

SOUTH AFRICA / JUDGMENT

Matsepe and Another v Minister of Finance and Others (10139/2022) [2022] ZAGPPHC 824 (1 November 2022)

[2022] ZAGPPHC 824

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M Kubushi

CASE / FILE NUMBER

10139/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

Number: 10139/2022

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
01
NOVEMBER 2022
In

the matter between:

KABELO
JOHN MATSEPE FIRST
APPLICANT
MOSHKATE
INVESTMENT GROUP (PTY) LTD SECOND
APPLICANT
and
MINISTER
OF FINANCE
FIRST RESPONDENT
MINISTER
OF COOPERATIVE SECOND
RESPONDENT
GOVERNANCE
AND TRADITIONAL AFFAIRS

NATIONAL
DIRECTOR OF THIRD
RESPONDENT
PUBLIC
PROSECUTION
SOUTH
AFRICAN LOCAL
FOURTH RESPONDENT
GOVERNMENT
ASSOCIATION

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] At the heart of the dispute between the parties in these proceedings is whether the restriction in Regulation 6(c) of the Municipal Investment Regulations, promulgated by means of Government Notice R 308 in GG 27431 of 1 April 2005 (“the Municipal Investment Regulations”), is lawful. The impugned regulation (“Regulation 6(c)”) relates to the power of municipalities to invest funds and limits municipalities to invest funds only in investment type

deposits with banks registered in terms of the Banks Act.[1] The empowering provisions for the promulgation of the Municipal Investment Regulations are contained in the Local Government: Municipal Finance Management Act (“the MFMA”);[2] section 13, thereof.

[2] The First Applicant, Kabelo John Matsepe, who is the sole director of the Second Applicant, Moshate Investment Group (Pty) Ltd, together with the Second Applicant, are, in these proceedings, challenging the validity of the Regulation 6(c), insofar as it limits the powers of municipalities to invest in banks registered in terms of the Banks Act.

[3] The Applicants maintain that Regulation 6(c) is invalid because it amounts to an administrative action which is not lawful on several review grounds under section 6(2) of the Promotion of Administrative Justice Act (“PAJA”).[3] Alternatively, the Applicants contend that Regulation 6(c) is invalid because it is irrational and thus an affront to the principle of legality.

[4] The Applicants contend that Regulation 6(c) is unlawful insofar as it stipulates that municipal investment deposits must only be with banks registered in terms of the Banks Act. The restriction is said to be irrational as it prevents the Applicants from soliciting and receiving financial gratification as a result of influencing municipalities to make deposits with Mutual Banks.

- [5] This application, insofar as it relates to the First Applicant, is alleged to be a collateral challenge to the validity of charges which, in whole or in part rely upon the validity of Regulation 6(c) of the Municipal Investment Regulations. The First Applicant is denying the legality of Regulation 6(c) and contends that this application constitutes a collateral challenge to the validity of that Regulation.
- [6] As will appear more clearly later in this judgment, there are criminal proceedings levelled against the First Applicant, which, criminal proceedings are alleged to rely on the validity of Regulation 6(c) and, are thus, said to constitute coercive proceedings against which the First Applicant is entitled to raise a collateral defence. The implication flowing from this contention is that should the impugned regulation be set aside as unlawful, invalid and unconstitutional, part of the charges against the First Applicant, which are premised on Regulation 6(c), would fall away.
- [7] The relief sought by the Second Applicant, on the other hand, is a direct review in terms of PAJA or the principle of legality.
- [8] No substantive relief is sought in the papers against the Respondents, in these proceedings, save for costs, in the event of opposition. However, the First Respondent, the Minister of Finance, and the Third Respondent, the National Director of Public Prosecutions, have opted to oppose the application.
- [9] The First Respondent is involved in these proceedings as the executive authority, who in the context of protecting public funds, is entrusted with oversight of the legislative regulation of municipal executive functions in accordance with the Constitution of the Republic of South Africa, 1996 and section 168(1) of the MFMA and, together with the Second Respondent, the Minister of Cooperative Governance and Traditional Affairs, is responsible for the drafting of the Municipal Investment Regulations. >
- [10] The interest of the Third Respondent in these proceedings, on the other hand, lies therein, that the First Applicant is an Accused person in criminal proceedings before the High Court of this Division.
- [11] Both, the First Respondent and the Third Respondent, are opposing the application seeking the dismissal of the application with costs. The First Respondent has raised a number of points in limine, which the Third Respondent is in support of. However, before the merits and points in limine are considered, it is imperative that the issue of the collateral challenge be first determined as it can be dispositive of the application.
- [12] Before doing so, it is apposite that a brief background of this matter is set out, the facts, of which, are mostly common cause and/or indisputable.

THE FACTUAL MATRIX

- [13] This application has its genesis in the corruption and malfeasance alleged to have been perpetrated by VBS Mutual Bank ("VBS"), a mutual bank registered in terms of the Mutual Banks Act.[4]
- [14] It is common cause that the Second Applicant had entered into a referral agreement with VBS in terms of which the Second Applicant would obtain a commission on every deposit made by clients referred to VBS by the Second Applicant. During the subsistence of the referral agreement, the Second Applicant referred several clients to VBS for investment purposes subject to a commission, such clients included municipalities.
- [15] VBS later experienced a liquidity problem which resulted in it being placed under curatorship by the First Respondent. SizweNtsalubaGobodo Advisory Services, represented by Mr Anoosh Rooplal, was appointed as the curator to VBS. Consequent upon the initial findings of the curator, which revealed massive losses to VBS, the Deputy Governor of the Reserve Bank appointed an investigator, Adv Terry Motau SC ("Adv Motau"), for the purposes of investigating the affairs of VBS.

Adv Motau's investigation led to the compilation and publication of a report titled "VBS Mutual Bank – The great bank heist" ("the Report"). The investigation revealed a wide range of criminality in the conduct of the affairs of VBS which involved a number of persons and entities. The Report recommended that all those who have been identified as

participating and benefiting from the so called "criminal enterprise" in VBS, be charged and prosecuted.

- [16] During such investigation, the First Applicant, as the sole director of the Second Applicant, was interviewed and questioned about his and the Second Applicant's involvement in VBS. The First Applicant's involvement in VBS's operations was set out in great detail in the Report, and the First Applicant was also found to be one of the persons who participated and benefited from the criminality revealed in the Report.
- [17] Pursuant to the Report's recommendations, the First Applicant was indicted along with thirteen
- (13) others. The First Applicant is cited as Accused ten (10) in the indictment. There are approximately thirty-three (33) charges levelled against the First Applicant. He is, both personally and as the directing mind of the Second Applicant, confronted with a criminal indictment[5] based on corruption, racketeering and money laundering for having allegedly received gratuitous payments in the amount of R35 million,

in contravention of various sections of the Prevention of Organised Crime Act ("POCA").[6] The other prescripts set out in the indictment include the Mutual Banks Act, the MFMA, the Municipal Investment Regulations, and the Prevention and Combating of Corrupt Activities Act ("PRECCA").[7] Various accused are also charged with contravening PRECCA, whilst others are charged with the common law offences of Theft and Fraud.

- [18] The criminal proceedings are currently before the High Court of this Division, and were initially case managed by De Vos J, and are presently case managed by the Deputy Judge President of this Division, and several pre-trial hearings are said to have already taken place.
- [19] Confronted with a criminal indictment based on the aforesaid charges, the First Applicant, both personally and as the directing mind of the Second Applicant, launches this application belatedly seeking to challenge the validity of Regulation 6(c), which was promulgated more than seventeen (17) years ago.[8]

THE COLLATERAL CHALLENGE

- [20] In challenging the validity and legality of Regulation 6(c), in this application, the Applicants raises a collateral challenge to the validity of the charges against the First Applicant, which, they allege are in whole or in part reliant upon the validity of Regulation 6(c). The Applicants claim that the determination of the collateral challenge by this Court, will determine whether the charges against the First Applicant, insofar as they are dependent upon the validity of Regulation 6(c), are valid.
- [21] The Applicants submit that a collateral challenge does not constitute review proceedings in terms of PAJA, where a Court would have a discretion whether or not to consider the challenge. They argue that in a collateral challenge, a Court is duty bound to rule on the legality of Regulation 6(c), as the collateral challenge would determine whether or not the charges against the First Applicant, insofar as they are dependent upon the validity of Regulation 6(c), are valid charges.
- [22] The Applicants contend that the First Applicant is entitled to raise a collateral challenge to the legality of Regulation 6(c) due to the presence of the served action, in the form of criminal proceedings, against him. They contend that the said criminal proceedings are based inter alia on the validity of Regulation 6(c), and hence, the First Applicant has, correctly, approached Court in the manner he did – by means of a collateral challenge. In support of this contention, the Applicants relied on the judgment in *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others*.^[9]
- [23] The Applicants submit, further, that the First Applicant raised the collateral challenge at the appropriate forum (being this Court) and did not have to do so in the Criminal Court. In this regard, they referred to the Supreme Court of Appeal judgment in *Kouga Municipality v Bellingan and Others*,^[10] wherein, that Court held that a collateral challenge need not be brought in the criminal proceedings [dealing with the charge] but could be brought in civil proceedings because Civil Courts [are] “better versed in administrative law than a specialist Criminal Court”.^[11]

- [24] The Applicants, furthermore, contend that the criminal proceeding against the First Applicant are predicated on Regulation 6(c) in that, the gist of the counts is that the First Applicant accepted gratifications sounding in money from Accused 1, 2 and 3 to solicit deposits into VBS from a number of municipalities, in contravention of the MFMA. The said contraventions of the MFMA as referred to in the various counts, relate to the alleged contravention of Regulation 6(c), which preclude investment into a Mutual Bank such as VBS.
- [25] The First Respondent and the Third Respondent are attacking the Applicants' collateral challenge on different grounds. The First Respondent founds its challenge to the collateral defence on the ground that there is no collateral challenge in these proceedings and in turn, that impacts on the Applicants, and in particular, the First Applicant's locus standi.
- [26] As regards the First Respondent's argument that the First Applicant has no standing to challenge the impugned regulation, the Applicants contend that the First Applicant's standing to challenge the regulation emanates from the fact that some of the charges which have been levelled against him are premised on the contravention of regulation 6(c). The contention is that, it stands to reason that should the regulation be set aside, those charges cannot, to the extent that they are dependent on the contravention of Regulation 6(c), be sustained.
- [27] To the contrary, the First Respondent denies that the First Applicant has made out a case for a collateral challenge defence and argues that on that basis alone, this application should not be countenanced. The contention is that the First Applicant, does not meet the criteria required for a collateral defence and has as a result, failed to establish a collateral challenge defence, and therefore, lacks locus standi, to bring these proceedings.
- [28] It is contended that, a collateral challenge may only be used if the right remedy is sought by the right person in the right proceedings, and the First Applicant is not the right person, this application is not the right proceedings, and the challenge to the impugned regulation is not the right remedy.[12] Hence, the First Applicant lacks locus standi, as the attack on the impugned regulation does not comply with a collateral challenge defence.
- [29] The First Respondent argues, further, that the impugned regulation does not apply to the First Applicant. The contention is that since the impugned regulation states that a municipality may invest funds only in investment type deposits with banks registered in terms of the Banks Act, it applies to municipalities, not the First Applicant. The First Applicant, as is argued, is not in a position of a municipality being coerced directly or indirectly in terms of the impugned regulation, and the relief sought has no effect whatsoever on the charges in the indictment.

- [30] Conversely, the Third Respondent challenges the Applicants' claim on the ground that the criminal charges against the First Applicant are not premised on the provisions of Regulation 6(c). It denies, specifically that the charges against the First Applicant are based on the validity of Regulation 6(c), and its determination.
- [31] The contention is that the First Applicant's reliance upon the General Preamble on reaching the conclusion that the charges are based on the impugned regulation, cannot be sustained on the evidence proffered in the Applicants' papers. According to the Third Respondent, the various prescripts comprising legislation and policies that govern the conduct of Municipalities in their practises relating to the investment of funds of Municipalities, referred to in the General Preamble to the indictments, should be interpreted and understood within the context of each individual charge preferred against each Accused, and in this instance, the First Applicant.
- [32] In reinforcing its argument that the charges against the First Applicant are not predicated on Regulation 6(c), the Third Respondent makes the following arguments:

32.1 In the first place, the Third Respondent contends that although the ambit of POCA as set out in the General Preamble to the indictments, aims to introduce measures to combat organised crime, money laundering and criminal gang activities and to prohibit certain activities relating to racketeering, amongst others, it, also, applies to individual wrongdoers like the First Applicant. In support of this argument, the Third Respondent refers to a decision of the Supreme Court of Appeal where it was held that the purpose of the Prevention of Organised Crime Act is not only to combat the special evils that are associated with organised crime but that its provisions are designed to reach far beyond organised crime and apply also to cases of individual wrongdoing.

32.2 Secondly, the Third Respondent argues, that in respect of the 'enterprise', the State alleges that Accused 1 to 14 were associated in fact and formed an enterprise as defined in section 1 of POCA and as envisaged in sections 2(1)(a) to 2(1)(f), thereof. The argument being that the Accused made use of various legally registered entities to provide continuity of structure for the unlawful activities. These accounts, according to the Third Respondent, were all under the control of various accused persons.

All Accused associated themselves with the enterprise. Members of the enterprise gained overall control of the financial systems of VBS, thereby enriching themselves and their associates through theft of money from the general pool of funds in VBS. The acts of theft of money were covered up by various fraudulent and money laundering activities. Furthermore, members of the enterprise received and made corrupt payments.

32.3 Lastly, the Third Respondent argues that whilst the First Applicant is charged with all the other accused, in terms of POCA, it appears clearly from the indictment that he furthered the enterprise's affairs as set out in the predicate offences in Counts 29, 54, 56, 58, 60, 62, 64, 66, 68, 70, 72, 74, 76, 78, 80, 82, 84, 86, 88, 90, 92, 94, 96, 98, 100, 102, 104, 106, 108, 110, 112, 114, 185 and 186. These predicate offences are instances where the First Applicant, whether on his own or with others, is charged for contravening section 3(a) read with sections 1, 2, 24 and 26 of PRECCA

and for money laundering. A successful prosecution in respect of the predicate offences is not reliant on a conviction in the racketeering offences.

[33] The crux of the Third Respondent's argument is that the Applicants misconstrue the nature of the charges as set out in the counts referred to above. According to the Third Respondent, neither the corruption charges nor the money laundering charges, which form the bulk of the charges against the First Applicant, are dependent on the validity or otherwise of Regulation 6(c). The nub of the charges, is that the First Applicant received monies derived from fictitious credits, as gratification for soliciting investments from Municipalities and to pay gratifications to other persons to influence them to deposit municipal funds into VBS. These charges stand alone and the elements of each of these charges is clearly defined and are not predicated upon the provisions of the Municipal Investment Regulations. The offences in particular, consist of the receiving of monies and the paying of it to third parties, to influence them to do or not to do, certain things.

Legislative Authority

[34] The Municipal Investment Regulations provide the legal framework within which municipalities can invest funds. The impugned regulation, in particular, sets out permitted investments that municipalities may invest money not immediately required. The impugned regulation specifies that a municipality or municipal entity may invest funds only in deposits with banks registered in terms of the Banks Act.

Discussion

[35] It is trite that a collateral challenge to an administrative act is available to a person where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question.[13]

[36] A collateral challenge would be raised where a person who is charged with an offence, challenges the validity of an administrative action or a law on which the charge is based.[14]

[37] The Supreme Court of Appeal dealt succinctly with the question of collateral challenge in its judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*, [15] whereat that Court decided how to act if an administrative act is invalid. That Court held that,

“But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act, so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases - where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act

- that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a “defensive” or a “collateral” challenge to the validity of the administrative act”.[16]

[38] That Court went further to express itself as follows in paragraph 35 and 36 of that judgment

–
“It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only ‘if the right remedy is sought by the right person in the right proceedings’. Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law.

It is important to bear in mind (and in this regard we respectfully differ from the court a quo) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: the right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and ex hypothesi the subject may not then be precluded from challenging its validity. On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.” (Footnotes excluded)

[39] The question, in the current proceedings, is whether the First Applicant is entitled to raise a collateral challenge.

[40] In answer to the question it is apposite to refer to two principles that were crystallised in the Supreme Court of Appeal judgment in *Kouga Municipality v Bellingan and Others*,^[17] namely;

40.1 The first principle is that criminal cases based on, amongst others, legislation, a by-law in that case, would constitute a coercive action. In the finding of that Court, it is the enforcement of that impugned legislation (by-law) that forms the substance of a substantial component of criminal charges against the Accused person.

40.2 The second principle is that a person facing such criminal charges, is entitled to launch his collateral challenge in civil proceedings, that is, a separate collateral challenge in the High Court. This is so because the High Court is the custodian of legality, such a custodian, as the High Court, is better suited to dealing with this type of matter than a Criminal Court.[18]

[41] Emanating from the two principles, it is common cause that the First Applicant is in the right forum, in that he has approached the High Court for relief. What remains in dispute is whether the First Applicant is the right person to approach the High Court as he did. Although, it is common cause that the First Applicant is facing criminal charges, there are two questions that ought to be answered in determining whether, in the circumstances of these proceedings, the First Applicant is the right person to approach this Court for a collateral challenge, to wit;

41.1 The first question is whether Regulation 6(c) is applicable to the First Applicant, that is, whether Regulation 6(c) constitutes a coercive action as against the First Applicant.

41. 2 The second question is whether such charges are based on Regulation 6(c), that is, whether the impugned regulation forms the substance of a substantial component of criminal charges against the First Applicant.

Whether Regulation 6(c) is applicable to the First Applicant

[42] The First Respondent's challenge to the Applicants' collateral defence that the First Applicant is not the right person for such collateral challenge, is based on two grounds, namely that: The First Applicant does not meet the criteria required for a collateral challenge; and, that Regulation 6(c) does not constitute a coercive action against the First Applicant.

Does the First Applicant meet the criteria required for a collateral challenge?

[43] From the reading of the passages referred to in paragraph [38] of this judgment, it is quite clear that a collateral challenge is available only if the right remedy is sought by the right person in the right proceedings. Is the First Applicant the right person in the right proceedings?

[44] Regulation 6(c) states that a municipality may invest funds only in investment type deposits with banks registered in terms of the Banks Act. The Regulation, in this sense, applies only to municipalities, it specifically states that 'a municipality may invest funds'. In addition, Regulation 2 of the Municipal Investment Regulations

("Regulation 2"), provides that these regulations (the Municipal Investment Regulations) apply to (a) all the municipalities; (b) all municipal entities; (c) all investment managers acting on behalf of, or assisting, a municipality or municipal entity in making or managing investments.

[45] Regulation 2 confirms that all the Regulations contained in the Municipal Investment Regulations, are applicable only to municipalities and municipal entities. At the very least, the Regulations apply, also, to investment managers acting on behalf of, or assisting, a

municipality or municipal entity in making or managing investments. It does not apply to third parties, as the Applicants are arguing, least of all, a person in the position of the First Applicant. It is evident from the reading of the Regulations that the First Applicant is not in a position of a municipality, a municipal entity or an investment manager of a municipality or municipal entity – he is not even an official of a municipality.

- [46] The Municipal Investment Regulations are specific as to their application. It is, thus, on that basis that this Court has to rule that the Municipal Investment Regulations, and by extension Regulation 6(c), apply only to municipalities or municipal entities. They do not apply to other persons or entities outside the municipal structure, like the First Applicant.

Does Regulation 6(c) constitute a coercive action against the First Applicant?

- [47] According to the First Respondent, the general thread that runs through case law is that a collateral challenge may be allowed where an element of coercion exists. The term “coercion”, according to the First Respondent, includes both direct and indirect coercion. A form of compulsion must exist to prevent a person from exercising their free will to do or refrain from doing something. This submission is, in this Court’s view, correct.
- [48] It is trite that a collateral challenge is raised as a defence to the validity of an administrative act when threatened by a public authority with coercive action. This is precisely so because the legal force of the coercive action will depend upon the legal validity of the administrative act in question.
- [49] The Applicants contend that the criminal charges levelled against the First Applicant constitute coercive action that gives rise to the right to raise a collateral challenge. In support of this argument, counsel for the Applicants referred to the judgment in *Kouga Municipality v Bellingan and Others*,^[19] whereat, the breach of a by-law relating to the hours of trading of liquor outlets in that municipality, was at issue. The municipality had sought to prosecute the Applicants therein under the said by-law. The Applicants brought a direct review application in terms of PAJA to declare the by-law invalid. The Court a quo declared the by-law invalid by, applying section 172(1)(b) of the Constitution, and suspended the invalidity for a certain period to afford the municipality the opportunity to rectify matters. On appeal, it was pointed out, that there was no bar to the respondents

being prosecuted during the period of suspension and that Court held, as a result, that the substance of the relief sought by the

Applicants in that matter was a collateral challenge. The Court remarked that –

“The problems associated with the relief sought by the applicants in their notice of motion and the order granted by the court a quo would be avoided if a declaratory order were to be granted that the by-law in question is invalid for the purposes of a prosecution of any of them based thereon. A collateral challenge to the validity of a piece of legislation can be mounted at any time and a court has no discretion to disallow such a challenge”^[20]

- [50] In the opinion of this Court, the referral by the Applicants to the judgment in Kouga Municipality, in support of their submission that the charges against the First Applicant constitute coercive action that gives rise to the collateral challenge raised by the First Applicant, is misconceived.
- [51] The two matters, in this Court's view, are distinguishable, in that, in Kouga Municipality, the by-law to which the collateral challenge was raised, was directed at the Applicants as the persons who were facing criminal charges, whereas in the current matter, the impugned regulation is not directed at the First Applicant, as the person who is facing criminal charges.
- [52] In the matter before this Court, the legal force of the impugned regulation does not threaten the First Applicant with coercive action. There is no compulsion that is required from the First Applicant, rather the coercive action in Regulation 6(c) is directed to the municipalities, and not the First Applicant. The impugned regulation does not say that the First Applicant must do or not do anything. There is nothing expected from the First Respondent.
- [53] The submission by the First Respondent that a collateral challenge cannot be a defence where evidence is needed to substantiate the claim or where the claimant will not suffer any direct prejudice as a result of the alleged invalidity, is in this Court's view, valid.
- [54] Consequently, it is this Court's finding that the First Applicant is not the right person in these proceedings, as envisaged in Regulation 6(c). It is quite evident that in terms of Regulation 6(c) the First Applicant is not a person who is threatened with coercive action, but the municipality is. The limitation of Regulation 6(c) is directed at a municipality or municipal entity or an investment manager of a municipality or municipal entity. There is no evidence on record, none could be proffered, to the effect that the First Respondent will suffer any prejudice if the impugned regulation is not declared invalid. This, is so, because as earlier stated, the coercive action envisaged by Regulation 6(c) is not directed at the First Respondent.

Whether the Charges are premised on Regulation 6(c)

- [55] The Applicants proposition is that the charges are based on Regulation 6(c) whereas both the First Respondent and the Third Respondent contend that the charges are not predicated on the impugned regulation.
- [56] In trying to persuade this Court that Regulation 6(c) forms the substratum of the charges against the First Respondent, the Applicants contend that the inflow of funds into VBS indicate that the charges relate to Regulation 6(c). The Applicants' attempt to establish that the flow of funds into VBS is an indication that the charges are predicated on Regulation 6(c), by arguing that it is stated, amongst others, in the General Preamble of the indictments, that Regulation 6(c) specifies that a municipality may deposit funds with the banks registered in terms of the Banks Act. As such, the contention is that, the position of VBS and

municipalities and the flow of funds into VBS, and the alleged conflict with Regulation 6(c), is what is part of what is laid at the door of the First Applicant as Accused ten (10). This the Applicants reinforce by referring to paragraph 30 of the indictment where it is stated that: Accused ten (10) [the First Applicant], 11, 12, 13 and 14 were part of the solicitation of deposits by various municipalities into VBS and influenced various municipal officials to make such investments

and reinvestments.

- [57] This Court is convinced by the argument of the Third Respondent in response to the above submissions of the Applicants. Indeed, in the General Indictment, reference is not made only to Regulation 6(c). There are a number of other legislations, including Regulation 6(c) and the policies referred to in the General Preamble of the indictments, that are referred to, and, as the Third Respondent says, they should be read and understood as constituting the backdrop and the context in which the charges are formulated.
- [58] In their argument, the Applicants refer to indictment 56 as an example to show that the charge is based on the flow of funds or reinvestment that was procured through the First Applicant, of a municipal investment into VBS. The submission is that as far as the First Applicant is concerned, Regulation 6(c) is relevant to the influx of money into VBS, and indictment 56 confirms the allegation that where the money comes from municipalities, it would be in conflict with Regulation 6(c).
- [59] The First Respondent, correctly so, disputes the Applicants' argument and contends that challenging the impugned regulation by collateral challenge does not assist the First Applicant, because the charges against him, are formulated in terms of POCA and the Corruption Act. The sting of the case lies there, together with the factual averments in support of the Regulation's language. The Regulation stated in the General Preamble, to which the Applicants seek to rely on, is argued to be simply referred to as part of the broader charges, but it is not a charge in itself.
- [60] This Court, in addition to the First Respondent's above submission, is, also, persuaded by the argument of the Third Respondent to the effect that the Applicants misconstrues the nature of the charges as set out in the indictment. The Third Respondent is correct in saying that neither the corruption charges nor the money laundering charges, which form the bulk of the charges against the First Applicant, are dependent on the validity or otherwise of Regulation 6(c).
- [61] The nub of the charges, as correctly argued by the Third Respondent, is that the Applicant received monies derived from fictitious credits, as gratification for soliciting investments from Municipalities and to pay gratifications to other persons to influence them to deposit municipal funds into VBS. These charges stand alone and the elements of each of these charges are clearly defined, and are not predicated upon the provisions of the Municipal Investment Regulations, in general and specifically, Regulation 6(c). The offences in particular, consist of the receiving of monies and the paying of it to third parties, to

influence them to do or not to do, certain things, it does not have anything to do with the inflow of money into VBS, as argued by the Applicants.

- [62] The Applicants in opposing the Third Respondent on this point, argue that factually, the charges related to the First Respondent deal in the main with the procurement of investment into VBS, and that is a Regulation 6(c) issue. The contention is that the charges as set out in the indictment, whether under the POCA provisions or under the Corruption Act, it would be unlawful activities, and that being the case, it is contended that although in the indictment Regulation 6(c) is not repeated again, but the preamble tells that money cannot be invested with a Mutual Bank by the municipality and from that flows the charges under POCA and under the Corruption Act. The submission is, therefore, that the Applicants' case has been properly made out.
- [63] The Applicants' submission that the charges under POCA and the Corruption Act flows from the fact that Regulation 6(c) is mentioned in the General Preamble to the indictment, is without merit. In order for the charges to be premised on Regulation 6(c), it must be mentioned, as an element, in each of the charges the First Applicant is facing. A charge is made up of certain elements and for the First Applicant to be found guilty of any of the charges all the elements of each charge must be alleged and proved. Regulation 6(c) is not an element of any of the charges levelled at the First Applicant.
- [65] For instance, charge 56, which the Applicants used as an example of the alleged flow of money into VBS, is the correct example, which shows that the charge(s) is not premised on Regulation 6(c). The charge is couched as follows in the indictment:

"COUNT 56: (ONLY IN RESPECT OF ACCUSED 10)

Contravening Section 3(a) read with Sections 1, 2, 24, 25 and 26 of the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004, as amended.

IN THAT upon or about 17 November 2016 and at or near Midstream in the Ekurhuleni North Magisterial District and or Midrand in the

Johannesburg North Magisterial District, Accused 10 unlawfully and intentionally, directly or indirectly, accepted or agreed or offered to accept a gratification, to wit the amount of R483 333, from another person, to wit Accused 1, Accused 2 and Accused 3, whether for the benefit of Accused 10 or for the benefit of another person in order to act, personally or by influencing another person so act in a manner that amounts to the illegal, dishonest, unauthorised, incomplete, or biased exercise, carrying out or performance of any powers, duties or functions arising out of a statutory, contractual or any other legal obligation, to wit the solicitation of a reinvestment in the cumulative amount of R200 000 000 in VBS by the Vhembe District Municipality on or about 15 November 2016 in contravention of the provisions of the Municipal Finance Management Act, 56 of 2003 and the making of corrupt payments to various municipal officials, both known and unknown to the State, in order to obtain such deposits of monies into VBS."

[65] Incidentally, the flow of money into VBS has nothing to do with the charges which the First Applicant is facing. The flow of money into VBS, if any, was occasioned by the municipalities when they invested or reinvested funds into VBS. This was not done by the First Applicant. As argued by the Third Respondent, the charges are that the First Applicant received monies and paid third parties, to influence them to do or not to do, certain things in order to get the municipalities to invest or reinvest funds into VBS. It is the municipalities who are proscribed from investing funds in Mutual Banks, not the First Applicant. Regulation 6(c) does not prohibit the First Applicant from referring clients to VBS to invest their monies.

CONCLUSION

[66] In this Court's view, the First Respondent and the Third Respondent are correct in their respective submissions that there is no collateral challenge raised in these proceedings. The Court in Oudekraal,[21] held that the right to challenge the validity of an administrative act collaterally, arises because the validity of the administrative

act constitutes the essential prerequisite for the legal force of the action. This was also confirmed in the judgment in Kouga Municipality, where the Court held that it is the enforcement of that impugned regulation that forms the substance of a substantial component of criminal charges against the Applicant (Accused).

[67] The Applicants have failed to prove, on a balance of probabilities, that the defence of collateral challenge is apposite in the circumstances of these proceedings. Thus, the point of lack of standing has been established. It means that the First Applicant had no standing to bring this application, in the first place. There is, thus, no need for this Court to proceed with the remaining issues raised in the application.

[68] It follows, also, that the application was launched out of the prescribed time period without any condonation. It was said that the Second Applicant has a direct interest in the collateral challenge. His condonation application was, as a result, tied to the First Applicant succeeding in his collateral challenge. As it is, the collateral challenge has not succeeded, the condonation application of the Second Applicant falls also to be dismissed. This Court cannot, thus entertain the application which now falls to be dismissed.

COSTS

[69] Due to the importance and complexity of the proceedings, all the parties had employed two counsel – one senior and one junior. The parties have all requested to be granted costs inclusive of costs consequent upon the employment of two counsel in the event of succeeding in their respective cases.

[70] The First Respondent and the Third Respondent are the successful parties and are, therefore, entitled to be awarded the costs of the application inclusive of costs of two counsel – one senior and one junior.

- [71] The First Respondent prays for the dismissal of the relief sought in the notice of motion with costs. The First Respondent submits that in the event the application is dismissed, a cost order will be appropriate since no constitutional question were raised in the application.
- [72] The Applicants argue that this application raises constitutional questions and that in the event they are not successful in their case they should, on the Biowatch principle,[22] not be mulcted with costs.
- [73] This Court is not convinced that there are constitutional issues in these proceedings. The Applicants in their papers make allegations in terms of sections 22 and 35 of the Constitution, without any facts substantiating those allegations as to how the Applicants are to be impacted by the said sections. In this Court's view the argument by the Applicants for costs, not to be awarded against them, was made in passing, without any facts in support of such an application. As such, this Court has to rule that the successful parties are entitled to their costs.

THE ORDER

[74] Consequently, the following order is made:

1. The condonation application is dismissed.
2. The application is dismissed.
3. The First Applicant and the Second Applicant are ordered, jointly and severally, to pay the costs of the application to the First Respondent and the Second Respondent.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 01 NOVEMBER 2022.

APPEARANCES:

APPLICANTS' COUNSEL:

ADV. E LABUSCHAGNE SC

ADV. V MABUZA

APPLICANTS' ATTORNEYS:

MALUKS ATTORNEYS

FIRST RESPONDENT'S COUNSEL: ADV. MOKOENA SC

ADV. N MAYET

FIRST RESPONDENT'S ATTORNEYS: STATE ATTORNEY

THIRD RESPONDENT'S COUNSEL: ADV. PD HEMRAJ SC

ADV. GP SELEKA

THIRD RESPONDENT'S ATTORNEYS: STATE ATTORNEY

[1] Act No 94 of 1990.

[2] Act No 53 of 2003.

[3] Act No 3 of 2000.

[4] Act No 124 of 1993.

[5] The counts which relate to the First Applicant, and which are relevant to this application are: Counts 29, 55, 56, 58, 60, 62, 64, 66, 68, 70, 72, 74, 76, 78, 80, 82, 84, 86, 88, 90, 92, 94, 96, 98, 100, 102, 104, 106, 108, 110, 112, 114 and 115.

[6] Act No 121 of 1998.

[7] Act No 12 of 2004.

[8] The First Respondent, acting with the concurrence of the Second Respondent, promulgated the Investment Regulations which was published and became effective on 1 April 2005.

[9] 2004

(6) SA 222 (SCA).

[10] 2012

(2) SA 95 (SCA).

[11] Ibid para 19.

[12] In this regard, the Applicants referred to Wade Administrative Law 6 ed 331, as cited in Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory) 1991 2 SA 527 (C) 530C-D and National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd 1993 2 SA 245 (C) at 253E-F.

[13] Oudekraal Estate (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA).

[14] See Kouga Municipality v Bellingan and Others 2012 (2) SA 95 (SCA).

[15]

[2004] 3 All SA 1 (SCA).

[16] Para 32

[17] 2012 (2) SA 95 (SCA).

[18] Para 19.

[19] 2012

(2) SA 95 (SCA).

[20] Ibid para 18. 12

[21] Para 36.

[22] The Biowatch principle provides that even when parties litigating against state parties lose a case, they are generally spared an adverse costs award, provided the case was of genuine constitutional import. See *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

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