IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 13097/2014

In the matter between:

MARIUS LLEWELLYN FRANSMAN Applicant

And

THE SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE First Respondent

THE CHAIRPERSON, WESTERN CAPE PROVINCIAL LEGISLATURE STANDING COMMITTEE ON PUBLIC ACCOUNTS Second Respondent

Delivered: 15 September 2016

JUDGMENT

BOQWANA, J

Introduction

[1] This is an application to review decisions allegedly taken by the Western Cape Standing Committee on Public Accounts ('SCOPA'/'the committee') arising

from the summonsing of the applicant to appear before it as a witness on 23 April 2014. Other ancillary relief, to which I shall return, is also sought.

[2] SCOPA is a committee established by the provincial legislature in terms of s 116 of the Constitution and the Standing Rules of the Western Cape Provincial Parliament ('Standing Rules'). It is common cause that, amongst other things, SCOPA is empowered to summons any person to appear before it and/or to produce documents, and to hear oral evidence and examine any reports, including those of the Auditor-General, on the affairs of the provincial executive.

Factual background

[3] In January 2014, the Auditor-General published a report on a performance audit of the use of consultants at selected departments of the Western Cape Provincial Government ('provincial government'). An independent auditing process was to evaluate measures instituted by management [of the said departments] to ensure that resources had been procured economically and were used efficiently and effectively.

[4] The performance audit on the use of consultants was conducted at two departments of the provincial government, namely, the Department of Health and the Department of Transport and Public Works. The audit covered eleven consultancy projects at the Department of Health with contracts or payments amounting to R625 million; and twenty consultancy projects at the Department of Transport and Public Works with contracts or payments amounting to R328 million, during the financial years of 2005 to 2010.

[5] The applicant, Mr Marius Fransman, was the Western Cape Provincial Minister of Transport and Public Works during the period of 2005 to July 2008, and Mr Pierre Uys was the Provincial Minister of Health.

[6] The report identified that the total expenditure on consultants by the two audited departments amounted to R 9.2 billion (89% of the total provincial

expenditure of R 10.3 billion on consultants) for the three-year period 2008-2009 to 2010-2011.

[7] The said report was tabled before a SCOPA meeting on 20 February 2014. The chairperson of SCOPA at that time and during the events that gave rise to this application was Mr Grant Haskin. At that meeting, committee members decided that both the applicant and Mr Uys should be invited to attend a SCOPA meeting scheduled for 17 March 2014. An invitation was also sent to the former Head of Department: Transport and Public Works, Mr Manyathi.

[8] The two former Members of the Executive Council ('MECs') were, according to Mr Haskins, invited because it was the responsibility of the executive authority to account to SCOPA, and not that of the accounting officer. This view is not shared by the applicant, who alleges that it was unusual for MECs to be called to account at a SCOPA meeting. This is because they were not involved in signing of contracts and financial management of the departments. It is, according to the applicant, the heads of departments that were normally called by SCOPA to answer questions. This issue is relevant to the applicant's case because he regards SCOPA's actions of calling him to account as being politically motivated and driven by members of the provincial majority party, the Democratic Alliance ('DA') whose mission was to embarrass him given that he had long moved on and left the provincial department. He was in 2014 the Deputy Minister of International Relations in the national government. Summonsing a member of the national executive was to him unprecedented.

[9] The applicant received the invitation to attend the meeting, scheduled for 17 March 2014, on 3 March 2014. In terms of the letter, the purpose of the invitation was for the applicant to participate in discussions and answer questions on the Auditor-General's report on the performance audit at the selected departments.

[10] The meeting was to be attended by SCOPA, Finance and Community Development and the two relevant departments (Health and Transport and Public

Works). The letter requested that any documents or presentations relevant to the subject be sent by the invitee to the committee coordinator.

[11] According to Mr Haskin, neither the applicant, Mr Uys nor Mr Manyathi attended the meeting. As a consequence thereof all three of them had to be summonsed to appear at the next SCOPA meeting scheduled for 23 April 2014.

[12] In his replying affidavit, the applicant alleges that he went to the venue of the meeting, but discovered that the meeting had started earlier than advised. It is not clear whether he announced his presence at the meeting as the replying affidavit is silent on this issue. From the respondents' point of view, however, the applicant did not arrive.

[13] I am bound to accept the version of the respondents. It, in any event, makes more sense to me than that of the applicant in that it seems inherently improbable that the first respondent would have considered it necessary to issue a summons requiring the applicant to appear before SCOPA, if he had presented himself voluntarily on 17 March 2014.

[14] Reacting to the summons, the applicant and Mr Uys attended the meeting of 23 April 2014 accompanied by a legal representative, whom they intended would represent them at the meeting. According to the applicant, upon their arrival, SCOPA members were already in attendance. Their legal counsel introduced herself to the chairperson, Mr Haskin, and informed him that she represented Mr Uys and the applicant. She further informed Mr Haskin that Mr Uys and the applicant intended to seek a postponement of the proceedings. Mr Haskin advised her that legal representation was not permitted and therefore she did not have any 'speaking rights' in the proceedings. He however advised that she could sit next to Mr Uys and the applicant to advise them. The applicant alleges that they had no choice but to accept the ruling of the chairperson, regardless of the fact that he was in need of legal assistance. He believed the chairperson was wrong as Rule 72 of the Standing Rules of the provincial legislature dated February 2014 permitted legal representation at committee meetings, while the Western Cape Witnesses Act

2 of 2006 (‘the Witnesses Act’), in terms of which they were summonsed, is silent on the question of legal representation.

[15] Mr Haskin’s version is different on this issue. He alleges that he recalls applicant’s counsel being introduced to him but could not remember her name. To his recollection, a conversation took place in a corridor, before the meeting commenced, where Mr Uys asked him whether legal representatives could attend the meeting. He told Mr Uys that they could consult with the legal representative but summonsed people were required to speak for themselves under oath or affirmation. According to him, neither Mr Uys nor the applicant made any application during the meeting to be legally represented, or for a legal representative to be permitted to make submissions to the committee on their behalf. He contends therefore that SCOPA made no decision that could conceivably form the subject of a review application in this regard. This issue is significant to the relief sought by the applicant for reasons that will become evident presently.

[16] The applicant recalls the meeting as being very hostile towards him. Apart from Mr Haskin, who was a member of the African Christian Democratic Party (‘ACDP’), and Mr Ozinsky, a sole member of the African National Congress (‘ANC’), the majority of the committee, who were members of the DA, was extremely adversarial and acted in bad faith. He believed that they were out to attack and catch him by surprise with the intention of embarrassing him and Mr Uys since they were high profile members of the ANC; they did this for the benefit of members of the media who were in attendance.

[17] Having been told that he and Mr Uys could not be legally represented, the committee did not allow him to speak, informing him that he could only do so after having taken an oath. This was contrary to the advice that he had received from his counsel. He had intended to explain his position to the committee and motivate for a postponement. He also would have requested to be provided with a list of questions and/or issues so as to adequately prepare.

[18] The applicant averred that he would have informed the committee that summons had been served during a demanding period, when political parties were electioneering for the national elections that were scheduled for 7 May 2014. Furthermore, he was no longer in the provincial government and had lost touch with its affairs; he therefore might need access to the relevant documents, records and the opportunity to consult with the relevant officials on issues relating to his time in office in the Western Cape government. According to him, there was no genuine or particularly pressing reason for the meeting to proceed before the elections. He formed the opinion that the hearing was nothing more than an abuse of the SCOPA process by members of the majority party for narrow political purposes.

[19] Mr Uys was however allowed to speak on the basis that, unlike the applicant, he was still a member of the provincial legislature. The applicant regarded this as an act of unfair discrimination as they had both been summonsed as witnesses.

[20] Mr Uys requested a postponement and asked that questions that SCOPA intended to ask be given to them in writing. His request was turned down. According to Mr Haskin, the view underlying this approach was that the applicant and Mr Uys should have asked for the documentation, questions and access to officials long before the meeting; and should have adequately prepared on receipt of summons. Members also informed Mr Uys that committee members could not be expected to prepare questions in advance and if a question or an issue not anticipated arose, a witness would be given an opportunity to furnish answers later in writing or ask for a postponement at that juncture.

[21] It appears that during the debate the chairperson expressed a view in support of the postponement but was outvoted by the majority of the committee. A motion was tabled that the meeting continue.

[22] Mr Haskin alleges that the meeting was chaired in line with the Witnesses Act and SCOPA's practice, which required non-members of the provincial

parliament to take an oath or affirmation before they can make any oral submissions to the committee. The applicant declined to take an oath and to further participate in the meeting and left. This has consequences in terms of the Witnesses Act, to which I shall return later.

[23] Feeling aggrieved, the applicant launched this application.

Relief sought

[24] The relief prayed for is in three parts.

[25] The first part deals with the review, correction and setting aside of alleged decisions made by SCOPA on 23 April 2014 -

(a) refusing the application to postpone the hearing and allow the applicant an opportunity to properly prepare for participating in the hearing; and by refusing to provide the applicant with the list of issues and/or questions that the applicant is expected to deal with at the said hearing;

(b) not allowing the applicant to address the hearing of SCOPA before having taken an oath as a witness; and

(c) denying the applicant an entitlement to legal representation at the SCOPA hearing.

[26] The second part seeks a directive that the respondents -

(a) provide the applicant with the list of issues and/or questions that the applicant is expected to deal with before the committee;

(b) provide the applicant with full access to all relevant documentation and records as well as an adequate opportunity to consult with any provincial or other officials necessary in order to properly prepare for the hearing in respect of the aforesaid issues and/or questions; and

(c) allow the applicant to address SCOPA without having taken an oath.

[27] The third part concerns a declaratory order sought by the applicant that he has not violated any of the provisions of the Witnesses Act by declining to continue his participation in the SCOPA hearing of 23 April 2014.

[28] In the alternative, a declaratory order is sought that the applicant is entitled to all of the relief sought above including legal representation.

Legal Framework

[29] The provincial legislature is established in terms of Chapter 6 of the Constitution. In terms of s 108 (1) of the Constitution, a provincial legislature is elected for a period of five years and when its term expires, it is dissolved and replaced by the next legislature. Section 17 of the Constitution of the Western Cape, Act 1 of 1998 ("the provincial constitution") contains similar provisions.

[30] In this case the committee's term of office was due to expire after the elections of May 2014. According to Mr Haskin, the committee intended to finalise issues raised in the Auditor-General's report before its term ended.

[31] Section 114 (2) of the Constitution requires a provincial legislature to (a) ensure that all provincial executive organs of state in the province are accountable to it, and (b) maintain oversight of the exercise of provincial executive authority in the province, including the implementation of legislation; and any provincial organ of state.

[32] Section 116 of the Constitution provides that:

> ' (1) A provincial legislature may--
>
> (a) determine and control its internal arrangements, proceedings and procedures; and
>
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
>
> (2) The rules and orders of a provincial legislature must provide for --

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy;

(c) financial and administrative assistance to each party represented in the legislature, in proportion to its representation, to enable the party and its leader to perform their functions in the legislature effectively; and

(d) the recognition of the leader of the largest opposition party in the legislature, as the Leader of the Opposition.'

Section 23 of the provincial constitution contains similar provisions.

[33] SCOPA is established to fulfil the function of holding the executive to account. It is common cause that SCOPA's functions include examining the Auditor-General's report in terms of Rule 98 and, necessarily, following up on the findings of that report relating to the use of public resources. It is not disputed that SCOPA has powers to summons witnesses to appear before it.

[34] Section 115 of the Constitution provides that:

'**115. Evidence or information before provincial legislatures**

A provincial legislature or any of its committees may

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) require any person or provincial institution to report to it;

(c) compel, in terms of provincial legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and

(d) receive petitions, representations or submissions from any interested persons or institutions.'

[35] Section 2 of the Witnesses Act empowers the Secretary of provincial parliament to issue summons for a witness to give evidence or to produce documents in terms of s 25 (a) of the provincial constitution and s 3 provides for the examination of witnesses as follows:

> **'3 Examination of witnesses**
>
> When the Provincial Parliament or a committee requires that anything be verified or otherwise ascertained by the oral examination of a witness, the person presiding at the enquiry may-
>
> (a) Call upon and administer an oath to, or accept an affirmation from, any person present at the enquiry who was or could have been summonsed in terms of section 2; and
>
> (b) Examine that person, or request the person to produce any document in the person's possession or custody or under his or her control which may have a bearing on the subject of the enquiry, subject to any limitation provided for, by or in terms of the Standing Rules with regard to the type of subject matter about which a witness may be questioned or the type of document that a witness may be requested to produce.'

Section 5 criminalises the following conduct by witnesses:

> '5 **Offences**
>
> (1) A person who-
>
> (a) has been duly summonsed in terms of section 2 and who fails, without sufficient cause-
>
> (i) to attend at the time and place specified in the summons; or
>
> (ii) to remain in attendance until excused from further attendance by the person presiding at the enquiry;
>
> (b) when called upon under section 3(a), refuses to be sworn in or to make an affirmation as a witness; or
>
> (c) Fails, without sufficient cause-
>
> (i) to answer fully and satisfactorily all questions lawfully put to him or her under section 3(b) or

(ii) to produce any document under his or her possession or custody or under his or her control which he or she has been required to produce under section 3(b),

commits an offence and is liable to a fine or to imprisonment for a period not exceeding 12 months or to both the fine and the imprisonment.'

Submissions

[36] The respondents contend that the review sought stems from issues that are no longer contentious in that the events of 23 April 2014 are history. Mr Budlender SC, who appeared for the respondents together with Ms Bawa SC, argued that the only reason that the historical facts were being ventilated was because the applicant fears that, if and when he is summonsed again, the aforementioned allegedly unlawful conduct might be repeated by members of SCOPA. In this regard, the first respondent openly tendered, with prejudice, exactly what the applicant demanded in his application.

[37] Mr Denzil Potgieter SC appearing, with Ms Nyman, for the applicant on the other hand argued that the relief sought by the applicant was important not only to deal with the past violations of his rights, but also to establish certainty in respect of future SCOPA proceedings. He also contended that the granting of the relief would serve the public interest as it sought to prevent abuse of power for political gain.

[38] The applicant's primary argument is that the matter is not moot as the factual circumstances indicate that SCOPA will reinstate the hearings based on utterances made by the Western Cape Premier, Ms Helen Zille in her state of the nation address on 24 June 2014 when, referring to the applicant, she apparently said the following:

' We welcome him back into this House because now we will make sure that he goes before SCOPA and we will make sure that he takes an oath and we will make sure that he tells us the truth about a lot of things to which we have been trying to get

answers, Madam Speaker, for a very long time. So, we give you a very warm welcome back and let me give you a little warning about some things that we will be raising with you.'

[39] From this statement, according to the applicant, it is evident that the Premier and her government are intent on using the SCOPA hearing process to continue harassing him and to score cheap political points.

[40] Furthermore, it is submitted on the applicant's behalf, that it is in the interests of justice that the court grants the relief so as to prevent the abuse of power by SCOPA in their hearings. The court is requested to set in place a process to regulate a future SCOPA hearing into the Auditor-General's report that would curtail the abuse of the hearing to oppress opposition parties and to score political points in the manner done on 23 April 2014 and which it is alleged is likely to recur in the absence of a court order. It is contended that the judiciary must step in to prevent abuse of state power. To support this proposition, counsel for the applicant referred to the *dictum* in *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) at para 2, which dealt with the role of the Public Protector.

[41] The respondents attacked the relief sought also on grounds that the impugned decisions did not (a) constitute administrative action; (b) that no decision was made refusing legal representation and (c) that courts do not grant declaratory relief simply to record history. There must be a real dispute which affects a person's right going forward; no consequential claim can be made in this matter because the applicant has been given or offered what he sought.

Would the orders sought by the applicant be of practical value?

[42] The only fact the applicant provides as a basis for the contention that the relief sought will have practical effect is the Premier's speech of 24 June 2014. Apart from that, there has been no indication that the current SCOPA which assumed office in May 2014 will summons the applicant to return. The current

committee members could take a completely different approach to that of their predecessors.

[43] The question of whether the applicant should be re-summonsed would be a new issue which would have to be determined by the current committee. Relevant questions would have to be considered if and when the applicant is re-summonsed. The new members are not bound by the views of the previous committee. It is not known if the committee would grant or refuse the applicant's requests, which the applicant seeks the court to direct. The context in which the requests might be made is also not currently determinable.

[44] The applicant firmly confirms in his replying affidavit what the purpose of this application is. In reply to the allegation by the respondents that the relief sought does not impact on his rights currently or in future and only dealt with pure history, the applicant alleges that 'it is critical for this court to grant the relief sought so that the respondents are prevented from continuing the abuse of power in their regulation of SCOPA hearings.' He further asks this court to set in place a procedure to regulate a future SCOPA hearing into the Auditor-General's report that would curtail the use of the process to oppress opposition parties and to score political points in the manner in which it was done by the majority party on 23 April 2014.

[45] It is not the role of the judiciary to get involved in parliamentary politics, or to determine the internal arrangements, proceedings and procedures of provincial legislatures that are reserved by the Constitution for determination by those legislatures themselves. The judiciary would be impermissibly impinging on the terrain of the legislature if it were to do what the applicant wants it do. The applicant wants the court to regulate SCOPA hearings to prevent the abuse and step in to protect minority parties from being mistreated by those in the majority. These are the only reasons why this application was brought.

[46] Despite the fact that no decision has been made to re-summons the applicant, the second respondent has given him certain undertakings should he be

re-called, which more than adequately addresses the forward looking relief. The applicant has rejected this tender. The respondents contend that the tenders given render the relief academic.

[47] In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 (CC), the Court held that while the issues might well have been moot because they were overtaken by events, the issues may be so crucial to important aspects of government, as well as rights contained in the Bill of Rights, that it could be in the interests of justice to grant the relief sought. (at para 27).

[48] It is, therefore, important to consider whether the tenders have indeed rendered the issues before the court academic, or whether a case has been made out for granting the relief in the interests of justice.

[49] The second respondent, who is the current chairperson of SCOPA, alleges that he was of the view that the complaints raised by the applicant could be resolved without resorting to litigation. He was satisfied that public interest would be served by resolving the matter and that it would serve no purpose for the court to adjudicate a matter purely for historical interest. He sought legal advice and instructed the respondents' attorneys of record to settle the matter. On 22 January 2016, the respondents' attorneys sent a letter to the applicant's attorneys with the following undertakings on behalf of the second respondent, in his capacity as the chairman of SCOPA:

> ' 6.1 that the applicant will be permitted to address SCOPA with regard to procedural matters (but obviously not factual matters falling within its enquiry) without having to take an oath;
>
> 6.2 that your client will be given a reasonable opportunity to prepare in order to enable him to properly participate in the hearing; and
>
> 6.3 that (to the extent that this is within the powers and competence of SCOPA), your client will be given access to all relevant documents and records, and an

adequate opportunity to consult with any provincial or other officials necessary in order to properly prepare for the hearing.

7. As SCOPA has a discretion as to whether to allow legal representation, your client, may request legal representation if he again is summoned to appear before SCOPA. That will be a matter to be decided by SCOPA, and our client is not in a position to give any undertaking in anticipation of what it will decide.

8. Our client's view is that the report of the Auditor-General adequately identifies the matters which your client will be required to address if he is summoned to appear before SCOPA. If any matter raised at such a meeting is such that your client could not reasonably have anticipated that he would be required to deal with it, he will be entitled to ask for time to enable him to prepare in that regard.'

[50] This was followed by a draft settlement agreement to be made an order of court. Further undertakings made by the second respondent in this draft were as follows:

'2 If the Applicant is summoned to appear before SCOPA, the second respondent, in his capacity as chairperson of SCOPA, will ensure that:

2.1 The Applicant will be permitted to address SCOPA with regard to any procedural matters, and matters not falling within the ambit of SCOPA's enquiry, without having to take an oath;

2.2 The Applicant will be given no less than 60 days' notice to enable him to consult with provincial or other officials and to undertake other preparation for the hearing;

2.3 To the extent that it is within the powers and competence of SCOPA, SCOPA will give the Applicant access to all identified relevant documents and records. To the extent that it is not within the powers and competence of SCOPA to give the Applicant such access, it will in a spirit of co-operation take reasonable measures to assist him to obtain such access from those who have the power to give it.

2.4 If the Applicant considers that he requires legal representation at the hearing, he may make application to SCOPA at the sitting at which he appears, to allow this. SCOPA must exercise its discretion as to whether to permit legal representation. If SCOPA refuses to permit legal representation, the Applicant will be given a reasonable opportunity, if he so requests, to challenge such refusal before the hearing proceeds further.

2.5 If the Applicant is requested by SCOPA to address matters that he could not reasonably have anticipated would be dealt with, the SCOPA meeting will be adjourned for a period of 30 days to allow him time for further preparation.

3. …It is recorded that if the Applicant is again summoned to appear before SCOPA and contends that this agreement has not been complied with, he is entitled to apply to the High Court for appropriate relief.'

[51] The applicant contends that this tender is merely a façade intended to trap him into submitting to a continued abusive process without any real or effective protection of his fundamental rights. His main concerns are that, given the history of the matter, the undertakings made by the second respondent, who is also a member of the ACDP, like his predecessor, would not be followed by the majority of the committee members who are members of the DA. According to him, without the support of the DA majority, those undertakings carry no weight.

[52] This contention is unfounded, in my view. The second respondent is representing SCOPA in these proceedings. It has not been suggested that he has no authority to act on their behalf in matters relating to this litigation. He alleged in the answering affidavit that he was mandated to take all necessary steps (including the filing of answering papers) on behalf of SCOPA in this matter and to report regularly to SCOPA in relation hereto. Consequently, if he is representing SCOPA, it should be taken that he can settle proceedings on behalf of SCOPA.

[53] To the extent that the second respondent has given undertakings on matters where a mandate was not given, that would be an issue for committee to take up with him. The committee would have to abide by any settlement agreement which would have been made an order of court. If the committee fails to comply with the

court order, the applicant would be within his rights to approach the court for an appropriate order.

[54] As regards, the issue of legal representation, the applicant's contention is that Rule 72 of the Standing Rules provides him with a right to legal representation. That Rule is worded as follows:

> '72. Counsel, attorneys and other persons appearing before a committee must observe the directions and conform to the rules laid down by the chairperson'

[55] The Rule plainly does not provide for a right to legal representation. It simply asserts that when counsel or legal representatives do appear before the committee, they must adhere to the committee rules. There is no absolute right to legal representation. At best, it indicates that the Rules conceive that there may be situations where attorneys and advocates will appear before the committee. The committee has the discretion on whether to allow legal representation.

[56] The matter of *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* 2002 (5) SA 449 (SCA) at para 21, which the applicant relied on, does not advocate for a right to legal representation. To the contrary, it supports a view that courts have denied the existence of any absolute right to legal representation in arenas other than a court of law (at para 5). The court, however, recognised that there may be cases where legal representation may be appropriate, where it '*may be essential to a procedurally fair administrative proceeding*.' (at para 11). Therefore, any rule purporting to compel an organ of state to refuse legal representation no matter the circumstances and '*even if they are such that a refusal might very well impair the fairness of the administrative proceeding, cannot pass muster in law*.' (at para 12). The court in *Hamata* confirmed a settled principle that the technikon's internal disciplinary committee had a discretion whether to allow legal representation, taking into account relevant factors, including those articulated in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) at 1184D-E as follows:

'...the nature of the decision, the "rights" affected by it, the circumstances in which it is made, and the consequences resulting from it.' (*Hamata* supra at footnote 25)

[57] In short, there is no absolute right to legal representation in fora other than courts of law, but it cannot be excluded as of rule; a discretion on whether to allow it must be exercised taking into account relevant factors. Having said that, if the rules of a particular tribunal allow for an unqualified right to legal representation then it will be unqualified. But that is not the case with Rule 72. The judgment of *Legal Aid South Africa v Magidiwana and Others* 2015 (6) SA 494 (CC) does not take the matter any further.

[58] The views expressed by the second respondent in this case that the committee has a discretion on the issue of legal representation are correct. I do not think it would be appropriate for this court to order that the applicant is entitled to legal representation; all the more so when the current committee members have not had the opportunity to consider the matter.

[59] Turning to the undertaking that the applicant would be permitted to address the committee without taking an oath, Mr Potgieter submitted that that undertaking must be seen in the context of the respondents' view that the applicant is now a member of the provincial parliament and accordingly allowed to address the committee without taking an oath. Whilst that is so, the tender is not qualified. The undertaking, as it reads, would be applicable whether or not the applicant is a member of parliament. There is no ambiguity in its wording. In my view, the tender given by the second respondent adequately satisfies the relief sought by the applicant.

[60] In view of the findings above, it is not necessary for this court to interpret the Witnesses Act, as argued by Mr Potgieter. Whether or not the former chairperson erred in his interpretation of the Witnesses Act is history.

[61] I am willing to assume, without deciding this issue, that the applicant may have been unlawfully treated by the previous committee as principles of natural justice may dictate that a person should be heard on procedural matters (i.e. issues

not pertaining to the examination of a witness) even if called as a witness, before the administration of the oath. In any event, if the applicant had attended the meeting of 17 March 2014 he was initially invited to participate in, no oath would have been required even though he was not a member as the Witnesses Act had not been invoked.

[62] I do not need to decide on this also because of the fact that for any future hearings that may arise (which is the applicant's main concern), the second respondent has undertaken to allow the applicant to address the committee without taking an oath. Furthermore, he is now a member of parliament, although nothing much turns on this issue as the undertaking is wide.

[63] As to the directive that the applicant be presented with a list of questions and/or issues he is expected to deal with at the hearing, the second respondent submits that the Auditor-General's report identifies the issues the committee would like addressed, but if it does arise that the applicant is requested to address matters that he could not reasonably have anticipated would be dealt with, the meeting would be adjourned for 30 days to allow him to prepare.

[64] The applicant seeks a directive that he be provided with a list of questions and/issues that he is expected to deal with at the hearing. Not only would that be premature, but the court may be confining members of SCOPA to a list of questions, which I do not consider appropriate. Nothing prevents the applicant, however, from asking SCOPA to present him with a list of questions for purposes of preparation if and when he is summonsed, or to seek clarity on those aspects of the Auditor- General's report that the committee would require him to focus on. It is up to SCOPA to decide how the process would be regulated and not the court, particularly in the absence of a decision having been made and/or infringement of the law. Whilst I understand the applicant's apprehension, it is unjustified to assume that the current committee members would act unlawfully.

[65] With regards to the preparation time that the applicant seeks to be directed, an undertaking is given that he would be given no less than 60 days to consult with

the provincial or other officials in order to prepare for the hearing as he requested. Furthermore, access would be given to documents, to the extent that it is within the powers and competence of SCOPA to do so and, if it is not within their competence, SCOPA would take reasonable steps to assist that those documents be obtained by the applicant. This more than adequately addresses the relief sought by the applicant in this regard.

[66] Mr Budlender submitted that the relief sought could not be granted for other reasons, namely, that the decisions of 23 April 2014 are not administrative action as contemplated in PAJA; that no decision was made on the issue of legal representation and that courts do not grant declaratory orders simply to record history.

Are these administrative decisions?

[67] The applicant brought the review application in terms of PAJA. He alleges that the SCOPA decisions fell to be reviewed and set aside, *inter alia*, in terms of section 6 (2) (a) – (f), (g) and (i), including various relevant subsections of PAJA. To support this contention counsel for the applicant relied on the decision of *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) which states as follows at para 21:

> '[21] This conclusion does not mean, however, that these decisions are immune from judicial review. The fundamental principle, deriving from the rule of law itself, is that the exercise of all public power, be it legislative, executive or administrative – is only legitimate when lawful (see eg Fedsure para 56). This tenet of constitutional law which admits of no exception, has become known as the principle of legality (See eg Cora Hoexter Administrative Law in South Africa 117). Moreover, the principle of legality not only requires that the decision must satisfy all legal requirements, it also means that the decision should not be arbitrary or irrational…'

[68] The passage clearly refers to legality reviews, not to reviews expressly brought in terms of PAJA. Only administrative action is reviewable in terms of PAJA.

[69] The respondents submit that the decisions challenged are not administrative action as contemplated by PAJA but instead decisions of a committee of the provincial parliament carrying out its legislative function of keeping the executive accountable; they are subject to review on grounds of legality, and not under PAJA; or they can be challenged under the common law duty to act fairly in investigations (if at all the hearing is viewed as investigative).

[70] I do not agree that *Ethekwini* supports the proposition advanced by the applicant's counsel. The Court in the preceding paragraphs found that the decisions in that matter were not administrative action. It said the following at para 20:

> '[20] There is further authority for the proposition that a decision taken by a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted, does not constitute 'administrative action'. This is to be found in decisions such as *Steele and Others v South Peninsula Municipal Council and Another* 2001 (3) SA 640 (C) at 644D; and *Van Zyl v New National Party and Others* 2003 (10) BCLR 1167 (C) [2003] 3 All SA 737) paras 48-54. Since the decisions under consideration bear all these hallmarks, I think it can be accepted with confidence that they do not constitute administrative action under PAJA. The further somewhat intricate question as to whether these decisions should be categorised as the exercise of an executive function as opposed to a legislative function, is one we do not have to decide. As long as these decisions do not qualify as 'administrative action', PAJA does not apply.' (Own emphasis)

[71] The Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 33 set out seven components which must be satisfied have not been satisfied in this case. The Court held that '*there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions*.'

[72] Mr Potgieter submitted that SCOPA was not performing a legislative function but an administrative function of supervising and investigating which he argued had nothing to do with legislation. I disagree with Mr Potgieter, SCOPA is a committee of parliament, carrying out its constitutional function of overseeing and holding the executive to account. Members deliberate and make decisions based on the views of the majority. The functions of the legislature that are peculiar to that arm of government do not have to do exclusively with passing legislation. Members deliberate and vote on many other legislative functions including holding the executive to account. I am therefore not persuaded that the examining of the Auditor-General's report and calling of witnesses pursuant thereto to answer questions on issues raised by the report constitute administrative action, for the purposes of PAJA. Apart from stating that the decisions constitute administrative action, the applicant has not stated what direct external legal effect the decisions have.

No decision was made on the issue of legal representation

[73] There is a dispute of fact on this issue. The applicant alleges that he was informed during the session of a committee by the chairperson that legal representation was not allowed. The second respondent submits that the applicant and Mr Uys enquired from Mr Haskin outside in the corridor whether they could be represented by counsel and he told them it was not allowed. According to Mr Haskin the issue was not discussed by the committee and no decision was taken. The transcript of the record of the meeting does not reflect any discussion on this issue. As these are motion proceedings, where there is a dispute on the facts final relief should be granted only if the facts as stated by the respondent together with the admitted facts that the applicant's affidavit would justify such an order. (See *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A) at 634-635. The application of this rule impels a finding that no decision was made by the committee on the issue of legal representation.

Courts do not grant declaratory relief simply to record history

[74] There must be a real dispute that affects rights going forward. The court in *Naptosa & Others v Minister of Education, Western Cape and Others* 2001 (2) SA 112 (C) at 125 B – E quoted with approval the remarks by Williamson J (as he then was) in *Adbro Investment Co Ltd v Minister of the Interior and Others* 1961 (3) SA 283 (T) at 285 B-C where he held the following:

> ' …(T)he Court in each case must…carefully determine whether or not the particular case in question is a proper case for the exercise of its discretion. For a case to be a proper case, in my view, generally speaking it should require to be shown that despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet justice or convenience demands a declaration be made…'

[75] The Court in *Naptosa* supra at para 125 D further stated that:

> 'A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent (*Suid-Afrikaanse Onderlinge Brand-en Algemene Versekeringsmaatskappy Bpk v Van den Berg en 'n Ander* 1976 (1) SA 602 (A)). A declaratory order need have no claim for specific relief attached to it, but it would not ordinarily be appropriate where one is dealing with events which occurred in the past. Such events, if they gave rise to a cause of action, would entitle the litigant to an appropriate remedy.'

[76] The applicant seeks past relief with no substantial relief attached to it. The second respondent has resolved the question of future conduct. As contended on behalf of the respondents, the court cannot tell parliament how to conduct its business purely on a hypothetical basis when the committee of parliament has tendered to comply with the future relief and the law. The applicant was not suing on behalf of others therefore the court could not give an order regulating SCOPA's future conduct, in a case where the second respondent acting for SCOPA made undertakings addressing the relief sought by the applicant.

Declaratory order – non-violation of the Witnesses Act

[77] As to whether the applicant violated the Witnesses Act by refusing to further participate upon the committee, *inter alia*, refusing to postpone the meeting, I do not believe that this court is in a position to pronounce on whether there was sufficient cause for the applicant to withdraw his participation in the meeting. That would be usurping the function of a criminal court. Inasmuch as it is argued that this court would be dealing with this case from a different angle, i.e. from a civil court point of view, I am not persuaded that the issues are any different to what a criminal court would look at. No solid basis has been presented before me to convince me otherwise.

[78] I am alive to the fact that there are many matters that serve before civil and criminal courts involving the same events. This is not one of those cases, in my view. Those are cases that involve different issues such as, for example, delictual claims. A civil court in those matters would consider whether a delictual claim exists and not whether an offence has been committed, which is what the applicant seeks the court to effectively do in this matter.

[79] Mr Budlender referred to a decision of the Appellate Division in the matter of *Attorney-General of Natal v Johnstone & Co Ltd* 1946 AD 256 at 261 which he submitted indicated that it was only in exceptional cases that a civil court would make an order effectively finding an [accused] person innocent. The pertinent passage of the judgment reads as follows:

> '…in general where it is alleged by the Crown that a person has committed an offence, the proper way of deciding on his guilt is to initiate criminal proceedings against him; and where such proceedings have already been commenced, even if the stage of indictment only has been reached, it seems to me that a court which is asked to exercise its discretion by entertaining proceedings for an order expressly or in effect declaring that the accused is innocent would do well to exercise great caution before granting such an order. In most types of case such an order would be entirely out of place. But the class of case to which the present belongs has certain features

that distinguish it from most other offences. The provisions are often difficult to construe and differences of view as to their effect may be honestly entertained…'

[80] No exceptional circumstances have been shown as to why this case is different from others other than to state that it is permissible for courts to hear the matter involving the same issues in both criminal and civil courts. Having not been provided with any clear basis on why this court should make the order sought, I have to decline ordering such relief.

Relief against the first respondent

[81] It was contended on behalf of the respondents that the relief against the first respondent must be dismissed because she has no power to do what the applicant seeks in the relief. The first respondent caused summons to be issued against the applicant. The issuing of summons is not being attacked. She has no control over SCOPA and may not interfere in their decisions. She has no power to comply with the relief sought against her. Other than the fact that the first respondent is the senior official responsible for the business of the provincial parliament, it has not been shown that she is able to comply with the relief sought against her by the applicant.

Conclusion

[82] In view of the undertakings made by the second respondent coupled with the fact that any possible re-summonsing of the applicant to attend a hearing before SCOPA is not known, I do not find it necessary to grant the relief sought by the applicant. As to the question of whether the Witnesses Act has been violated, this court is not in a position to grant the declaratory order sought for reasons outlined above.

[83] Both parties asked for costs against each other. Notwithstanding the fact that costs for both parties would ultimately be sourced from the same public purse, none of the parties contended for a no cost order. Both counsel asked for the matter to be dismissed with costs including the costs of two counsel. Mr Budlender

further indicated for the record that he was not involved in the drafting of the heads of argument. For those reasons, I would grant costs in favour of the respondents.

[84] In the result, the following order is made:

1. The application is dismissed with costs, including costs of two counsel to the extent of their employment.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the Applicant: Adv D Potgieter SC with Adv R Nyman

Instructed by: State Attorney, Cape Town

For the Respondents: Adv G Budlender SC with Adv N Bawa SC

Instructed by: Webber Wentzel, Cape Town