



CONSTITUTIONAL COURT OF SOUTH AFRICA

Rosemary Thérèse Hunter v Financial Sector Conduct Authority and Others

CCT 165/17

Date of judgment: Thursday 20 September 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday, 20 September 2018 at 10h00, the Constitutional Court handed down judgment in an appeal against the decision of the Supreme Court of Appeal. The Supreme Court of Appeal had dismissed an appeal from the High Court in Pretoria. The case concerned a project run by the Financial Sector Conduct Authority (FSCA) – formerly the Financial Services Board. It aimed to cancel the registration of pension funds that had effectively ceased to exist. The legal issue at stake was whether the FSCA had a constitutional duty to investigate potentially unlawful cancellations. If such a duty exists, it leads naturally to the question of whether the FSCA had fulfilled that duty.

The project came about as a response to a change in the way pension funds operated in South Africa. There was a shift from funds that were specific to certain employers, to umbrella funds which allowed the contributions of employees from different employers to be managed in a single fund. As a result, assets, liabilities and members were moved from many of the employer-specific funds to the umbrella funds. Those employer-specific funds remained registered despite the fact that they had become defunct. In 2007, the FSCA started “the cancellations project,” a project to cancel the registrations of defunct funds.

When Ms Rosemary Hunter was appointed as Deputy Registrar of the FSCA in 2013, she soon became concerned that there were various problems with the cancellations project. She worried that some registrations had been cancelled by mistake when the funds concerned still had assets and members. Any mistaken cancellations could prejudice the members of those funds and might be unlawful.

As a result of Ms Hunter’s complaints, the FSCA launched an investigation into the cancellations project. Initially, O’Regan J, a former Justice of the Constitutional Court,

was tasked with assessing a number of Ms Hunter's complaints. The report she produced led to further investigations. Those were conducted by KPMG and an attorney specialising in pension funds.

Ms Hunter was dissatisfied with the investigations and the FSCA's position on the matter. She asked the High Court for a suite of orders to be made against the FSCA. She was unsuccessful in the High Court and the Supreme Court of Appeal and appealed to the Constitutional Court. The main issue before the Constitutional Court was whether the FSCA should be ordered to conduct further investigations into the cancellations project.

Khampepe J wrote the majority judgment. Mogoeng CJ, Goliath AJ, Jafta J, Petse AJ and Theron J concurred in her judgment. She reasoned as follows.

The application for leave to appeal should be granted since the case raises an important constitutional issue and Ms Hunter had reasonable prospects of success. The merits of the appeal depended on whether the FSCA was under a duty to investigate potentially unlawful cancellations. The only legal authority which establishes a duty upon a public functionary to investigate potentially unlawful action is the case of *Khumalo*. That case concerned a different issue to the one at hand. Therefore, the investigative duty established in that case did not apply in the present circumstances. In any event, the FSCA conducted various investigations into Ms Hunter's complaints. Furthermore, if Ms Hunter wanted to challenge the lawfulness of the cancellations, she had to follow a particular procedural route. The cancellations were administrative action and Ms Hunter had to bring a claim in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). She had not done so. For those reasons, the majority dismissed the appeal.

Froneman J wrote the minority judgment. Dlodlo AJ and Madlanga J concurred in his judgment. He reasoned as follows.

From the outset of the litigation, Ms Hunter had asked the courts to order an adequate investigation into the cancellations project. The factual basis for her claim was provided by the FSCA, as it had to be. Although Ms Hunter's pleadings were not always clear, the FSCA was not prejudiced by the manner in which the case proceeded. Moreover, the procedural route through which she pursued her claim – legality rather than PAJA review – was appropriate.

The case of *Khumalo* explicitly sets out an investigative duty. The duty is explained in general terms. Its existence is implied by the provisions in the Constitution which set out the basic values and principles of public administration. That duty requires public functionaries like the FSCA to investigate instances where it has come to their attention that they might have acted unlawfully. Not all such instances of potential impropriety are equal. So, any investigation must be proportionate to the evidence of unlawful action and the seriousness of alleged unlawfulness. Well-founded, serious allegations require thorough investigation. Spurious allegations require no investigation at all.

In this case, the FSCA did not fulfil its constitutional duty. Three aspects of the case make that clear. First, the FSCA had admitted to unlawfully appointing certain “representatives” in the course of the cancellations project. That indicated a lax approach to its duty to act lawfully. Secondly, there were many mistakes made in the course of the project. There are potentially hundreds of errors that will go undetected without further investigation. Finally, the adequacy of the cancellations project was credibly called into question by expert FSCA employees with knowledge of the project. For those reasons, the minority would have ordered the FSCA to investigate all of the cancellations made in the course of the project. The manner of that investigation is up to the FSCA. However, they must make public the process and outcome of that investigation.

Cachalia AJ wrote a dissenting judgment. He reasoned that Ms Hunter had advanced a case in this Court that had no basis in her pleadings before the High Court. In the Constitutional Court, Ms Hunter’s case was that the FSCA has a duty to investigate systemic irregularities in the cancellations project. This, Cachalia AJ held, was a mutation of the case she had made in the High Court. Consequently, this Court was being asked to sit as a court of first and last instance and the FSCA was prejudiced, in that it could not know precisely what case it was being asked to answer. For those reasons it was not in the interests of justice for this Court to hear Ms Hunter’s appeal. Therefore, Cachalia AJ would have dismissed Ms Hunter’s application for leave to appeal.