

SOUTH AFRICA / JUDGMENT

Mamepe Capital (Pty) Ltd and Another v Financial Services Tribunal and Another (93773/2019) [2021] ZAGPPHC 148 (29 January 2021)

[2021] ZAGPPHC 148

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

93773/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case number.

93773/2019

Heard on: 25 January

2021

Date of Judgment: 29

January 2021

In

the matter between:

MAMEPE

CAPITAL (PTY) LTD

First Applicant

MAUWANE

KOTANE

Second Applicant

and

THE

FINANCIAL SERVICES TRIBUNAL

First Respondent

THE

FINANCIAL SECTOR CONDUCT AUTHORITY

Second Respondent

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

- [1] This is a review application in terms of section 235 of the Financial Sector Regulation Act, Act 9 of 2017 (“the Act”), read with the provisions of the Promotion of Administrative Justice Act, Act 3 of 2000 (“PAJA”).
- [2] First applicant (“Mamepe”) was, at all material times, a financial services provider within the meaning of the Act and the Financial Advisory and Intermediary Services Act, Act 37 of 2002 (“the FAIS Act”), Second Applicant (“Kotane”), as a director of Mamepe, was a key person as defined in the Act and he was a financial advisor in terms of the FAIS Act. Mamepe and Kotane are referred to collectively as “the applicants”.
- [3] Second respondent, the Financial Sector Conduct Authority (“the FSCA”), is appointed in terms of section 56 of the Act, with the broad purpose of promoting fair treatment of financial customers and of regulating the financial sector. The first respondent (“the Tribunal”) was established in terms of section 219 (1) of the Act in to reconsider, amongst other matters, decisions of the FSCA. The Tribunal abides the decision of this Court. The FSCA opposes the application.
- [4] On 13 February 2019, after having considered certain complaints against applicants, the FSCA notified the applicants of three decisions that it had made:
- [4.1] A disbarment order was granted against Kotane in terms of section 153
- (1) (a) of the Act, prohibiting him from providing financial services for a period of ten years;
- [4.2] Mamepe’s licence was withdrawn in terms of section 9 (1) (a) and (c) of the FAIS Act;
- [4.3] In terms of section 144 (1) (d) (i), read with section 144 (3) (e) of the Act, applicants were directed to repay the sum of R 10 million to SME Bank (in liquidation) (“the bank”). jointly and severally.
- [5] On 11 April 2019 applicant brought application before the Tribunal for a reconsideration of the decision of the FSCA. On 19 November 2019 the reconsideration application was dismissed. Applicants then launched this review application which is aimed solely at setting aside the FSCA decision that they are to repay R 10 million to the bank. Applicants accept that they have contravened sections 8 (9) (c) of the FAIS Act, and they do not challenge the disbarment order against Kotane, nor the withdrawal of Mamepe’s licence.

THE

BACKGROUND

- [6] During or about 2014 applicants formed a business relationship with the bank, through the bank's chief executive officer, Mr. Tawanda Mumvuma. On 7 January 2014 Mamepe entered into a written agreement with the bank in terms of which Mamepe undertook to provide financial services to the bank, more specifically, a capital raising campaign and general financial and advisory services.
- [7] The agreement was capable of cancellation by either party, on thirty days' written notice. Furthermore, the agreement contained a Shifren-clause which required all additions, variations and agreed cancellations to be in writing. Finally, the agreement recorded that the written document contained the entire agreement between the parties.
- [8] During the period 2014 to 2016, the bank paid large sums of money (amounting to millions of rands) to various companies, as so-called money market investments. These payments were facilitated by applicants through bank accounts held in South Africa in Mamepe's name. On 17 June 2015 the bank paid a further R 10 million to Mamepe. It is the latter payment that is the subject of this application.
- [9] On 29 November 2016 and on 23 March 2017 the Registrar of the Financial Services Board (as it was then) received complaints from the bank relating to monies to the value of R 280 million that the bank believed had been invested with Mamepe. The Registrar also received a request for assistance in obtaining information regarding the bank's investments from the Namibian Financial Institutions Supervisory Authority.
- [10] The Registrar launched an investigation that was ultimately concluded by investigators acting for the FSCA (upon the Act coming into operation). During March 2017 Mumvuma was suspended as CEO of the bank, and his replacement, Mr. Herunga, asked Kotane for information and supporting documents relating to the bank's investments with Mamepe. Kotane refused to disclose any information to the bank.
- [11] On 21 June 2017, pursuant to a subpoena issued at the request of the Namibian Police. Kotane deposed to an affidavit in which he

stated the following:

[11.1] He confirmed that Mamepe and the bank had entered into an agreement in terms of which Mamepe undertook to render financial services to the bank, which included capital raising, advisory, asset management and private equity services;

[11.2] He said that the bank had transferred funds to nominee accounts. These funds were held separate from Mamepe funds.

[11.3] Kotane said that these funds were money market instruments in respect of which Mamepe had offered advisory services. He warned that should the bank withdraw the investment prematurely, a 20% penalty would be payable, calculated on the total investment.

[11.4] Mamepe had, according to Kotane, provided monthly statements to the bank in respect of these so-called money market instruments. These statements reflected the capital cash flow and interest earned on the investments. The statements expressly recorded that the transactions had been executed through Mamepe.

[11.5] Kotane alleged that as at 31 July 2016 the portfolio balance was R 217 million, of which R 175 million had been invested in a consignment of fertilizer through a supplier called Rawfert.

[12] The affidavit was couched in such a fashion as to leave little doubt that the investments were under Mamepe's control.

[13] The investigation revealed that much of the information provided by Kotane was a lie. There was no relationship between Mamepe and the nominee companies, and Mamepe had nothing to do with those investments. save that it had channeled the funds through a bank account held in its name. Mamepe had provided false statements to the bank to substantiate the alleged investments. There was no

portfolio. There was no investment in fertilizer, and the "commodity investment" allegedly worth R 175 million was a fabrication. There was also no penalty for early withdrawal of the alleged investment. Kotane later alleged that he had been duped by Mumvuma into providing false information which, Kotane says, had originated from Mumvuma in the first place. Not surprisingly. both the FSCA and the Tribunal rejected Kotane's version as false.

THE FINANCIAL STATUTES

[14] Section 8 (9) (c) of the FAIS Act, provides that no person may:

"perform any act, make or publish any statement, advertisement, brochure or similar communication which-

- i) Relates to the rendering of a financial service, the business of a provider or a financial product; and
- ii) the person knows, or ought reasonably to know, is misleading, false, deceptive, contrary to the public interest or contains an incorrect statement of fact."

[15] Applicants admit that, by publishing false statements in respect of the so-called money market investments, they contravened the aforesaid provision.

[16] Section 144 of the Act grants the FSCA the authority to issue a written directive to a financial institution to take the action specified in the directive, if the circumstances set out in section 144 (1) are found to exist. They are the following:

"(1) (a) the financial institution is conducting its business in a way that poses a material risk to the efficiency and integrity of financial markets;

- (b) the financial institution's treatment of its financial customers is such that the institution will not be able to comply with Its obligations in relation to the fair treatment of financial customers;
- (c) the financial Institution is providing financial education in a manner that is not in accordance with relevant conduct standards;
- (d) the financial institution or a key person, representative or contractor of the financial institution-
- (i) has contravened or is likely to contravene a financial sector law for which the Financial Sector Conduct Authority Is the responsible authority;
- (ii) has not complied with an enforceable undertaking accepted by the Financial Sector Conduct Authority;
- (iii) is involved, or is likely to be involved in financial crime; or
- (iv) is causing or contributing to instability in the financial system, or is likely to do so."

[17] There is no dispute that the FSCA was entitled to issue a directive against Mamepe in terms of section 144

- (1) (d) (i) of the Act. The FSCA was entitled also, in terms of the provisions of section 144 (2) (a), to issue a directive against Kotane, by virtue of Kotane having been a key person who had contravened section 8 (9) (c) of the FAIS Act.

[18] Section 144 (3) sets out the aims of a directive in terms of subsections 144

- (1) or (2):

"(3) A directive in terms of subsection (1) or (2) must be aimed at achieving the objective of the Financial Sector Conduct Authority set out in section 57 and-

- (a) stopping the financial institution or the directed person from contravening applicable financial sector laws, or reducing the risk of such contravention;
- (b) ensuring that the financial institution or the directed person complies with the enforceable undertaking that was accepted by the Financial Sector Conduct Authority;
- (c) stopping the financial institution or the directed person from being involved in financial crime, and reducing the risk that it may be so involved;
- (d) reducing the risk that a systemic event may occur; or
- (e) remedying the effects of a contravention of a financial sector law or the person's involvement in financial crime."

[19] Section 57 states the broad objectives of the FSCA which are to:

“(a) enhance and support the efficiency and integrity of financial markets; and

- (b) protect financial customers by-
- (i) promoting fair treatment of financial customers and potential financial customers by financial institutions; and
- (ii) providing financial customers and potential financial customers with financial education programs, and otherwise promoting financial literacy and the ability of financial customers and potential financial customers to make sound financial decisions; and
- (c) assist in maintaining financial stability.”

[20] Subsections

- (a) to (d) of section 144 (3) provide for preventative measures, whilst the purpose of subsection (e) is restorative, seeking to remedy the effects of the contravention. The Oxford Languages defines the word “remedying” as “to “set right an undesirable situation”. In other words, to the extent possible in the circumstances of each case, the FSCA may Issue a directive setting right what has gone wrong. In this instance, it was of the view that applicants should repay to the bank what Mamepe had received, being the R 10 million that it had been paid on 17 June 2015.

THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT. 2000

- [21] Section 235 of the Act provides that any party to an application for reconsideration of a decision, who is dissatisfied with an order of the Tribunal, may institute review proceedings in terms of PAJA. Section 6 (1) and (2) of PAJA reads as follows :

“Judicial review of administrative action

6.(1) Any person may institute proceedings in a court or tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

- (a) the administrator who took it-
 - (i) was not authorized to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorized by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action was procedurally unfair;
- (d) the action was materially influenced by an error of law;

- (e) the action was taken-
 - (i) for a reason not authorized by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of unauthorized or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;
- (f) the action itself-
 - (i) contravenes a law or is not authorized by the empowering provision; or
 - (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator;
 - (g) the action concerned consists of a failure to take a decision;
 - (h) the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
 - (i) the action is otherwise unconstitutional or unlawful.”

[22] It is not in dispute that the FSCA decision and the directive to repay the money constitute administrative action as defined in *Grey’s Marine Hout Bay and others v Minister of Public Works and others*[1], which judgment was cited with approval by the Constitutional Court in *Minister of Defence and Military Veterans v Motau*[2]. The decision of the FSCA, and the resulting directive may thus be reviewed under PAJA

THE APPLICANTS’ CASE

[23] Applicants argue that the FSCA decision to direct repayment was not authorized by the Act, and that the FSCA had erred in law by finding that it was so authorized. This ground of review would thus fall under sections 6 (2) (a) (i) and 6 (2) (d) of PAJA. Furthermore, applicants say that the decision was irrational because it was not rationally connected to the purpose of the empowering provision, which is a ground for review under section 6 (2) (f) (ii).

[24] Applicants also argue that the FSCA acted unreasonably. They say so for two reasons. Firstly, they say, the FSCA disregarded the fact that part of the R 10 million was payment for services already rendered, for which applicants should be paid. It was unreasonable, in those circumstances, for the FSCA to direct repayment of the entire R 10 million. Secondly, applicants contend that repayment of R 10 million is disproportionate to the “minor infringement for which no harm has been proven to any party” (I quote from the applicants’ heads of argument).

THE LACK OF AUTHORITY ARGUMENT

[25] Applicants have argued that the FSCA is not entitled to grant directives for the payment of monies to third parties as a way to remedy the effects of a contravention of a financial sector law, They make the following arguments:

[25.1] In other sections of the Act the legislature has specifically provided for directives for the payment of monies. For instance, in section 167 the legislature has allowed for payment of administrative penalties. Therefore, the argument goes, if the legislature intended to provide for directives that include the payment of monies to third parties, it would have expressly said so. The FSCA, it is argued, is only entitled to give directives which do not require the payment of monies. The FSCA’s authority is limited so applicants say, to giving directives that, for instance, require the applicants to retract their false statements and to publish the retraction to the public.

[25.2] Applicants also argue that in essence the directive to repay the bank R 10 million is a penalty. Section 167 already allows for payment of an administrative penalty, and therefore the FSCA cannot, in addition to its powers in terms of section 167, direct payment of monies to the financial customer in terms of section 144 (3). The authority argument is based on section 6 (2) (a) (i) and 6 (2) (d) of PAJA.

[26] In interpreting a statute, one should have regard to the dictum in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3]

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, or some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all of these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document..... The ‘inevitable point of departure is the language of the provision itself read in context and having regard to the purpose of the provision and the background to the production of the document.”

- [27] The purpose of the Act, as stated in the preamble thereto, includes the protection and promotion of rights in the financial sector as set out in the Constitution. One of the main objectives of the FSCA is the protection of financial customers. This it does, inter alia, by regulating and supervising the conduct of financial institutions, and where necessary, by issuing directives to financial institutions, to key persons in those institutions, or to their representatives or contractors. There is a distinct difference between the purpose of subsections 144 (3) (a) to (d), which, as I have pointed out, are preventative in nature, whilst subsection 144
- (3) (e) is restorative and is aimed at remedying the effects of a financial crime. In some instances, the remedy might not require the repayment of monies, such as when a financial customer's shares are stolen, and a directive is given that they should be returned. However, often the effects of a financial crime would include a pecuniary loss. Financial transactions involve money in one way or another, and in most cases, I venture to say, a contravention of a financial law will result in the loss of money. The mere publication, as applicants suggest, of a retraction of a previously false statement or a directive aimed at reducing the risk of future contravention would not remedy a pecuniary loss. Is the FSCA then to do nothing to remedy the loss? I do not believe so.
- [28] In my view the legislature intended the word "remedy" to carry a wide meaning, leaving the FSCA to consider, in each individual situation, what would be required to set right the wrong. The FSCA is an administrator with an expert understanding of financial matters, and is well placed to determine how a financial wrong may be set right. In this regard I am mindful of the words of Schatz JA[4]:
- "[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraint under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."*
- [29] The applicants' further argument, that the directive to repay the money is essentially a penalty and should have been considered under section 167 of the Act, is equally unpersuasive. Section 167 provides for the imposition of an administrative penalty in instances where a person has contravened a financial sector law, or has contravened an enforceable

undertaking which has been accepted by the responsible authority. The penalty must be paid to the financial sector regulator, and not to the financial customer that suffered the effects of the contravention of the law.

[30] A payment of a penalty in terms of section 167 would certainly be punitive, and possibly preventative, but would not remedy the effects of the contravention. Sections 144 and 167 clearly have different aims.

[31] In my view the legislature intended to authorize the FSCA to direct appropriate remedies for each individual case. That is apparent from the fact that the legislature did not specifically define the nature of the relief that the FSCA could give. It used the word “remedy” instead, which has a wide meaning, leaving it up to the FSCA to decide what remedy is appropriate. In my view, a remedy may include, where appropriate, the repayment of monies. I therefore find that the FSCA is authorized to direct the payment of monies in terms of section 144 (3) (e) of the Act. The first ground for review, in terms of section 6 (2) (a) (i) and section 6 (2) (d) of PAJA, is without merit.

DID THE FSCA ACT UNREASONABLY IN DIRECTING REPAYMENT?

[32] The argument that the FSCA acted unreasonably by ordering the repayment of the entire R 10 million is also, in my view, unfounded.

[33] The first leg of the argument, that Mamepe had rendered services to the bank for which it is entitled to be paid, ignores the shifting sands of the applicants’ case. On 12 May 2017 applicant’s

erstwhile attorney wrote to the erstwhile Financial Services Board in answer to certain questions posed by the latter. In the letter he answered the questions as follows:

“Question 1: Does Mamepe Capital have a relationship with SME Bank Namibia?:

Answer: Yes. there is an existing relationship.

Question 2: What is the nature of the relationship?

Answer. General financial and advisory services.

Question 3: Is there a written mandate that governs the relationship?

Answer: Yes

Question 4: If there is a written mandate then a copy is to be furnished.

Answer: Copies of the mandate are attached hereto.

Question 5: Has Mamepe Capital invested funds on behalf of SME Bank:

Answer: Yes.

- [34] Applicants' attorney said nothing in the letter about an oral agreement between Mamepa and the bank, and nothing about a capital raising agreement, but he clearly confirmed that the services rendered to the bank were financial and advisory in nature.
- [35] In an interview with investigators on 31 January 2018 Kotane stated that although it had been foreseen at the outset that applicants would render financial services to the bank, agreement had also been reached with the bank that applicants would raise capital on behalf of the bank of either R 2.5 billion or R 3.2 billion (Kotane's version is not clear). Mamepe would be entitled to a commission of 0.5% (or 0.25% - the version is once again unclear) on the amount of capital so raised. The R 10 million was intended. Kotane said, to be an advance payment towards the commission. This version flies in the

face of the Shifren-clause in the written agreement, to which I alluded earlier. (As an aside, it is common cause that applicants

never raised any capital on behalf of the bank.)

- [36] Throughout the investigation by the FSCA, applicants' version remained the same: The R 10 million had been paid as an advance for services to be rendered, not for services already rendered. In Kotane's affidavit to the Tribunal, in support of the application to reconsider the FSCA's decision, Kotane says:

"8.1 In respect of the R 10 million payment received from SME Bank on 17 June 2015:

8.1.1 the payment was received by the first applicant as an upfront payment that was agreed upon for all future services which the respondent would render to SME Bank; and

8.1.2 the payment was not limited to a specified number or value of services to be performed by the respondent and was not restricted to

a certain period of time."

- [37] In the founding affidavit in this application Kotane contradicted his earlier versions when he said:[5]

"The R 10 million paid to the First Applicant was a fee for services rendered both past, present and future to SME Bank."

- [38] I sought clarity from applicants' attorney on the exact nature of the services allegedly rendered. He was unable to point me to any evidence that Mamepe had rendered legitimate services. If services had in fact been rendered, it surely would have been easy to produce the invoices raised in respect of those services.

- [39] Kotane has contradicted himself at various times, and has changed his version when he thought it would assist his case. I therefore have no hesitation in rejecting applicants' version. I agree with the conclusion of the Tribunal, that in all likelihood the R 10 million was paid as a fee to produce false documents which Mumvuma could use to hide his money laundering activities. There is simply no evidence that the R 10 million was paid as a fee for any legitimate service.
- [40] The second leg of the reasonability argument is that the contravention was so minor that the FSCA could not reasonably have directed the repayment of the money. This argument is equally without merit. Applicants were part of a fraudulent scheme that extended over a long period of time, was coordinated with Mumvuma, and which caused the bank to lose substantial sums of money. Kotane, who was an experienced financial advisor, and not a naïf as he pretended, persisted with the fraud even after the investigation had commenced. The payment of R 10 million was unconnected to any proven services, and was likely payment for applicants' assistance in hiding the fraudulent scheme. To this day Kotane has not played open cards with this Court. and he continues to minimize the seriousness of his offence. I reject the argument that the contravention was minor.
- [41] Applicants have to show that the decision was one "that a reasonable decision-maker could not reach". (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*).[6] In *Bato Star O'Regan J* held as follows[7]

"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case [footnote removed]. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected."

- [42] In my view, the decision was made in accordance with the broad aims of the Act, which is to protect financial customers. It had the effect of remedying the effects of a contravention of a financial law (albeit to a limited extent), and thus it fulfilled the exact purpose of section 144 (3) (e). I see no basis to find that the FSCA should have directed payment of a reduced amount. I can find nothing irrational or unreasonable in its decision. The ground for review under section 6 (2) (h) of PAJA should also fail.

WAS THE BANK A FINANCIAL CUSTOMER?

- [43] Applicants contend that the bank was never a financial customer within the meaning of the Act Applicants say that, although they rendered services to the bank, those services do not fall within the definition of "financial services". Consequently, they say, the FSCA was not entitled to direct repayment of the monies to the bank.
- [44] A "financial customer" Is defined in section 1 of the Act as:

“a person to, or for, whom a financial product, a financial instrument, a financial service or a service provided by market Infrastructure is offered or provided. in whatever capacity”

[45]

The financial service provider does not have to actually provide a financial service to the customer for it to be considered a “financial customer” . If such services are offered, the customer to whom the services are offered is then a “financial customer” as defined in the Act. It is common cause that Mamepe entered into an agreement with the bank for the provision of financial services. The agreement specifically stated that Mamepe would render stock brokerage, share and derivative trading services, which are financial service . In my view, once the agreement was signed, the bank was a financial customer of Mamepe. When Kotane was interviewed by the investigators, he acknowledged that the services offered to the bank included financial services which were regulated by the Act. There is therefore no question in my mind that applicants offered financial services within the meaning of the Act.

[46] Furthermore, on applicants’ own version, Mamepe provided financial services to the bank by tracking interest rates on money market securities. Applicants also provided administration services in terms of section 3 (1) (a) (iv) of the Act by preparing statements for the bank that reflected the funds that had purportedly been Invested in money market products, albeit that the statements were false.

[47] Applicant’s attorney made the astonishing submission that, because the statements were false, they did not constitute a financial service within the meaning of the act. Applicants only pretended to render financial services by providing false statements. If that were so, on applicants’ argument, whenever a financial service provider commits a fraudulent act, that act cannot fall within the purview of the Act, and it Is only legitimate acts that may be the subject of a directive in terms of section 144 of the Act. If that were so, then the entire purpose of section 144 would be defeated. The submission is rejected.

IS A COURT THE PROPER FORUM TO DETERMINE THE DISPUTE?

[48] Finally, applicants contend that the proper forum for the determination of how much should be repaid to the bank (If anything) is the High Court. I am told that the bank has already launched proceedings to recover its money from the applicants.

[49] Applicants say that there had not been a proper hearing before the FSCA, wherein discovery could be made, and witnesses cross-examined. Applicants submit that, if there were to be a trial in court, those

procedures would follow, and it may be found that applicants should not repay the monies, or at least that they should repay less than the full amount. They suggest that the FSCA was not possessed of all the relevant facts.

[50] Applicants' problem with this argument is that the facts are essentially common cause. Furthermore, applicants had ample opportunity to place further evidence before the FSCA, and before this Court. if they so wished. In my view, the insistence on a High Court trial is simply a delaying tactic. Obviously, once the FSCA's directive has been enforced, the bank would have to reconsider its claim in the High Court. The fact that there is a pending High Court matter does not, however, preclude the FSCA from exercising its powers in terms of the Act.

[51] My views regarding the applicants' conduct should by now be clear. I have not been told whether criminal charges have been pursued against them. Therefore, I shall request the Registrar to forward this judgment to the Director of Public Prosecutions in Johannesburg for the necessary investigations into the applicants'

conduct.

[52] In the circumstances I make the following order:

[52.1] The application is dismissed with costs, including the cost of senior counsel.

[52.2] The Registrar of Court is requested to forward this judgment to the Director of Public Prosecutions, Johannesburg for consideration.

JJC SWAHEPOE.L

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down. is deemed to be 29 January 2021.

Attorney for Applicant: Mr. Rael Zimmerman

Taitz & Skikne Attorneys

Counsel for Respondent: Adv. A Cockrell SC

Attorney for Respondent: MOTHLE JOOMA SABDIA INC

(Mr. Jooma)

[1] 2005

(6) SA 313 (SCA)

[2] 2014 (5) SA 69 (CC)

[3] 2012 (4) SA 593 (SCA)

[4] Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another [2003] 2 ALL SA 616 (SCA)

[5] In par. 23.1

[6]

[2004] ZACC 15; 2004 (4) SA 490 (CC) at par. 45; See also: Rkgase and another v Minister of Rural Development and Land Reform and another [2019] 4 ALL SA 511 (GP)

[7] At paragraph 45

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