

SOUTH AFRICA / JUDGMENT

Deighton v Financial Sector Conduct Authority and Others (15703/2021)

[2022] ZAGPPHC 520 (8 July 2022)

[2022] ZAGPPHC 520

COURT

North Gauteng High Court, Pretoria

BEFORE

Millar

CASE / FILE NUMBER

15703/2021

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FLYNOTES:

ACCESS
TO DOCUMENTS AND NATURAL JUSTICE
Administrative
law – Natural justice – Procedural fairness –
Investigation panel – Financial Sector
Conduct Authority –
Person required to attend interview – Not provided
beforehand with documents on which he
would be questioned –
Inherently unjust procedure – Investigation as well as
composition of panel reviewed and
set aside – Financial
Services Regulation Act 9 of 2017.
IN
THE HIGH
COURT OF
SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
Case
No. 15703/2021
REPORTABLE:NO
OF
INTEREST TO OTHER JUDGES:NO
REVISED
NO
8
JULY 2022
In

the matter between: DEIGHTON,
MICHAEL EDWARD Applicant
And
FINANCIAL
SECTOR CONDUCT
AUTHORITY FIRST
RESPONDENT
THE
FINANCIAL SECTOR REGULATOR SECOND
RESPONDENT
PASCOE,
ALEXANDER
THIRD
RESPONDENT
PILLAY,
PRINISHA
FOURTH
RESPONDENT
LOXTON,
DAVID
FIFTH
RESPONDENT

Coram: Millar
J
Heard

on: 9 May 2022

Delivered: 8
July 2022 -
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
SAFLlI.
The
date and time for

hand-down is deemed to be 10H00 on 8 July 2022

.

Summary:

Review of
decision of FSCA investigating panel to deny proper and timeous
access

to
documents upon
which
applicant
was
to
be
questioned beforehand

-

adverse
finding and
decision
against
applicant subjecting him
to potentially
unlimited fine

-

no
substantial
redress
on appeal
of any
decision -
failure
by
panel
members
to
appreciate
consequences of
inherently unjust
procedure
adopted
by them

-

investigation
as
well
as
composition
of
panel
reviewed
and
set

aside.

ORDER

It

is Ordered :

1.

It is

declared that the
investigation

and/or

action

undertaken

against

the

applicant

pursuant to

the

Respondents'

Investigation

Instruction

dated

26

October

2020

is unlawful on the
basis

that

it is

procedurally

unfair;

2.

The investigation

instituted

and pursued by the Respondents
against the Applicant

in terms

of

the

Financial

Services

Regulation

Act,

9 of 2017,

is reviewed

and

set

aside on the

basis that it

violates the

requirements of

procedural fairness .

3.

If
the first Respondent
chooses to
proceed afresh with the
investigation aga
inst
the Applicant,
then that must
only be done provided

that:

3.1
the third,
fourth and fifth
respondents are removed and take no further
part in
the investigation
and/or action against the applicant.

3.2
The investigation
against the
Applicant is conducted
in accordance with the
principles
of
natural
justice,
procedural
fairness,
and
section
3(2)
of
the
Promotion of
Administrative Justice
Act 3
of 2000 (PAJA),
with due regard
to the
findings
made
by the
Court
in
this judgment
as
regards the
requirements
of fairness
as applied to
the facts of this case.

4.
The Respondents
are to
pay the costs of this
application,
on the
scale as
between party
and party
which costs
are to
include
the
costs
consequent
upon the
employment
of
two
counsel,
jointly
and
severally
, the
one
paying,
other/s
to
be
absolved
.

JUDGMENT

MILLAR J

1. This is an application in which the applicant, Mr. Deighton seeks an order reviewing and setting aside the steps taken pursuant to an investigation of him, authorized by the first respondent and conducted by the third, fourth and fifth respondents . The crux of the applicant's case is that the way the investigation, through an interview, was conducted offended his right to a fair and just administrative process.
2. The respondents dispute that the process adopted was neither fair nor just. They further contend that the present application, brought as it has been, prior to the

conclusion

of the investigation and any decision against him is premature and subversive of the of the investigative scheme of the Financial Sector Regulation Act[1].

3. The investigation has as its genesis events that occurred during May 2019 regarding the financial statements of the Tongaat Hulett group of companies. Tongaat Hulett Limited ('THL') is a multinational agricultural and agri-processing business with interests in the Republic as well as in Zimbabwe and Mozambique.
4. During May 2019 , allegations surfaced regarding the manner inwhich the group's financial statements had been prepared and presented.THl then appointed Price Waterhouse Coopers ('PWC') to report on the allegations.
5. In November 2019 , PWC reported and identified certain matters of concern which included inter alia the involvement of certain senior executives, one of whom was the applicant ("Mr. Deighton"). He had been the managing director of Tongaat Hulett Developments ("THD"). It was alleged that he had been engaged in undesirable accounting practices which included the early recognition of sales revenue from the sale of land.
6. In consequence , THL reported itself to the first respondent ('FSCA') and furnished it with the PWC report. THL unilaterally acknowledged that it had contravened section 81 of the Financial Markets Act[2] ('FM Act') in respect of the accounting periods ending March 2017 and April 2018 respectively.
7. The commissioning of both the report as well as the acknowledgement of a contravention of the FM Act, occurred in circumstances where the applicant, who had been the managing director of one of THL's subsidiaries from March 2017 until April 2018 , was neither consulted in regard to the terms of reference for the PWC report, or in the process leading to the preparation of the report or the subsequent admission by THL of its contravention of section 81[3] of the FM Act. This was all common cause between the parties.
8. On 21 August 2020, and by agreement between THL and the FSCA, an administrative penalty of R118 340 000.00 was imposed on THL. The majority of the penalty was remitted in terms of section 173 of the Financial Sector Regulation Act[4] with the result that THL had to only pay R20 million.
9. Now armed with the PWC report and the admission made by THL, the group for which all of the implicated executives had worked ,the FSCA on 26 October 2020, initiated a "new" investigation[5] of certain of the former executives individually, premised entirely upon the veracity of the PWC report. An investigation panel ('the panel') consisting of the third respondent ('Mr. Pascoe'), fourth respondent ('Ms. Pillay') and fifth respondent ('Mr. Loxton') were appointed to conduct the interview and investigation.

10. On 5 November 2020 , the panel wrote to Mr. Deighton's attorneys informing him of the investigation and the period to which it related. The letter pertinently referred to Section 81 and although not specifically referred to in the letter, annexed to it were extracts from various Acts .[6] They also requested that he indicate his availability to be interviewed. The following day, on 6 November 2020, his attorneys responded requesting an indication of the specific issues that would be traversed during the interview and that once they had that, they would then be in a position to agree dates.
11. On 7 November 2020, the panel responded by advising the

background

to the reasons for the investigation, the purpose of the interview as well as the topics that would be traversed.

12. The topics to be traversed included general matters relating to Mr. Deighton's qualifications as well as his role and reporting line within the THL group, and his involvement in the compilation or submission of information forming part of the annual financial statements of THD. Most pertinently, the letter indicated specific issues to be traversed which included:
 - '5. Your involvement with regards to the land sale transactions at THD;
 6. The process followed at THD regarding land sale transactions.
 7. The policies followed by THD in concluding land sale transactions.
 8. Your involvement relating to the conclusion of the following land sale transactions:
 - a. MPW Cape Properties (Pty) Ltd;
 - b. Africa Rising Investments (Pty) Ltd;
 - c. The Toyota South Africa Educational Trust;
 - d. Govender S & Viahakis T incorporated a company to become the Purchaser Ridgeside P4 Residential Estates (Pty) Ltd;
 - e. Dexaphase (Pty) Ltd;
 - f. The Ocean Forest Club Trust;
 - g. Taylor-made Property Asset Managers (Pty) Ltd'
 9. Your involvement in the drafting and/or publication in respect of the Annual Financial Statements of Tongaat for the years ended 31 March 2017 and 31 March 2018.'
13. Besides the specific topics identified, the letter also advised that the interview may also cover 'any other matter that may arise from the interview'.

14. On 13 November 2020 , the panel issued a notice in terms of Section 136 (1) of the FSR Act requiring Mr. Deighton to attend an interview on 18 November 2020. Attached to this notice were also the same annexures which had been attached to the 5 November 2020 letter. He duly attended together with his legal representatives .
15. The commencement of the interview, as happens often in legal proceedings, was occupied by preliminary procedural matters. Foremost amongst these was the complaint by Mr. Deighton that he had not been given prior access to copies of the documents relating to the specific transactions about which he was to be interviewed and furthermore that he had not been warned that he was a 'suspect' as contemplated in Section 135 of the FSR Act.
16. The documents in question, which also included a copy of the PWC report, were contained in a bundle which had been made available to the panel beforehand and with which they had presumably prepared for the interview.
17. Initially the panel took the view that they would only permit Mr. Deighton to peruse the specific documents upon which he was being questioned while he was being questioned. The reason advanced for not allowing him prior access to or possession of the documents upon which he was to be questioned was that they were confidential, notwithstanding that he had been a signatory to several of the documents . This was objected to on the basis that it was prejudicial. The panel then indicated that he would be permitted to request ad hoc adjournments in order to consult with his legal representatives as the interview progressed.
18. The first interview besides dealing with a general discussion of Mr. Deighton's qualifications and work history with THO was also to be in respect of what was alleged to be the back dating or earlier recognition in the financial statements of certain property sale transactions - a sample of 6 were identified for discussion at the interview.
19. Mr. Deighton made clear during the interview that he was not an accountant and although he had signed the financial statements , he had no direct role in their preparation. He was unequivocal that THD's accounting policy with regard to the recognition of sales of land transactions in the financial records of the company was only meant to occur once the transfer of the property had taken place.
20. Ms. Pillay explained the significance of the date of the sale being reflected in the financial statements as opposed to the date of transfer, particularly over a financial year end - if the revenue was included before the transfer occurred and fell into an earlier financial period, it would result in an overstatement revenue for the specific prior period. Mr. Pascoe then indicated that the investment community made decisions based on the financial results for each accounting period. Their respective statements made that either the failure to apply the accounting policy or the backdating of the transactions would fall foul of Section 81 of the FM Act.
21. It was in the context of a discussion during the interview that Mr. Loxton then stated:

'But is the actual effect actually relevant, because if you look at the legislation all we have to show is there is a misrepresentation and that is it, game, set and match.'

22. In response to a question as to whether the matter was as simple as that, he then went on to say:

'Well if you look at the legislation, I mean it is actually very, very clear. If a person makes or publishes in respect of securities a statement, promise or forecast etc. there is no need to read all those details and the person knows or reasonably [ought] to know it is false, misleading or deceptive, now it doesn't you don't need an accountant to understand that if you overstate revenue, if you[re] taking revenue from year one, and putting it in, year two putting it in year one, that is a misrepresentation in anybody's language.'

23. The phrase, 'game set and match ' was thereafter repeated several times by Mr. Loxton in his efforts to explain that he had been referring to what the legislation provided for in the event of findings adverse to Mr. Deighton. The use of the phrase was seized upon by Mr. Deighton's representatives at the interview (and also in this hearing) as being indicative of the fact that any panel, if Mr. Loxton was a part of it, was incapable of giving Mr. Deighton a fair hearing.

24. The first interview was almost at an end and arrangements were being made for a second interview, when the following exchange took place between Mr. Deighton's legal representatives[7] and members of the panel:

'Mr. Parsee Could we have a copy of the bundle of documents ?

Mr. Pascoe No, it's confidential.

Mr. Parsee Oh the ones that you are going to show us?

Mr. Loxton That you can look .. it in the meeting and deal with them, but you cannot have them. '

25. And later:

'Mr. Parsee: Why is it confidential not to give us beforehand but not confidential when we, when you want to deal with it?

Mr. Parsee: So, are we going to get copies of the documents that you, you present in the enquiry, will we get copies after that?

Mr Pascoe No. Not in this enquiry, not at this stage. If this gets, if for example, if the authority makes a decision to proceed with the enforcement action you would have the opportunity, as I said you will get the audit letter, you will get the report, all the annexures alleging the contravention, you will have it all at that stage of the process '.

:

26. And

'Mr. Haus (sic): And we referred to the objection that we noted on the previous occasion. In 2.2.2, we asked for copies of all the documents, sought to be put to client which we asked on the previous occasion.

But what we then established is that client had been given a file of certain contracts by the PWC, was it? Or was it the investigating officer?

Mr. Deighton: Well, it is PWC 's file, but handed to us by the investigating officer.'

27. And

'Mr. Pascoe: You know, ours is based on a balance of probabilities whereby criminals (sic) beyond a reasonable doubt. Okay?

Mr. Pascoe: Our administrative process, you know, it is really on the papers. So as I have explained, you know, that whole enforcement process to you. I do not know if you can recall.

28. And

'Mr. Haus (sic): But just for our present purposes, I just wanted to confirm that as far as Mike is concerned, for example, the penalty, the administrative penalty for section 81 is limitless. It is in the discretion of FSA.

Mr. Pascoe: Of the decision makers, the authority

Mr. Haus (sic): Okay. For the admin, he can face a limitless fine. In other words, one that is a higher fine than the crime.

Mr. Haus (sic): So, based on what we discussed now. I think there can be no doubt that the subject matter here materially and adversely affects Mike because, I mean, he can face a limitless fine.

Mr. Pascoe: Sure.'

29. The first interview ended without any interrogation of the substantive matters for which the interview had been convened.

30. A second interview was held on 4 December 2020. Between the holding of the first interview and the second, correspondence was exchanged between Mr. Deighton's legal representatives and the panel. On 25 November 2020, they specifically requested that he be furnished before the second interview, with 'copies of all the documents sought to be put to our client at the hearing'.

31. On 27 November 2020 , the panel responded. The response referred to Section 81 of the FM Act and Sections 135 and 136 of the FSR Act. The panel then asserted that:

'8. What is required of Mr. Deighton is that he answers questions lawfully put to him, and that he tells the truth.

9...

10. This is an ongoing investigation, and we believe that placing copies of documents in circulation would present a clear and present risk to properly conducting the investigation. As happened on 20 November 2020, your client will be afforded sufficient time to evaluate any document that may be presented to him. We refer you to Section 272 of the FSR Act . . .'
32. The response was clear in its terms. Mr. Deighton would not be furnished with any documents beforehand to enable him to prepare or consider their contents and the implications of his responses to any questions put to him.
33. The panel held to the view expressed at the first interview that he would only be permitted to see the documents upon which he was to be questioned contemporaneously with the questioning during the interview and that he would be given what the panel considered to be 'sufficient time to evaluate any document that may be presented to him'.
34. Mr. Deighton attended the second interview. The panel, on this occasion, was represented by Mr. Pascoe and Ms. Pillay. Mr. Loxton was not present. Further procedural matters were raised on behalf of Mr. Deighton at the commencement. It suffices to say that the second interview ended in the same way as the first - without any progress in the conduct of the investigation.
35. What transpired between Mr. Deighton's legal representatives, Mr. Deighton as well as the members of the panel in the exchange of correspondence and during the two interviews, was contemporaneously recorded.
36. The parties' views of the manner in which the interview was conducted differ markedly.
37. Counsel for Mr. Deighton argued that the entire process should be impeached on the basis that it was devoid of fairness and, that if conducted on the basis that the panel had endeavored to do, would offend his right to a fair[8] administrative process and would furthermore natural justice and was akin to subjecting Mr. Deighton to a 'Court of the Star Chamber.[9]'
38. On the other hand, Counsel for the respondents argued that the present application was premature as the investigation, which was subject to a different standard of fairness, was not finalized. Absent the finalising of the investigation, no decision adverse to Mr. Deighton had or could be taken and in consequence besides being premature, the present application amounted to an improper interference in the conduct of the investigation.
39. Is there merit to the contention that the interview process ought to be impeached as argued by Mr. Deighton or should he have accepted the investigation and interview process determined by the panel and only in circumstances of an adverse finding against him, have then, at that stage have challenged both the process and decision?
40. . What then is the statutory scheme in terms of which the interview was called for and then conducted and was Mr. Deighton entitled to the rights that he sought to assert?

41. . The Act provides in section 135(1)(a)[10] that the FSCA may appoint an investigator if there is a reasonable suspicion .of a contravention of a financial sector law having taken place, and in terms of section 135(2)[11] particularly, to investigate any matter relating to a contravention of section 81 of the Financial Markets Act.
42. . The investigator once appointed has the powers set out in sections 136 to 138 of the Act. These powers are wide ranging and empower the investigators to require any person they believe may be able to provide information to submit to questioning[12], or to produce documents and then submit to questioning in regard thereto[13] - all under oath.[14] The investigator may furthermore take possession of any document produced[15] and may also give directions to any person present to facilitate the exercise of his powers[16]. The powers also extend to taking possession of documents produced[17] .
43. Section 136(2) also provides that: 'A person being questioned in terms of this section is entitled to have a legal practitioner present at the questioning to assist the person ' Besides the powers set out in section 136, an investigator may also enter and search premises[18]s either with consent or in terms of a warrant issued on application[19] by the investigator .
44. . The Act, besides conferring upon the investigators the powers set out in sections 136 to 138, also impose obligations upon any person who is summoned to an investigation or required to produce documents. These obligations are set out in section 139 and specifically provide that a person may not either intentionally or negligently interfere or hinder the conduct of an investigation,[20] must follow any directives given,[21]must answer any question put to him fully and truthfully[22] (my emphasis).
45. He may also not refuse to answer any question or to comply with any direction[23] and perhaps most relevant to the present proceedings[24] :
- ' (5) A person may not give an investigator any information that is false or misleading, including by omission, and is relevant to an investigation, if the person knew that the information was false or misleading, including by omission.'
46. The obligations set out in section 139 are tempered by the protections as set out in section 140[25]. The protections provided for in this section, however, relate to protection against self-incrimination in any criminal proceedings in consequence of or related to the subject matter of the investigation . The protections do not extend to self-incrimination within the context of the FSCA investigation or its consequences .
47. Once the investigation has been completed, a report together with all the evidence gathered during the investigation is then submitted with a recommendation to the FSCA. The Act provides in section 67 for the specific process that is be followed by the executive committee who makes a decision on what is placed before it.
48. . While the process and procedure to be employed by the investigating committee is set out in the FSCA Act, the process and procedure of the executive committee to whom the report of the investigating committee and its recommendation is submitted , is not predetermined .

The committee determines its own process and procedure[26]. Nowhere in the FSCA Act is there any provision for the specific process and procedure to be followed in the evaluation of the investigation report or the recommendations made therein. However, the FSCA has indicated the procedure that it follows. Counsel for the FSCA explained the procedure as follows[27] :

48.1 'First, it issues a notice of the proposed administrative action, which sets out the FSCA's preliminary and prima facie views, the reasons for such views and all documentation upon which they are based.

48.2 The notice invites the affected person to make representations, to dispute any of the information contained in the notice, and, in appropriate circumstances, to appear before the FSCA.

48.3 Only after considering the affected person's representations does the FSCA make a final decision, in which it sets out its

reasons

and informs the affected person of his or her internal remedies under the FSR Act. '

49. Chapter 10 of the FSCA Act deals with enforcement and sets out the possible sanctions that may be imposed on any person who has contravened any financial sector law. Most pertinent and relevant in the present matter is the power contained in section 167[28] which entitles the FSCA, besides imposing an unlimited penalty, to also include in the

determination

of that penalty, the amount of its reasonable costs incurred[29] . The penalty provisions in section 167 are supported by a provision for the payment of the penalty, interest on the penalty as well as having the penalty made an order of court.[30]

50. It was argued on behalf of the respondents that the present application was premature because it was only after the FSCA had exercised its powers, with the executive committee deciding[31] and communicating that decision and the

reasons

for the decision[32] , that the applicant could and then should more appropriately bring the present application for review. The argument was premised on the basis that the conduct of the investigation as well as the submission of the investigation report and recommendations were not in and of themselves 'decisions' as contemplated in section 218 of the FSCA Act and for that reason not subject to review.

51. However, while section 218(k) of the FSCA Act specifically excludes 'a decision to conduct a supervisory on-site inspection or an investigation' from the definition of a 'decision', it does not exclude the decisions taken by the relevant parties during an on-site inspection or for that matter during an investigation.
52. In arguing that the present application was premature, I was referred to *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd*[33]. It was argued that any procedural irregularity can be 'cured by a procedurally fair appeal/[34]' and I was also referred to *Rhino Oil & Gas Exploration SA (Pty) Ltd v Normandien Farms (Pty) Ltd and Another*[35] in which it was stated that:

'As a general rule, a challenge to the validity of an exercise of public power that is not final in effect is premature. An application to review the action will not be ripe, and cannot succeed on that account ...

There is a close connection between prejudice and ripeness Baxter states that 'the appropriate criterion by which the ripeness of an action in question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not. ·

53. In *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others*[36] it was also stated that:

Two principles come into play in this regard: first, that in order for an exercise of public power to be ripe for review, it should ordinarily be final in effect; and secondly, that the decision must have some adverse effect for the person who wishes to review it, because otherwise its setting-aside would be an academic exercise which courts generally eschew.'

54. Counsel for the respondents argued that the decision of the investigating committee carried 'no serious or final consequences'[37] for the applicant because it was not a final decision and that it was merely 'the preliminary step of a process that

.

does not affect the respondent's rights [38]' Furthermore , it was argued that the PAJA[39]did not arise in the present case.

55. In support of this I was referred to the finding of the Constitutional Court in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidrotech Systems (Pty) Ltd and Another*[40] in which it was held:

'[38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of State decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.'

56. The question of whether it is self-evident that the decision of the investigating committee has no serious or final consequences or does not affect Mr. Deighton's rights must, it seems to me of necessity, be considered in light of both the statutory scheme in terms of which the investigation was conducted, as well as the specific consequences that would attach to the failure by him to comply with the directions given in terms of the statutory scheme by the investigating committee.
57. Although the investigating committee would itself not make any binding decision on Mr. Deighton, it would gather evidence, on oath, to either support or dispel the findings of the PWC report. This would be done by questioning him on specific documents in respect of which conclusions had been drawn in the PWC report.
58. The panel had indicated to Mr. Deighton at the commencement of the first interview that - 'We are investigating a possible contravention of section 81 of the FMA, which relates to false, misleading or deceptive statements, promises or forecasts.'
59. However, THL had already provided a report which purportedly demonstrated such contraventions, and had thereafter admitted to such contraventions, and agreed the initial penalty of R 118 340 000,00 which was then reduced to R20 million. All that remained in terms of the investigation, at least as far as Mr. Deighton was concerned, was whether he too was to be found to have contravened section 81 during his tenure with the group.
60. What is apparent is that there was no need for any further investigation, at least as far as THL was concerned - the investigation and any further steps that it may have led to, once it had been completed, was clearly aimed at either exonerating or implicating Mr. Deighton personally. It is through this lens that the entirety of the process ought properly to be considered.
61. Mr. Deighton himself understood the gravity of an adverse finding by the panel against him - the panel was precognized of this by him at the outset of the first interview when he informed the panel that:

'Tongaat Hulett have steadfastly, after two years of attack against me, has steadfastly refused to provide me any meaningful information about the basis of their allegations against me in multiple activities. I am a person and I have got extremely limited financial means. They have conducted, amongst other things, a press campaign to support what's happened over this last period.'

62. Was the way the investigating committee conducted the interview biased or was it unfair and offensive to natural justice? The two main grounds upon which this was premised was firstly, the repeated use by Mr. Loxton of the phrase 'game, set and match' as being indicative of some bias on his part and secondly, the fact that he was not given a full and proper opportunity to consider beforehand all the documentation which the investigators intended to put to him in questioning.

63. Given the context within which Mr. Loxton uttered the phrase on more than one occasion , I am not persuaded that it was indicative per se of any bias on his part against Mr. Deighton. It seems to me that his use of the phrase was rather part of his idiom and the way he expressed his view as to when the investigation would be concluded. The use of a particular idiom is not in and of itself indicative of any bias.
64. The investigation and interview did not progress to a stage where Mr. Deighton committed himself on any substantive matter
- the highwater mark of this argument could only be regarding the findings in the PWC report which was part of the brief of the panel and the veracity of which, at least insofar as it may have related to Mr. Deighton, was the very subject of the investigation. It was held in *Hamata v Chairperson Penninsula Technikon Internal Disciplinary Committee*[41]

'It is not bias per se to hold certain tentative views about a matter. It is human nature to have certain prima facie views on any subject. A line must be drawn, however, between

issues

mere predispositions or attitudes, on the one hand, and pre-judgment of the

issues

to be decided, on the other. Bias or partiality occurs when the tribunal approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitudes or opinions. but when it shuts its mind to any submissions made or evidence tendered in support of the case it has to decide. No one can fairly decide a case before him if he has already prejudged it.'

65. In the present matter, given the exchanges and limited concessions made in regard to inspection of the documents , I am not persuaded that the members of the tribunal , and particularly Mr. Loxton, conducted themselves in a manner which can fairly be described as partial or biased.
66. However, central to the conduct of investigations by the FSCA, is that the person or persons appointed to conduct he investigations must have 'appropriate skills and expertise.[42]' This provision is particularly important given the wide powers granted to the investigators[43]. Most significantly are the provisions of section 139.
67. It is essential when an investigation is conducted, particularly involving the interview of a private individual, who is subject to the provisions of section 139, such investigation must be conducted in as fair and constitutional manner as the circumstances permit. While section 139 read together with section 140 does offer a protection against self-incrimination in any criminal proceedings, it nevertheless:

67.1 prohibits intentional or even negligent interference with or hinderance with the conduct of the investigation[44] except with lawful excuse[45]

67.2 compels compliance with any directives given by the tribunal[46]

67.3 compels a response to questions put 'fully and truthfully to the best of the person's knowledge'[47]

67.4 compels a response that is not false or misleading including by omission which is relevant to an investigation[48]

68. It is having regard to the statutory obligations upon Mr. Deighton and those set out in sections 139(3) and 139(5), that the refusal of the tribunal to afford Mr. Deighton an opportunity to properly consider and take advice about the documents he was to be questioned on beforehand, is to be considered.

69. It is indisputable that if a person is to be questioned upon specific documents and the law compels him to answer fully and truthfully and to the best of his knowledge and, to ensure that his responses are neither false nor misleading even by omission, that natural justice demands that he ought to be given those documents beforehand to ensure that his responses meet the standard expected of him by the law.

70. It was observed in *John v Rees*[49] that:

'It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice . "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice . As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.'

71. It was argued on behalf of Mr. Deighton that the process to which he was to be subjected by the tribunal in having to answer questions on or about documents that he had little or no time to consider beforehand, was an egregious limitation of his right to fair administrative process. Apposite to the present matter, it was held in *Pergamon Press Ltd, Re* [50]

' . . . While conceding that the proceedings decided nothing in themselves, Lord Denning warned against underestimating the significance of the inspectors ' task:

'They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal proceedings or to civil actions.... Seeing that their work and their report may lead to such consequences, I am clearly of opinion that the inspectors must act fairly. '

72. If Mr. Deighton were to have acquiesced and allowed the tribunal to have conducted the investigation in the manner that ii. sought to do, it would be difficult if not impossible for him, in the event of an adverse finding against him by the FSCA, to appeal such finding.
73. The finding would have been premised upon an investigation in respect of which the procedure was manifestly unfair and in respect of which he had acquiesced and committed himself on oath to responses which would themselves have formed the basis of the adverse finding. Any subsequent attempt to clarify or supplement any answer that he had given, could only occur in circumstances in which he would have to admit to having breached at the very least, either of or both sections 139(3) and (5).
74. It is for this reason that the provisions of section 134(2)(c) are important. This section is meant to provide the necessary direction for the FSCA to ensure that the members of the tribunal are not only qualified from a forensic perspective to conduct the investigation but also from a legal perspective to ensure that the investigation is conducted in a manner which is consonant with the provisions of section 33(1) of the Constitution^[51] and section 3(1)^[52] of PAJA.
75. The failure of the panel, at both interviews, to appreciate the consequences of their refusal to allow Mr. Deighton prior access to the documents upon which he was to be interrogated, having regard to the particularly serious consequences of any subsequent possible adverse finding against him, is to my mind manifestly unjust^[53] .
76. The appropriate time to have brought this application was when it was brought - to wait until the process was complete and to then, after having acquiesced to responding under oath with the knowledge that the response may possibly be neither complete nor misleading would be absurd.
77. Self-evidently, and having regard to the specific scheme of the FSCA Act and the failure of the panel to allow sufficient and timely access to the documents upon which Mr. Deighton was to be questioned - Once committed on oath, Mr. Deighton would find himself between Scylla and Charybdis regarding any appeal in the event of an adverse decision ^[54].
78. I find that the failure of the panel to make the documents upon which he was to be questioned available to Mr. Deighton beforehand, procedurally unfair^[55] and it is for this reason that I intend to make the order that I do.

79. The costs order will follow the result. This matter is one of sufficient importance to the respective parties that they each chose, wisely and reasonably in my view, to employ the services of two counsel and hence the order in this regard.

80. In the circumstances I make the following order:

80.1 It is declared that the investigation and/or action undertaken against the applicant pursuant to the Respondents' Investigation Instruction dated 26 October 2020 is unlawful on the basis that it is procedurally unfair;

80.2 The investigation instituted and pursued by the Respondents against the Applicant in terms of the Financial Services Regulation Act, 9 of 2017, is reviewed and set aside on the basis that it violates the requirements of procedural fairness;

80.3 If the first Respondent chooses to proceed afresh with the investigation against the Applicant, then that must only be done provided that:

80.3.1 the third, fourth and fifth respondents are removed and take no further part in the investigation and/or action against the applicant.

80.3.2 The investigation against the Applicant is conducted in accordance with the provisions of natural justice, procedural fairness, and section 3(2) of the Promotion of Administrative Justice Act 3 of 2000, with due regard to the findings made by the Court in this

judgment

as regards the requirements of fairness as applied to the facts of this case;

80.4 The Respondents are to pay the costs of this application, on the scale as between party and party which costs are to include the costs consequent upon the employment of two counsel, jointly and severally, the one paying, other/s to be absolved.

A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:

9 MAY 2022

JUDGMENT

DELIVERED ON:

8 JULY 2022

COUNSEL FOR THE APPLICANT:

ADV. M DU PLESSIS SC

ADV. J MITCHELL

INSTRUCTED BY:

LARSON FALCONER HASSAN

PARSEE

REFERENCE:

MR. PARSEE

COUNSEL FOR THE RESPONDENTS : ADV. G MARCUS SC

ADV. M MBIKIWE

INSTRUCTED BY: REFERENCE :

RW ATTORNEYS

MR. L GROOME

[1] 9 of 2017

[2] 19 of 2012

[3] '(1) No person may, directly or indirectly, make or publish in respect of securities traded on a regulated market, or in respect of the past or future performance of a company whose securities are listed on a regulated market- (a) any statement, promise or forecast which is, at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know, is false, misleading or deceptive; or (b) any statement, promise or forecast which is, by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knows, or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact '.

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(b) any statement, promise or forecast which is, by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knows, or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact '.

[4] 9 of 2017 which came into operation on 1 April 2018

- [5] investigation' used as a verb means to "Search or inquire into; examine (a matter) systematically or in detail;" Shorter Oxford English Dictionary, Oxford University Press, 2007, Vol. 1, page 1425
- [6] There was an extract of Section 81 of the Financial Markets Act 19 of 2012 and Sections 135 to 140 of the Financial Sector Regulation Act 9 of 2017.
- [7] His attorney Mr. Parsee and his advocate Mr. Howse SC.
- [8] fair
- "just , unbiased, equitable, impartial, legitimate, in accordance with the rules or standards" Shorter Oxford English Dictionary, Oxford University Press, 2007, Vol.1, page 920
- [9] 9 Frank Riebli in an article titled The Spectre of the Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's

Self-incrimination Jurisprudence described how the US Supreme Court has referred to the Court of the Star Chamber: 'On the other hand, the Court has consistently used Star Chamber to develop identifiable themes: brutality, abuse of power, oppressive

state might overpowering the helpless individual, and persecution. Star Chamber is usually a foil, contrasted with our own courts and legal system, by adjectives like "hated," "obnoxious," and "opprobrious." The Court has said, for example, that it 'thought the privilege {against self-incrimination} necessary to prevent any recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. ' The Court has also referenced Star Chamber in explaining or justifying the scope of the protections it finds under the Self-Incrimination Clause. The Court stated, for example, that "[t]he importance of a right does not, by itself, determine its scope, and therefore we must continue to hark back to the historical origins of the privilege,

particularly the evils at which it was to strike. The privilege against compulsory self-incrimination was developed by painful

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opposition to . . . Star Chamber proceedings.'

[10] '(1) A financial sector regulator may instruct an investigator appointed by it to conduct an investigation in terms of this Part in respect of any person, if the financial sector regulator a) reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, a financial sector law for which the financial sector regulator is the responsible authority. b)

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b)

[11] (2) The responsible authority may investigate any matter relating to an offence or contravention referred to in sections 78, 80 and 81 of the Financial Markets Act, including insider trading in terms of the Insider Trading Act, 1998 (Act 135 of 1998), and the offences referred to in Chapter VIII of the Securities Services Act, 2004 (Act 36 of 2004), committed before the repeal of those Acts '.

[12] S 136(1)(a)(i) & (iii)

[13] S 136 (1)(a)(ii) & (iii)

[14] S136(1)(a)(iv)

[15] S136(1)(a)(vi)

[16] S136(1)(a)(vii)

[17] S136(1)(b)-(e)

[18] S137

[19] S138

[20] Section 139(1)

[21] Section 139(2)

- [22] Section 139(3)
- [23] Section 139(4)
- [24] Section 139(5)
- [25] See for example specifically section 140(1)(c) which provides that: 'An incriminating answer given, and an incriminating document or information produced, as required in terms of paragraph (b), is not admissible in evidence against the person in any criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for a contravention of section 273 based on the false or misleading nature of the answer'.
- [26] See section 67(2)
- [27] Set out succinctly in the heads of argument filed on behalf of the respondents in paragraphs 50, 50.1, 50.2, 50.3.
- [28] '167.Admin istrative penalties. - (1) The responsible authority for financial sector law may, by order served on a person, impose on the person an appropriate administrative penalty, that must be paid to the financial sector regulator, if the person - (a) Has contravened a financial sector law; or (b) Has contravened an enforceable undertaking accepted by the responsible authority. (1) In determining an appropriate administrative penalty for particular conduct - (a) The matters that the responsible authority must have regard to include the following - (i) The need to deter such conduct; (ii) the degree to which the person has co-operated with a financial sector regulator in relation to the contravention; and (iii) any submissions by, or on behalf of, the person that is relevant to the matter, including mitigating factors referred to in those submissions; and (b) Without limiting paragraph (a), the matters that the responsible authority may have regard to include the following - (i) The nature, duration, seriousness and extent of the contravention; (ii) any loss or damage suffered by any person as a result of the conduct; (iii) the extent of any financial or commercial benefit to the person, or a juristic person related to the person, arising from the conduct; (iv) whether the person has previously contravened a financial sector law; (v) the effect of the conduct on the financial system and financial stability; (vi) the effect of the proposed penalty on financial stability; (vii) the extent to which the conduct was deliberate or reckless. (2) An administrative penalty may include an amount to reimburse the responsible authority for reasonable costs incurred by the responsible authority in connection with the contravention. (3) The responsible authority may not impose an administrative penalty on a person if a prosecution of the person for an offence arising out of the same set of facts has been commenced. (4) An administrative penalty order is not a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (5) The responsible authority that makes an administrative penalty order must publish the order.' (6)
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 - (i) The nature, duration, seriousness and extent of the contravention;
 - (ii) any loss or damage suffered by any person as a result of the conduct;
 - (iii) the extent of any financial or commercial benefit to the person, or a juristic person related to the person, arising from the conduct;
 - (iv) whether the person has previously contravened a financial sector law;
 - (v) the effect of the conduct on the financial system and financial stability;
 - (vi) the effect of the proposed penalty on financial stability;
 - (vii) the extent to which the conduct was deliberate or reckless.
 - (2) An administrative penalty may include an amount to reimburse the responsible authority for reasonable costs incurred by the responsible authority in connection with the contravention.
 - (3) The responsible authority may not impose an administrative penalty on a person if a prosecution of the person for an offence arising out of the same set of facts has been commenced.
 - (4) An administrative penalty order is not a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977)
 - (5) The responsible authority that makes an administrative penalty order must publish the order.'

(6)

[29] Section 167(3)

[30] Section 168, 169, 170 and especially 170(2)

[31] Section 218

[32] Sections 228 and 229

[33]

[2005] ZASCA 11; 2005

(6) SA 182 (SCA) at paras 33-35

[34] *ibid*

[35] 2019

(6) SA 400 (SCA) at paras 33 and 34 - a judgment which was upheld by the Constitutional Court on a different ground in *Normandien Farms v*

South African Agency for Promotion of Petroleum Exportation and Exploitation 2020 (4) SA 409 (CC) - see especially para 24

[36] 2021

(3) SA 593 (SCA) at para 45

[37] *Simelane N.O and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another*

(2003) 1 All SA 82 (SCA) at para 16 quoting para 54 of *Norvatis SA (Pty) and others v The Competition Commission and others* (reference omitted)

[38] *Competition Commission v Yara (South Africa) (Pty) Ltd and Others* 2013 (6) SA 404 (SCA) para 24

[39] 3 of 2000.

[40] 2011

(1) SA 327 (CC) para 38

[41] 2000

(4) SA 621 (C) para 67

[42] Section 134 (2)(c) of the FSR Act 9 of 2017

[43] See Sections 135 to 137

[44] Section 139(1)

[45] Section 139(4)

[46] Section 139(2)

[47] Section 139(3)

[48] Section 139(5)

[49] [1970] CH 345 at 402 C-E

[50] [1970] All ER 535 (CA) at 539

[51] Constitution of the Republic of South Africa 1996 - "section 33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[52] "3

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

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of any person must be procedurally fair."

[53] See Legitimate Expectation and Natural Justice: English, Australian and South African Law, John Hlophe, (1987) SALJ 165 - "...what is essential for the purposes of natural justice is not whether or not the Minister is exercising purely administrative or quasi-judicial powers, but whether the exercise of powers has disadvantageous or detrimental consequences to the affected persons"

[54] Megarry J's dictum in *Leary v National Union of Vehicle Builders* (1971) Ch 34 at 49F - ' a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body'

is particularly apposite to the particular facts of this case

[55] PAJA section 6(2)(c)

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