

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

10 October 2023

DATE

A handwritten signature in blue ink, appearing to read "D. Dosi".

SIGNATURE

CASE NUMBER: 2483/2020

In the matter between:

KHANYISILE KWEYAMA

First Applicant

MATHATHA TSEDU

Second Applicant

FEBE POTGIETER-GQUBULE

Third Applicant

JOHN MATISOHN

Fourth Applicant

and

SPECIAL INVESTIGATING UNIT

First Respondent

SOUTH AFRICAN BROADCASTING CORPORATION

Second Respondent

MJAYELI SECURITY (PTY) LTD

Third Respondent

MAFOKO SECURITY PATROLS (PTY) LTD

Fourth Respondent

MAFOKO SECURITY SUPPLIES (PTY) LTD

Fifth Respondent

MAFOKO SECURITY SERVICES

Sixth Respondent

PRESIDENT OF SOUTH AFRICA

Seventh Respondent

JUDGMENT

DOSIO J:

Introduction

[1] This is a review application wherein the applicants seek an order reviewing and setting aside the remedial actions contained in paragraph 7 of the Special Investigation Unit ('SIU') final report. This report was in respect of the investigation into the procurement of goods and services on behalf of the SABC from Mafoko Security Patrols (Pty) Ltd ('Mafoko').

[2] The applicants, ('the interim board members'), contended that the SIU went beyond the scope of the President's proclamation and enquired whether the interim board members of the South African Broadcasting Corporation ('SABC'), rendered themselves delinquent directors in terms of s162 of the Companies Act 71 of 2008 ('the Companies Act'). The interim board members contended that the SIU acted irrationally, procedurally unfairly and exceeded its powers

in reaching the findings it made and unlawfully imposed the remedial action set out in paragraph 7.

[3] The interim board members do not seek relief against the second to seventh respondents who have been merely cited as they may have an interest in the outcome of the relief the interim board members seek.

[4] The application is opposed by the SIU.

Background

[5] In 2016, the National Assembly of the Republic of South Africa recommended that an interim board of directors for the SABC be appointed to, amongst others, stabilise the governance of the SABC and to commence a process intended to return the SABC to proper and normal governance.

[6] Pursuant to the aforesaid recommendation and in April 2017, the President of the Republic of South Africa appointed the interim board members as directors of the SABC.

[7] When the interim board members were appointed, the SABC was already in the middle of a tender process for the appointment of a service provider to provide physical security at its Auckland Park premises and for its television outside broadcasts. In this regard, a bid evaluation committee ('BEC') had already been constituted to evaluate the bids.

[8] In the running for the appointment of a service provider, to provide physical security at the SABC's Auckland Park premises, were the following security companies *inter alia* Mafoko and Mjayeli Security (Pty) Ltd ('Mjayeli').

[9] In the run up to the adjudication of the tender for the provision of security services, the first applicant ('Ms Kweyama') received a whistle blower report that there were irregularities associated with the tender which implicated one of the parties who had submitted a bid and who had been shortlisted for evaluation and adjudication. Ms Kweyama conferred with her fellow interim board members and they resolved that she report the matter to the SIU.

[10] The SIU made findings against the interim board members with regard to events that happened on 30 June 2017 at the SABC interim board meeting, when the applicants awarded the tender to Mafoko. The SIU made a finding that:

‘the investigation has revealed that the interim Board had irregularly awarded the security contract to the bidder that scored the second highest points, justifying their decision by using BBBEE level status, as a factor that has already been evaluated as an objective criteria and which cannot be used as valid basis thereof. This action by the Board has been found to be wrongful and irregular. Even though they may have doubts about awarding the contract to the highest bidder, they were supposed to consider launching an investigation or cancel the tender or remitting it for reconsideration and they have failed to discharge their fiduciary duties in that respect and failed to act in the best interests of the SABC.’¹

[11] On 13 June 2019, the SIU released the report titled ‘*The investigation conducted in respect of the procurement of, or contracting for goods, works or services by or on behalf of the SABC from Mafoko Security Patrols*’ (‘the report’).

Contentions of the interim board members

[12] The interim board members contended that the remedial actions contained in paragraph 7 of the report are reviewable.

[13] In terms of paragraph 7 of the report, the SIU recommended that the interim board members be rendered delinquent directors in terms of s162 of the Companies Act. In addition, the SIU made a referral to the National Prosecuting Authority in terms of s86(2) of the Public Finance Management Act 1 of 1999, (‘PFMA’) for criminal action against the interim board members due to the alleged misconduct committed by them.

[14] In light of the report, the interim board members contended that the remedial action as contained in the report is reviewable in accordance with s6(2)(b) to 6(2)(i) of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’), as well as the principle of legality and the rule of law, on the grounds that the requirements of substantive and procedural rationality and fairness have not been complied with.

[15] The interim board members base their review on the following grounds:

¹ SIU Report, para 71.

- (a) That the SIU acted *ultra vires* by investigating the fiduciary duties of the interim board members and that even if the SIU had the requisite authority, it failed to take into account relevant considerations;
- (b) The report is irrational;
- (c) The procedural flaws in the investigation render the report reviewable;
- (d) There was no *audi alterem partem* before adverse findings were made against the interim board members;
- (e) The SIU's investigation is unconstitutional and contravenes the principle of legality.

Contentions of the SIU

[16] The SIU contended that this application must be dismissed with costs because neither PAJA nor the principle of legality apply.

[17] The SIU contended that the findings of the SIU and the intention to launch an application in terms of s162 of the Companies Act is merely an intention to refer and recommend to the SABC to launch the application.

[18] It was further contended that a mere expression of an intention to recommend the bringing of an application is not a reviewable administrative decision under PAJA or under the principle of legality.

Whether the matter in casu is reviewable in terms of PAJA

[19] The SIU forms part of an organ of state in terms of PAJA.² Accordingly, this Court has to determine whether the report is reviewable in terms of PAJA.

[20] For the conduct to be reviewable under PAJA, the conduct has to fall within the definition of administrative action. Furthermore, whether the conduct is administrative action, it has to be decided on the facts of each individual case.³

[21] Administrative action is defined in s1 of PAJA as follows:

² *Mphaphuli Consulting (Pty) Limited v Special Investigating Unit* [2022] JOL 52444 (LP) at para 27.

³ *Prudential Authority of the South African Reserve Bank v Msiza* [2023] ZAGPPHC 313 at para 24.

'administrative action' means any decision taken, or any failure to take a decision, by-

- (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) ... which adversely affects the rights of any person and which has a direct, external legal effect, ...' [my emphasis]

[22] Section 1 of PAJA defines a decision as:

'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.'

[23] In terms of s6 of the PAJA, any person may institute proceedings in a Court for the judicial review of an administrative action.

[24] In the matter of *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,⁴ the Supreme Court of Appeal stated that:

'At the core of the definition of administrative action is the idea of action (a decision) of an administrative nature taken by a public body or functionary.'

The same above-mentioned principle was applied in the matter of *Gamevest (Pty) Ltd v Regional Land Claims Commissioner Northern Province and Mpumalanga and Others*,⁵ as well as in this division in the matter of *Companies and Intellectual Property Commission v Moola*⁶ ('Moola').

⁴ *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 SCA.

⁵ *Gamevest (Pty) Ltd v Regional Land Claims Commissioner Northern Province and Mpumalanga and Others* 2003 (1) SA 373 (SCA).

⁶ *Companies and Intellectual Property Commission v Moola* [2017] ZAGPJHC 102.

[25] The contents in paragraph 7 of the report is not a decision as contemplated by PAJA, in that it is a report informing the President that the SIU intends making certain recommendations. There is no decision because the intention has not yet been implemented.

[26] In *Masuku v Special Investigations Unit*⁷ ('*Masuku*'), the Court stated that:

'if the term 'recommendation' is understood as a term of art to identify the expression of public power; eg, as exercised by the Public Protector, plainly the SIU lacks such a power. However, it is inescapable that an investigator must form an *opinion* about the material gathered. The very act of enquiring, interviewing and searching is driven by a perception of a perceived pattern of conduct, however tentatively held, which is tested by the investigation. When furnishing a report, an express obligation on the SIU, it is obvious that the material must be ordered and rendered coherent to substantiate an opinion on what has been discovered or not discovered. In my view, the recommendations of the SIU must be understood in this sense: a legitimate comment on whether any official had been culpable of improper activity.'⁸ [my emphasis]

[27] In *Mphaphuli Consulting (Pty) Limited v Special Investigating Unit*⁹ ('*Mphaphuli*') the court stated that:

'the SIU is similar to a commission of inquiry. A commission of inquiry, as was observed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹⁰ is primarily an investigative body whose responsibility is to report to the President.'¹¹ [my emphasis]

[28] It was further stated in *Mphaphuli*¹² that the purpose of the SIU Act is to investigate corrupt practices and maladministration and if it believes it has found a crime it must refer it to the prosecuting authority or may institute a claim in the special Tribunal or in a Court if it believes there is a civil claim.¹³

[29] In the matter of *Masuku*¹⁴ it was stated that:

⁷ *Masuku v Special Investigations Unit* [2021] ZAGPPHC 273.

⁸ Ibid para 62.

⁹ *Mphaphuli Consulting (Pty) Limited v Special Investigating Unit* [2022] JOL 52444 (LP).

¹⁰ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999).

¹¹ *Mphaphuli Consulting (Pty) Limited v Special Investigating Unit* [2022] JOL 52444 (LP) at para 25.

¹² *Mphaphuli* (note 6 above).

¹³ *Masuku* (note 4 above) para 17.

¹⁴ Ibid.

‘the function of the SIU is to investigate matters, not to make a determination about matters. This is a significant point of distinction.’¹⁵ [my emphasis]

[30] This implies that the SIU’s opinion about any issue is not determinative or final.¹⁶ In fact, all that the SIU has done is to make its own finding that the interim board members breached their fiduciary duties.

[31] In the matter of *Bhugwan v JSE Ltd*,¹⁷ the Court held that there must have been an exercise of the statutory or public power based on the conclusion so reached. In the matter *in casu* there is no compliance with this critical requirement. The SIU has not yet exercised its power to actually make recommendations to the Chairperson of the SABC board. It has merely expressed its intention to do so, upon the outcome of the review application brought by Mjayeli in the review with case number 47916/2017.

[32] In *Weinert Municipality of the City of Cape Town*,¹⁸ the Court 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. Hoexter explains the concept thus: ‘The idea behind the requirement of ripeness is that a complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the courts’ time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made.’¹⁹ [my emphasis]

[33] The proposal to be made to the SABC board is a decision yet to be made and the SABC as yet is not required to do anything. Thus, the matter is academic or premature.

[34] In the matter of *Moola*²⁰ the Court stated that:

‘it would be a foreign notion if a potential accused in a potential criminal trial were entitled to exact that the very recommendation to the NPA that s/he be prosecuted, first passes PAJA review muster.’²¹

¹⁵ Ibid para 16.

¹⁶ Ibid at para 17.

¹⁷ *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ).

¹⁸ *Weinert Municipality of the City of Cape Town* [2022] ZAWCHC 252; [2023] 1 All SA 536 (WCC).

¹⁹ Ibid para 23.

²⁰ *Moola* (note 6 above).

²¹ Ibid para 45.

[35] In the matter of *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd*²² ('Viking'), the Constitutional Court stated that whether or not administrative action, which would make PAJA applicable, has been taken, cannot be determined in the abstract.²³

[36] In the matter of *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd*²⁴, the Supreme Court of Appeal stated that:

'now that the review of administrative action is dealt with in terms of the PAJA, the position is clear. An administrative action is defined in section 1 to be, *inter alia*, a "decision" which has a "direct, external legal effect". In commenting on this aspect of the definition of administrative action, Hoexter says: "The PAJA does not refer to ripeness as such. However, s 1 of the Act appears to underscore the requirement of ripeness by confining the ambit of administrative action – the gateway to the Act – as a 'decision', and moreover one with 'direct' effect. Both of these terms suggest finality.'²⁵ [my emphasis]

[37] The SIU's findings have not adversely affected the rights of the interim board members as yet. The Constitutional Court in the matter of *Viking*²⁶ stated that:

'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.'²⁷ [my emphasis]

[38] In the matter of *Moola*²⁸ the court stated that:

'a recommendation that a matter be referred to a court for determination would ordinarily imply that no direct external legal effect could yet have resulted, nor could rights have been adversely affected.'²⁹ [my emphasis]

²² *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* [2010] ZACC 21; 2011 (1) SA 327 (CC) ; 2011 (2) BCLR 207 (CC).

²³ Ibid para 37.

²⁴ *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd* [2011] ZASCA 202; 2012 (2) SA 16 (SCA); [2012] 2 All SA 111.

²⁵ Ibid para 21.

²⁶ *Viking* (note 20 above).

²⁷ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) at para 38.

²⁸ *Moola* (note 6 above).

²⁹ Ibid para 40.

[39] The SIU's recommendation to consider applying to court for a delinquency order does not have a direct, external, nor does it adversely affect the rights of the interim board members. Likewise, even if the recommendations are adopted, that would not have a direct, external or adverse effect on the rights of the interim board members, because no binding decision has followed as yet.³⁰

[40] The findings of the SIU are inchoate and not susceptible to review under PAJA. As a result, the SIU's report does not comply with the requirements of administrative action in terms of PAJA as there is no decision yet, merely a recommendation. It is also premature and definitely not final in effect.

Whether the matter is reviewable under the principle of legality

[41] The principle of legality is a fundamental principle of Constitutional law.³¹

[42] It stems from the doctrine of the rule of law, which states that the use of all public power, whether legislative, executive, or administrative, is only legitimate when it is lawful.³²

[43] In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa*,³³ the Constitutional Court stated that:

'it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'³⁴

³⁰ Ibid at para 42.

³¹ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 para 56.

³² *Democratic Alliance v Ethekwini Municipality* [2011] ZASCA 221; 2012 (2) SA 151 (SCA); [2012] 1 All SA 412 (SCA) para 21.

³³ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241.

³⁴ Ibid para 85.

[44] The principle of legality requires that every exercise of public power be rational.³⁵ It also underpins common law principles of *ultra vires*.³⁶

[45] The interim board members contended that if the SIU report is not reviewable under PAJA, then it is reviewable based on the principle of legality and the rule of law on the grounds that the requirements of substantive and procedural rationality and fairness have not been complied with.

[46] The SIU contended that they investigated the matter and disputed that they acted *ultra vires* or that their process in investigating the maladministration was irrational or unfair.

[47] The corollary of investigating serious maladministration or improper conduct of board members is that if it is found that there was indeed maladministration or unlawful conduct and improper conduct, the investigator must specify exactly what did the interim board member do.

Whether the SIU acted irrationally

[48] In the matter of *Albutt v Centre for the Study of Violence and Reconciliation*,³⁷ the Constitutional Court stated the following:

‘The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.’³⁸ [my emphasis]

[49] In the matter of *SA Predator Breeders Association v Minister of Environmental Affairs and Tourism*,³⁹ the Supreme of Appeal stated that:

³⁵ *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) at para 69.

³⁶ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 para 59.

³⁷ *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

³⁸ *Ibid* para 51.

³⁹ *SA Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA)

'rationality, as a necessary element of lawful conduct by a functionary, serves two purposes: to avoid capricious or arbitrary action by ensuring that there is a rational relationship between the scheme which is adopted and the achievement of a legitimate government purpose or that a decision is rationally related to the purpose for which the power was given, and to ensure the action of the functionary bears a rational connection to the facts and information available to him and on which he purports to base such action. As noted in the Pharmaceutical case (*supra*) at paragraph 90 "a decision that is objectively irrational is likely to be made only rarely but, if this does occur a court has the power to intervene and set aside the irrational decision".'⁴⁰ [my emphasis]

[50] The Constitutional Court clarified this difference by stating that:

'procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power.'⁴¹

[51] The SIU was asked to investigate serious issues of maladministration at the SABC. From this premise, it is clear that there is a rational basis why the SIU expressed its intention to go after the interim board members as it is the SIU's mandate to curb maladministration. The procedural means adopted by the SIU to obtain the objective sought is rational.

Whether the SIU acted ultra vires in investigating the fiduciary duties of the applicants

[52] It is common cause that on 30 June 2017 the interim board members made a decision to award the security contract to Mafoko who was the second highest scoring bidder.

[53] The interim board members argued that the SIU was only empowered to investigate the 'procurement of, or contracting for goods, works or services by or on behalf of the SABC from Mafoko in a manner that was inconsistent with fair, competitive, transparent, equitable or cost-effective process'. It was contended that these were the express powers of the SIU and its authorised investigation did not include questions of governance skill, which would exceed the

⁴⁰ Ibid para 28.

⁴¹ *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) at para 64.

SIU's mandate. In addition, the SIU was not empowered to enquire whether the interim board members rendered themselves as delinquent directors or to impose remedial action.

[54] The SIU is established as an independent statutory body in terms of the Special Investigating Units and Special Tribunals Act No, 74 of 1996 ('the Special Tribunals Act').

[55] The SIU is empowered to investigate serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public.

[56] Section 4 of the Special Tribunals Act provides the functions of the SIU as follows:

'The functions of a Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in section 2(1)-

- (a) to investigate all allegations regarding the matter concerned;
- (b) to collect evidence regarding acts or omissions which are relevant to its investigation and, if applicable, to institute proceedings in a Special Tribunal against the parties concerned;
- (c) to present evidence in proceedings brought before a Special Tribunal;
- (d) to refer evidence regarding or which points to the commission of an offence to the relevant prosecuting authority;
- (e) to perform such functions which are not in conflict with the provisions of this Act, as the President may from time to time request;
- (f) from time to time as directed by the President to report on the progress made in the investigation and matters brought before the Special Tribunal concerned;
- (g) upon the conclusion of the investigation, to submit a final report to the President; and
- (h) to at least twice a year submit a report to Parliament on the investigations by and the activities, composition and expenditure of such Unit.'

[57] The Special Tribunal Act authorises the head of the SIU to institute legal proceedings on its own or on behalf of a State Institution. If during the investigation, any matter comes to the attention of the SIU which justifies the institution of civil proceedings by a State institution, against any person, he/she may bring such matter to the attention of the State Attorney or the State Institution concerned.⁴²

⁴² Section 5(5) and (7) of the Special Tribunal Act.

[58] The SIU must always perform its functions in a manner that complies with the Constitution by acting with impartiality and without prejudice.

[59] In the matter *in casu*, the SIU was given specific powers under Proclamation R.29 of 2017 to investigate, amongst others serious maladministration in connection with the affairs of the SABC; improper or unlawful conduct by board members, officials or employees of the SABC; unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon state property; unlawful or improper conduct by any person.

[60] On 6 July 2018, the President issued proclamation R19 of 2018 ('proclamation'), in terms of which the SIU was appointed to investigate, amongst others, the procurement of goods, works or services by or on behalf of the SABC from Mafoko. In terms of paragraph 2 of the schedule to the proclamation, the SIU was requested to investigate the maladministration in the affairs of the SABC or any losses or prejudice suffered by the SABC or the State as a result of such maladministration. It is clear that the schedule gave the SIU wide powers.

[61] Sections 50 and 57 of the PFMA placed fiduciary duties on the interim board members in their capacity as office bearers of the SABC to act with fidelity, honesty, integrity and in the best interests of the SABC in managing its affairs.

[62] Reading the provisions of s4 of the Special Tribunals Act, the PFMA and in conjunction with the proclamations, this Court finds that the SIU had the power to investigate the fiduciary duties of SABC and as a result the actions of the SIU were not *ultra vires*.

Procedural fairness, the right to be informed of remedial action and the audi alteram partem rule

[63] The interim board members contended that although the *audi alteram partem* rule applies in respect to the SIU writing to the interim board members to make submissions on evidence, they were entitled to be informed of the remedial action. The interim board members contended that in respect to the remedial action they were denied the right to be heard in terms of the *audi alteram partem* rule. Reference was made to the cases of *Administrator of Transvaal and Others v Traub and Others*⁴³ ('Administrator of Transvaal') and *Gordhan and Others v Public Protector and Others*⁴⁴ ('Gordon').

⁴³ *Administrator of Transvaal and Others v Traub and Others* (4/88) [1989] ZASCA 90; [1989] 4 All SA 924 (AD) (24 August 1989).

⁴⁴ *Gordhan and Others v Public Protector and Others* (36099/2098) [2020] ZAGPPHC 777 (17 December 2020).

[64] The SIU on the other hand contended that it had conducted interviews with the interim board members and it had exchanged letters during the process of the investigation and that these letters were considered.

[65] In the matter of *Administrator of Transvaal*,⁴⁵ the Director of Hospital Services rejected the applications of certain doctors in respect to promotions to become Senior House Officers ('SHO') at the hospital. This was because the doctors had signed a critical letter. The court found that the *audi alteram partem* principle of natural justice, requiring a fair hearing, was not followed. The court extended the traditional scope of *audi alteram partem* beyond just decisions affecting existing rights. It endorsed the 'legitimate expectation' doctrine from English law. It found the doctors had a legitimate expectation of being appointed as SHO's based on decades of practice of approving recommended applications. This gave rise to an expectation of a hearing before rejecting appointments on suitability grounds. The Appellate Division (as it then was), held that by not providing a hearing, the Director failed to act fairly as required by the *audi alteram partem* rule, thereby making the decision invalid. The court dismissed the argument that the doctors were in fact given a fair hearing and held that:

'A frequently recurring theme in these English cases concerning legitimate expectation is the duty on the part of the decision-maker to 'act fairly'. As has been pointed out, this is simply another, and preferable, way of saying that the decision-maker must observe the principles of natural justice.'⁴⁶

[66] In the matter of *Minister of Water and Sanitation v The Public Protector of the Republic of South Africa*,⁴⁷ the Court held that:

'A basic rule of fairness is that a person who will be adversely affected by an act or a decision of the administration or authority shall be granted a hearing before he suffers detriment.'

[67] This principle is derived from tenets of natural justice which is 'inspired by the notion that people should be afforded a chance to participate in the decision that will affect them and more importantly an opportunity to influence the result of the decision.'⁴⁸

[68] The interim board members were informed by the SIU that they:

⁴⁵ *Administrator of Transvaal* (note 40 above).

⁴⁶ *Ibid* page 940.

⁴⁷ *Minister of Water and Sanitation v The Public Protector of the Republic of South Africa* [2019] ZAGPPHC 193.

⁴⁸ *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 at para 75.

- (a) failed to comply with section 2(1)(f) of the PPPFA by not appointing the highest scoring bidder;
- (b) failed to consider the opinion by National Treasury;
- (c) failed to record objective reasons for not approving the award of the tender to the highest scoring bidder; and
- (d) committed acts of financial misconduct in terms of section 81 of the PFMA.

[69] In the letter dated 14 September 2018, the SIU expressly stated that:

'9.4 The SIU is considering bringing an application under section 162 of the Companies Act of 2008, to declare the former interim Board of the SABC delinquent or to have them placed under an order of probation for failing to act in the best interest of the SABC.

9.5 The SIU is considering a referral to NPA in terms of section 83(3) of the PFMA, for criminal action against the former accounting authority/Interim Board due to financial misconduct committed by its members.

9.6 Before proceeding as such, the directors will be afforded a right to reply to the allegations which will be brought against them.' [my emphasis]

[70] On the information supplied by the SIU, the interim board members must have realised that this was an opportunity to address the SIU on any intended remedial action. The interim board member's contention that they were not given an opportunity to address the SIU on possible or intended remedial action is misplaced. They were given every opportunity to persuade and influence the SIU's finding that they did not commit acts of financial misconduct.

[71] The interim board members, with the exception of John Mattisonn and Febbe Potgieter-Gqubule, gave oral and written evidence which was induced through interviews and letters. John Mattisonn and Febbe Potgieter-Gqubule responded in writing to the letters sent by the SIU.⁴⁹

[72] In the matter of *Bam-Mugwanya v Minister of Finance And Provincial Expenditure, Eastern Cape, and Others*,⁵⁰ the Court held that it was not necessary for a functionary to receive oral representations, where the person affected having had more than sufficient opportunity to place relevant evidence before the functionary by way of written representations.

⁴⁹ CaseLines (Mr John Mattisonn 001-84 to 001-95) and (Ms Febbe Potgieter-Gqubule 001-96 to 001-107).

⁵⁰ *Bam-Mugwanya v Minister of Finance And Provincial Expenditure, Eastern Cape, and Others* 2001 (4) SA 120 (C).

[73] All four of the interim board members, cited in this review, replied in writing to the letter of the SIU dated 14 September 2017. In the matter of *Administrator of Transvaal*⁵¹ the court made it clear that before an adverse decision is taken, an affected person will be given a fair hearing. This Court finds that the interim board members were given more than enough opportunity to address any issue which could implicate them. As a result, they cannot rely on the matter of *Administrator of Transvaal*⁵² to help them as they did have the benefit of *audi alteram partem*.

[74] After considering all the evidence, including the written submissions of the interim members, the SIU considered recommending that the SABC launch an application in terms of s162 of the Companies Act.

[75] The interim board members relied on the case of *Gordhan*⁵³ to demonstrate that the principle of procedural rationality requires that the interim board members should have been informed of the intended remedial action because the remedial action affected their rights.

[76] In the matter of *Gordhan*,⁵⁴ the Court was dealing with the Public Protector Act which prescribes procedures for remedial action. The Special Tribunal Act is different in that it does not prescribe remedial action, accordingly, the reliance on the matter of *Gordhan*⁵⁵ by the interim board members is misplaced.

[77] A proper reading of the Special Tribunal Act shows that the legislator specifically excluded the giving of notice for remedial action. The Special Tribunal Act is clear that the SIU is authorised to launch civil proceedings during the course of the investigation. Had the legislator intended that the affected person be given an opportunity to first make representations with regard to the remedial action, there would have been a clear provision prescribing that the SIU must first notify the affected person of the intended remedial action. That provision does not exist because the SIU Act does not contain the words 'remedial action'.

[78] The rules of natural justice do not apply to the recommendations of the SIU, styled 'remedial actions to follow on completion of the SIU investigation' at paragraph 7 of the SIU report. It is clear from the text of these recommendations that the SIU does not itself make findings that the applicants are delinquent directors. The SIU only made a *prima facie* case which should be

⁵¹ *Administrator of Transvaal* (note 40 above).

⁵² *Ibid.*

⁵³ *Gordhan* (note 41 above).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

considered by the courts and only expressed its intention to recommend to the SABC that the SABC must consider bringing an application in terms of s162 of the Companies Act. Such a decision does not affect the rights of the applicants and consequently the rules of natural justice have no application.

[79] This Court finds that the SIU complied with its duties in terms of the Special Tribunals Act and the actions of the SIU are not unconstitutional, unlawful or unfair. Accordingly, the review is dismissed.

Costs

[80] The interim board members have brought this review application to vindicate their Constitutional rights to fair administrative action and to access justice. Although they brought it in their own capacity the issue of costs is in the discretion of this Court.

[81] The interim members were not malicious in launching this review. Taking into consideration the matter of *Biowatch Trust v Registrar Genetic Resources and Others*,⁵⁶ this Court will not make a cost order against the interim board members.

Order

[82] The application is dismissed.
No order as to costs.



D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to Caselines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 10 October 2023

⁵⁶ *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

Appearances:

On behalf of the applicants:

Adv. M.M. Le Roux

Instructed by:

Malatji & Co Attorneys

On behalf of the first respondent:

Adv. T Moretlwe

Adv. Z. Matondo

Instructed by:

WERKSMANS ATTORNEYS