant that the first respondent had failed to comply with the procedure in the FSR Act by failing to afford the applicant his right to be heard. The second respondent contends that the applicant does not have a general right to be heard and that there is a general misconception that it is a requirement of natural justice to afford interested parties the right to be heard during an investigation.

[45] It was contended for the applicant that the requirement for a fair procedure had been endorsed in a plethora of decisions of our courts including the Constitutional Court. In *Pharmaceutical Manufacturing Association of SA & Another: In Re Ex Parte President of the Republic of South Africa and others* 2000(2) SA 674 (CC) at para 85 Chaskalson P stated:

> " It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action"

[46] In *Masetlha v President of the Republic of South Africa & another* 2008(1) SA 566 (CC) para 75 is stated that the audi alteram partem principle derives from the tenets of natural justice which are rules of fair procedure, "It is inspired by the notion that people should be afforded a chance to participate in the decision that will affect them and more importantly an opportunity to influence the result of the decision."

[47] In *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC) the court stated the following about the right of the victims of apartheid crimes and where the President, was considering a special dispensation for pardon to applicants convicted of politically motivated offences: para [17]:

> "What was in issue there was whether the decision to exclude the victims of these crimes from participating in the special dispensation process was irrational. Ngcobo CJ confirmed that under the rule of law, the test to be applied was whether the President's decision to undertake the process

> without affording the victims opportunity to be heard, was rationally related to the achievement of the objectives of the process. If not, the decision could not pass constitutional muster."

[48] Counsel for the second respondent places reliance on what was described as the "core of the definition of administrative action" as laying emphasis as to what should only be considered as constituting 'administrative action (a decision)' as discussed in paragraph [22] in *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and others* 2005 (6) SA 313 (SCA). I do not understand Nugent JA to mean that 'administrative action' is limited to such conduct as defined in PAJA only. In paragraph [21] Nugent JA defined administrative action as follows:

> "Administrative action means any decision of an administrative nature made.....under an empowering provision [and] taken.....by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct or external legal effect."

[49] Section 33 of the Constitution imposes a duty on the state to give effect to lawful, reasonable and procedurally fair administrative action and as given effect to in PAJA. In both instances this is a requirement that has to be fulfilled where, the action or decision has the potential to adversely affect the rights of an individual. It also gives a right to reasons for such decision. Conduct that has the capacity to adversely affect the rights of an individual can be equated to administrative action. The Constitution in terms of section 2 thereof is the Supreme law in South Africa and any conduct that infringes the legal rights entrenched in the Constitution would be inconsistent therewith and therefore invalid and reviewable. Section 3(1) of PAJA provides that "administrative action which materially and adversely affects the rights or

legitimate expectation of any person must be procedurally fair."

[50] In our new constitutional order, where individual rights are entrenched in the constitution, an individual would have a right to insist upon such right being applied and recognized in as far as it relates to him or her. It is therefore trite that the both the Constitution and PAJA protects the individual against unfair administrative action.

[51] It was contended for the applicant that the first respondent made definite findings which cannot be said to be mere recommendations. It was contended for the second respondent, relying on *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 that it was "unlikely that an investigation which excludes a determination of culpability could itself affect the rights of any person in a manner that has a direct and external legal effect." The facts in my view are distinguishable because in Viking no proper investigation by a competent, skilled person appointed by the City was conducted to investigate the complaint. The question of a direct and external legal effect did not therefore arise.

[52] As to the meaning of 'a direct and external legal effect' I look to Nugent JA's definition in Greys Marine *supra* at para [23] where he stated the following:

> "While PAJA's definition purports to restrict administrative action to decisions that, as a fact, adversely affect the rights of any person'. I do no think that the literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsistent with s 3(1) which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with this requirement that it must have a 'direct and external legal effect, was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in

> tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

[53] The submission advanced by counsel for the applicant in his reliance on Magidiwana and Others v President of the Republic of South Africa and Others (37904/2013) [2013] ZAGPPHC, is in my view what is discussed by Makgoka J from paragraphs [33] – [37] of the judgement. In paragraph [36] he stated:

> "Of course, all of these were in the context of procedural fairness inside the proceedings of committees or commissions, which is not the case in the present application. However, I can see no reason why they should not be applicable with equal force, to a case such as the present, where, similarly, the rights of persons including those of the applicants are potentially in danger of infringement. The common denominator is the recognition that, committees and commission like the Marikana commission have the power to make far-reaching findings and recommendations, which carry the potential prejudice to rights of individuals and corporations, the bearers of which are entitled to protect, even at that investigative stage."

Makgoka J cites with approval the position crisply summed up in LAWSA vol.2 part 2 para 169. Although it is the position prevailing in a commission of enquiry, I am of the view that it aptly describes the position prevailing which the applicant is concerned about where it is stated in the LAWSA extract quoted:

> "……..In addition, a commission's report may accuse or condemn persons who may then be subjected to civil or criminal proceedings. The whole process, it has been held, is potentially prejudicial to a person's rights of personality."

At paragraph [37] Makgoka J stated:

> "In the context of the present application, it is of no consequence that the

> commission is not of a judicial or quasi-judicial nature. That does not, in my view, place the Commission outside of the scope of s, 34 of the Constitution, At conceptual level the general proposition that the proceedings of commissions of enquiry fall outside of the scope of s. 34 at the outset, is, to my mind, an over-simplification of a complex situation involving constitutional rights and a distinct possibility of those rights being adversely affected by the outcome of the commission."

Even if *Magidiwana supra* concerned a commission of enquiry and that here we are dealing with an investigation, it is important in the interests of justice to extend the principle of the rule of law and rules of natural justice even to those individuals who are suspected like in this instance of wrongdoing by the investigator, being the individual's right to be heard before adverse findings, remarks and conclusions are made in investigations such as the one envisaged in sections 136 and 137 of the FSR Act. There is not merit whatsoever in the argument that the affected individual shall have the opportunity in proceedings which might be engaged in the future to clear his or her name; or that he or she may have recourse to a claim for damages.

[54] It was contended for the applicant that a case had been made out in terms of PAJA as well as the Constitution. While it was contended for the second respondent that the investigation and the findings that followed did not amount to administrative action, it was conceded that at most public power was exercised. From the above case law it is evident that public power is reviewable and, whether an administrative action stems from the PAJA or the exercise of public power both entail a requirement that a fair procedure which encompasses a right to be heard. For example, the content of the WhatsApp messages with the name of the applicant may have caused or resulted in a suspicion that the applicant had a role in the impropriety at VBS, as an investigator the source, and content had to be verified and no explanation is given why the version on the applicant was not obtained. An investigator in the position of the first respondent, was in my view obliged to ensure that the rule of law, the rules of natural justice were observed as provided for in section 33 of the Constitution and

section 3 of PAJA. It is a duty placed on him as the investigator even if the Authority would not have implemented any of his recommendations after receiving his report.

[55] In my view where an investigator knows or is expected to foresee that his findings, remarks and conclusions will have consequences for the party on whose behalf an investigation is conducted and for the party against whom findings will be made, he is obliged to listen to both sides and, the partly who is likely to be affected by adverse finding is entitled to demand the right to be heard before an adverse remark or finding conclusion or decision is made against him or her. The advantage that the first respondent had is that he came into the picture when the curator had already investigated some of the irregularities at VBS, the first respondent was expected to expand his investigation to involve also those individuals who colluded with the employees at VBS and who could give more information on such activities. Several people who were interrogated were not employees of VBS like Mr Matsepe.

[56] According to the applicant findings were made which adversely affected him. This was not directly disputed by the second respondent. The second respondent instead invited the applicant to respond in his replying affidavit, which was not an appropriate proposition to make. In my view, it is like asking the applicant to now present the answers which he could have given to the first respondent during investigation, without the benefit of having his evidence being evaluated together and at the same time with all the evidence of the witnesses before adverse findings and recommendations were made to the second respondent. At this point the first respondent was functus officio he could not be engaged now by the second respondent to give clarity on any version given in a replying affidavit. Another question is what would happen if the response in reply requires another response, how would the issue of disputed facts be resolved as a result of such invite by the second respondent. Would the second respondent consider the reopening of an investigation to address these concerns. These are issues which were not addressed in the application. In any event such invite does not cure the complaint,

which was a failure on the part of the first respondent invite the applicant to respond to the allegations made against him before any report on the investigation was presented to the second respondent.

Does the redacted record amount to an infringement of the applicants right to access to information in terms of section 32 of the Constitution and to an infringement of section 34 of the Constitution.

[57] Section 32 of the Constitution provides for access to information that is required to exercise or protect any right and, national legislation had to be enacted to give effect to the rights under this section. Section 34 of the Constitution provides that everyone has a right to have any dispute that can be resolved by application of law decided in a fair public tribunal. In terms of Rule 53 the report and record in the form a transcript and other documents were provided to the applicant.

[58] It is common cause that after receipt of the record the applicant engaged the respondent by way of correspondence to the attorneys of the respondents with a request to be provided with a full record. There was acknowledgment that the record had been redacted, with an explanation that the redacted portion did not relate to the applicant.

[59] The second respondent contends that an order declaring that its failure to file a full unredacted record unlawful and unconstitutional is without merit. The second respondent raises several issues among which is the failure to identify which information ought to have been in the record was excluded. Three other issues were raised in response to the applicants attempt to invoke section 32 and 34 of the Constitution. These are articulated in counsel's heads of argument. First is the applicant's failure to issue notices in terms of Rule 30 and or Rule 30A of the Uniform Rules of Court and an application to compel if the defect is not rectified. The second is that the applicant accepted the record and filed a supplementary affidavit

which showed that the applicant suffered no prejudice as a result of the form in which the record was filed. The third was that there was no complaint that the Rule 53 was inadequate to protect the applicant's constitutional rights. The applicant's reliance on sections 32 or 34 of the Constitution cannot arise because of the principle of subsidiarity and the provisions of section 7 of the Promotion of Access to Information Act 2 of 2000," ("the PAIA")

[60] I prefer to deal first with the redacted record in as far as it related to the evidence of the witnesses evinced in the transcript. I am not in a position to deal with the other formal documents because, except for demand for the missing pages the applicant has not identified which if any in particular have not been provided. With regard to the transcript there exists pages where the content has been blocked out, there the applicant has failed to demonstrate how he was prejudiced thereby in relation to this application. I agree with the second respondent that the correct approach would have been to follow the Rule 30 and or Rule 30A notices route before filing the amended notice of motion and supplementary affidavit

[61] In his supplementary affidavit the applicant contended that this request for an unredacted record had nothing to do with a request under PAIA. However, his counsel relies on *Brummer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) and the pronouncement by Ngcobo J, of the need for "an open and transparent government and the free flow of information concerning the affairs of the state," that everyone had a right to access any information that is held by the state. The facts were distinguishable in that Brummer, a journalist had applied for access to information to enable him access to information held by the respondent which was intended for reporting on it. His application was a challenge to the limitation in the period for launching an application for access imposed in section 78(2) of the PAIA. He contended that such limitation violated his right to access to information and access to court in terms of section 32 and 34 of the Constitution.

[62] In this matter the applicant did not launch an application for access to

information in terms of PAIA. I am more inclined to be in agreement with counsel for the second respondent, that the issue raised of access to information had more to do with the application of the principle of subsidiarity and, he relied on the application of the principle as espoused in *My Vote Counts NPC v Speaker National Assembly and Others* (CCT 121/14) [2015] ZACC 131. In that matter the majority and minority judgements endorsed the application of the doctrine of subsidiarity articulated in paragraph [160]. The application of the doctrine where access to information was sought, was that litigant should not be allowed to rely directly on a fundamental right contained in the Constitution, where legislation had been enacted to deal with the issue in terms of the Constitution and to give effect to that right, unless there was a challenge to the constitutionality of the legislation. As I understand it, a litigant cannot in a Rule 53 review directly engage a right in section 32 of the Constitution without going through PAIA.

[63] As I see it, and given the complexities in the procedures in PAIA, I would still agree that the Rules 30 and or 30A to be more appropriate because the litigation had already commenced and it is alleged that the second respond failed to comply with the Rule 53 by rendering a complete record to enable the applicant to comply with Rule 53 (4). If this approach had been adopted, the court would in its discretion have ordered the second respondent to provide all information necessary and relevant to the impugned decision to enable him to exercise his right in terms of section 34 of the Constitution, failing which the second respondent would be in contempt. In these circumstances I would therefore not pronounce that the rendition of an incomplete record was unlawful and unconstitutional where applicant relied on section 32 of the Constitution.

<u>Does an attempt by the second respondent to answer to the allegations amount to hearsay where the first respondent failed to file an answering or confirmatory affidavit / the expunging of the impugned findings/ an apology</u>

[64] My view is that the application really concerns the violation of a right to a fair procedure by the first respondent and the failure by the second respondent to file a complete record. I am not called upon to evaluate the truth or not in the affidavits or to consider the justification of the contents of the report by the second respondent in the answering affidavit. Dealing with the truth or not of the facts will require me to determine whether disputes of fact arise, which in my view should be discouraged as a situation that may result in a review application such as the present one. However, where adverse findings remarks and conclusions have been drawn from facts where the applicant has not been given an opportunity to state his side, albeit, in an investigation, I have already dealt with my finding that such right does exist and should have been recognized and applied.

[65] In considering expunging of the impugned findings, remarks and conclusions from the reports would in my view present problems in that the evidence presented orally and documentary remain. The evidence as I see it covers a wide range of issues. The report has been published on the website of the second respondent and has received wide circulation. An order reviewing and setting aside should suffice. Another consideration is that the appropriateness of the investigation by the second respondent was required as of law. It cannot be denied that the evidence unravelled might most probably give answers to the impropriety at VBS or give credence to impropriety as presented to the second respondent, which might culminate in processes by law enforcement agencies and probably civil proceedings against those found to be involved.

[66] The request for an apology is not one that can in my view be considered in review proceedings.

CONCLUSION

[67] In considering the order I intend granting I take into account the extensive issues which were the subject of investigation and, the impossibility of extracting a complete complement of those findings remarks and conclusions complained about. I shall confine myself to those specifically identified in the notice of motion. I am therefore constrained to limiting my order to certain of the prayers only.

ORDER

[68] In the result I make following order.

1. The adverse findings, remarks and conclusions by the first respondent in the report titled "THE GREAT BANK HEIST" contained in paragraphs 72; 73; 80; 81 and 90 are reviewed and set aside

2. The first respondent's failure to afford the applicant the right to procedural fairness (audi) prior to the release of the report titled "THE GREAT BANK HEIST" is unlawful and unconstitutional and violated the applicant's right in terms of section 34 of the Constitution.

3. The second Respondent is ordered to pay the costs including costs of two Counsel where engaged.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**27 FEBRUARY 2020**
JUDGMENT RESERVED ON	:	**27 FEBRUARY 2020**
ATTORNEYS FOR THE APPLICNT	:	**MALULEKA INC.**
ATTORNEYS FOR THE ESPONDENTS	:	**WERKSMANS ATT.**