

ROBIN VELA

versus

THE AUDITOR GENERAL OF ZIMBABWE N.O.

and

BDO ZIMBABWE CHARTERED ACCOUNTANTS

*(a firm of chartered accountants whose partners are Ngoni Kudenga,
Gladman Sabarauta, Martin Makaya, Gilbert Gwatiringa and Jonas Jonga)*

HIGH COURT OF ZIMBABWE

CHINAMORA J

HARARE, 18 March 2020 & 17 June 2020

Opposed application

Adv T Mpfu with Mr A Rubaya, for the applicant

Mrs F Chimbaru, for the first respondent

Mr J R Tsivama, for the second respondent

CHINAMORA J: **Introduction:** This is an application brought in terms of s3 (1) (a) as read with s4 of the Administrative Justice Act [*Chapter 10:28*] (“the AJA”); as read with ss26 and 27 of the High Court Act [*Chapter 7:06*], together with the common law. The applicant alleges infringement of his fundamental right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair as enshrined in s 68 (1) of the Constitution. The applicant seeks before this court relief sought set out as follows:

“IT IS ORDERED THAT:

1. The forensic audit of the National Social Security Authority [“NSSA”] for the period 1 January 2015 to 28 February 2018 produced on behalf of the Auditor General of Zimbabwe by BDO Chartered Accountants be reviewed and set aside in all those respects that pertain, whether directly and/or indirectly to the applicant.
2. Costs of suit shall be borne by the second respondent on the higher sale of legal practitioner and own client”

The first and second respondents opposed the application. A brief chronology of the events culminating in the present application is provided by way of background.

Background

The facts of the matter are discernible from the affidavits filed by the parties. Where matters are contentious, I have set them out under separate headings. It is common cause, however, that the applicant was board chairman of NSSA from 12 July 2015 to 27 March 2018. When he left, the first respondent appointed the 2nd respondent to conduct a forensic audit of NSSA, which culminated in a report with findings/conclusions some of which relate to the applicant. The report was served on the applicant on 2 August 2019. Subsequently, he was given a questionnaire to which he gave some responses. The applicant advised that his responses to the questionnaire should be read together with the consents of a dossier dated 11 May 2018 and housing transaction supplement (and annexures) dated 16 July 2018, which he had prepared. I will now set out the respective submissions of the parties, beginning with the applicant's case.

The applicant's submissions

The applicant asserted that he was aggrieved by the adverse findings and conclusions relating to him that were made in auditor general's report. In summary, he identifies the matters of concern as follows:

1. Metbank investments were not above board and had yielded losses to NSSA.
2. The off-take agreements were irregular and had resulted in losses to NSSA.
3. The applicant caused agreements between NSSA and Housing Corporation of Zimbabwe (Private) Limited (HCZ) to be concluded, and they caused losses to NSSA.
4. The conduct of interviews for people recruited into senior management was shrouded in mystery, with no accountability.
5. Board fees were overpaid. The report recommended: "*NSSA should seek legal counsel on how to deal with the involvement of the former board chairman in the overpayment of board fees*".
6. The applicant interfered in management issues.

The detailed grounds of challenge

Elaborating the basis of application, the applicant stated that he was unhappy with both the forensic audit's processes and conclusions. The grounds which found the challenge to the report are detailed below:

Acting beyond remit of powers

The applicant asserted that the first respondent exceeded the powers given to her by s9 (2) as read with paragraph 10 of the Sixth Schedule to the Constitution, as read with s2 (1) of the Audit Office Act [*Chapter 22:18*]. He stated the respondent's constitutional function as being to audit accounts, financial systems and financial management of public accounts, and concluded that any audit beyond this remit was unlawful.

The report is not a forensic report

For the applicant, it was argued that public power cannot be exercised for a purpose other than that for which it has been given. Once the decision was made by the first respondent to conduct a forensic investigation, it was that investigation that had to be undertaken. The applicant submitted that, to the extent that none of the people who produced the report are qualified or accredited as forensic investigators, the report is invalid and could not be relied on by the first respondent.

The report is incompetent

The applicant averred that the report was incompetently prepared as it relied on wrong or speculative information. He cited the figure of US\$4,968-00 used to show that board fees were unlawfully paid, yet there was an actual approved sum. Also disputed was the conclusion that board fees were not approved, because some were approved by the permanent secretary and implemented by NSSA's management. In relation to the Africom issue, the applicant disputed the alleged loss to NSSA of \$300,000-00, and said a profit restatement of \$15,5m to NSSA was ignored.

He disagreed with the sum of \$104 million given as potential loss to NSSA on the HCZ issue, as the auditors wrongly assumed that the completed houses would have no takers. He argued that, had he been given a right to be heard, he would have cleared any concerns and obviated reliance on the arbitrary figures. The applicant submitted that conclusions were reached on unjustified comparisons between the HCZ and NBS housing schemes without considering key significant differences. It was contended that a forensic report would have noticed this.

My attention was drawn to the judgment in *Housing Corporation of Zimbabwe (Pvt) Ltd v Zimnat Assurance Company (Pvt) Ltd* HH 579-18, delivered on 22 February 2019. The applicant averred that, the second respondent released the report disregarding that the judgment affects the conclusions in the report. In that case, NSSA had demanded that Zimnat pays it under the performance bond alleging breach by HCZ for failing to deliver housing units in terms of the off-

take agreement. In response, HCZ sought an interdict against the payment on the basis that NSSA's demand was fraudulent as it had delivered some housing units. The interim interdict was granted pending the outcome of arbitration proceedings. In due course, an award was made to HCZ.

In light of the High Court judgment and subsequent arbitral award, the applicant contended that no basis, other than incompetence and malice, existed for the second respondent's negative finding and conclusion. The applicant complained that the report was never updated to reflect the judgment and the award. In addition, he asserted that no evidence was shown of any meeting between him and HCZ representatives to substantiate the conclusion that he caused the agreements between NSSA and HCZ to be concluded.

Contrary to the conclusion that HCZ was a week old company which had obtained a US\$304 million contract without tender, the applicant argued that it was a subsidiary of Housing Africa Corporation (HAC). He added that HAC approached NSSA as early as February 2017, and that HAC incorporated HCZ as a special purpose vehicle for its housing projects in Zimbabwe.

Bias on the part of the auditors

The applicant averred that questions put to him via a questionnaire were framed in a biased way. When he provided answers, he submitted that no reasons were given in instances where the auditors disagreed with him. He argued that his responses were either ignored or his explanations not followed through. Additionally, the applicant stated that no attention was paid to 3 dossiers of information that he provided, without any reasons for ignoring them. He argued that the process was tainted and compromised and that his answers were not considered, and he surmised that this was because they did not tally with the auditors' desired outcome. The applicant argued that the information he provided confirmed there was board approval for the projects allegedly not properly approved. He added that collective responsibility was taken by the board, as appears from supporting minutes and e-mail correspondence. If his explanations been taken into account, the applicant stated that they would have affected the conclusions arrived at in the report.

He also highlighted the undesirability of Mr Kudenga's continued involvement in the audit despite attacks on him by a member of parliament since he was owing the applicant money. The applicant argued that the allegation of bias or its likelihood made it imperative for Mr Kudenga to recuse himself from the audit process. The argument continued that everything he did beyond the point that he should have recused himself is invalid.

To demonstrate the second respondent's double standards or discriminatory approach, the applicant referred the court to notable events which happened during the period covered by the audit. These are as follows: former minister, Ms Petronella Kagonye, against resolutions of NSSA and NBS boards, appointed one Lameck Danga as managing director of NBS, after coming second in the interviews. He pointed out that the report did not criticize Ms Kagonye for this. The second one relates to the permanent secretary, Mr Ngoni Masoka, who directed Mr Danga's salary to be paid at a rate higher than that of his seniors in NSSA. Again, the applicant argued that the report did not condemn this. A third one involves an amount of US\$598,000-00 ascribed to cost of "unfair dismissals" in the report. The applicant stated that the report omitted to mention that former minister, Mr Patrick Zhuwao, forced NSSA, against a board resolution, to pay a Mr Chikuni Mtiswa the sum of US\$400,000-00. Next is the issue of Ms Petronella Kagonye who forced the termination of Mr David Makwara's contract of employment as general manager of NSSA on the ground that he was too close to the applicant. He complained that the losses arising from these decisions were unjustifiably blamed on the applicant.

The additional case involved Ms Petronella Kagonye forcing NSSA to sponsor a sum of US\$200,000-00 to a disability conference in her Caledonia constituency, and another US\$200,000-00 to a school in Ruwa before the 2018 elections. The applicant lamented that the auditors did not criticize the minister for the abuse of pensioners' funds for "vote buying" for a private benefit. A final issue raised by the applicant is that the report unfairly criticized him for decisions taken before he joined NSSA. As further proof of bias, he protested that the report incorrectly ascribes to him loss of US\$4 million in a debt swap deal involving Metbank's property, and US\$2 million through properties bought from Metbank at inflated prices before his appointment.

The applicant argued that the second respondent was not an impartial auditor and drew the court's attention to the agreement letter dated 15 May 2018 where the following appears:

"We understand that the results of our work may be used in disciplinary hearings or criminal proceedings. If you wish to retain us as an expert witness in connection with this matter, those services will be billed separately based on the actual time spent at our standard hourly charge out rates".

If the second respondent was a neutral auditor, the applicant wondered how it would give objective testimony in any subsequent proceedings arising out of the report.

Inaccurate and inconsistent report

The applicant contended that the report is inaccurate to the extent that it alleges that some investments were made without board approval. He referred to a board resolution of September 2012 which authorized management to implement decisions of the Board Investment Committee. Additionally, he submitted that the report was inconsistent, particularly, with regard to the HCZ issue where it gave loss figures varying from US\$16 million to US\$104 million then to US\$304 million. He argued that, at any rate, the amount of US\$16 million paid by NSSA to HCZ was secured by a Zimnat insurance guarantee of US\$16 million and a land bond of US\$32 million.

The applicant stated that the board's view was that offtake agreements did not require to go through a tender board, and a Mr Charles Nyika employed to ensure compliance with procurement regulations did not raise any alarm. He therefore argued that the suggestion that he pushed the projects without tender approval was malicious. The applicant also denied authorizing Metbank to utilize US\$37.75 million of NSSA treasury bills in their custody, since the authority was granted in the name of the General Manager, Ms Liz Chitiga, but a letter in her name had been signed by her Executive Assistant, Mr James Chiuta. Even so, he submitted that the criticism was unwarranted since NSSA had the Reserve Bank of Zimbabwe clearance on the good standing of Metbank.

Conflict between the Auditor General and the Accountants

The applicant submitted that the auditors' findings conflict with the first respondent's earlier work. In this regard, the applicant contended that if a loss of US\$104 million existed, it would have been flagged in the December 2018 results as a contingent liability and published in her annual report. The argument continues that, the second respondent's figure is arbitrary and false.

The respondents' submissions

The respondents raised some points *in limine*. The first is that the report was not a decision, but contained factual findings and, consequently, was not reviewable. Secondly, it was argued that the second respondent was not an administrative authority whose decision can be subject to judicial review. It was further argued that the grounds relied on by the applicant did not constitute grounds for review contemplated by s27 of the High Court Act. On its part, the second respondent submitted that the application did not comply with r257 insofar as the grounds of review were not stated in the application but in the founding affidavit. It further contended that no adverse action has been

taken against the applicant on the basis of the report and, as such, the process leading to the issuance of the report is not reviewable.

A further preliminary point raised was that there had been a material misjoinder of the second respondent as it was a private party which had been engaged by the first respondent. It denied exercising any public power and should not have been joined to the proceedings as it was a mere agent of the first respondent who was the principal. The second respondent argued that it was not covered by the definition of administrative authority in s2 (1) of the AJA, and urged the court to dismiss the application. Thus, the respondents urged the court to dismiss the application on those preliminary points.

In respect of the merits, the first respondent submitted that it had no knowledge of the averments set out in the applicant's detailed grounds of challenge. Regarding the attack on the forensic investigation process, the first respondent deferred to the second respondent "*as the party better placed to respond*". She stated that the audit process was conducted lawfully and that no valid basis existed for setting aside the report. The first respondent asserted that it was NSSA which was being audited and not the applicant. Additionally, it contended that the applicant's remedy lay in suing for damages for defamation if he perceived that the report unfairly cast him in bad light.

The second respondent denied that there was anything irregular, unreasonable, incompetent, biased, malicious or unfair about the report. It maintained that it exercised its discretion reasonably when it dealt with information received from the applicant and others implicated in the audit. With respect to the contract of US\$304 million, the second respondent argued that its magnitude required that it should have gone to tender. On the issue of board fees, the second respondent submitted that it had no reason to take into account an increase which had been improperly approved by the permanent secretary at the instance of the applicant.

In conclusion, the second respondent urged the court to dismiss the application as it had carried out its mandate in terms of its brief from the first respondent, arguing that the report was factual and impartial.

Issues for determination

The issues that confront this court for determination are as follows:

1. Whether, when the second respondent acted under the authority of the Auditor General, it exercised administrative or public power.

2. Whether the forensic investigation constitutes reviewable action/conduct or decision.
3. Whether grounds for review exist

The relevant law

It is not in doubt that in terms of s26 of the High Court Act, this court has power to review proceedings and decisions of inferior courts, tribunals and administrative authorities. The grounds upon which a review may be brought are set out in the High Court Act, in particular, s27 thereof which, in the relevant part, reads:

“27 Grounds for review

- (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be –
 - (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
 - (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
 - (c) gross irregularity in the proceedings or the decision.
- (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities.”

See *Ndlovu N.O. v CBZ Bank & Anor* SC 27-17

Essentially, the applicant’s complaint is that there were gross irregularities in the manner the forensic investigation was carried out by the first respondent acting through the auditors she had appointed. The appropriate place to begin is the Constitution which, through s68 (1), entitles everyone to just administrative action which is carried out in a lawful, reasonable and procedurally fair manner. The section, *inter alia*, provides:

“68 Right to administrative justice

- (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
- (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct”.

The constitutional right enshrined in s68 (1) has been mirrored and given effect in terms of the AJA. Thus, s3 (1) of the AJA provides that an administrative authority which takes action which may affect the rights, interests or legitimate expectations of any person shall act lawfully,

reasonably and in a fair manner and give reasons for its action. Section 3 (2) merits quoting in *extenso*, as it states:

“(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1) –

- (a) adequate notice of the nature and purpose of the proposed action; and
- (b) a reasonable opportunity to make adequate representations; and
- (c) adequate notice of any right of review or appeal where applicable”.

In addition, section 4 of the AJA provides:

“4 Relief against administrative authorities

- (1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief.
- (2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate—
 - (a) confirm or set aside the decision concerned;
 - (b) refer the matter back to the administrative authority concerned for consideration or reconsideration;
 - (c) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
 - (d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
 - (e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*.
- (3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provision”.

It is not debatable that there is adequate authority for this court to deal with this application.

Analysis

Whether BDO Accountants exercised administrative power

I identified the first issue for determination as whether, when the second respondent acted under the authority of the Auditor General, it exercised administrative or public power. In dealing with this application, I have to define the legal status of the second respondent vis-à-vis the audit process. It is only through doing so that the jurisdiction of this court is engaged. I am mindful of the point in *limine* challenging this court’s jurisdiction. The first respondent’s functions are set out in 309 (2) of the Constitution as follows:

“2. The functions of the Auditor-General are--

- (a) to audit the accounts, financial systems and financial management of all departments, institutions and agencies of government, all provincial and metropolitan councils and all local authorities;
- (b) at the request of the Government, to carry out special audits of the accounts of any statutory body or government-controlled entity;
- (c) to order the taking of measures to rectify any defects in the management and safeguarding of public funds and public property; and
- (d) to exercise any other functions that may be conferred or imposed on him or her by or under an Act of Parliament”.

As an agency government, NSSA is subject to audit by the first respondent. By virtue of s8 (1) of the Audit Office Act, the first respondent’s powers can be delegated. Section 9 permits the first respondent to carry out contracted audits, which are defined as follows:

“9 Contracted audits

- (1) The Comptroller and Auditor-General may, by notice in the Gazette, appoint a person registered as a public auditor in terms of the Public Accountants and Auditors Act [*Chapter 27:12*] to inspect, examine and audit the accounts, records or stores that are required by this Act or by any other enactment, to be inspected, examined or audited by the Comptroller and Auditor-General and report the results of the inspection, examination or audit.
- (2) The person appointed in terms of subsection (1) may carry out an economy, efficiency and effectiveness audit of the operations, or specified operations, of a designated statutory body, and report the results of the audit to the Comptroller and Auditor-General”.

It is common cause that the second respondent was contracted to carry out an audit of NSSA under the statutory framework described above. In this regard, the AJA defines administrative authority to include:

“(d) any other person or body authorized by any enactment to exercise or perform any administrative power or duty; and who has the lawful authority to carry out the administrative action concerned”.

From the foregoing framework, I find it beyond argument that the second respondent performed a public function and made findings and recommendations in this regard. It follows that by carrying out the forensic audit, the second respondent fell squarely within the definition of administrative action contemplated by the AJA. It can hardly be open to dispute that the decision to recommend vested in the second respondent, while the decision to accept the recommendations lay with the first respondent. However, what is particularly relevant to the issue before me was articulated in *Adv Mpofu’s* submission that upon being adopted, ownership in the recommendations shifted to repose in the first respondent. Once that happened, it is naïve of the auditors or the Auditor

General to deny that the second respondent effectively exercised administrative power. I dismiss the point *in limine* raised for lack of merit.

Whether the audit constitutes reviewable action/conduct or decision

The second issue was whether the audit constitutes reviewable action/conduct or decision. This question cannot be answered without looking at the architecture of s3 (1) and (2) of the AJA. Those provisions make it evident that the exercise of public power should not be arbitrary, but must conform to the principles of legality, fairness and reasonableness. I agree with Adv *Mpofu*'s submission that what is reviewable is not merely a decision of an administrative body, but administrative action. There are a number of cogent reasons which render it a woeful folly to conflate administrative action with administrative decision.

Firstly, s2 (1) of the AJA is clear that the two concepts are different, and should be so treated, since it defines "administrative action" to mean any action taken or decision made by an administrative authority. Clearly, the use of the elective conjunction suggests that this court can review either an action or a decision of an administrative functionary. Secondly, it is instructive to consider the purpose of the AJA, whose preamble provides a clue to why action and decision should neither be confused nor be used interchangeably. It is in the following terms:

"AN ACT to provide for the right to administrative action and decisions that are lawful, reasonable and procedurally fair; to provide for the entitlement to written reasons for administrative action or decisions; to provide for relief by a competent court against administrative action or decisions contrary to the provisions of this Act; and to provide for matters connected with or incidental to the foregoing". [My own emphasis]

That this court can examine the purpose of legislation to aid statutory interpretation has judicial precedent. NCOBO J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 89 eloquently stated the position thus:

"... the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background." [My own emphasis]

Thirdly, s68 (1) of the Constitution, though using the word “conduct”, confirms that action is different from, and was not intended to mean decision. It provides that every person has a right to lawful, prompt, efficient, reasonable, proportionate, impartial and procedurally fair “administrative conduct”. Similarly, s68 (2) gives anyone who has been adversely affected by “administrative conduct” the right to be given reasons in writing for such conduct. The word decision was avoided (I dare say, deliberately), buttressing the argument that a decision *per se* is not a *causa sine qua non* for the remedy of judicial review to be tenable. Fourthly, the Constitution provides a further rationale for not construing action to mean decision, and s46 (2) is a must read. It is couched as follows:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or body must promote and be guided by the spirit and objectives of this Chapter”.

It must be borne in mind that s46 (1) enjoins this court to give full effect to the rights and freedoms enshrined in this Chapter. It follows, in my view, that the best way to achieve this is to interpret the definition of “administrative action” in the AJA in a way which does not subsume action and decision into one. Such an approach would enhance the process of review by not confining it to decisions to the exclusion of examining the process and actions taken in the lead up to those decisions. In fact, the use of the formulation “administrative conduct” as opposed to decision, in s68 of the Constitution, makes it imperative for a wider interpretation to be given. In this respect, the Cambridge English Dictionary defines “conduct” as meaning “to organize and perform a particular activity”, while the Collins English Dictionary has a similar meaning.

At any rate, this issue was settled in the South African case of *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA), which held that recommendations constitute administrative action which remains valid until reviewed and set aside. In the jurisprudence of this court, the *obiter dicta* remarks in *Kazingizi v Dzinoruma* HH 106-06, are persuasive as MAKARAU and PATEL JJ (as they then were), appositely stated:

“The integrity of the order lies in the procedure used to reach that order and the reasoning employed to opt for that particular result.”

In view of the foregoing, contrary to the position taken by the respondents, my view is that the forensic investigation undertaken by the second respondent and report produced by that exercise are reviewable. Accordingly, the preliminary objection has no basis and is dismissed.

Whether grounds for review exist

The question that must now be resolved is whether valid grounds for review have been established. I will now examine the grounds advanced in the application, but not in any particular order. The applicant submitted that the second respondent was not neutral and that the lack of impartiality affected its approach to the audit. If substantiated, this issue is material to the credibility and validity of the entire forensic investigation and findings culminating from that process. I turn to the letter of engagement signed between the Auditor General and the auditors on 15 May 2018. While the second respondent asserted that it was an impartial auditor, in that letter it intimates willingness to testify for a fee in criminal proceedings or disciplinary hearings which might arise from the report it prepared. That caused me concern.

It is trite law that one need not establish actual bias but an appearance of bias. This was the test set by Supreme Court, in *Leopard Rock Hotel (Pvt) Ltd v Wallen Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 273G-H and 274 A-C. In *Foya & Mutimba v R & Jackson N.O.* 1963 R & N 318 (FS), it was stated that:

“... what the applicants had to show was not necessarily personal animosity towards them. If they showed that the position was such that a reasonable man in their position would have thought that he would not have a fair trial in the circumstances and that there was nothing in further acts disclosed to indicate that there was not a real likelihood that would be enough”.

I note that the engagement letter suggests an understanding between the parties that the audit may result in disciplinary or criminal action being taken. Thus, a reasonable person in the position of the applicant would be forgiven for thinking that the auditors were compromised as they were essentially touting for business relating to proceedings to future proceedings to either prosecute him or dismiss him from his job.

The applicant did not end there. He argued that the second respondent displayed bias against him in that the audit report is silent on cases of abuse of NSSA funds by former ministers Petronella Kagonge and Patrick Zhuwao. He submitted that the discriminatory approach was a manifestation of bias in the investigation. I observe that these specific allegations by the applicant were not

answered, the second respondent (in para 42 of its opposing affidavit) preferring to provide the following reply:

“Some issues picked by the applicant herein were clearly outside the scope of our mandate although they in the same vein do come across to me as an indirect admission by the applicant of not following laid down procedures just like the individuals he refers to. Be that as it may, since this fell outside our instructions, it may probably be of interest to the first respondent in respect of other proceedings, not necessarily investments, which is what we had been tasked to deal with”.

I must say that I find the above response disingenuous (if not, dishonest). An examination of the terms of reference contained in Attachment “A” to the engagement letter does not support the stance adopted by the second respondent. It is obvious that the audit extended to human resources and “*any other issue that may arise*”. Indeed, the issue of board fees and promotions to senior positions which the audit dealt with are not investment matters. It is apparent that the allegations were not denied. More relevantly, the auditors did not say that the issues did not come to their attention. Rather, their attitude was that they were not part of their remit, so they had no business looking at them. I find that somewhat cavalier. Consequently, the failure to address this complaint seriously undermines the second respondent’s claim (in para 48 of Opposing Affidavit) that:

“Applicant seems to miss the point that this is an impartial report which states facts supported by evidence. It is not meant to celebrate individual victories or punish individual mistakes. This is an audit of an organization”.

The law is clear on the consequences of failure to deny a specific allegation of fact. For the avoidance of doubt, an unrefuted allegation is taken as having been admitted. See *Fawcett Security Operations v Director of Customs & Excise* 1993 (2) ZLR 121 (SC).

Not addressing the alleged financial indiscretions of ministers Kagonye and Zhuwao necessarily means that the differential treatment of the applicant and these officials remained un rebutted. The circumstances which implicate a breach of s56 of the Constitution have been the subject of discussion by the Constitutional Court in this jurisdiction. In this context, in *Nkomo v Minister of Local Government, Rural & Urban Development & Ors* 2016 (1) ZLR 113 (CC) at 118H-119B by ZIYAMBI JCC (as she then was) asserted:

“The right guaranteed under s 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application

of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons.”

Inevitably, I am satisfied that the applicant has established that there was unequal treatment between him and the ministers. In the absence of a rational explanation or the differentiated treatment, is inescapable to conclude that the applicant established the ground of bias.

Further, the question of alleged inflated payments in respect of Metbank properties and loss of US\$4 million in a corrupt debt swap deal was not addressed. The applicant’s complaint was that the inflation of prices and swap arrangement had nothing to do with him as he had not joined NSSA when this occurred. No cogent reason was given for not providing an answer. In face of such a damning indictment, the following response (in para 44 of the second respondent’s opposing affidavit) is dumbfounding:

“The challenge bewitching the applicant is that he is taking this report personally. This is a wrong approach. As highlighted before, this report is not a personal attack on the applicant nor directed at him. The report is an audit of NSSA for the period set in the mandate and it is simply backed by evidence”.

Quite clearly, the allegation called for a rebuttal beyond glossing over it. After electing not to dispute the averment which can be paraphrased; “*I did not do it as I was not there*”, I can see no conceivable basis for the second respondent to depose that the report was backed by factual evidence. On the principle that what is not denied is deemed to have been conceded, the applicant’s claim would carry the day. This court is compelled to make one of a few inferences. Either the auditors were biased against the applicant, or they did not apply their mind to the facts before them when conducting their forensic audit. On the extreme end, the court is compelled to conclude that it was case of incompetence. This issue has previously confronted this court. In *Ramilewa v Secretary of the Public Service Commission* 1988 (1) ZLR 257 (H) at 262 B-F; GREENLAND J quoted with approval from *SA Defence and Aid Fund and Anor v Minister of Justice* 1967 (1) SA 31 (C), where Corbett J at 34H-35D CORBETT J (as he then was) said:

“The court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter. See eg *Minister of the Interior v Bechler and Others supra*

[1948 (3) SA 409 (A)]; *African Commercial and Distributive Workers' Union v Schoeman NO and Another* 1951 (4) 266 (T); Sachs 1953 (1) SA 392 (A).”

In *casu*, no plausible reason has been availed for making a finding of fact or conclusion without an evidential foundation. The second respondent had all the facts before it, more so, relating to NSSA’s investments. It is simply unreasonable and irrational to make that kind of conclusion. In my view, reasonable administrative action is intrinsically linked to the principle of rationality. I can do no better than agree with the learned author, Cora Hoexter, in *Administrative Law in South Africa*, (1st ed) at 307, who gives the meaning of rationality as follows:

"This means in essence that a decision must be supported by the evidence and information before the administrator as well as the reason given for it. It must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken."

This means that an administrative decision which has been taken on an accurate factual basis is both unreasonable and irrational. In other words, if the decision has been made in ignorance of the true facts material to that decision or not considering relevant material, such a decision is reviewable. Whichever inference this court makes, it establishes a gross irregularity within the contemplation of s27 (1) (c). I therefore find that the applicant has established this ground of review.

Assuming that the second respondent chose to reject the position put across by the applicant in the questionnaire, at the very least, reasons ought to have been given for such a stance. See *Kazingizi v Dzinoruma supra*, where MAKARAU and PATEL JJ aptly proffered the rationale for providing reasons:

“The absence of reasons for the judgment gave great cause for concern. It is trite that very trier of fact has to give reasons for his or her decision. A judicial decision that is not explained easily lends itself to criticisms of being arbitrary and/or capricious. Where the litigants have presented their competing facts and arguments before the trial court, they have a legitimate expectation to know whether their version of facts and their argument have been received and if not, why...One could very well argue that the failure to give reasons for judgment is a gross misdirection on the part of the trial court and one that vitiates the order given at the end of the trial...The integrity of the order lies in the procedure used to reach that order and the reasoning employed to opt for that particular result.”.

I endorse the self-compelling logic of this judgement and respectfully state that it applies with equal force to administrative decision-making. Reasons are invariably linked to the concept of rationality. I take the view that a finding or a decision will be considered to be reasonable when there is a material connection between the evidence and the result. Such a connection is explained in the decision maker’s reasons. Also worth mentioning is that the apparent out of hand rejection of the

applicant's answers in the questionnaire effectively means that he was denied the right to be heard in violation of the rights guaranteed by s3 of the AJA. In this respect, PATEL JA succinctly explained what constitutes acting in a fair manner in *Attorney-General v Leopold Mudisi & Ors SC 48-15*, in the following terms:

“The obligation to act in a fair manner is further expanded in s 3 (2) of the [Administrative Justice] Act to require the giving of “adequate notice of the nature and purpose of the proposed action” and “a reasonable opportunity to make adequate representations” as well as “adequate notice of any right of review or appeal where applicable”.

In light of the conduct exhibited by the second respondent above, the applicant did not get a fair hearing in breach of his rights. This obviously triggers his right of review in terms of s 27 (1) (c) of the High Court Act.

Finally, I would add that insofar as the integrity of the order lies in the procedure used to reach that order, it cannot be gainsaid that the process giving rise to an executive decision is reviewable. The point *in limine* that there are no grounds for review has no foundation and is dismissed.

Conclusion

As I have found that they the investigation leading to the report was biased and that the auditors did not apply their minds to issues before them, I do not propose to deal in detail with the other grounds raised by the applicant. At any rate, I believe that they have been sufficiently covered in my judgment. It is worth emphasizing that the inaccuracies in the report speak to failure to apply one's mind to the issues for determination before it.

In respect of costs, the conduct of the second respondent warrants censure. The record shows that it was within its power to eliminate some of the failures which undermined the applicant's rights. For example, the period the applicant joined the NSSA board could have been easily verified from information in its possession. Again, it would not have been difficult to consider the answers given by the applicant and provided reasons for discounting them. In respect of the alleged financial improprieties of ministers Kagonye and Zhuwao, the court is not convinced by the reason given for not confronting them in the report. It is evident to me that they fell within the second respondent's brief, but were unexplainably avoided. In the exercise of my discretion, I have decided to award punitive costs against the second respondent. As no costs were sought against the first respondent, I will grant the order as prayed in the draft order.

Disposition

The Court is empowered in terms of section 28 of the High Court Act to issue a range of orders if it is satisfied that the conduct complained of falls foul of the provisions of the Administrative Justice Act or the Constitution.

In the result, I make the following order:

IT IS ORDERED THAT:

3. The forensic audit of the National Social Security Authority [“NSSA”] for the period 1 January 2015 to 28 February 2018 produced on behalf of the Auditor General of Zimbabwe by BDO Chartered Accountants be reviewed and set aside in all those respects that pertain, whether directly and/or indirectly to the applicant.
4. Costs of suit shall be borne by the second respondent on the higher scale of legal practitioner and client scale.

Rubaya & Chatambudza, applicant’s legal practitioners
Civil Division of the Attorney General’s Office, first respondent’s legal practitioners
Sawyer & Mkushi, second respondent’s legal practitioners