THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 755/2011

In the matter between:

CORPCLO 2290 CC t/a U-CARE **FIRST APPELLANT**

CORPCLO 2297 (PTY) LIMITED t/a DMP MARKETING **SECOND APPELLANT**

and

THE REGISTRAR OF BANKS **RESPONDENT**

Neutral citation: *Corpclo 2290 cc t/a U-Care v The Registrar of Banks* (755/11) [2012] ZASCA 156 (2 November 2012)

Coram: MPATI P, LEWIS, MALAN, LEACH JJA and SOUTHWOOD AJA

Heard: **14 SEPTEMBER 2012**

Delivered: **2 NOVEMBER 2012**

Summary: Banks Act 94 of 1990 – contravention of s 11 – appellants conducting 'the business of a bank' as defined in notice issued in terms of paragraph (*e*) of the definition of 'the business of a bank' in s 1 – interdict granted against the appellants in terms of s 81 of the Act prohibiting them from conducting their business in contravention of the Act – appellants appeal against the order on the grounds that the provisions of the Act and the notice itself not properly interpreted in the light of the Constitution and the Act – such grounds not part of the defence in the court a quo and raised for the first time in the appellants' heads of argument – whether the court should consider the new defences where they were not raised in the court a quo.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Booyens AJ, sitting as court of first instance)

The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

SOUTHWOOD AJA (MPATI P, LEWIS, MALAN and LEACH) JA CONCURRING):

[1] The issue in this appeal is whether the KwaZulu-Natal High Court, Pietermaritzburg (Booyens AJ) correctly granted an interdict in terms of s 81 of the Banks Act 94 of 1990 prohibiting the appellants (respondents in the court a quo) from continuing a business practice in contravention of s 11(1) of the Act. This appeal is with the leave of the court a quo.

[2] The Act, originally called the Deposit-taking Institutions Act, was enacted to provide for the regulation and supervision of public companies taking deposits from the public and matters connected therewith. It has been extensively amended and now provides for the regulation and supervision of

public companies which intend to carry on ‘the business of a bank’ which means, primarily, the acceptance of deposits from the general public as a regular feature of the business. Subject to s 18A (which is not presently relevant), s 11(1) provides that no person shall conduct the business of a bank unless such person is a public company and is registered as a bank in terms of the Act. A number of functions are assigned to the Registrar of Banks by the Act. The Registrar is a South African Reserve Bank officer or employee, designated by the Reserve Bank, to perform, under the control and direction of the Reserve Bank, the functions assigned to the Registrar under the Act (s 4). In order to perform his or her functions under the Act the Registrar has all the powers and duties corresponding with those conferred or imposed by the Inspection of Financial Institutions Act 80 of 1998 on a registrar in terms of that Act (s 6). These include the power to appoint inspectors who have extensive powers to investigate.

[3] In terms of s 81 of the Act, if the Registrar has reason to suspect that any person who is not registered in terms of the Act as a bank –

(a) is likely to conduct the business of a bank in contravention of the provisions of section 11(1); or (b) has so contravened the provisions of section 11(1) and/or that such contravention is likely to be continued or repeated; the Registrar may apply to the relevant high court for an order prohibiting the anticipated contravention referred to; in paragraph (a) and/or prohibiting the continuation or repetition of a contravention referred to in paragraph (b).

If it is proved to the satisfaction of the high court that there is a reasonable likelihood of a contravention of s 11(1) taking place or that there is a reasonable likelihood that a contravention will be continued or repeated, the high court may make the relevant order applied for. It should be noted that s 9 of the Act provides for a review by a board of review of any decision taken by the Registrar by any person aggrieved by the decision. Such a review is confined to the question of whether or not the Registrar, in taking the decision, exercised his or her discretion properly and in good faith. The board of review may after the review confirm, vary or set aside the Registrar's decision.

[4] The primary definition of 'the business of a bank' as defined in s 1, is:

'(*a*) the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question,'

But the definition is extended in paragraph (*e*) to include: 'any other activity which the Registrar has, after consultation with the Governor of the Reserve Bank, by notice in the *Gazette* declared to be the business of a bank'.

On 27 March 1997, the Registrar, by Notice 498 published in *Government Gazette* 17895, declared the following 'business practice' (defined to include 'any scheme, practice or method of trading, including any method of marketing or distribution') to be 'the business of a bank':

'2. The acceptance or obtaining of money, directly or indirectly, from members of the public, as a regular feature of a business practice, with the prospect of such members (hereinafter referred to as the "participating members") receiving payments or other money-related benefits, directly or indirectly–

(a) on or after the introduction of other members of the public to the business practice (hereinafter referred to as the "new participating members"), from which new participating members, in their turn, money is accepted or obtained, directly or indirectly, as a regular feature of the business practice, whether or not–

(i) the introduction of the new participating members is limited to their introduction by participating members or extends to the introduction of the new participating members by other persons; or

(ii) new participating members are required to acquire movable or immovable property, rights or services;

(b) on or after the promotion, transfer or change of status of the participating members or new participating members within the business practices; or

(c) from funds accepted or obtained from participating members or new participating members in terms of the business practice.

3. The soliciting of, or advertising for, directly or indirectly, money and/or persons for introduction into or participation in a business practice as described in paragraph 2 *supra*.'

[5] During April 2009, acting on the instructions of the Governor of the Reserve Bank, the Registrar appointed three employees of PriceWaterhouseCoopers Forensic Services (Pty) Ltd as temporary inspectors to investigate whether the appellants, their directors, members and officers and related persons and entities were conducting the business of a bank in contravention of s 11(1) of the Act. The inspectors ascertained that –

(a) the business (known as U-Care) operated by the first appellant operates as a multi-tiered structure (members are referred to as 'independent

contractors') where members of the public are requested to make monthly contributions to U-Care;

(b) members make a minimum monthly contribution (initially R125, later R165) which is deposited into an Absa account held in the name of the first appellant;

(c) this monthly contribution is utilized as follows:

(i) 60 % is paid back to members as commissions and/or bonuses;

(ii) 20 % is paid to the second appellant, the management company, for 'administrative expenses';

(iii) 20 % is donated to charity;

(d) when joining, a member nominates a charity. When 20 members have nominated a charity it is selected to receive donations;

(e) members are paid commissions as a reward for other members they sign up, down to four levels in the tiered structure;

(f) To qualify for commission a member must have three paying members per level;

(g) Commission is paid over four levels totalling R75 (later R125). This is 60 % of the contribution;

(h) The commission is calculated as follows:

(i) first level – R10 commission per member signed up;

(ii) second level – R20 commission per member signed up;

(iii) third level – R30 commission per member signed up;

(iv) fourth level – R15 commission per member signed up;

(i) Commission is only paid down to four levels and there must be three paying members per level. If there are fewer than three paying members on a level, commission is not paid;

(j) Such unpaid commissions are used to pay bonuses;

(k) 'Clubs' are also paid bonuses/rewards on a monthly basis:

(i) 'Club 20' – R150 per month is paid to members with 20 people in their structure of which four people are on the first level;

(ii) 'Club 60' – R500 per month is paid to members with 60 people in their structure of which six people are on the first level;

(iii) 'Club 100' – R1 000 per month is paid to members with 100 members in their structure of which ten people are on the first level;

(iv) 'Club 150' – R1 500 per month is paid to members with 150 people in their structure of which 15 people are on the first level;

(v) 'Club 200' – R2 000 per month is paid to members with 200 members in their structure of which 20 people are on the first level.

[6] The appellants have also advertised their business and solicited business by means of their website.

[7] On the strength of these facts the Registrar had reason to suspect that the appellants were contravening, and would continue to contravene, s 11(1) of the Act read with Notice 498, Consequently, the Registrar launched the

application in the court a quo for the relief set out in s 81 of the Act. The appellants opposed the application and filed an answering affidavit.

[8] Despite the denial of certain allegations in their answering affidavit, the appellants did not create any bona fide disputes of fact which would be an obstacle to the grant of final relief.[1] Their principal contention is that they conduct a charity funding business which provides a service to both donors (called 'participants') and charities. They make donation by the participants easier and less complicated and they distribute funds to charities on a regular monthly basis. This facilitates the operation of the charities which are assured of a regular monthly income. Without disputing the business practice described in the Registrar's founding affidavit, they contend that they do not conduct the business of a bank.

[9] It also appears from the answering affidavit, that, in the first two years of its existence, U-Care received total donations (or contributions) amounting to almost R15 million, and in the next three and a half years, donations amounting to more than R60 million. The appellants claim that U-Care is a transparent fund-raising business which is inspired by altruistic motives but they have not provided any facts to support these bald allegations or explain the dramatic growth in income or turnover and they have not attached to their

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C; *Wightman t/a J W Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) paras 12-13; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

answering affidavit any financial statements or other relevant documents. They have provided no information about the donors, the amounts the donors contribute, the charities that benefit from the business, the amounts distributed to the charities and the commissions or bonuses paid to the participants. They have also not stated what the second appellant's cost structure is and what amounts have been paid to the second appellant for its administrative expenses.

[10] It further appears from the affidavit that in 2007 the members or directors of the appellants became concerned about whether their business was lawful – they do not say when, but it was probably when they received a letter from the Deputy Registrar seeking information about the business – and they claim to have approached the Department of Trade and Industry for 'the necessary approvals to operate such business models so as to comply with the relevant laws of the Republic of South Africa'. Strangely, they do not state what the outcome of such approach was and they do not attach to their affidavit any approval given by the Department of Trade and Industry or any correspondence between themselves and the Department. All that the court was told by the appellants' counsel from the Bar was that the Department of Trade and Industry did not grant approval. Although this evidence should have been set out in the answering affidavit, it is entirely consistent with the most plausible inference from the absence of such approval in the papers.

[11] The appellants' inaction after that is difficult to understand if they were truly concerned about whether their business was legitimate. After they failed to obtain the Department's approval, they should have sought legal advice to ensure that they were not acting unlawfully. Yet they did nothing. Not even the investigation carried out by the Registrar's inspectors in April 2009 could prompt them into action. The appellants did not obtain legal advice until the papers were served in August 2010. Apparently the only advice they received was to simply deny that they were conducting 'the business of a bank'.

[12] In their answering affidavit the appellants raised only one defence: that the Registrar's founding affidavit did not disclose a cause of action because the facts averred did not establish that the appellants were conducting 'the business of a bank'. Neither of the appellants is a public company and they did not dispute that they are not registered as a bank. Accordingly, the only dispute was whether the appellants conduct 'the business of a bank' as described in the Notice. This required the application of the provisions of the Notice to the business practice described earlier. The court a quo had no doubt that the appellants were conducting the 'business of a bank' and pertinently recorded the appellants' counsel's concession that the appellants' business practice described above is tantamount to conducting the 'business of a bank'. On the ordinary grammatical meaning of the words in the Notice, that concession was clearly correct and so was the grant of the order against the appellants. It was clear that unless interdicted the appellants would

continue with their business activities and persist in contravening s 11(1) of the Act.

[13] On appeal, the appellants' counsel (who did not appear in the court a quo) seek, in their heads of argument, to make out a completely new case on behalf of the appellants. This has three parts. First, they contend that the court a quo failed in its duty under ss 8 and 39 of the Constitution to interpret the Act in a way that respects, promotes and fulfils the rights in the Bill of Rights. It did this, according to the argument, because it failed to take account of ss 1, 22, 25 and 33 of the Constitution. Second, they contend that even if the court a quo's interpretation is correct, Notice 498 is unconstitutional because it is ultra vires and overbroad and falls outside the scope of ss 1 and 11 of the Act. Third, they contend that s 1 of the Act gives 'unlawfully wide' powers to the Registrar to determine the meaning of 'the business of a bank'. Thus, the appellants raise three constitutional issues, the proper interpretation of the Act, the constitutionality of the Notice and the constitutionality of the power conferred on the Registrar to determine the meaning of 'the business of a bank'.

[14] It is apparent from the judgment of the court a quo that no attempt was made to interpret the Notice – obviously because the ordinary grammatical meaning is clear and unambiguous and was not disputed – and that none of the matters now sought to be raised was mentioned during the hearing.

[15] The Registrar's counsel contends that because these issues were not canvassed in the appellants' answering affidavit the appellants are precluded from advancing them on appeal.[2] The Registrar's counsel points out that not only was the Registrar not warned of the issues raised but the court is deprived of the assistance of *amici curiae* such as the Reserve Bank, the Minister of Finance and the Minister of Trade and Industry, all of whom would have had an interest in the relief sought.[3]

[16] The appellants' approach ignores all the well-established rules of practice governing motion proceedings and the raising of constitutional issues. It is trite that in motion proceedings the affidavits comprise both the pleadings and the evidence and that the parties' contentions should appear clearly from the affidavits so that the opposing party can deal with them.[4] Furthermore, Rule 16A of the Uniform rules emphasizes the necessity for constitutional issues to be clearly raised. In *Shaik v Minister of Justice and Constitutional Development & others*[5] the Constitutional Court said:

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[2] *Philips & others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 39; *Prince v President, Cape Law Society & others* 2001 (2) SA 388 (CC) (2001 (2) BCLR 133) para 22.

[3] See eg *Platinum Asset Management (Pty) Ltd v Financial Services Board & others: Anglo Rand Capital House (Pty) Ltd & others v Financial Services Board & others* 2006 (4) SA 73 (W) and the unreported judgment of Hiemstra AJ in *Claassen v Minister of Justice & others,* Case number 40405/08 (NGHC).

[4] *Radebe & others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793D-G; *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) paras 28-29; *Minister of Land Affairs and Agriculture & others v D & F Wevell Trust & others* 2008 (2) SA 184 (SCA) para 43.

[5] *Shaik v Minister of Justice and Constitutional Development & others* 2004 (3) SA 599 (CC) (2004 (1) SACR 105) paras 24-25; *Phillips & Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 40.

'The minds of litigants (and in particular practitioners) in the High Courts are focused on the need for specificity by the provisions of Uniform Rule 16A(1). The purpose of the Rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests. This is especially important in those cases where a party may wish to justify a limitation of a chap 2 right and adduce evidence in support thereof. It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity. This is not an inflexible approach. The circumstances of a particular case might dictate otherwise. It is, however, an important consideration in deciding where the interests of justice lie.' And it has been held that it is impermissible to rely on a constitutional complaint that was not pleaded.[6]

[17] The issue was comprehensively dealt with by the Constitutional Court in *Prince v President, Cape Law Society & others*[7] where Ngcobo J said: 'Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the Court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have

[6] *Phillips & others v National Director of Public Prosecutions,* supra, para 39.
[7] *Prince v President, Cape Law Society & others* 2001 (2) SA 388 (CC) para 22.

to meet, so as to allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.'

[18] The constitutional attack on the Notice and the power of the Registrar clearly affects other parties who should have been given notice of such attack so that they could intervene and present evidence and argument in support of the constitutionality of the Notice and the Registrar's power in paragraph (*e*) of the definition of 'the business of a bank' This part of the appellants' argument therefore cannot be considered. In so far as this court might have been inclined to consider the interpretation issue raised in the appellants' heads of argument, it does not assist the appellants that the argument in the heads of argument is incoherent and unintelligible; it did not become more coherent and intelligible during oral argument. At one stage the appellants' counsel clearly conveyed to the court that he was abandoning all arguments except that based on the Notice being ultra vires, only to return to the other arguments during reply.

[19] The only sections relevant to the Registrar's cause of action against the appellants are s 11 (read with the definition of 'the business of a bank' in the Notice) and s 81. No sections in the South African Reserve Bank Act 90 of

1989 or any other Act have to be considered or interpreted. Both ss 11 and 81 and the Notice are clear and unambiguous. Section 11 clearly prohibits any person, other than a public company which is registered as a bank in terms of the Act, from conducting the business of a bank – which includes the 'business practice' described in the Notice. Section 81 provides what action the Registrar can take if he or she has reason to suspect that any person, who is not registered as a bank in terms of the Act, is likely to conduct the 'business of a bank' in contravention of the provisions of section 11(1) or that such a contravention is likely to be continued or repeated. This is therefore a case of a clear, straightforward prohibition of defined conduct and clear and straightforward provisions authorising the Registrar's action.

[20] It is a primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning in the light of their context, where 'context' includes the language of the rest of the statute, the matter of the statute, its apparent scope and purpose, and, within limits, its background. When interpreting the words in as statute, the court must, from the outset, consider the language and the context together.[8] This must be done even when the words to be interpreted are clear and unambiguous.[9] In addition, s 39(2) of the Constitution requires that every piece of legislation must be construed in a manner that promotes the 'spirit, purport and objects of the Bill of Rights,' ie '(a)ll statutes must be interpreted through the prism of the Bill or

[8] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 89; *Jaga v D□nges NO & another; Bhana v D□nges NO & another* 1950 (4) SA 653 (A) at 662G-663A.
[9] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* supra paragraph 90; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) st 600E-H.

Rights'.[10] This must be done whatever the nature of the legislation.[11] But looking through the prism of the Constitution does not open the door to changing the clear meaning of the statute. If the clear meaning conflicts with the Bill of Rights, the remedy is to strike it down.[12] And it must always be borne in mind that s 39(2) postulates that the interpretation which is proposed is one which would demonstrably promote an identifiable value enshrined in the Bill of Rights and also one of which the legislation is reasonably capable.[13] In seeking to give meaning to the words of a statute the court will also give effect to the object or purpose of the legislation[14] but this cannot change the meaning of words which are only capable of one meaning.[15] I now turn to consider what I regard as the main shortcomings in the appellants' new case.

[21] The heads of argument do not consistently identify the relevant section or sections in the Act which, it is contended, have not been properly interpreted and then in relation to each such section explain how, by the application of the rules of interpretation, the relevant provisions would acquire a different meaning not in conflict with the relevant rights in the Bill of Rights.

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[10] *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) para 21.
[11] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 31 ('…even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution…')
[12] *Cipla Medpro (Pty) Ltd v Aventis Pharma SA, Aventis Pharma SA & others v Cipla Life Services (Pty) Ltd & others* [2012] ZASCA 108 paras 44-45.
[13] *Thoroughbred Breeders Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 597H-I and 604F-G; *Bato Star Fishing (Pty) Ltd v Minister of Environmental* Affairs, supra, para 72.
[14] *Standard Bank Investment Corporation Ltd v Competition Commission and others; Liberty Life Association of Africa and others v Competition Commission & others* 2000 (2) SA 797 (SCA) paras 16-22.
[15] *Standard Bank Investment Corporation Ltd* ,supra, paras 19-22.

The argument in connection with the appellants' right to just administrative action in terms of section 33 of the Constitution is formulated as if this case is a review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – which it clearly is not. After referring to ss 22, 25 and 33, and what they mean, the argument concludes that the court a quo failed to interpret the Reserve Bank Act (which is neither relevant nor the subject of attack), the Act and Notice 498 in a manner that took account of the constitutional rights of the first appellant, its members and beneficiaries, and that the correct interpretation required an interpretational 'reading down'. This is then stated in extremely vague and general terms:

'a. The Registrar should not have been entitled to investigate and arrive at adverse decisions impacting on the rights of Corpclo without showing due respect for Corpclo's administrative rights to procedural fairness;

b. The Registrar should not have been entitled to take a decision that seriously impacts upon the rights of Corpclo and its directors and members to property and freedom of trade without sufficient reason and with respect for procedural fairness;

c. The Banks Act and Government Notice 498 should be interpreted to exclude Corpclo and like organisations, which is clearly not operating "the business of a bank" as envisaged by the Banks Act;

d. The power of the Registrar to declare activities to be "the business of the bank" in terms of section 1 of the Banks Act should be constitutionally limited.'

[22] The following comments on these conclusions are apposite:

Conclusion 'a' does not relate to the interpretation of any relevant section. It seems to

relate to a constitutional attack on the provisions of s 6 of the Act (which is not relevant) in terms of which the Registrar is empowered to appoint inspectors, and an attack on the Registrar's decision in terms of s 81 to launch the application in the court a quo. The second attack should clearly have been made in a review in terms of s 9 of the Act in terms of PAJA. Conclusion 'b' also does not relate to the interpretation of an identified section. It seems to relate to a constitutional attack on s 81 which allegedly conflicts with the appellants' rights in terms of ss 22, 25 and 33 of the Constitution or an attack on the Registrar's decision to launch the application in the court a quo, which should have been made in a review under s 9 of the Act or in terms of PAJA. Conclusion 'c' relates to interpretation but does not identify any provisions of the Act which should be interpreted as alleged and it is therefore not possible to establish which provisions should be read down. Similarly the words in the Notice which must be read down are not identified. Conclusion 'd' is also not an interpretational but a constitutional issue. Here the appellants have conflated the two issues. It is striking that the appellants have not addressed the clear meaning of ss 11 and 81 and the Notice.

[23] The Act is a law of general application which was enacted to regulate and supervise the business of public companies taking deposits from the public. However, it is clear from the provisions of s 11 that no one may engage in these activities unless such person is a public company and is registered as a bank in terms of the Act. It is also clear from the definition of 'the business of a bank' (para (*e*)) that the Registrar has, after consultation

with the Governor of the Reserve Bank, the power to declare any other 'business practice' to be 'the business of a bank'. Finally it is clear that the court may issue an interdict which has the effect that the offender may not conduct the contentious 'business practice'. For present purposes it will be accepted that such an interdict interferes with the appellants' right to choose their trade or occupation (s 22 of the Constitution) and will constitute a deprivation of property (s 25 of the Constitution).

[24] In their heads of argument the appellants have not dealt with the limitation of rights allowed by s 36 of the Constitution or the internal limitations of the rights in s 22 ('the practice of a trade, occupation or profession may be regulated by law') and s 25 (a person may be deprived of property in terms of a law of general application). In their argument before this court the appellants' counsel made no submissions in respect of these matters.

[25] Regarding the appellants' right to just administrative action in terms of s 33 of the Constitution, the appellants' heads of argument attack the Registrar's decision (in terms of unidentified provisions of the Reserve Bank Act 90 of 1989 – which is not relevant – and the Act) to appoint inspectors to investigate the appellants and to institute proceedings against them on the grounds that these were administrative decisions taken by an organ of State in the course of implementing legislation and that the Registrar failed to act in a manner that was lawful, reasonable and procedurally fair. This would

require, so it is contended, that the appellants be given adequate notice of the nature and purpose of the administrative action, a reasonable opportunity to make representations, a clear statement of the administrative action and adequate notice of the right to request reasons and of any right of review. It is also contended that administrative action must not be taken arbitrarily, capriciously, in bad faith or for an ulterior purpose. In support of these contentions the appellants refer to ss 1, 3 and 6 of PAJA. These are clearly not matters of interpretation but matters for review in terms of PAJA.

[26] Even if the argument could be found to relate in some way to the interpretation of the sections, the appellants' reasoning is seriously flawed. First, it will be remembered that the Registrar's cause of action in the court a quo was simply the contravention of s 11 of the Act read with the Notice and s 81 of the Act. The Registrar's decision to investigate the appellants' business was of no relevance whatsoever. Secondly, the Registrar's decisions to investigate the appellants' business and institute proceedings against the appellants for an interdict in terms of s 81 of the Act were not administrative actions for the purposes of PAJA as they did not (as required by the definition of 'administrative action' in s 1 of PAJA) adversely affect the rights of the appellants or have a direct, external legal effect or have that capacity.[16] Whether or not administrative action, which would make PAJA

[16] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & another* 2011 (1) SA 327 (CC) para 37; *Joseph & another v City of Johannesburg & others* 2010 (4) SA 55 (CC) para 27; *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) par 23; *City of Cape Town v Hendricks & another* [2012] ZASCA 90; J R de Ville *Judicial Review of Administrative Action in South Africa*, (2003) para 2 1 6; Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 220-227.

applicable, has been taken, cannot be determined in the abstract. Regard must always be had to the facts of the case.[17] A decision to investigate and the process of investigation, which exclude a determination of culpability, could not adversely affect the rights of the appellants in a manner that has a direct and external legal effect.[18] So too a decision to institute proceedings in the high court for an interdict does not affect the rights of the appellants or have that capacity.[19] It is the high court which decides that the Act is being contravened and decides to grant the interdict.

[27] Since this is not a review, none of the additional cases referred to by the appellants' counsel during argument[20] in support of the proposition that before the Registrar took the decisions, the appellants should have been given an opportunity to adduce material 'which would deter the decision-maker from making that decision', are of any relevance.

[28] The object or purpose of the Act is clearly to regulate the registration and operation of persons conducting the 'business of a bank'. Section 11(1) prohibits all persons who are not public companies and who are not registered in terms of the Act from conducting the 'business of the bank'. This is not affected by any right in the Bill of Rights.

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[17] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & Another* 2011 (1) SA 327 (CC) para 37.
[18] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & another,* supra, para 37.
[19] *Competition Commission of SA v Telkom SA Ltd* & another [2010] 2 All SA 433 (SCA) para 11.
[20] *Mahon v Air New Zealand Ltd & others* [1984] 3 All ER 201 (PC) at 210*b-e*; *General Council of Medical Education and Registration of the United Kingdom v Spackman* [1943] 2 All ER 337 (HL) at 342F-346A and *Whine v Dranklisensieraad vir Gebied 34* 1967 (2) SA 316 (O) at 321C-G.

[29] There is, therefore, no merit in the appeal and it must be dismissed.

The following order is made:

The appeal is dismissed with costs, such costs to include the costs of two counsel.

B R SOUTHWOOD
ACTING JUDGE OF APPEAL

APPEARANCES

For Appellants:	**A J Dickson (SC) (with him M du Plessis)** **Instructed by:** **M C Wilkinson & Co, Hilton** **McIntyre & Van der Post, Bloemfontein**
For Respondent:	**E L Theron (with him T Manchu)** **Instructed by:** **Hahn & Hahn Inc, Pretoria** **Symington & de Kok, Bloemfontein**