



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Financial Sector Conduct Authority and Others v Municipal Employees' Pension Fund and Others
(1344/2023) [2026] ZASCA 66 (8 May 2026)

Today, the Supreme Court of Appeal (the SCA) upheld an appeal by the Financial Sector Conduct Authority (the Financial Authority), a financial sector regulator under the Financial Sector Regulation Act 9 of 2017 (the Act). At the instance of the first respondent, the Municipal Employees' Pension Fund (the Pension Fund), the Gauteng Division of the High Court, Pretoria (the High Court) ordered the Financial Authority to provide the Pension Fund with a record of its two-pronged decision to investigate the Pension Fund, and to apply to a judge for a search-and-seizure order against the Pension Fund.

The Financial Authority suspected that the Pension Fund was contravening financial sector laws. It launched an investigation into the Pension Fund's conduct under s 135 of the Financial Sector Regulation Act. It subsequently applied *ex parte* for a warrant to search the Pension Fund's premises. A judge granted the application and issued the search warrant, authorising the Financial Authority to search the Pension Fund's premises and seize the documents and information listed therein. After the warrant was executed, the Pension Fund filed an urgent application seeking, among other things, an order setting aside the *ex parte* order.

In addition to seeking an order setting aside the *ex parte* order, the Pension Fund sought to review the Financial Authority's decision and, under rule 53(1)(b) of the Uniform Rules of Court, called on the Financial Authority to dispatch to the Registrar of the High Court the record of the proceedings relating to that decision. The Financial Authority opposed the application on the ground that its decision was not reviewable, either under the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) or on the ground of legality, because it neither determined culpability nor adversely affected rights.

The High Court held that the mere institution of a review application by the Pension Fund, without more, entitled it to the record, 'no matter how flawed it may be'. It reasoned that the reviewability of the impugned decision would ultimately be determined by the court hearing the review application, and thus was irrelevant to the question of whether the record should be produced. Accordingly, the High Court ordered the Financial Authority to furnish the Pension Fund with the record. It subsequently dismissed the Financial Authority's application for leave to appeal. Upon further application to this Court, the application for leave to appeal was referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the SC Act).

In a unanimous judgment by Makgoka JA, the SCA provided an overview of the authorities decided after the High Court's judgment, namely: *Murray and Others NNO v Ntombela and Others* [2024] ZASCA 24; [2024] 2 All SA 342 (SCA); 2024 (4) SA 95 (SCA) (*Murray*); *Commissioner for the South African Revenue Service v Richards Bay Coal Terminal (Pty) Ltd* [2025] ZACC 3; 2025 (6) BCLR 639 (CC); 2025 (5) SA 617 (CC); 88 SATC 162 (*Richards Bay*); *Famous Idea Trading 4 (Pty) Ltd v Government Employees Medical Scheme and Others* [2026] ZACC 5; 2026 (4) BCLR 291 (CC)

(*Famous Idea*). In *Famous Idea*, the Constitutional Court confirmed that when a decision-maker asserts that its decision is not reviewable, this concerns the court's review jurisdiction rather than its constitutional jurisdiction to entertain and determine review applications generally, which a court must first determine. The Court also emphasised that an applicant seeking the production of the record must establish a factual basis for asserting that the court has review jurisdiction.

Turning to the Pension Fund's affidavit against this requirement, the SCA noted that no factual basis was laid upon which the court's review jurisdiction could be founded. This fell short of what was set out in *Famous Idea*. Thus, on the papers as they stood, the Pension Fund was not entitled to the production of the record. The SCA pointed out that this was understandable, given that, at the time the application was launched, the weight of authority required only the filing of what appeared to be a review application, after which the production of the record would have to follow. The correct legal position was only clarified by the Constitutional Court in *Famous Idea*, which was delivered subsequent to the High Court's judgment. Because of this, fairness would ordinarily require that the Pension Fund be afforded an opportunity to supplement its papers to comply with the essence of *Famous Idea*.

However, the SCA held that remitting the matter would be a futile exercise for the following reasons. First, the Pension Fund sought two remedies: (a) the setting aside of the *ex parte* order by way of reconsideration, and (b) judicial review. A court cannot grant both remedies. It must grant one or the other. The SCA held that the default remedy for challenging an order obtained *ex parte* is to apply for reconsideration and to set it aside, not to seek judicial review. There must be special circumstances that warrant a court's exercise of its review jurisdiction, rather than simply setting the order aside on reconsideration. As the Pension Fund had not advanced any reasons for proceeding by way of judicial review, the default position must apply, and its remedy was to seek reconsideration of the impugned decision.

Second, the SCA held that a court has review jurisdiction under the PAJA and the competence to order the furnishing of the record only if the impugned decision constitutes 'administrative action'. It focused on the requirement in the definition of 'administrative action' that the decision must adversely affect rights. After surveying the relevant authorities on this issue, the SCA concluded that a regulatory body's decision to investigate and to refer complaints to an adjudicative body is not 'administrative action' and therefore not reviewable. Applied to the present case, the SCA held that the Financial Authority's decision to investigate and to seek a warrant did not, in itself, adversely affect the Pension Fund's rights, nor did the decision to seek a search warrant from a judge. It was the *ex parte* order that did so, not the Financial Authority's decision. As the order is a judicial decision, it was not reviewable under the PAJA. Accordingly, the SCA concluded that the Financial Authority's decision did not constitute 'administrative action' and thus was not reviewable. The SCA further concluded that these two issues presented insurmountable obstacles to the Pension Fund obtaining the record, rendering it futile to refer the matter back to the High Court to afford the Pension Fund an opportunity to supplement its papers to address the inadequacies in its affidavit to comply with the requirements set out in *Famous Idea*.

The SCA accordingly granted the Financial Authority leave to appeal and allowed the appeal with costs of two counsel. It set aside the High Court order requiring the Financial Authority to furnish the record to the Pension Fund and replaced it with an order dismissing the Pension Fund's application with costs.

ENDS