IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 92967/2019

1. REPORTABLE: **YES**
2. OF INTEREST TO OTHER JUDGES: **YES**
3. REVISED: **24 May 2021**.

24 May 2021
DATE

SIGNATURE

In the matter between:

MIGHTY MWALE **APPLICANT**

and

THE FINANCIAL SERVICES TRIBUNAL **FIRST RESPONDENT**

PRUDENTIAL AUTHORITY **SECOND RESPONDENT**

JUDGMENT

COERTZEN, AJ:

THE APPLICATION:

[1] The applicant in this matter participated in an illegal pyramid scheme. The

present application finds its way to this court by virtue of the provisions of s 235 of the Financial Sector Regulation Act, 9 of 2017 ('FSR Act'). The section provides of judicial review of orders of the Financial Services Tribunal ('The Tribunal').[1] The notice of motion, which was previously amended, initially sought to review decisions of both the first and second respondents. On conclusion of the argument on 18 March 2021 the applicant applied for a final amendment of the notice of motion, which I granted. It is now beyond doubt that the applicant seeks the following relief:

'"1. Reviewing and setting aside the decision of the First Respondent dated 12 June 2019;

2. Directing the First Respondent to constitute of (sic) *new panel hear* (sic) *the reconsideration application de novo as between the parties…"* – (emphasis added).[2]

THE AUTHORITY AND THE DIRECTION:

[2] The second respondent, the Prudential Authority ('the Authority'), is a juristic person which operates within the administration of the Reserve Bank. The Authority was established in terms of s 32 of the FSR Act and is a 'financial sector regulator' as defined in s 1 of the FSR Act.

[3] On 28 June 2018 the Authority issued a direction ('the direction') in terms of s 83 of the Banks Act[3] against the applicant and against Mighty Solutions CC ('the Corporation'). The applicant is the sole member of the Corporation.

[4] The Authority's reasons[4] for its decision to issue the direction were placed before the Tribunal and before this court.

---

[1] Section 235 of the FSR Act provides:
'Any party to proceedings on an application for reconsideration of a decision who is dissatisfied with an order of the Tribunal may institute proceedings for a judicial review of the order in terms of the Promotion of Administrative Justice Act or any applicable law.'

[2] In terms of the "RE-AMENDED NOTICE OF MOTION" dated 19 March 2021.

[3] 94 of 1990.

[4] The Authority's "Statement of Reasons" in terms of s 229(2) of the FSR Act.

THE TRIBUNAL AND THE RECONSIDERATION APPLICATION:

[5] The Tribunal was established in terms s 219 of the FSR Act. The decisions[5] of the Authority are subject to reconsideration by the Tribunal on the application of a person aggrieved.[6] The applicant applied to the Tribunal for a reconsideration of the decision of the Authority - ('the reconsideration application'). On 12 June 2019 the Tribunal dismissed the reconsideration application. The Tribunal's written reasons[7] for its decision were placed before this court. Not satisfied with the outcome of the reconsideration application the applicant now applies to this court for a review of the Tribunal's decision.

[6] The Authority opposes the review application. The Tribunal abides by the outcome. It was common cause at the hearing of the review application that the decision of the Authority was subject to reconsideration by the Tribunal, and that the decision of the Tribunal is in turn reviewable by this court.

[7] Although the applicant was entitled to legal representation[8] before the Tribunal, he elected to take part in the proceedings in person. The Corporation was the second applicant in the proceedings before the Tribunal. The Corporation is under business rescue in terms of the relevant provision of the Companies Act.[9] The Tribunal held the view that the applicant lacked *locus standi* to act or to appear on behalf of the business rescue practitioner. This is not an issue before me.

[8] A reconsideration application must be made in accordance with the Tribunal Rules,[10] must contain full particulars of the grounds on which the application is based and must be drafted to conform as far as possible to a standard form. The proceedings are to be conducted *"with as little formality and technicality,*

[5] As defined in sec 218 of the FSR Act.
[6] In terms of s 230 of the FSR Act.
[7] Published on the website of The Financial Sector Conduct Authority: www.fsca.co.za
[8] Section 232(1)(c) of the FSR Act.
[9] 71 of 2008.
[10] Available at: www.fsca.co.za

and as expeditiously, as the requirements of the financial sector laws and a proper consideration of the matter permit".[11] The person chairing the Tribunal panel may give directions to facilitate the conduct of proceedings.[12] The Tribunal panel[13] is not bound by the rules of evidence but may inform itself "*on any relevant matter in any appropriate way"*.[14]

[9] The reconsideration application must contain the Authority's decision letter and the Authority's reasons[15] and any other information including annexures provided to the applicant by the Authority. The Authority must furnish the Tribunal with a bundle of the relevant underlying documents on which the decision was based together with further reasons, where necessary. The applicant may augment the grounds on which the application is based, if necessary.[16]

THE PAPERS IN THE REVIEW APPLICATION:

[10] The applicant did not place his statement that he must have submitted to the Tribunal before me in the review application. I am left to determine the review application on the applicant's founding affidavit and on the Authority's answering affidavit.[17]

[11] In support of the review application the applicant annexed the following annexures to his founding affidavit:

MM1 - Draft Final Report dated July 2014 by Mr Johan Kruger ('Kruger');
MM2- Progress report and letter dated 20 April 2017 from Kruger to the Registrar of Banks;

[11] Section 232(1)(b) of the FSR Act.
[12] Section 232(2) of the FSR Act.
[13] In this matter consisting of three members – (See s 224 of the FSR Act).
[14] Section 232(4) of the FSR Act.
[15] In terms of s 229 of the FSR Act.
[16] Affidavits are seemingly not required in a reconsideration application.
[17] There is no replying affidavit by the applicant.

MM3 - An extract summary of transactions on the account of the Corporation together with a letter from ATM Solutions dated 7 June 2019 relating to an ATM machine placed at a business premises of the Corporation, and an extract summary of transactions relating to the ATM;

MM4 - A transcript of the (partly transcribed) argument before the Tribunal on 11 June 2019;

MM5 - The Tribunal's reasons;

MM6 - The Authority's reasons.

THE GROUNDS OF REVIEW:

[12] The applicant relies on essentially four grounds of review, namely:

i) That the Tribunal's decision was influenced by a material error of law;
ii) That the Tribunal's decision was unreasonable;
iii) That the Tribunal's decision was irrational;
iv) That the Tribunal (specifically the chairman[18]) was biased against the applicant.

THE LEGAL FRAMEWORK:

[13] The Authority's decision to issue the direction was taken in terms of s 83(1) of the Banks Act, which provides:

'If as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Authority is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank… the Authority may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements and within such period as may be specified in the direction, all money so obtained by that person in so far as such money has not yet been repaid, including any

[18] The Tribunal was chaired by a former judge of the Supreme Court of Appeal, Mr Justice LTC Harms. The reference to "chairman" is intentional. By contrast the chairperson of the Tribunal is defined in s 1 of the FSR Act as *'the person holding the office of the Chairperson of the Tribunal in terms of section 220 (4), and includes a person acting as the Chairperson.'*

interest or any other amounts owing by that person in respect of such money.' – (emphasis added).

[14] In terms of s 84 of the Banks Act the Authority must, simultaneously with the issuing of a direction under section 83(1), appoint a repayment administrator to manage and control the repayment of money in compliance with the direction, provided that the Authority may afford the person subject to the direction a reasonable period of time to devise and implement an alternative plan of action that is in the interests of the investors and to which the Authority has no objection. The repayment administrator is obliged, amongst other duties, to take possession of all the assets of the person subject to the direction.[19] It is common cause that Kruger was appointed as repayment administrator.

[15] In terms of s 1 of the Banks Act, "the business of a bank" means—

"(a) … (d);

(e) <u>any other activity which the Authority</u> has, after consultation with the Governor of the Reserve Bank, <u>by notice in the Gazette declared</u> to be <u>the business of a bank</u>, but does not include…" – (emphasis added).

[16] The Registrar of Banks[20] extended the definition of "the business of a bank" to include participants in pyramid and related schemes in terms of s 1(e), as follows":[21]

'In terms of paragraph (e) of the definition of "the business of a bank" in section 1 of the Banks Act, 1990 (Act 94 of 1990), and after consultation with the Governor of the South African Reserve Bank, I, Christo Floris Wiese, Registrar of Banks, hereby declare the activities set out in paragraphs 2 and 3 of the Schedule to be the business of a bank.

C F WIESE,

[19] Section 84(1A)(b)(i) of the Bank's Act.
[20] Since 1 April 2018 the Authority.
[21] GN 498 published in the Government Gazette No. 17895 on 27 March 1997.

Registrar of Banks

SCHEDULE

1. *Definitions.—In this Schedule, "the Act" means the Banks Act, 1990 (Act 94 of 1990), and any word or expression to which a meaning has been assigned in the Act shall bear such meaning and, unless the context otherwise indicates—*

***"business practice"** includes-*

(a) any agreement, arrangement or understanding, whether legally enforceable or not, between two or more persons; or

(b) any scheme, practice or method of trading, including any method of marketing or distribution.

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 practice; 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.' – ('the Notice').

It was common cause before the Tribunal that the Authority relied solely on the extended definition under s 1(e) of the Banks Act, read with the Notice.

[17] Section 12(1) of the South African Reserve Bank Act[22] provides:

'If the Governor or a Deputy Governor has reason to suspect that any person, partnership, close corporation, company or other juristic person who or which is not registered in terms of the Banks Act…is carrying on the business of a bank…, he or she may direct the Registrar of Banks…, to cause the affairs or any part of the affairs of such person, partnership, close corporation, company or other juristic person to be inspected by an inspector appointed under section 11 (1), in order to establish whether or not the business of a bank…is being carried on by that person, partnership, close corporation, company or other juristic person.' – (emphasis added). As from 1 April 2018, Part 4 of Chapter 9 of the FSR Act apply *mutatis mutandis* to inspections in terms of subsection (1).[23]

[18] A reconsideration application constitutes an internal remedy as contemplated in section 7(2) of PAJA (Promotion of Administrative Justice Act, 3 of 2000).[24] I have already pointed out the applicant seeks to review the Tribunal order and to remit the matter to a differently constituted Tribunal panel. It is sometimes difficult for a court to determine the limits of its own power. In *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) the Constitutional Court held:

"Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the

[22] 90 of 1989.
[23] Section 12(2) of the South African Reserve Bank Act read with GN No. 169 in Government Gazette 41549 of 29 March 2018.
[24] In terms of s 230(1)(b) of the FSR Act.

processes of other branches of government unless to do so is mandated by the Constitution."[25]

It seems to me that the Tribunal was tasked with a reconsideration of the Authority's decision and the exercise of a discretion by the Authority to issue the direction. That the Tribunal did by reconsidering the available facts placed before the Authority in the context of the indicated legislative framework. This court must in my view similarly consider the application for review of the Tribunal order, against the same background and in the same context, together with the facts put forward in the affidavits in the review application. I agree with the Tribunal's assessment of the legal position that the Tribunal had no jurisdiction over the decisions of the Governor or Deputy Governor of the South African Reserve Bank. The decision of the Deputy Governor to direct the Authority to investigate the affairs of TVI and related persons and entities, was not open for reconsideration by the Tribunal.

THE FACTS BEFORE THE TRIBUNAL:

[19] It is common cause that during 2010 the applicant joined an illegal pyramid scheme known as TVI[26] - ('TVI') ; and that he participated in the scheme. It is not disputed that the Tribunal correctly held that the nature of the business of TVI was accurately described by the Supreme Court of Appeal in *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another* [2016] ZASCA 163; [2017] 1 All SA 1 (SCA), as follows:[27]

"[2] …TVI was described on its website as: "an International Direct Selling Company having Alliances and Channel partners all across the world" and as "one of the fastest growing companies in the Network Marketing Industry today". It claimed to operate in over 160 countries across the globe and that its head office was in London.

[3] The business entailed the marketing and sale of a travel voucher, mostly in electronic

[25] At para 37.
[26] Known by different names such as 'Travel Ventures International', 'TVI Express' and 'Travel Ventures Institution'.
[27] At paras 2 – 4.

form. The voucher purportedly gave members significant discounts for international travel and accommodation with "travel partners" including the Hilton Hotels, Lufthansa, Swissair, South African Airways and many other reputable companies. It had to be bought electronically at USD2503 via TVI's website. Each had a unique number and a member purchasing it was accorded a particular status, such as an "Associate" or "Distributor". The member would be granted certain rewards such as a seven day holiday at a partner's three to five star hotel or resort, a free companion flight and a lifetime access to TVI's promotions and discounts in relation to air travel, accommodation, car hire and travel insurance.

[4] The structure of the institution and its business was that of a typical pyramid scheme. A member had to traverse two boards, the "traveller" and the "express" boards. Upon joining, members were initially given positions at level one of the traveller board and would thereafter travel across four levels until they exited the first (traveller) board. On exiting the first board they received a reward of USD250 in cash and USD250 in vouchers ("double your investment"!). But to qualify for the rewards they had to "sponsor" two new entrants. A member exiting the traveller board would then go on to the first level of the express board where the exit reward was USD10 000. Thereafter the member could go on to the next express board, ad infinitum. A member would also earn 5 to 10% of sales made by his or her "downline" (those that he sponsored and those sponsored by them),and be eligible for numerous other prizes. As a marketing gimmick, TVI's presentation displayed endorsements of network marketing companies by Messrs Warren Buffet, Bill Clinton, Robert Kiyosaki and Donald Trump."

[20] I pause to point out that the exact terms of the appointment of the inspectors by the Deputy Governor of the Reserve Bank, and the exact terms of the Authority's direction, were not placed before me. It is however not in dispute that the Tribunal correctly held in this regard:

"A Deputy Governor of the Reserve Bank had reason to suspect that TVI Express ('TVI') was carrying on the business of a bank or a mutual bank, whilst not being registered, and inspectors were appointed on 18 March 2011 as temporary inspectors of inter alia, TVI, a number of named role players, and 'any related persons and entities'.

The purpose of the appointment was to establish whether or not the business of a bank or mutual bank was being carried on by TVI and any related person or entity in contravention of the Banks Act.

During the inspection and as a consequence, the Authority became satisfied that the applicants were a related entity and had obtained money from members of the public by carrying on the business of a bank without being registered as a bank. Subsequently, on 28 June 2018, the Authority issued a directive, in which the applicants were directed to repay all money obtained in contravention of the Banks Act. Simultaneously, the Authority appointed a repayment administrator, Mr JG Kruger." – (added emphasis).

[21] The Tribunal held that on the undisputed facts, that TVI conducted a business practice falling within the terms of the Regulation, in that it obtained money, directly or indirectly, from members of the public as a regular feature of a business practice, with the prospect of the participating members receiving payments or other money-related benefits, directly or indirectly from funds accepted or obtained from participating members or new participating members in terms of the business practice, as contemplated in para 2(c) of the Regulation. The applicant contends that his involvement in TVI did not fall foul of the extended definition as contemplated in paragraphs 2 and 3 of the Schedule. The following is stated in the Tribunal's reasons:

"[The applicant] *repeatedly relied on the reports of the inspector where it was stated that his 'involvement in TVI is only substantiated to the extent of our review of his banking records. We* [the inspectors] *therefore, have no independent, direct evidence that he conducted the business of a bank in contravention of the Banks Act.'*

The statement must be read in context and bearing in mind that independent, direct evidence is never essential to establish a fact – indirect and circumstantial evidence often carries more weight."

[22] It appears from the Tribunal's reasons, from which I borrow liberally, that the Tribunal considered, *inter alia*, the following facts:

i) The applicants before the Tribunal are or were not TVI;

ii) The inspector's reports added that it was suspected that most of the applicant's activities were conducted either on a cash basis and/or

through unidentified accounts and that sufficient evidence exists to substantiate the submission that the Banks Act had been contravened;

iii) The Authority explained the standard practice (of TVI) in South Africa as follows:

a) That the investor purchased a block on the traveler board for R2,700.00;

b) Participants were advised that they would receive R 5 400.00 on completion of the traveller board and R108,000.00 on completion of the express board;

c) No actual cash returns were paid but that TVI credited the investors with US $500 and UD $10,000 when cycling out of the respective boards - [The applicant admitted that he 'cycled out', which explains the number of vouchers he had left];

d) The member then converted the credits into vouchers on the website and sold them to other members of the public at the rate of R2,700.00 per voucher in order to realise the financial benefit from the scheme;

iv) The applicant did not deny on the papers that he had 19 (nineteen) registered profiles;

v) That the applicant had the highest "ranking" within TVI South Africa, namely that of "Presidential Associate". This ranking entitled him to 10% commission for sales in his "downlines";

vi) A further 17 (seventeen) registered profiles were found on a list of TVI under the surname 'Mwale'. The names linked to these profiles were all

family members of the applicant and they all used the applicant's residential address;

vii) The applicant relied on a schedule referred to as "MM", which schedule purported to be a 'blow-by-blow' rebuttal of the nature, purport and motive of the transactions relied on by the Authority;[28]

viii) The applicant admitted that he had sold vouchers to the sum of R116,100.00 to persons in East London, Kokstad, Bracken, Maclear and diverse places in Gauteng. In some instances the applicant sold eight or nine vouchers to a single person. He sold vouchers to one Dumisane on at least three occasions. The applicant did not explain how and why this happened. These amounts were deposited in the bank account of the Corporation;

ix) The applicants before the Tribunal admitted that they have lost money in the scheme because after the scheme was closed, they had to dispose of the vouchers which they thought they could sell. It appeared from the argument before the Tribunal that this amounted to some 98 vouchers, which represents vouchers to the value of R264,600.00;

x) There were numerous deposits or amounts loaded onto the ATM or Smartbox systems into the Corporation's account of amounts at multiples of R2,700.00. According to the applicant these payments were cash receipts in respect of petrol and other sales at his retail outlets which were then 'banked' onto the ATM or Smartbox systems. The applicant relied on a letter from ATM Solutions which confirms that he had an agreement with them to upload a cash machine at Meadowlands;

xi) The applicant presented a printout of cash receipts at Engen Meadowlands to show that large amounts of cash were daily loaded onto

[28] MM3 to the founding affidavit.

the ATM system.

THE TRIBUNAL'S EVALUATION OF THE FACTS:

[23] I again borrow from the Tribunal's reasons.

[24] The Tribunal held that the question is whether the applicants were parties to any understanding, whether legally enforceable or not, with TVI in conducting the scheme as described. This depended on the applicants' involvement in the scheme, as detailed in the Authority's reasons.

[25] The information relied on by the applicant in the purported blow-by-blow rebuttal, MM[29], were refused by the applicant when it was first sought on 2 December 2014. The Tribunal held that now, after the s 83 decision, the applicants before the Tribunal have an explanation. The Tribunal held however that the document MM *"does not rebut but rather confirms the opinions formed"*.

[26] In light of the applicants' admission referred to in para 22(viii) above, and further in light of the fact that the amounts in question were deposited into the banking account of the Corporation, the Tribunal rejected the applicants' denial that they have ever received money from members of the public.

[27] The Tribunal held that the applicants have no credible explanation for the numerous deposits or amounts loaded onto the ATM or Smartbox systems into the second applicant's account of amounts at multiples of R2,700.00. The coincidence of all these being related to cash petrol sales at two different locations, was held by the Tribunal as simply too good to be true. The Tribunal therefore rejected the explanation on the facts.

[28] The Tribunal held that the letter from ATM Solutions referred to in para 22(x) above, confirming an agreement in respect of a cash machine at Meadowlands,

[29] MM3 to the founding affidavit.

proves nothing. According to the Tribunal the question is not whether cash had been received by either of the applicants but why it had been received.

[29] The Tribunal held that the printout of cash receipts referred ton in para 22(xi) above, similarly does not prove anything in the applicant's favour. That was also never in dispute and was in fact taken into account by the inspector. The Tribunal held that what strikes one is that the printout covers the period 11 February 2011 to 15 May 2011, while MM deals with the period 13 August 2010 to 2 May 2012; that the printout relates to Meadowlands only; that the daily takings on the printout were nearly all in excess of R100,000.00 while the amounts on MM are, save for two, less than R45,000.00; and that not a single transaction appearing on MM appears on the printout. The Tribunal also held that the payments in multiples of R2,700.00 made to a contractor, to a Quickshop supplier, for airtime vouchers and the like, raise the same questions.

[30] The Tribunal held that the explanation that the vouchers were goods that were sold does not change the fact that accepting money for the vouchers fell within the scope of the prohibition. Importantly, schedule MM deals with FNB account number 62044324911 only and the 'suspicious' transactions identified by the inspectors in that account.

[31] The Tribunal held that the applicants failed to deal with the particulars of the applicant's platinum FNB account 620839986300, which indicate "probable investor deposits" of R670,000.00 and "probable voucher purchases" of R62,100.00.

[32] The applicant did not dispute the allegations concerning the transactions reflected on the platinum account with other known TVI operators living as far apart as the Northern Cape and the Eastern Cape involving sales of R40,500.00, R10,800.00 and R54,000.00 and purchases of R62,100 from another known operator.

[33] On the facts the Tribunal was satisfied that the applicants before the Tribunal obtained money by carrying on the business of a bank within the meaning of the Regulation. In this regard the Tribunal held:

> *"*[T]*he applicants obtained money, directly or indirectly, from members of the public as a regular feature of a business practice (i.e., the TVI scheme) with the prospect of the participating members receiving payments or other money-related benefits, directly or indirectly (a) on or after the introduction of new participating members of the public to the scheme, from which, in their turn, money is accepted or obtained, directly or indirectly, as a regular feature of the TVI scheme or (b) on or after the promotion, transfer or change of status of the participating members or new participating members within the business practice; or (c) from funds accepted or obtained from participating members or new participating members in terms of the scheme."*
> – (emphasis added).

[34] In dismissing the reconsideration application the Tribunal held that there was no reason to reach a different conclusion from that reached by the Authority in its reasons.

THE AUTHORITY'S REASONS:

[35] I have already pointed out that the applicant did not place the statement that he submitted to the Tribunal, before me. The Authority's reasons (without the annexures referred to therein), form part of the founding affidavit. In my view it is necessary to have regard to the Authority's reasons to determine whether the Tribunal correctly dismissed the reconsideration application. What follows hereafter is a summary of certain relevant facts as they appear from the Authority's reasons.

[36] The Deputy Governor had reason to suspect that, *inter alia*, TVI Express, which is not registered as a bank, was carrying on the business of a bank. The Deputy Governor directed the Authority to cause the affairs of TVI Express to be inspected by temporary inspectors appointed in terms of s 11(1) of the Reserve Bank Act. Kruger and two others were appointed as temporary inspectors of, *inter alia*, TVI Express.

[37] When making the decision the Authority was aware of, *inter alia*, the following:

i) TVI is an international scheme operating inter alia as *Travel Ventures International* and *TVI*;

ii) TVI surfaced in India in April 2008;

iii) A similar summary of the nature and business of TVI as expounded by the SCA in *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another*, is set out in the Authority's reasons;

iv) TVI was closed in South Africa during 2011;

v) The scheme markets the sale of travel vouchers which purportedly gives the recipient significant discounts for international travel and accommodation. These vouchers could be purchased (in electronic format and rarely printed) from the TVI web site or from distributors who "cycled" from the TVI board system;

vi) TVI fraudulently claimed a relationship with certain travel partners and benefits appeared to be fraudulent. It appeared to the inspectors that TVI paid for the accommodation (benefits limited to Indian citizens) to create a sense of legitimacy for the scheme. All that remained as potentential benefit to a participant is the reward structure of what is inappropriately known as "multi-level marketing", by marketing and recruiting new participants to TVI;

v) The concept of TVI is based on boards (the "Traveller Board" and the "Express Board"), consisting of certain levels. It is not necessary for purposes hereof to provide more detail than what already appears from the above, suffice it to say that participants "cycle out" from the boards,

move up in ranking and earn commission. The standard practice in South Africa is that a participant purchases a voucher for R2,700.00. Participants are advised that they will receive R5,400.00 when cycling out from the Traveller Board and R108,000.00 when cycling out from the Express Board. The distributor becomes eligible to earn a certain percentage as residual income from every sale in their "down-line", depending on their rank. TVI offered unrealistically lucrative rewards to the various ranks for further sales.

vi) The inspectors have investigated more that 170 different institutions that participated in TVI Express; have obtained and executed more than 140 search warrants; have submitted more than 300 reports to the Authority pertaining to TVI; have requested information relating to more than 10,000 different bank accounts of distributors and have opened more than 100 case with the South African Police Service for investigation;

vii) The Authority has issued more than eighty s 83 directives to different institutions who participated in TVI, and has appointed Kruger as repayment administrator;

viii) As a result of the inspection conducted under section 12 of the Reserve Bank Act the authority was satisfied that the applicants before the Tribunal obtained money by carrying on the business of a bank without being registered or authorized to do so;

[38] The Authority received the following reports from the inspectors pertaining to the institution (the applicant and the Corporation):

i) A report dated 7 July 2014, a copy of which is attached to founding affidavit in this court[30];

[30] MM1.

ii) A report dated 20 April 2017, a copy of which is attached to the founding affidavit in this court;[31]

iii) A report dated 19 February 2018 which was not placed before the court.

[39] On 28 June 2018 the Authority issued a direction in terms of s 83 of the Banks Act, to the applicant and to the Corporation, and appointed Kruger as repayment administrator in terms of s 84. The repayment administrator served the s 83 direction on the applicant and the Corporation, as well as a rule *nisi* issued on 26 November 2018 under case number 84978/2018 in this court, which order confirmed Kruger's duties as repayment administrator.

[40] When issuing the s 83 direction the Authority took into account, *inter alia*, the facts referred to above, as well as the contents of the three inspection reports, which included:

i) The number of profiles and ranking of the applicant as a TVI distributor;

ii) The analysis of the bank account of the Corporation, specifically the number of transactions classified as "probable investor deposits" amounting to R866,700;

iii) The unwillingness of the applicant to allow Kruger access to his premises, notwithstanding a valid search warrant issued in this court under case number 30346/2014, as a result of which Kruger was unable to obtain further documentation or particulars of members of the general public that deposited money with the applicant and the Corporation;

iv) The institution accepted at least forty deposits in contravention of the Banks Act;

[31] MM2.

v) The analysis of the Bank account of the applicant, specifically the transactions classified as “probable investor deposits” of R670,700.00;

vi) There is *prima facie* evidence that the institution contravened the Banks Act;

vii) Kruger summoned the applicant to produce documents pertaining to TVI. He also notified the applicant to elaborate his involvement in TVI Express and why his conduct was not the business of a bank;

viii) The applicant admitted that he participated in the TVI Express scheme;

ix) The applicant, through his legal representatives, provided a blunt denial and alleged that he only participated in the TVI Express scheme to take advantage of the holiday specials and discounted packages, of which the applicant provided no evidence that he ever did. The applicant also denied having any documents pertaining to TVI Express;

x) The applicant elected not to answer the inspector’s questions;

xi) Sufficient evidence existed to substantiate Kruger’s findings that the applicant and the Corporation unlawfully obtained an aggregate amount of least R1,537,400.00 in contravention of the Banks Act;

xii) Neither the applicant nor the Corporation are registered to carry on the business of a bank. The answers provided by the applicant and the content of the reports satisfied that Authority that the ‘institution’ obtained money by carrying on the business of a bank without being registered or authorised to do so.

[41] The Authority had reason to suspect that the acceptance of deposits from the general public appears to be a regular feature of the business practices of the

applicant and the Corporation and that their business practices are built around, and dependent on depositors listing further deposits for the businesses. The Authority expressed the view in its reasons that the business practices are unsustainable without the solicitation of new deposits.

[42] Based on the above and based on the inspection reports, the Authority had reason to suspect that the applicant and the Corporation have contravened s 11(1) of the Banks Act.[32]

THE INSPECTION REPORTS:

[43] In addition to what has already been stated above, what follows hereafter is a summary of certain relevant facts as they appear from the inspector's reports.

[44] The Deputy Registrar of Banks appointed the inspectors to inspect the business practices of amongst others, TVI Express Makers and/or TVI Express and/or any related person or entity.

[45] The applicant was linked to the investigation during an investigation of the offices of an entity referred to as Yatra Ventures South Africa, when the inspectors found a list of all ranked TVI members in South Africa. It appeared from the list that the applicant had three registered profiles and the ranking of "Presidential Associate". The inspectors identified sixteen other profiles all of which listed the applicant's residential address. These were in the names of the applicant's wife and daughters.

[46] On an FNB account of the Corporation the inspectors identified, *inter alia*, (a) "probable investor deposits" of R866,700.00 (40 transactions during the period 3 August 2010 to 2 May 2012), (b) "possible investor deposits" of R1,500.00 (1 transaction on 28 January 2010, (c) "probable voucher purchases" of

[32] Which provides that no person shall conduct the business of a bank unless such person is a public company and is registered as a bank.

R610,200.00 (10 transactions during the period 13 August 2010 to 30 April 2012) and (d) “possible voucher purchases” of R5,271,698.64 (99 transactions during the period 5 August 2010 to 31 May 2012).

[47] The inspectors suspected that most of the applicant’s TVI activities were conducted either on a cash basis and/or through banking accounts yet to be identified.

[48] In the report of 20 April 2017, and in respect of an FNB platinum cheque banking account in the name of the applicant, the inspectors identified (a) “probable investor deposits” of R670,700.00 (34 transactions during the period 18 September 2009 to 11 June 2016, of which 2 relate to one PE Lotlhare who is the subject of a separate TVI investigation, and 2 relate to one I Nethavhani, a known TVI operator in the Northern Cape and 1 to a Dr Mandlakazi, a known TVI operator in the Eastern Cape), and (b) “probable voucher purchases” of R62,100.00 (5 transactions during the period 1 December 2009 to 28 April 2010. These were all referenced on the applicant’s account as TVI transactions and matched to an FNB account belonging to another known TVI operator).

THE APPLICANT’S CASE IN THE FOUNDING AFFIDAVIT:

[49] The applicant contends: (a) That the decision of the Tribunal was materially influenced by an error of law (in failing to properly interpret the definition of ‘the business of a bank’); (b) That the decision of the Tribunal was not rationally connected to the information before it; (c) That the decision of the Tribunal was unreasonable, and; (d) that the Tribunal was biased against the applicant in favour of the Authority.

[50] The applicant avers that he joined TVI upon the invitation of one S Maziya Sibeko, with the intention of benefitting from discounted offers on car hire, accommodation, and flights. He was not aware that TVI was a pyramid scheme. The applicant admits involving his family members to participate in

TVI, but he denies that he ever solicited or received funds from them, because he (the applicant) paid for their vouchers to enter the scheme. If the applicant recruited other people to the scheme his benefits from participation in the scheme would increase. According to the applicant his participation in the scheme was as a person who bought vouchers, and not as a person who actively sold or accepted or obtained money from members of the public. He never campaigned or advertised or recruited new members to TVI. He describes himself as a victim of TVI who was duped into purchasing vouchers with the view of benefitting from the discounts promised. The applicant denies having conducted the business of a bank in contravention of the Banks Act. The applicant contends that out of 23,000 transactions only 40 on the banking account of the Corporation might have been associated with TVI. This constituted some 0,17%. As far as his personal banking account is concerned only 5 out of 9,865 transactions were suspected to be associated with TVI. This in turn constituted some 0,05%.

[51] The applicant avers that the Tribunal was biased against him and in favour of the Authority. He relied on a partially transcribed argument before the Tribunal in support. The applicant avers that he was interrupted when making submissions and that he was unable to present his case properly. He was shouted at and the body language of the chairman confirmed his bias in favour of the Authority. The applicant avers that evidence was presented at the hearing rebutting the findings of the inspection reports, but the Tribunal failed to take such evidence into account.

[52] As I have already indicated the applicant's statement was not placed before the court. The transcription consists only of the main arguments presented at the hearing before the Tribunal.

[53] The applicant avers that he has been prejudiced by the decisions of the respondents in that he has been deprived of his property due to its seizure and removal.

THE AUTHORITY'S CASE IN THE ANSWERING AFFIDAVIT:

[54] The Authority, correctly in my view, points out that the appointment of the repayment administrator was made by Authority in terms of s 84 of the Banks Act, and it is as such not a decision subject to review in these proceedings.

[55] The Authority explains the TVI scheme in its answering affidavit and refers to the discovery of the list by the inspectors, linking the applicant and his aforementioned profiles to the scheme. It is not necessary to repeat the detail in this judgment. The conduct of the applicant, through the TVI scheme, was determined to be the business of a bank in contravention of s 11 of the Banks Act.

[56] On 28 June 2018 the Authority issued the s 83 direction in terms of which the applicant and the Corporation were directed to repay all monies obtained in contravention of the Banks Act.

[57] On 5 December 2018 the rule *nisi* under case number 84978/2018 in this court together with the direction and a letter informing the applicant of the amount unlawfully obtained, were served on the applicant. The applicant did not oppose the confirmation of the rule *nisi* on the return date.

[58] The Authority contends that the applicant's averments of bias amounts to no more than a discontent over the factual and legal findings of the Tribunal. The applicant had previously also laid a complaint against the judge who issued the rule *nisi*.[33] The Authority contends that the transcript of the proceedings does not bear out any of the criticisms of the applicant against the chairman.

[59] The applicant's reference to the small percentage of TVI related transactions involved, ignores *"the regular features of the scheme in which the applicant admittedly participated"*. The extended definition does not specify the number

[33] The complaint was apparently dismissed by the JSC.

of times one must receive or obtain money before falling foul of the regulation and the definition of the business of a bank. It is contended that the obtaining or receipt of money must be regular feature of the business practice of the scheme.

[60] The inspectors reviewed the statements of the applicant's FNB banking account for the period 24 June 2009 to 22 October 2016. The statements reflected 8,071 transactions which comprised 1,848 inflows for an aggregate amount of R59,519,015.76 and 6,223 outflows for an aggregate amount of R59,514,919.44. On 22 October 2016 the account was overdrawn by an amount of R49,041.32.

[61] The inspectors reviewed the statements of the Corporation's FNB banking account for the period 31 July 2010 to 31 May 2012. The statements reflected 22,978 transactions consisting of 14,779 inflows for an aggregate amount of R207,860,432.00 and 8,199 outflows for an aggregate amount of R208,985,843.48. On 31 May 2012 the closing balance on the account was an amount of R1,831,480.39.[34]

[62] The Authority points out that the applicant provides no proof that he ever took advantage of the alleged discounted offers.

[63] As I have already pointed out the applicant did not reply to the Authority's answer.

MATERIAL ERROR OF LAW?

[64] The applicant's argument on review boils down to a contention that the Tribunal materially erred in its interpretation of "the business of a bank" in terms of the extended definition, and in terms of the Notice. As I understand the argument, the applicant contends that his involvement in TVI was not a regular feature of

[34] According to the Authority's affidavit the Corporation is apparently in the process of deregistration.

his (the applicant's) business practice. In support of the argument the applicant relied on the finding of Yekiso J in *Registrar of Banks v Net Income Solutions CC and others* [2016] JOL 37103 (WCC):[35]

"The acceptance of money from members of the public must be a regular feature of a business practice conducted by the entity concerned. In this regard not only was the acceptance of money from the public a "regular feature" of NIS's business, it was the core feature of the business. This is amply demonstrated by an analysis of NIS's business account conducted by the inspectors. The inspectors discovered that a total amount of R812,345,892.49 flowed into NIS's account. Of that amount, deposits received from participants in the scheme constituted R805,973,697.33. Based on this analysis, deposits received from participants in the scheme constituted 92,2% of all money received by NIS in its business account. Based on this evidence, there can thus be no doubt that acceptance of money from the public was the very purpose of the scheme and, therefore, a regular feature of its business practice."[36]

[65] The Banks Act was originally called the Deposit-taking Institutions Act. It was enacted to provide for the regulation and supervision of public companies taking deposits from the public and matters connected. – *Corpclo 2290 CC t/a U-Care v Registrar of Banks* (755/2011) [2012] ZASCA 156; [2013] 1 All SA 127 (SCA) (2 November 2012).[37] The primary meaning of "the business of a bank" as defined in s 1 of the Banks Act 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'[38]

In terms of paragraph (d) of the definition "the business of a bank" is also defined as:

'(d) the obtaining, as a regular feature of the business in question, of money through the sale of an asset, to any person other than a bank, subject to an agreement in terms of which the seller undertakes to purchase from the buyer at a future date the asset so

[35] Case No. 3056/13 delivered on 25 June 2013.
[36] At para 41.
[37] At para 2.
[38] *Corpclo 2290 CC t/a U-Care v Registrar of Banks* at para 4.

sold or any other asset;'

However, as pointed out by the SCA in *Corpclo 2290 CC t/a U-Care v Registrar of Banks:*[39]

"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'."

[66] It is so, as contended by the applicant, that the court in *Registrar of Banks v Net Income Solutions CC and others* found that the acceptance of money from members of the public must be and was in fact found to be a regular feature of the business of the respondent in that matter. The learned judge held:

"[66] Based on the evidence as a whole it is quite clear that the NIS scheme involves the acceptance of deposits from the general public as a regular feature of the scheme."

[67] I do not think that the judgment in *Registrar of Banks v Net Income Solutions CC and others* is authority for the proposition that transactions involving the applicant before me, do not fall within the extended definition. The Notice does not require the acceptance or obtaining of money to be a regular feature of the business of the applicant. All that is required in terms of paragraph 2 of the Notice is that the "activity"[40] must be *"a regular feature of a business practice"* – (emphasis added), which includes any agreement, arrangement or understanding between two or more persons or any scheme, practice or method of trading, including any method of marketing or distribution (as contemplated in the Notice). It is not disputed that the activities and the business practice of TVI fell within the extended definition as contemplated in the Notice. It appears to me that on the facts the Tribunal interpreted "business practice" as defined in Regulation 1 of GN498, and as employed by the Registrar in Regulations 2 and 3 of the Notice, to mean (and to be) a reference

[39] At para 4.
[40] Declared in terms of s 1(e) of the definition to be the business of a bank.

to the business practice of the TVI scheme, in respect of which an agreement, arrangement or understanding existed between TVI and the applicants in conducting the scheme. The Tribunal held that the acceptance or obtaining of money, directly or indirectly, from members of the public by the applicants, was a "regular feature" of the TVI scheme. This was not disputed by the applicant. The Tribunal found on the facts that the applicants before the Tribunal obtained money, directly or indirectly, from members of the public as a regular feature of the TVI scheme, with the prospect of the participating members receiving payments or other money-related benefits, directly or indirectly (a) on or after the introduction of new participating members of the public to the scheme, from which, in their turn, money is accepted or obtained, directly or indirectly, as a regular feature of the TVI scheme or (b) on or after the promotion, transfer or change of status of the participating members or new participating members within the business practice; or (c) from funds accepted or obtained from participating members or new participating members in terms of the scheme. The Tribunal held that there was no reason for it to reach a different conclusion from that reached by the Authority. The Tribunal was satisfied on the facts that the applicants conducted the business of a bank as contemplated in the extended definition.

[68] From what I have stated above I agree with the Tribunal's interpretation of the Notice and with the Tribunal's evaluation of the facts and the conclusion reached. It follows therefore that the applicant has not persuaded me that the decision of the Tribunal was influenced by a material error of law.

DECISION OF THE TRIBUNAL UNREASONABLE AND IRRATIONAL?

[69] The applicant also argued that the Tribunal order is reviewable because no reasonable decision-maker would have reached the decision reached by the Tribunal. It was contended that the Tribunal's decision is irrational and unreasonable. According to the argument the Tribunal did not properly take into account that the applicant was a victim of TVI; that the investigation reports

concluded that there was no evidence of the applicant's involvement in the TVI scheme; that only some 0,0005% of transactions (5 out of 9.865) went through the applicant's account as "probable" (not proven) TVI transactions over a period of 9 years; that the applicant only had immediate family members in his profile; that he paid for them (as recruiter) and they never did.

[70] In view of the facts before the Tribunal as appears from the reasons and further based on the facts as they appear from the Authority's reasons, I am not persuaded that the Tribunal decision was unreasonable or irrational. In my view there were sufficient facts before the Tribunal to justify the conclusion that it should not interfere with the discretion exercised by the Authority.

[71] As far as the argument is concerned that the applicant must be seen as separate from the Corporation, it must be borne in mind that the applicant is the sole member of the Corporation. The benefit flowing from the use by the applicant of the Corporation's banking account in conducting the business of a bank in contravention of the Banks Act, was ultimately that of the applicant.

[72] It then follows that in my view there is no merit in the applicant's argument that the Tribunal's decision was irrational and/or unreasonable.

[73] The applicant's complaint that he is still being deprived of his property was not a relevant consideration before the Tribunal. In my view it is also not a relevant consideration in the review application. The taking into possession by the repayment administrator of the applicant's property, and the legal consequences flowing from such seizure, are regulated by s 84 of the Banks Act. It is not a decision subject to review in these proceedings.

BIAS:

[74] In support of this ground the applicant relied on the aforesaid transcript of the proceedings before the Tribunal. The applicant avers in his founding affidavit:

a) That he *"was being interrupted when making submissions and hence could not present* [his] *case properly"*;

b) That the chairman *"could be seen to be advancing"* the Authority's case but when the applicant questioned this, he was shouted at and stopped from proceeding with his *"inquisition of the chairperson's conduct"*;

c) That the body language of the chairman confirmed his bias in favour of the Authority in that when the chairman asked the applicant a question, the chairman would always look in the direction of the Authority's legal representatives *"almost as if he was seeking approval"* from the Authority;

d) That the Tribunal failed or neglected to take into account the evidence that was presented *"rebutting the findings of the Reports in respect of the transactions that were suspected to be associated with the TVI business"*. It is alleged that the Tribunal still made the decision it made despite the transactions being explained in the aforesaid "blow-by-blow" explanation placed before the Tribunal.

[75] I have already indicated that the transcript contains in the main the argument presented at the hearing before the Tribunal. It runs into some 79 pages of typed record and ends abruptly during the applicant's argument in reply.

[76] The following appears evident from the transcript:

a) The applicant was not interrupted when making his opening remarks. While not legally represented, the applicant fully appreciated the nature of the proceedings before the Tribunal;

b) The applicant was given considerable leeway to present his case and he

alluded to the background leading up to the reconsideration application, without interruption or objection from any member of the panel or from the Authority's counsel;

c) The "blow-by-blow" explanation relied on by the applicant before the Tribunal, was the subject of considerable debate;

d) When the chairman pointed out to the applicant that he had failed to deal with the transactions on his personal account (presumably in his written statement), the chairman did not, as the applicant suggests, prevent the applicant from providing an explanation. The applicant was in fact allowed to do so and he did provide an explanation;

e) Both the remaining two members of the Tribunal also engaged the applicant in argument on the facts and the law;

f) The chairman apologised for interrupting the applicant during his argument, but this only came after another member of the Tribunal panel engaged the applicant extensively on a specific point. The applicant then proceeded to address the Tribunal seemingly unperturbed by the prior interruption;

g) The debate became somewhat heated when the applicant implied that the chairman was *"speaking for"* the Authority. It is perhaps prudent to quote from the transcript:

"CHAIRMAN: *Just-just – I just personally or let's put it this way the Prudential Authority says it is just so unlikely that you would have all these multiples in this short period of 2 700 being banked.*

APPLICANT: *Have they run a fuel station this Prudential Authority? Have they run a fuel station?*

CHAIRMAN: *Why didn't – why was it that after May 2012… [intervened]*

APPLICANT: *Chair are you speaking for the Prudential Authority?*

CHAIRMAN: Listen Mr Mwale… [intervened]
APPLICANT: No-no I'm asking.
CHAIRMAN: I'm asking you a fair question on the facts before us.
APPLICANT: What is your question?
CHAIRMAN: And please don't cheek me.
APPLICANT: Don't?
CHAIRMAN: I don't accept that.
APPLICANT: Don't what?
CHAIRMAN: Don't cheek me with your remarks."
– (emphasis added);

h) The applicant's argument consists of some 57 pages of the transcribed record;

i) The Authority's argument consists of some 16 pages of transcribed record. The members of the Tribunal engaged counsel for the Authority on various legal and factual aspects of the matter;

j) The applicant's argument in reply consists of some 6 pages of transcribed record (before the transcript abruptly ends).

[77] There is a formidable burden upon a litigant who alleges bias or its apprehension. Both the person who apprehends bias and the apprehension itself must be reasonable. Mere apprehensiveness or even a *"strongly and honestly felt anxiety"* that a presiding officer will be biased, is insufficient. A mistake on the facts on its own does not justify a reasonable apprehension of bias. A party alleging bias based on incorrect findings of fact must establish partiality, failing which the question of unreasonableness does not arise. If a mistake on the facts is shown, a reliance on reasonable apprehension of bias will only be successful if the error relates to a material fact and it is so unreasonable that it is inexplicable, except on the grounds of bias. - *De Lacy and Another v South African Post Office* (CCT 24/10) [2011] ZACC 17; 2011

(9) BCLR 905 (CC) (24 May 2011).[41]

[78] It must be borne in mind in my view that the Tribunal panel consisted of three members. It is evident from the transcript that the remaining members also extensively engaged the applicant during argument. No allegations of bias are however made against the other members of the Tribunal. The decision of the Tribunal was unanimous.

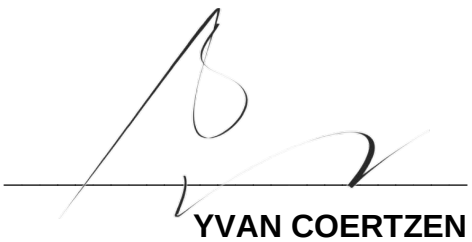
[79] Having considered the facts and the transcription placed before me, I am not persuaded that the applicant has shown that the Tribunal (or the chairman for that matter) was biased. I do not believe that the applicant's perception of bias, if it genuinely existed, was reasonable.

[80] It is evident from the questions posed to counsel for the Authority during argument that the chairman in fact expressed his doubts about the prospects of the repayment administrator to establish the identity of the "investors" in this matter. It appears to me that the applicant's remedy lies elsewhere.

In the result it is ordered:

1. The application is dismissed;

2. The applicant is ordered to pay the second respondent's costs, including the costs of two counsel where so employed.



YVAN COERTZEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

[41] At paras 69 - 72.

Date of hearing: 18 March 2021
Delivered: 24 May 2021

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading the judgment to the digital CaseLines system utilised in this division. The date and time for hand-down is deemed to be at 10h00 on 24 May 2021.

Appearances:

For the applicant:	MB Mhango
	Attorneys for the applicant:
	Bazuka & Company Inc.
	Randburg
Counsel for second respondent:	Adv EL Theron SC
	Adv S Mathiba
	Attorneys for the second respondent:
	Bowman Gilfillan Inc.
	Pretoria