THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1344/2023

In the matter between:

FINANCIAL SECTOR CONDUCT AUTHORITY	**FIRST APPLICANT**
UNATHI KAMLANA N O	**SECOND APPLICANT**
BRANDON TOPHAM N O	**THIRD APPLICANT**
GERRIT JACQUES BRUWER N O	**FOURTH APPLICANT**

and

MUNICIPAL EMPLOYEES' PENSION FUND	**FIRST RESPONDENT**
AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LIMITED	**SECOND RESPONDENT**
AKANI PROPERTIES (PTY) LIMITED	**THIRD RESPONDENT**
MUNGHANA LEISURE AND TOURISM (PTY) LIMITED	**FOURTH RESPONDENT**
MARGARET MAGDALENA LE GRANGE	**FIFTH RESPONDENT**
ZAMANI ERNEST EHPRAIM LETJANE	**SIXTH RESPONDENT**
NTHABELENG REFILWE MOTSOHI	**SEVENTH RESPONDENT**
JACK BRUCE MALEBANE	**EIGHTH RESPONDENT**

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

Coram: MAKGOKA, NICHOLLS and SMITH JJA and DAWOOD and MOLITSOANE AJJA

Heard: 16 May 2025

Delivered: 8 May 2026

Summary: Civil Procedure – Rule 53 of the Uniform Rules of Court – Financial Sector Conduct Authority **–** review of the decision of a regulatory body to investigate – whether a regulatory body is obliged to disclose the record of its decision to investigate when that decision is challenged on review under rule 53 simultaneously with the relief to set aside the *ex parte* order obtained following the investigation.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kooverjie J sitting as court of first instance):

1 The applicants are granted leave to appeal.

2 The appeal is upheld with costs, including costs of two counsel.

3 The order of the Gauteng Division of the High Court, Pretoria, is set aside and replaced with the following:

'The application is dismissed with costs.'

JUDGMENT

Makgoka JA (Nicholls, Smith JJA and Dawood and Molitsoane AJJA concurring):

[1] This is an application for leave to appeal against an order of the Gauteng Division of the High Court, Pretoria (the High Court). That court, in terms of rule 53 of the Uniform Rules of Court, ordered the first applicant to provide the record of its two-pronged decision to investigate the first respondent, and to apply to a judge for a search-and-seizure order against the first respondent. The High Court subsequently dismissed the applicants' application for leave to appeal. Upon further application to this Court, the application was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the SC Act).[1] The parties were directed to be prepared to argue the merits of the appeal, should they be called upon to do so.

[1] Section 17(2)*(d)* of the SC Act reads:
'The judges considering an application referred to in paragraph *(b)* may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.'

[2] The delivery of this judgment has been delayed by several factors, including having to await the Constitutional Court's judgment in *Famous Idea Trading v Government Employees Medical Scheme* (*Famous Idea*).[2] That case was heard after this appeal. It had a direct bearing on the central issue in dispute in the appeal, namely, whether a court considering an application to compel the production of a record is entitled to determine whether the impugned decision is reviewable. As the Constitutional Court reserved judgment, it was prudent for this Court to await the Constitutional Court's judgment in that matter, which was delivered on 11 February 2026. In light of that judgment, the parties were invited to file supplementary heads of argument, if so advised. The parties obliged, respectively, on 24 February 2026 and 4 March 2026.

Factual background

[3] The first applicant, the Financial Sector Conduct Authority (the Financial Authority), is a financial sector regulator under the Financial Sector Regulation Act 9 of 2017 (the Financial Sector Regulation Act). In terms of s 135(1)*(a)*, it is empowered to conduct an investigation if it reasonably believes there is, or may be, a contravention of a financial sector law. The Financial Authority, through its instructed investigator, may, under s 138, apply to a judge for a search warrant. The second, third and fourth applicants are officials of the Financial Authority. I refer to all the applicants collectively as 'the Financial Authority.'

[4] The Financial Authority suspected that the first respondent, the Municipal Employees' Pension Fund (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. Ledwaba DJP granted the

[2] *Famous Idea Trading 4 (Pty) Ltd v Government Employees Medical Scheme and Others* [2026] ZACC 5; 2026 (4) BCLR 291 (CC).

application and issued the search warrant on 27 June 2022. The warrant authorised the Financial Authority to search the Pension Fund's premises and to seize the documents and information listed therein. The warrant was executed against the respondents between 5 and 14 July 2022. The parties signed an Escrow Agreement under which all seized information is held by a third party pending the determination of the main application.

[5] On 25 July 2022, the Pension Fund and the other respondents filed an urgent application seeking, among other things, an order setting aside the *ex parte* order. It is unclear from the papers what the relationship between the Pension Fund and the other respondents is, or what the other respondents' interest in the matter is. Be that as it may, I refer to the respondents collectively as 'the Pension Fund.'

[6] In addition to an order setting aside the *ex parte* order, the Pension Fund also sought to review '[t]he decision of one or more of the [applicants] to institute the *ex parte* application . . .'. The Pension Fund further called on the Financial Authority, under rule 53(1)*(b)* of the Uniform Rules of Court, to dispatch to the Registrar of the High Court the record of the proceedings relating to the Financial Authority's decision to investigate the affairs of the Pension Fund, 'together with such reasons as the [Financial Authority is] by law required to give or desire to make'. The Financial Authority had fifteen days to comply, but failed to do so. Instead, on 16 August 2022, it delivered its notice of intention to oppose the envisaged application.

[7] On 15 September 2022, the Pension Fund filed a notice in terms of rule 30A, complaining that the Financial Authority had failed to dispatch the record and reasons by the 16 August 2022 deadline set out in their review application. The notice afforded the Financial Authority 10 days to deliver the record, together

with the reasons, 'failing which [the Pension Fund] will apply to court. . . to compel compliance with the Rules, and to seek other relief.'

[8] On 30 September 2022, the Financial Authority, through its attorneys, replied to the Pension Fund's rule 30A notice and asserted that: (a) the Financial Authority's decision does not constitute administrative action within the meaning of s 1 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA); and (b) the Financial Authority's decision to investigate the Pension Fund did not have a direct and external legal effect within the meaning of s 1 of the PAJA. Accordingly, the Financial Authority contended that the Pension Fund was not entitled to any record under rule 53(1)*(b)*.

In the High Court

[9] As a result, on 25 October 2022 the Pension Fund lodged an application in the High Court in terms of rule 30A(2) of the Uniform Rules, seeking a declaratory order that the Financial Authority had failed to comply with rule 53(1)*(b)* and with their notice in terms of Rule 30A dated 15 September 2022, and an order compelling the Financial Authority to furnish the record. The Pension Fund's application was premised on its entitlement to the record as a matter of course, having filed a rule 53 review application. The Pension Fund further asserted that the review application was brought under the PAJA.

[10] The Pension Fund stated that the Financial Authority had relied on impermissible grounds for refusing to comply with rule 53(1)*(b)*, insofar as those grounds amounted to defences on the merits and were thus irrelevant at that stage of the proceedings. The Pension Fund emphasised that the application to compel was not the correct forum to debate the merits of their contentions, which will be addressed before the High Court in due course in the review application. In any event, the respondents asserted that the Financial Authority's contentions were

ill-founded for a variety of reasons, including that they were focused on the PAJA challenge, which ignored the fact that all exercises of public power are reviewable under the principle of legality and must comply with the rule of law.

[11] Furthermore, the Pension Fund asserted that the Financial Authority's decision had a very real and direct effect on their rights, including infringements of their rights to privacy and human dignity. It also resulted in the Pension Fund incurring substantial costs to address the effects of the Financial Authority's decision, including the search-and-seizure process, legal challenges, and market consequences, such as the loss of goodwill. The Pension Fund, it argued, has been seriously prejudiced by the Financial Authority's decision.

[12] The Pension Fund asserted that courts always retain the right to control and review unconstitutional exercises of power at intermediate stages of a multi-stage decision-making process. This may arise from the nature of the decision, the manner in which it was made (eg, in bad faith), or the basis on which it was made (eg, without adequate supporting documentation). These aspects will only be fully known once the record is delivered, enabling the court to assess them. It is not for the Financial Authority to pre-empt this process by way of an interlocutory objection, when the Court, hearing the merits, has not yet fulfilled its review function with the full benefit of the record. For these reasons, the Pension Fund sought an order requiring the Financial Authority to provide the record and the reasons for its decision.

[13] The Financial Authority opposed the application and advanced two main reasons why it should not be ordered to provide the record. First, the *ex parte* application sought a search-and-seizure warrant to support a full investigation, and did not determine the Pension Fund's culpability. Culpability would be determined after considering the information obtained during the investigation.

A decision to investigate, and the process of that investigation, including a decision to institute proceedings to obtain a warrant to further such investigation, provided that such investigation does not include a determination of culpability, cannot be seen to affect the rights of any person in a manner that has a direct and external legal effect. Thus, averred the Financial Authority, its decision to institute the *ex parte* application, as well as the Judge's order to grant the warrant, do not constitute administrative action, and therefore the PAJA does not apply.

[14] Second, the Financial Authority contended that the principle of legality does not apply because the Pension Fund failed to establish that: (a) the Financial Authority acted outside the law and in a manner inconsistent with the Constitution; and (b) the decision to institute the *ex parte* application was irrational and unrelated to the purpose for which the powers in the Financial Sector Regulation Act were conferred on the Financial Authority.

[15] For these reasons, the Financial Authority contended that there was no *causa* for a review under rule 53, and consequently no legal basis for the relief sought, 'as there is no valid review before the court'. Accordingly, a request for a record under those rules cannot be made. The Financial Authority, therefore, sought the dismissal of the Pension Fund's application.

[16] Before I turn to the High Court's judgment, it is necessary to set out how our courts understood the default legal position regarding a decision-maker's obligation to furnish the record of its decision. The default position was understood as follows: in an application for review, the decision-maker is obliged to furnish the applicant with the record of the decision under review, irrespective of the merits of the applicant's review application. This was on the authority of

this Court's decisions, such as *Competition Commission v Computicket*[3] and *SARS v Richards Bay Coal Terminal*.[4]

[17] The only exception was understood to be when the decision-maker challenged the court's review jurisdiction, as held by the Constitutional Court in *Competition Commission of South Africa v Standard Bank* (*Standard Bank*).[5] In that event, a ruling on jurisdiction must precede all other orders, including any order on whether the record should be produced. This is because a court must be competent to make any orders it issues. If the court lacks jurisdiction in the matter, the obligation to furnish the record does not arise.[6] A defence that the decision was not reviewable was considered irrelevant to the question of whether the decision-maker had to furnish the record. As long as the applicant filed an application to review the decision, the obligation arose without more.

The judgment of the High Court

[18] The High Court approached the application on the basis of the default position set out above. Having found no challenge to its jurisdiction, it 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'. The High Court 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.

---

[3] *Competition Commission v Computicket (Pty) Ltd* [2014] ZASCA 185; 2014 JDR 2507 (SCA); [2015] 1 CPLR 15 (SCA).
[4] *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* [2023] ZASCA 39; 2023 JDR 0956 (SCA); 86 SATC 145 para 28.
[5] *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* [2020] ZACC 2; 2020 JDR 0685 (CC); 2020 (4) BCLR 429 (CC) (*Standard Bank*).
[6] *Standard Bank* paras 201-203, see also paras 118 and 119.

An overview of the authorities subsequent to the High Court's judgment

[19] In a judgment of this Court in *Murray v Ntombela* (*Murray*),[7] the majority affirmed the default position explained above. There, the respondents instituted review proceedings in terms of rule 53 against the decision-makers, who refused to produce the record of their decision. The respondents then launched an application to compel the decision-makers to furnish the record. The decision-makers filed a rule 6(5)*(d)*(iii) notice asserting that their decision was not reviewable because they had neither exercised a public power nor performed a public function when they made it.

[20] The majority held that determining whether the impugned decision was reviewable would require the court to assess the substantive merits of the review before the procedural requirements of rule 53 were satisfied, which was untenable. Accordingly, that issue fell to be determined with the merits of the main review application. The majority dismissed the decision-makers' appeal and upheld the High Court's order requiring the decision-makers to furnish the record.

[21] The minority in *Murray* disagreed, holding that the exception carved out in *Standard Bank* was not the only one. It recognised an analogous exception under which the decision-maker can resist furnishing the record on the basis that the impugned decision is not reviewable.

[22] Subsequent to *Murray*, the Constitutional Court delivered its decision in *Commissioner for the South African Revenue Service v Richards Bay* (*Richards Bay*),[8] which is relevant to the question of whether, assuming it had review jurisdiction, the High Court should have exercised that jurisdiction before

[7] *Murray and Others NNO v Ntombela and Others* [2024] ZASCA 24; [2024] 2 All SA 342 (SCA); 2024 (4) SA 95 (SCA).
[8] *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.

deciding whether to order the Financial Authority to furnish the record. In *Famous Idea*, the Constitutional Court overturned this Court's majority judgment in *Murray* and endorsed the minority judgment. I address the Constitutional Court's reasoning in both these matters later.

In this Court

Leave to appeal

[23] The threshold question is whether the Financial Authority has satisfied the requirements for leave to appeal. These are set out in s 17(1) of the SC Act, namely: (a) the presence of reasonable prospects of success,[9] or (b) another compelling reason why the appeal should be heard.[10] I consider these requirements in light of the facts of the case and the developments in jurisprudence since the High Court's judgment. Key among these are the Constitutional Court's decisions in *Famous Idea*, which overruled the *Murray* majority judgment, and in *Richards Bay*. I conclude that the Financial Authority should be granted leave to appeal. Although it needs to satisfy only one of the two requirements, I am satisfied that both are met.

The effect of Famous Idea

[24] The Constitutional Court stated that the majority of this Court in *Murray* had misunderstood its judgment in *Standard Bank*. The Court explained that the Standard Bank exception required a reviewing court to determine its jurisdiction by reference to the founding papers. The Court further explained that an applicant seeking production of the record must establish that all grounds, upon which it was asserted that the court had review jurisdiction, are supported by relevant factual material. In other words, an applicant must identify both the facts upon which they base their cause of action and the legal basis of that cause of action.

---

[9] Section 17(1)*(a)*(i).
[10] Section 17(1)*(a)*(ii).

Where the review is based on the PAJA, an applicant must allege that the decision constitutes administrative action and explain why. Unless an applicant lays a factual basis for the review ground, it will have failed to engage the court's review jurisdiction and is not entitled to the record.[11]

[25] Importantly, 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. The Constitutional Court unanimously held that the majority judgment in *Murray* was incorrect to the extent that it held that such a defence constitutes a challenge to the merits of the review, rather than to the court's review jurisdiction. It accordingly overruled the *Murray* majority and endorsed the minority.[12]

[26] In the present case, the Financial Authority resisted the rule 30A application on the ground that its decision is not reviewable because it: (a) does not include a determination of culpability; (b) cannot be seen to affect the rights of any person in a manner that has a direct and external legal effect. Thus, it neither constitutes 'administrative action' under the PAJA nor under the principle of legality. The Constitutional Court in *Famous Idea* endorsed this defence as a challenge to the court's review jurisdiction, which must be determined before an order can be made requiring a decision-maker to furnish the record.

[27] In the present case, the thrust of the Pension Fund's case was that, having instituted a review application under rule 53, it was entitled to the record as a matter of law. In its affidavit, the Pension Fund stated that the Financial Authority's grounds for refusing to furnish the record (as gleaned from previous correspondence between the parties) were irrelevant, as they amounted to

[11] *Famous Idea* paras 60-64.
[12] Ibid para 65.

defences on the merits. The Pension Fund then traversed those grounds to show that they were ill-founded.

[28] However, what is glaringly absent from the Pension Fund's founding affidavit is any factual basis upon which the court's review jurisdiction could be founded. This is understandable, given that the weight of authority at that stage required only the filing of what appeared to be a review application, after which the production of the record would have to follow. We now know that this is insufficient and that a factual basis for the court's review jurisdiction must be established, as subsequently clarified by the Constitutional Court in *Famous Idea*. Thus, on the papers as they stand, the Pension Fund is not entitled to the production of the record. Because the High Court's judgment was delivered before the clarification by the Constitutional Court, fairness would ordinarily require that the Pension Fund be afforded an opportunity to supplement its papers to comply with the essence of *Famous Idea.*

[29] Having carefully considered that option, I conclude this would be a futile exercise. This is for two reasons, each of which presents insurmountable obstacles to the Pension Fund obtaining the record. The first concerns whether the Pension Fund was entitled to seek, simultaneously, an order setting aside the *ex parte* order and a judicial review of the Financial Authority's decision to investigate and to apply for the *ex parte* order. I refer to this as the choice-of-remedy issue. The second is that, in addition to asserting the court's review jurisdiction, the Pension Fund had to demonstrate that the Financial Regulator's decision to investigate and to apply for a warrant affected its rights in a manner that had a direct and external legal effect.

Choice of remedy

[30] As noted, in its notice of motion, the Pension Fund sought, in the main, an order setting aside the *ex parte* order. It also sought judicial review of the Financial Authority's decision to seek a warrant. Accordingly, the Pension Fund invoked two distinct remedies, both within the High Court's jurisdiction.

[31] In *Richards Bay*, the taxpayer sought relief under s 47(9)*(e)* of the Customs and Excise Act 91 of 1964 (the CEA), which provides for a wide appeal against a tariff determination made under the CEA. The taxpayer also sought judicial review of SARS's tariff assessment. Consequently, the taxpayer requested a record of the decision, among other things, under rule 53. SARS refused to produce the record, contending that judicial review did not apply to the dispute, which had to be resolved by the wide appeal. The Court explained how this issue should be approached:

'What emerges is that not every reviewable irregularity would necessitate a resort to review relief, especially when there is a tailor-made remedy that can address the complaint of a wrong decision which may negate the need to persist with a challenge to an irregular process. . . If the determination is found to be incorrect, a wide appeal court will substitute it with the correct determination which will, subject to possible further appeals, bring finality to the dispute. In that event there may be nothing left to review, as the Court observed in *BP Southern Africa*, where it asked, in the context of a review and a wide appeal brought simultaneously against the same decision, "[o]nce that appeal has been determined, the question was what, if anything, was left of the review?"'[13] (Footnotes omitted.).

[32] Under these circumstances, the Constitutional Court held that, in respect of review relief, once a court has review jurisdiction, it must also decide whether to exercise it. Thus, the Court drew a distinction between the conferment of jurisdiction by law and the court's exercise of that jurisdiction. Accordingly, the mere fact that a court is clothed with jurisdiction does not necessarily oblige it to

[13] *Richards Bay* paras 115 and 116.

exercise it. It may decline to do so in certain circumstances, such as in the present case, where a party invokes two distinct remedies.

[33] In the present case, if the court, on reconsideration, finds that the *ex parte* order was erroneously sought or granted, it would set it aside and grant the ancillary orders sought by the Pension Fund, including the return of documents seized pursuant to the warrant. In that event, I ask the same question: what, if anything, would be left to review? Nothing, I surmise. This is because, as mentioned, the Pension Fund's pleaded case is silent as to the basis on which the High Court was to assume review jurisdiction. Its invocation of the judicial review remedy was designed solely to access the record. I find apposite the Constitutional Court's characterisation of the taxpayer's demand for the record in *Richards Bay*:

'There may also be instances where a taxpayer may purport to advance a ground of review, but in substance be seeking to obtain a correct decision, and simply be clothing its challenge in PAJA language in order to obtain access to the record. *It is in these instances where a court must refuse to exercise its review jurisdiction and require a party instead to pursue the section 47(9)*(e) *appeal as the remedy properly suited for the challenge. The manner in which a party pleads their case is important, just as the availability of the two remedies is in assisting a court to determine whether the exercise of its review jurisdiction is warranted*.'[14] (Emphasis added.)

[34] What is clear is that a court cannot grant both remedies in respect of the same decision. It must select one. As to which, the Constitutional Court in *Richards Bay* held that where a statute provides for certain relief, a party should rely on that relief rather than judicial review, unless the court is satisfied that the applicant has advanced sufficient reasons to be entitled to proceed by way of review. I see no reason in principle to adopt a different approach here.

[14] Ibid para 109.

[35] A reconsideration application to set aside an order obtained *ex parte* is the default remedy, not a judicial review. The Pension Fund has not advanced any reasons for proceeding by way of judicial review. Thus, the High Court would have had no basis to decide whether to exercise its review jurisdiction. In any event, any such decision must be preceded by a determination that the court has review jurisdiction. I have demonstrated that the Pension Fund's case does not get out of the starting stalls in that regard. It would thus be futile to remit the matter in circumstances where the court would not be in a position to decide whether to exercise its review jurisdiction. On this basis, too, the Pension Fund's case flounders.

Whether the Financial Authority's decision constitutes 'administrative action'

[36] A court will have review jurisdiction under the PAJA and the competence to order the furnishing of the record only if the impugned decision constitutes 'administrative action'. In *Minister of Defence v Motau and Others*,[15] the Constitutional Court described the concept of 'administrative action' as the threshold requirement for administrative law review.[16] It explained:

'The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions."[17] (Footnote omitted.)

[37] The disputed requirement in the present application is whether the Financial Regulator's decision adversely affected the Pension Fund's rights. This Court has considered this issue in relation to regulatory bodies, including the Competition Commission, the Registrar of Banks, and the Companies and

[15] *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC).
[16] Ibid para 33.
[17] Ibid.

Intellectual Property Commission.

[38] Under s 49B(2)*(b)* of the Competition Act 89 of 1998, any person may lodge a complaint with the Competition Commission against any entity. The complaint is investigated under s 49B(3), after which the investigating team submits its final report to the Commission. The Commission may refer the complaint to the Competition Tribunal under s 50(2)*(a)* of the Competition Act. In the cases before this Court, the issue was whether the Competition Commission's decision to investigate and to refer the matter to the Competition Tribunal was reviewable.

[39] In *Simelane v Seven-Eleven* (*Simelane*)[18] this Court endorsed the Competition Tribunal's conclusion in *Novartis v Competition Commission*[19] that the Commission's functions are investigative, not determinative. Accordingly, this Court concluded that the ultimate decision to refer a matter to the Tribunal and the referral itself are of an investigative, not an administrative, nature, and therefore, not subject to review, 'save in cases of ill-faith, oppression, vexation or the like.'[20] *Simelane* was followed in *Competition Commission v Telkom*[21] (*Telkom*); and *Competition Commission v Yara* (*Yara*).[22] In *Telkom*, this Court elucidated the requirement that the decision must have the capacity to affect legal rights, as follows:

'[A]lthough the complaint referral indeed affects Telkom in the sense that it may be obliged to give evidence under oath, be subject to a hearing before the Tribunal, and be required to submit its business affairs and documentation to public scrutiny it cannot be said that its *rights* have

[18] *Simelane and Others NNO v Seven-Eleven Corporation (Pty) Ltd and Another* 2003 (3) SA 64 (SCA); [2003] 1 All SA 82 (SCA).
[19] *Novartis SA (Pty) Ltd v Competition Commission* (CT22/CR/B Jun 01 paras 35-61).
[20] *Simelane* para 17.
[21] *Competition Commission of South Africa v Telkom SA Ltd and Others* [2009] ZASCA 155; 2009 JDR 1265 (SCA); [2010] 2 All SA 433 (SCA).
[22] *Competition Commission v Yara (South Africa) (Pty) Ltd and Others* [2013] 4 All SA 302 (SCA); 2013 (6) SA 404 (SCA); [2013] 2 CPLR 351 (SCA).

been affected or that the action complained of had that capacity.'[23] (Footnote omitted.)

[40] In *Yara*, it was emphasised that the purpose of the Commission initiating a complaint and the subsequent investigation is not to afford the suspect firm an opportunity to put its case. This Court explained further:

'The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case.'[24]

[41] As regards the Registrar of Banks (the Registrar), its regulatory powers derive from the Banks Act 94 of 1990 (the Banks Act). The Registrar is empowered to investigate a matter and, if there is reason to suspect a contravention of s 11(1) of the Banks Act, to apply to the High Court for the relief set out in s 81 of the Banks Act. In *Corpclo v Registrar of Banks*,[25] the Registrar obtained relief in the High Court as envisaged above.

[42] On appeal, the appellants invoked the PAJA, contending that the decisions to investigate and to institute proceedings against them were administrative decisions that required them to be given adequate notice of their nature and purpose, and a reasonable opportunity to make representations, among other things. With reference to *Telkom* and other authorities, this Court summarily dismissed this contention, holding that a decision to institute proceedings in the High Court for an interdict does not affect the appellants' rights or have that capacity. It is the court that decides that the Banks Act is being contravened and

[23] Ibid para 10.
[24] *Yara* para 24.
[25] *Corpclo 2290 CC v The Registrar of Banks* [2012] ZASCA 156; 2012 JDR 2100 (SCA); [2013] 1 All SA 127 (SCA).

grants the interdict.[26]

[43] Similarly, in *Singh v Companies and Intellectual Property Commission*,[27] this Court concluded that the investigation of a complaint lodged with the Companies and Intellectual Property Commission does not constitute administrative action. It concluded that the definition of administrative action in s 1 of the PAJA does not extend to a referral to a statutory body for investigative purposes.

[44] The same approach was adopted by the High Court in *Wingate-Pearce v South African Revenue Service*.[28] It held that the South African Revenue Service's receipt of information about the applicant from the Police's Organised Crime Unit could not, in itself, adversely affect the applicant's rights. Nor could its decision to investigate his tax affairs, the investigation process, or the decision to apply for the warrant. These processes did not constitute administrative action.[29]

[45] The essence of these cases is reinforced by the Constitutional Court's observation in *Viking v Hidro-Tech* (*Viking*)[30] that it is unlikely that a decision to investigate and the process of investigation, without determining culpability, could itself adversely affect the rights of any person in a manner that has a direct and external legal effect.

[46] I consider these authorities apposite to the present case. As I see it, the Financial Authority shares certain features with the Competition Commission and

---

[26] Ibid para 26.
[27] *Singh v Companies and Intellectual Property Commission* [2019] ZASCA 69; 2019 (5) SA 432 (SCA).
[28] *Wingate-Pearse v Commissioner, South African Revenue Service and Others* 2019 (6) SA 196 (GSJ); [2019] 4 All SA 601; 82 SATC 21.
[29] Ibid para 41.
[30] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) paras 38-39.

the Registrar of Banks in relation to their investigation and referral procedures. All these regulatory bodies have investigative and referral powers conferred by their respective legislative instruments. Under the Competition Act, the Commission refers complaints to the Competition Tribunal after investigation. Under the Banks Act, the Registrar of Banks may, after an investigation, apply to the High Court for specified relief.

[47] Under the Financial Sector Regulation Act, the Financial Authority may, upon investigation, apply to a magistrate or judge for a warrant under s 138. That section must be read with ss 135, 136, 137 and 138. Section 135 provides that a financial sector regulator may instruct an investigator appointed by it to conduct an investigation in respect of any person if it reasonably: (a) suspects a contravention of a financial sector law for which the financial sector regulator is the responsible authority; or (b) believes that an investigation is necessary to achieve the objects referred to in section 251(3)*(e)*. Section 136 sets out investigators' powers to question and to require the production of documents or other items. Section 137 empowers investigators to enter and search premises.

[48] Section 138(1), which provides for the obtaining of warrants, reads:

'(1)*(a)* A judge or magistrate who has jurisdiction may issue a warrant for the purposes of this Part on application by an investigator.

(b) The judge or magistrate may issue a warrant in terms of this section –

(i) on written application by the investigator setting out under oath or affirmation why it is necessary to enter and investigate the premises; and

(ii) if it appears to the magistrate or judge from the information under oath or affirmation that –

(aa) in the case of an investigation under section 135(1)*(a)*, that –

(AA) there are reasonable grounds for suspecting that a contravention of a financial sector law has occurred, may be occurring or may be about to occur;

(BB) entry and investigation of the premises are likely to yield information pertaining to the contravention; and

(CC) entry and investigation of those premises is reasonably necessary for the purposes of the investigation;
(bb) in the case of an investigation under section 135(1)*(b)*, that there are reasonable grounds to believe that the investigation necessary to comply with a request referred to in that section.'

[49] It is plain from s 138 that the overarching jurisdictional fact for the Financial Authority to apply for a warrant is reasonable suspicion of a contravention of a financial sector law. Once a basis is laid for this under oath, it is the magistrate or the judge who exercises a discretion whether to grant the warrant. In other words, the Financial Authority's role is limited to the investigation.

[50] To sum up, the upshot of *Simelane* and the cases that followed it is that a regulatory body's decision to investigate and to refer complaints to an adjudicative body is not an administrative action and therefore not reviewable. In my view, this applies with equal force to the Financial Authority's decision to investigate and to seek a warrant. That decision does not, in itself, adversely affect the Pension Fund's rights, nor does a decision to seek a search warrant from a judge. It is the *ex parte* order that does so, not the Financial Authority's decision to investigate and to apply for the warrant. As the order is a judicial decision, it is not reviewable under the PAJA.

[51] Because the order was obtained *ex parte*, the Pension Fund's remedy is reconsideration. This preserves administrative fairness. For these reasons, the Financial Authority's decision to investigate and to seek a warrant is not reviewable. Accordingly, I agree with the Financial Authority's argument that the Pension Fund's application was conceptually flawed and that they it is not entitled to the record.

Conclusion

[52] For all the reasons stated above, I conclude that the Financial Authority should be granted leave to appeal and that the appeal should be allowed. Costs should follow the result. It brooks no debate that the issues involved warranted the employment of two counsel.

Order

[53] In the result, the following order is granted:

1 The applicants are granted leave to appeal.

2 The appeal is upheld with costs, including costs of two counsel.

3 The order of the Gauteng Division of the High Court, Pretoria, is set aside and replaced with the following:

'The application is dismissed with costs.'

_____

T MAKGOKA

JUDGE OF APPEAL

Appearances:

For applicants:	W Trengove SC (with him L Peter)
Instructed by:	Norton Rose Fulbright SA Inc., Johannesburg
	Macintosh Cross & Farquharson, Pretoria
	Phatshoane Henney Attorneys, Bloemfontein
For respondents:	AE Franklin SC (with him J P V McNally SC and T Mafukidze)
Instructed by:	Webber Wentzel, Johannesburg
	Honey Attorneys, Bloemfontein.