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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. 38719/2022

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED: NO

DATE: **29 September 2023**

In the matter between:

MEC FOR ECONOMIC DEVELOPMENT,
TOURISM AND ENVIRONMENTAL AFFAIRS,
KWAZULU-NATAL PROVINCE

First Applicant

THE PREMIER OF KWA-ZULU NATAL PROVINCE

Second Applicant

And

THE SOUTH AFRICAN RESERVE BANK
PRUDENTIAL AUTHORITY

First Respondent

THE MINISTER OF FINANCE

Second Respondent

ITHALA SOC LIMITED

Third Respondent

ITHALA DEVELOPMENT FINANCE
CORPORATION LIMITED (REG. NO. 2001[...])

Fourth Respondent

Coram: Millar J

Heard on: 15 September 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 12H30 on 29 September 2023

Summary: Application to review and set aside conditions attached to an Exemption from compliance with the provisions of the Banks Act – legality review – no basis upon which to find that any of the conditions imposed are subject to review – application dismissed with costs.

ORDER

It is Ordered:

[1] The application is dismissed.

[2] The applicants are ordered to pay the costs of the first and second respondents on the scale as between party and party, such costs to include the costs consequent upon the employment of two counsel where more than one counsel was engaged.

JUDGMENT

MILLAR J

INTRODUCTION

[1] For almost three decades, the fourth respondent, the Ithala Development Finance Corporation (Ithala), which amongst other business took deposits from

members of the public, as banks do, even though it is not a bank, sought and was granted, Exemption from compliance with certain provisions of the Banks Act.¹

[2] The most recent of these Exemptions was granted on 22 July 2022 together with certain conditions.

[3] The first applicant, as the main shareholder of the fourth respondent of which Ithala SOC Limited, the third respondent, is a wholly owned subsidiary, takes issue with the imposition of certain specific conditions and seeks to impugn the Exemption on the terms in which it was granted. A previous application brought by the third respondent itself was unsuccessful.²

[4] The first and second applicants, together with the third and fourth respondents, make common cause in challenging the legality of the imposition of the conditions that were attached to the Exemption. For convenience, these four parties will be referred to in this judgment collectively as “Ithala”.

[5] It is the case for the applicants and Ithala that the granting of the Exemption with the specific conditions that are challenged is subject to legal review and that those conditions should be set aside *inter alia* on the basis that their imposition was irrational, done with a lack of *bona fides*, *ultra vires* as well as being unconstitutional and unlawful.

[6] Overshadowing these review proceedings was the argument on behalf of Ithala that in consequence of the conditions attached to the Exemption, ‘*existing clients of Ithala [will], through an arbitrary stroke of regulatory fait join the innumerable in South Africa who are excluded from the formal regulatory banking space and who operate on the fringes of the sophisticated and regulated financial systems in South Africa. This is contrary to the intention and policy of incorporating, rather than excluding, rural communities from such critical banking functions. It*

¹ 94 of 1990.

² *Ithala SOC Limited v South African Reserve Bank and Others* (010146/2022) [2022] ZAGPPHC 784 (14 October 2022).

would be a significant step backwards for rural KwaZulu-Natal with many very real-world consequences that make this highly undesirable.'

BACKGROUND

[7] Ithala, and its predecessors, have their origin in the establishment of the Bantu Investment Corporation Ltd in 1959. This was established for the purpose of development of what were euphemistically called "black areas" within the Republic. A branch was established in the then province of Natal.

[8] Over the passage of time, together with a number of regulatory and other changes, it found itself under the control of the Kwa-Zulu Natal Government operating as the Kwa-Zulu Finance and Investment Corporation Ltd. In 1999, it became the Ithala Development Finance Corporation Ltd.

[9] Ithala is subject to the Ithala Development Finance Corporation Act.³ It is listed as a provincial government business enterprise in Schedule 3D of the Public Finance Management Act⁴ (PFMA).

[10] Ithala is not a bank although it takes deposits. It is only able to continue to do so upon application for and the granting of an Exemption.

[11] The Exemption is granted by the Prudential Authority acting together with the concurrence of the Minister of Finance. The Exemption is to the effect that the deposit taking activity of Ithala is deemed not to constitute *'the business of a bank'* as provided for in s 1(1)(cc) of the Banks Act.

[12] The section provides that the business of a bank *'does not include. . . (cc) any activity of a public sector, governmental or other institution, or of any person or category of persons, designated by the Authority, with the approval of the Minister, by notice in the Gazette, provided such activity is performed in accordance with such*

³ 5 of 2013.

⁴ 1 of 1999.

conditions as the Authority may with the approval of the Minister determine in the relevant notice.'

[13] What is clear is that the decision to grant the Exemption and to impose conditions is within the statutory remit of the Prudential Authority, subject only to the approval of the Minister of Finance. The granting of an Exemption, with or without conditions, is in consequence of the discharge of statutory obligations.⁵ In the present matter, it is not in dispute that the Prudential Authority and the Minister speak with one voice.

[14] The attachment of conditions to the granting of the Exemption is not a recent phenomenon. The granting of an Exemption, together with conditions, has occurred each time an Exemption was applied for and granted since at least 2014.

[15] On 17 January 2022, the Prudential Authority issued an Exemption to Ithala for the period 1 January 2022 up to and including 30 June 2022. This Exemption also contained various conditions.

[16] On 3 June 2022, the Prudential Authority addressed a letter to the CEO of Ithala. The letter was marked "secret" and headed "*Ithala SOC Ltd: Exemption Notice and Proposed Directive*". The letter recorded *inter alia* that "*Ithala remains in breach of conditions attached to the Exemption Notices*" and then went on to specify a number of concerns. These included *inter alia* that the positions of both the Chief Financial Officer as well as Chairperson of the Board had been vacant for three and two years respectively and that the Board of Directors was not '*fully and appropriately constituted and in compliance with the requirements of the Banks Act.*'

[17] The consequence of the failure to comply with the conditions and the concerns raised was that the Prudential Authority:

'... is not able to rely on the regulatory returns submitted by or the accuracy of financial and prudential and regulatory reporting received from Ithala due to

⁵ *S v Weinberg* 1979 (3) SA 89 (A) at 98E and *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) at para [153].

its failure to fill the Chief Financial Officer's position as well as that of the General Manager of Finance which has been vacant since 1 September 2020.'

and

'In addition, Ithala's regulatory returns are frequently late, in non-compliance of Regulation 6(1) read with Regulation 7 of the Regulations relating to Banks, making it difficult for the PA to appropriately supervise Ithala.'

and

'Ithala has also not been able to provide adequate capital commitments or a legally binding renewal of a guarantee over its deposits from its shareholder – Province of Kwa-Zulu Natal.'

[18] The letter went on to record that:

*'The Banks Act **does not provide for a provincially owned entity such as Ithala to apply for authorization to establish a bank.** Consequently, Ithala's continuation of its deposit taking activities will be entirely reliant on the PA's continued issuance of Exemption Notices in terms of the Banks Act. Operation under Exemption is meant to be a temporarily measure that is aimed at assisting qualifying institutions to regularize themselves as a type of financial institution. Ithala has not been able to do that since formation.'*

and

'Furthermore, ABSA Bank Ltd has advised Ithala that it intends to terminate its sponsorship arrangement with Ithala for clearing and settlement in the national payment system, with effect from 31 December 2023.'

and

‘The PA has also been advised by Ithala that the Standard Bank of South Africa Ltd has declined to enter into a sponsorship arrangement with Ithala for clearing and settlement in the national payment system.’

[19] The Prudential Authority then went on to inform Ithala that, subject to any representation it may receive from it, by 21 June 2022, it would not be issuing any further Exemption Notices beyond 30 June 2022. On 20 June 2022, a lengthy letter was sent by Ithala to the Prudential Authority in which it sought to address the concerns raised in the letter of 3 June 2022 and requested reconsideration of the decision.

[20] When no response was received from the Prudential Authority by Ithala, Ithala launched an urgent application on 28 June 2022 to compel the grant of a further Exemption. Prior to the hearing of that application the Exemption, which forms the subject of this application, valid from 1 July 2022 to 31 December 2023 was granted.

THE IMPUGNED EXEMPTION NOTICE

[21] The impugned Exemption Notice was published⁶ on 22 July 2022. In its explicit terms, it provides:

‘The Prudential Authority hereby designates with the approval of the Minister of Finance, under the definition of “the business of a bank” in Section 1(1), paragraph (cc) of the Bank’s Act, 1990 (Act 94 of 1990) that the business of the institution, specified in paragraph 2 of the schedule, shall not be deemed to constitute the business of a bank until 15 December 2023, subject to the conditions set out in paragraph 4 of the schedule.’

[22] The schedule attached to the Exemption contains a number of explanatory paragraphs. It is certain of the conditions contained in paragraph 4 with which Ithala takes issue. Before turning to consider each of the specific conditions, it must be

⁶ The Exemption was published as General Notice 1169 of 2022, in Government Gazette No. 47063.

noted what the reason for granting the Exemption was. This is found in paragraph 3.5 of the schedule which states:

'3.5 This Exemption granted to Ithala in terms of this Exemption notice is granted to afford Ithala a final opportunity to regularize its deposit taking activities and accordingly should the conditions stipulated in this Exemption notice not be met, in accordance with the terms and on the basis stipulated herein, then Ithala's deposit taking activities shall be subject to wind-down as detailed herein.' [my underlining].

[23] The KZN Province took issue with four specific conditions.

[24] Firstly, condition 4.3 which provides that Ithala shall obtain authorisation by no later than 30 June 2023 from the Prudential Authority to establish a bank in terms of s 13 of the Banks Act or to establish a mutual bank in terms of s 14 of the Mutual Banks Act.

[25] Secondly, condition 4.5 which provides that Ithala shall procure that the KZN Provincial Government or National Government provide irrevocable and unconditional guarantees to fund all capital shortfalls to an amount of 15% of the risk weighted assets held by Ithala or R250 million, whichever was the lessor, valid until 31 March 2024. This guarantee was to be in favour of the Prudential Authority.

[26] Thirdly, condition 4.8 which provides for the process, in the event of non-compliance with the conditions attached to the Exemption notice, for the winding down of Ithala's deposit taking activities. This was conditional should Ithala fail to comply with any of the conditions of the Exemption and fail to remedy the non-compliance within 48 hours of being called upon to do so or a failure to obtain authorization to establish a bank or mutual bank by 30 June 2023.

[27] Fourthly, condition 4.9 which provides that Ithala is directed in terms of s 131(1)(a) of the Financial Sector Regulation Act,⁷ to submit information to the

⁷ 9 of 2017

Prudential Authority and to subject itself to an audit, to be conducted at the cost of the Prudential Authority by no later than 30 September 2022 in order to give effect to condition 4.8 in the event that it was necessary to do so.

[28] It is common cause that Ithala has, to date, failed to comply with any of the above conditions.

LEGALITY REVIEW

[29] Before dealing with the basis upon which the present review has been brought, it is apposite to address the contention by Ithala that the Prudential Authority at no stage furnished written reasons for the decision to issue the impugned Exemption Notice with the conditions in it.

[30] Prior to the issue of the Exemption Notice, the parties engaged with each other in writing. The Prudential Authority in its letter of 3 June 2022, raised its concerns and gave its reasons why it was disinclined to grant a further Exemption beyond 30 June 2022. Ithala for its part and in its letter of 20 June 2022, responded comprehensively to the concerns raised by the Prudential Authority and it was in consequence of this, that the further Exemption with the conditions attached to it was granted.

[31] Put plainly, the Prudential Authority precognized Ithala with its reasons for not wanting to grant a further Exemption, Ithala engaged with those reasons and the result was the granting of a further Exemption. The reasons need not be clothed with the title “reasons for decision” when they are readily ascertainable from the record before the parties. It seems to me that it must be a determination made on substance and not on form.⁸

[32] The present review is brought in terms of the principle of legality. The exercise of all public power must comply with the principle of legality - Section 2 of the Constitution of the Republic of South Africa 1996 provides that ‘*The Constitution is*

⁸ *Wessels v Minister for Justice and Constitutional Development* 2010 (4) SA 128 (GNP) at 141I-J.

the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

[33] The exercise of the power must be within the scope of the power conferred⁹, exercised in good faith¹⁰ and be neither arbitrarily nor irrationally exercised.¹¹ *'The principle of legality provides a general justification for the review of exercises of public power and operates as a residual source of review jurisdiction.'*¹²

[34] It is not in issue that the Prudential Authority and the Minister of Finance are in the exercise of their authority to grant Exemptions in terms of the Banks Act, obliged to do so.¹³

THE FIRST AND SECOND GROUNDS OF REVIEW – IRRATIONALITY AND LACK OF BONA FIDES

[35] In *Albutt v Centre for the Study of Violence and Reconciliation, and Others*¹⁴ it was held that:

"The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objectives sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that

⁹ *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC).

¹⁰ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

¹¹ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

¹² *Administrative Law in South Africa*, 2nd Ed, C Hoexter, Juta, 2012 at 121.

¹³ *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC) at para [82].

¹⁴ 2010 (3) SA 293 (CC) at para [51]. *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another* 2016 (3) SA 1 (SCA) at paras [44] and to the reference therein to *Patel v Witbank Town Council* 1931 (TPD) 284 at 290 and *Democratic Alliance v President of the Republic of South Africa and Others* 13 (1) SA 248 (CC) at para [40].

could have been used, but whether the means selected are rationally related to the objective sought to be achieved.” (my underlining)

[36] It was argued for Ithala that paragraph 3.5, as a condition, was irrational. Properly construed however, paragraph 3.5 in its terms simply records that the Exemption that has now been granted was granted to ‘*afford Ithala a final opportunity to regularize its deposit taking activities*’. It goes on further to state the consequences of failure to meet the conditions upon which the Exemption was granted – the winding down of the deposit taking activities.

[37] It follows that if Ithala does not obtain a further Exemption, it cannot lawfully continue with its deposit taking activities. This paragraph imposes no condition upon Ithala and in its terms simply serves to record the legal consequences of the failure to meet the conditions in terms of which the Exemption was granted.

[38] Since s 1(1)(cc) of the Banks Act permits the granting of an Exemption with conditions, there is nothing irrational in including within the Exemption a statement of the legal consequences of non-compliance. Paragraph 3.5 is not a condition and as such its inclusion is not irreconcilable with the granting of the Exemption.

[39] It was argued that paragraph 4.3, which deals with the authorization to establish a bank or mutual bank is inconsistent with the notion of an Exemption in the present circumstances. The argument on behalf of Ithala was that an Exemption from the Banks Act, cannot through the imposition of a condition, be used to achieve something diametrically opposite being enforcement of compliance with the provisions of the Banks Act by compelling registration in terms of that Act.

[40] It was argued that the Financial Sector Regulation Act¹⁵ (FSR Act) provides the Prudential Authority with extensive enforcement powers and that the exercise of any power should be in terms of that Act. The use by the Prudential Authority of s 1(1)(cc) of the Banks Act to impose conditions on Ithala was improper and this

¹⁵ 9 of 2017.

should necessarily have occurred within the powers conferred in terms of the FSR Act.

[41] This argument was predicated on the assumption that the Prudential Authority had no intention to exempt Ithala but rather to force compliance with the Banks Act through the imposition of conditions. Under-pinning this argument, was a 'legitimate expectation' by Ithala to the grant of an unconditional Exemption predicated on the fact that even though conditions were imposed, there would be no concomitant obligation to comply with these.¹⁶

[42] Ithala argued that the imposition of condition 4.3 created an impossibility on the part of Ithala *inter alia* because the Banks Act requires the business of a bank to be conducted by a public company and Ithala, being a provincial government business enterprise falls within the definition of state-owned company and does not fall within the definition of a public company.¹⁷ For this reason, Ithala argued that it cannot apply for and obtain a banking license under the Banks Act. Following on from this "impossibility", condition 4.8 serves to provide for the winding down of Ithala's deposit taking activities. On this basis, the imposition of both conditions 4.3 and 4.8 are both irrational and without *bona fides*.

[43] This argument considered *in vacuo* is appealing. However, condition 4.3 is not circumscribed in its terms by Ithala only having to obtain authorisation to establish a bank or mutual bank. Paragraph 4.3 in its entirety provides:

'4.3.1 Ithala shall obtain authorization from the Prudential Authority before 30 June 2023 to establish a bank as provided for in section 13 of the Banks Act or a mutual bank as provided for in section 14 of the Mutual Banks Act.'

4.3.2 The requirement to obtain authorisation to establish a bank or mutual bank does not in any way imply that Ithala will obtain such authorization.

¹⁶ SA Veterinary Council and Another v Szymanski 2003 (4) BCLR 378 (SCA) at para [19].

¹⁷ See s 11(1) of the Banks Act read together with s 1 of the Companies Act 71 of 2008.

4.3.3. Obtaining authorization to establish a bank or mutual bank is dependent on Ithala complying with the requirements of the Banks Act or the Mutual Banks Act, as applicable.

4.3.4 Ithala shall be required to submit its application for authorisation as referred to in 4.3.1 sufficiently in advance of 30 June 2023 so as to ensure that such application can be considered, and a decision taken by the Prudential Authority in relation thereto prior to such date’.

[44] The Prudential Authority in its letter of 3 June 2020 specifically recognised that Ithala could not, at least on its understanding of the provisions of the Banks Act, meet the requirements for registration as a bank. It was Ithala itself in its letter of 20 June 2020 that informed the Prudential Authority that *‘The perceived impediment to “establish a bank in terms of the banks act” is not insurmountable’*. In that letter, Ithala set out how it believed it would be able to go about this. The proposal included reference to consultative as well as legislative “processes” which required *‘a reasonable period’* for these to take place and which necessitated a further Exemption.

[45] When one considers condition 4.3 together with the 18 month extension that accompanied it, notwithstanding the initial reservations of the Prudential Authority as to whether or not registration in terms of the Banks Act could be achieved by Ithala, it is apparent that the very purpose for which this condition was imposed, was to afford Ithala the opportunity to effect that which it had proposed.

[46] It was argued for Ithala, somewhat cynically, that after having imposed the condition neither the Prudential Authority nor Treasury had sought to or had provided any detailed explanation as to how Ithala could either become a bank or a mutual bank. It seems to have missed the point that having put up the skittle itself, it was illogical for it to now argue an impossibility.

[47] Furthermore, even if Ithala was incorrect in its representation that compliance with the Banks Act or the Mutual Banks Act was *‘not insurmountable’*, the fact that the Prudential Authority imposed the condition and afforded the opportunity for Ithala

to attempt to comply with that condition establishes to my mind, that any 'legitimate expectation' on the part of Ithala was in respect of the process that was to be followed – which it was. There is simply no legal basis upon which a legitimate expectation could be claimed in respect of the grant of an Exemption without or with a waiver of conditions.¹⁸

[48] It cannot be argued that the imposition of condition 4.3 was either irrational or lacked *bona fides* or was imposed in circumstances where it was impossible for Ithala to comply. It was imposed in consequence of the representation by Ithala itself that compliance was “not insurmountable”¹⁹ and furthermore a sufficient period of time was afforded to it.²⁰

[49] Condition 4.5 was that guarantees were to be furnished before 31 October 2022 by the Kwa-Zulu Natal Provincial Government or National Government.

[50] There were two guarantees required:

[50.1]The first:

‘(a) An irrevocable and unconditional commitment, valid until 31 March 2024, to fund all capital shortfalls of Ithala below the higher of R250 000 000 or 15% of risk-weighted assets, to be settled within 48 hours from the occurrence of the shortfall;’

[50.2] The second:

‘(b) An irrevocable and unconditional guarantee, valid until 31 March 2024, in favour of the Prudential Authority for the benefit of the

¹⁸ See *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 (CC) at para [36]; *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 (9) BCLR 891 (CC) at para [96].

¹⁹ *Trinity Broadcasting (Ciskei) v Independent Communications Authority of SA* 2004 (3) SA 346 (SCA).

²⁰ *Minister of Home affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) 421 (SCA).

depositors of Ithala equal to R0.75 for every R1.00 of depositor funds to be called on by the Prudential Authority should Ithala breach its minimum capital adequacy requirement of the higher of R250 000 000 or 15% of risk-weighted assets.'

[51] It was argued for Ithala that the condition relating to the furnishing of the guarantees was "extraordinary" and that there was no reason to believe that these would ever be triggered. The Prudential Authority was also criticized for imposing the condition in circumstances where there was already security in place. The security which was extant was a guarantee with a maximum value of R300 million furnished by the Provincial Government in favour of the depositors in Ithala in order to safeguard the deposits held by Ithala. This guarantee was for the period 1 January 2022 up to and including 31 December 2024.

[52] The guarantee, although it is stated to be given '*irrevocably, and unconditionally*'²¹ the Kwa-Zulu Provincial Government '*would need to comply with further legislative provisions in order to make payment of the due amounts.*'²²

[53] The guarantee is for a fixed maximum amount and does not address the requirements of '*R250 000 000 or 15% of risk weighted assets*' as set out in either paragraphs (a) or (b) of condition 4.5. Furthermore, the guarantee is in favour of individual depositors.²³

[54] On a plain interpretation of the guarantee that has been furnished, it neither complies with condition 4.5 (a) or (b) in respect of the amount and in respect of 4.5 (b) it is in favour of the individual depositors and not the Prudential Authority as stipulated in the condition.

[55] Ithala argued that condition 4.5 is ambiguous. The premise from which the ambiguity is said to arise is that the Kwa-Zulu Natal Province has already furnished a

²¹ Paragraph 4.1 of the guarantee issued on 10 June 2022, the benefits of which were accepted by Ithala on 14 June 2022.

²² *Ibid* para 11.2.

²³ The guarantee is expressed to be in favour of a "*Finance Party*" who may submit a written demand for payment – the guarantee defines "*Finance Parties*" as meaning "*the depositors of Ithala SOC Ltd, and "Finance Party" means anyone of them as the context may require*".

guarantee which complies with condition 4.5 (a). This being so, the argument goes, *'it would be a nonsensical interpretation of clause 4.5 (b) to require the provincial government to effectively provide a guarantee that would be triggered by its failure to comply with its own financial commitment.'* On this argument, the only party who could provide the guarantee contemplated in condition 4.5 (b) is the National Government and that it is its failure to furnish that guarantee that is frustrating compliance with the condition.

[56] The entirety of Ithala's argument on this aspect is based on the guarantee obtained by it on 10 June 2022. The terms of the guarantee as is apparent, do not match the terms of the conditions that were imposed. There is no dispute that the furnishing of security is necessary – what is in issue is whether or not the security that has been furnished is sufficient to meet the purpose for which the condition is imposed.

[57] Instead of obtaining a guarantee that meets the conditions imposed by the Prudential Authority, Ithala seeks to hammer the proverbial square peg into a round hole and when it does not fit, claim a lack of rational connection between the terms of the condition, considerations before the Prudential Authority and purpose of the condition.

[58] The fifth condition which Ithala claims is irrational, is condition 4.9. This condition is framed as a directive to Ithala in terms of s 131(1)(a)²⁴ of the FSR Act for Ithala to provide the Prudential Authority with information. The directive provides for the furnishing of information and the compilation of a report:

'4.9.1 Ithala is directed, in terms of the provision of section 131(1)(a) of the Financial Sector Regulation Act, to provide the Prudential Authority with specified information or a specified document under the control of Ithala, that is relevant to assisting the Prudential Authority in performing its functions in terms of a financial sector law. The specified information and document that

²⁴ The section provides: *"The responsible authority for a financial sector law may, by written notice to any person, request the person to provide specified information or a specified document in the possession of, or under the control of, the person that is relevant to assisting the responsible authority to perform its functions in terms of a financial sector law."*

the Prudential Authority requires from Ithala is a report to be compiled by an auditor, as selected by the Prudential Authority, by no later than 30 September 2022, at the cost of the Prudential Authority:

- (a) which will detail the manner in which, by no later than 31 March 2024, all depositor claims of Ithala can be settled, if required, through the wind-down of the deposit-taking activities of Ithala to be transferred to a registered bank or mutual bank in terms of an alliance banking relationship or similar with minimal disruption to clients of Ithala;*
- (b) by giving consideration and priority to the interests of all its stakeholders, in particular depositors and employees.'*

[59] It was argued for Ithala that no document that exists is specified. However, the condition refers not only to documents but also to information. The condition explicitly requires Ithala to furnish information to an auditor to be appointed and paid for by the Prudential Authority so as to enable the compilation of a report. This is permissible having regard to the provisions of s 131(2)(b)²⁵.

[60] The purpose of imposing this condition is entirely consistent with the purpose for which the Prudential Authority was established ²⁶ and pertinently, in the case of Ithala to *'protect financial customers against the risk that those financial institutions may fail to meet their obligations.'* ²⁷

THE THIRD AND FOURTH GROUNDS OF REVIEW – ULTERIOR PURPOSE AND ULTRA VIRES

[61] Ithala argues that the imposition of the conditions and in particular 4.3, was done for an ulterior purpose. It was argued that *'the respondents Exemption granting powers were put to use for an ulterior purpose (not for the purpose of*

²⁵ This section provides: *"The responsible authority may require the information or document to be verified as specified in the notice, including by an auditor approved by the responsible authority."*

²⁶ See section 33 of the FSR Act.

²⁷ *Ibid* section 33(c).

exempting compliance with the Banks Act) but another purpose (for the purposes of winding up Ithala's operations; or divesting provincial ownership of Ithala).'

[62] It is trite that a statutory power may only be used for a valid statutory purpose²⁸ and may not be used for an ulterior purpose. It was argued that the only purpose for which s 1(1)(cc) of the Banks Act could be used was for the granting of an Exemption.

[63] I was referred by way of example in this regard to *National Director of Public Prosecutions v Zuma*²⁹ which in turn referred to *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and Others*,³⁰ a case in which the police had gone about confiscating gambling machines, not for the purpose of using them as evidence but rather to put *Highstead* out of business. I was also referred to *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security and Others*³¹ as well as *Tsose v Minister of Justice and Others*.³² All the cases to which I was referred, make plain that the exercise of a statutory power is circumscribed by the purpose for which the power is granted and that it must be exercised within that context lawfully.

[64] In the present matter, each of the conditions imposed is directly connected to the concerns raised by the Prudential Authority in its letter of 3 June 2022 read together with Ithala's response to that letter of 20 June 2022.

[65] Indeed insofar as a position had been taken in that letter subject to the response of Ithala, that no further extension would be granted beyond 30 June 2022, after receiving the response from Ithala, an Exemption was indeed granted with conditions that are directly and pertinently the consequence of the engagement by

²⁸ *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at 780G-H.

²⁹ 2009 (2) SA 277 (SCA) at para [38].

³⁰ 1994 (1) SA 387 (C).

³¹ 2009 (6) SA 513 (WCC). This was a case which concerned the use by the police of their powers to arrest for purposes of intimidating, harassing and punishing sex workers instead of bringing them to trial.

³² 1951 (3) SA 10 (A) at 17C-D. This was a case in which it was held that if the object of the arrest, although ostensibly to bring the arrested person before court, was not effected for that purpose but rather to frighten or harass him, without his appearing in court, then that arrest was effected for an ulterior purpose and is unlawful.

the Prudential Authority with Ithala. For this reason, I am not persuaded that the imposition of any of the conditions was actuated by an ulterior purpose.

[66] When regard is had to the entirety of the contents of the schedule attached to the Exemption Notice, what is readily apparent is that paragraph 3.5 is in its terms not a condition but a recordal of the reason for the granting of the Exemption. Similarly, paragraph 4.9 is a regulatory directive which the Prudential Authority is entitled to issue at any time and does not form a condition relating to the deposit taking activities of Ithala.

[67] The conditions that relate directly to the deposit taking activities – conditions 4.3, 4.5 and 4.8 - deal with this particular aspect pertinently and fall squarely within the power ³³ to grant the Exemption with conditions as provided for in s 1(1)(cc) of the Banks Act. For this reason, too, I find the argument that the imposition of the particular conditions was *ultra vires* to be without merit.

THE FIFTH GROUND OF REVIEW – UNCONSTITUTIONALITY AND UNLAWFULNESS

[68] This ground is predicated upon a finding that the granting of the Exemption with the conditions that were attached to it was done for the ulterior purpose of either forcing Ithala to ‘close its doors’ or to force the provincial government to ‘part with ownership and control’. For the reasons that I have set out above, I have declined to make that finding.

[69] Ithala devoted some time in its heads of argument dealing with the purpose for which it was created and its objectives. Notwithstanding the concession that Ithala is only in a position to take deposits subject to Exemptions and any conditions attached thereto being granted to it in terms of the Banks Act, it argues, that because Ithala was established ‘*to further socio-economic development – that is to say, urban and rural development - within the Province of KwaZulu - Natal, as an instrument under the control of the Provincial Government*’ that the imposition of the very

³³ *Minister of Finance v Aribusiness NPC* 2022 (4) SA 362 (CC) at para [102].

conditions deemed necessary for the protection of depositors *'amount to unconstitutional interference with the performance by the Provincial Government of a legitimate governmental function on behalf of persons domiciled, ordinarily resident or carrying on business within the Province of KwaZulu – Natal.'* This argument disregards the very purpose for which the Prudential Authority was established. I am of the view that these grounds of review are also without merit.

COSTS

[70] The parties were all agreed that the costs should follow the result and furthermore that given the nature of the matter, its importance not only to the parties but to the interests of the wider community, that the engagement of more than one counsel was a wise and reasonable precaution. It is for this reason that I intend to make the order for costs that I do.

ORDER

[71] In the circumstances it is ordered:

[71.1] The application is dismissed.

[71.2] The applicants are ordered to pay the costs of the first and second respondents on the scale as between party and party, such costs to include the cost consequent upon the employment of two counsel where more than one counsel was engaged.

**A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 15 SEPTEMBER 2023

JUDGMENT DELIVERED ON: 29 SEPTEMBER 2023

FOR THE APPLICANTS: ADV. A DICKSON SC

ADV. A CHRISTISEN
ADV. T PALMER
INSTRUCTED BY: MATTHEW FRANCIS INC.
REFERENCE: MR. Y MAHARAJ

FOR THE FIRST RESPONDENT: ADV. N MAENETJE SC
ADV. M MAJOZI
INSTRUCTED BY: WERKSMANS ATTORNEYS
REFERENCE: MS. C MANAKA

FOR THE SECOND RESPONDENT: ADV. L ABRAHAMS
INSTRUCTED BY: THE STATE ATTORNEY PRETORIA
REFERENCE: MS. Z ZENANI

**NO APPEARANCE FOR THE THIRD
OR FOURTH RESPONDENTS**