

PRACTICAL IMPLICATIONS

Audi Alteram Partem

To share or not to share?

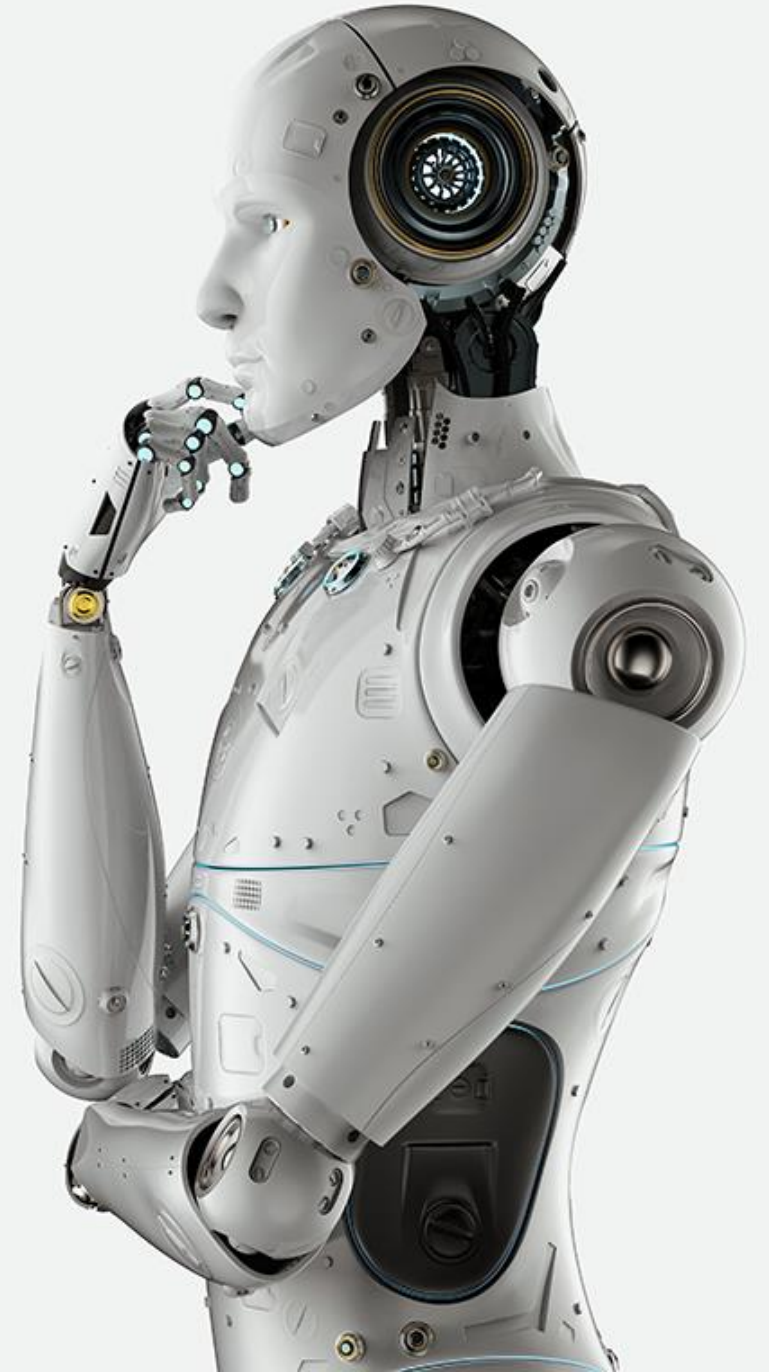
Zaakir Mohamed, Director
Head of Corporate Investigations & Forensics
August 2022



Overview

Overview

- ❑ Introduction
- ❑ Audi Alteram Partem
- ❑ Legal Privilege / Confidentiality
- ❑ Recent judgments
- ❑ What does this mean for investigations?
- ❑ Questions



The background features a vibrant, abstract pattern of wavy, flowing lines. The colors transition from deep blue on the left to bright yellow and orange on the right, with a spectrum of intermediate colors including teal, green, and red. The lines have a glossy, metallic appearance, creating a sense of movement and depth.

Introduction

Introduction

- Conducting a meaningful investigation requires
 - careful consideration of initial set of facts
 - understanding purpose of investigation
 - appropriate methodology to be used
 - attention to detail
 - being impartial and objective
 - constant application and thought given to procedures being performed
 - maintaining highest levels of integrity and ethical behaviour
 - ensuring procedures performed beyond reproach
- Procedures performed must be fair
- Findings must be substantiated



Introduction

- Numerous challenges may be faced during and after investigation
- Key considerations relevant to investigations:
 - when is a forensic report legally privileged?
 - am I required to share the forensic report with any third party?
 - do I have an obligation to share my report with an implicated party?
 - do I have an obligation to interview an implicated party? What happens if I don't?
- Integrity of process may be called into question if these considerations not understood





Audi Alteram Partem

Audi Alteram Partem

- Means
 - listen to the other side
 - let the other party be heard
- Considered to be one of the basic theories of natural justice
- Essentially
 - gives right to parties – no party shall be condemned unheard
 - any decision taken without listening to both parties considered to be against principles of natural justice
 - promotes objective and informed decisions
 - implies that person must be given opportunity to argue case



Audi Alteram Partem

- Natural justice
 - essence is fair adjudication
 - purpose is prevention of miscarriage of justice
- *Audi Alteram Partem* rule entails four principles
 - party to administrative enquiry afforded opportunity to state case before decision is made if decision likely to affect rights or legitimate expectations
 - prejudicial facts communicated to party who may be affected by administrative decision so that party can rebut such facts
 - administrative body making decision must give reasons for decision
 - administrative body must be impartial



Audi Alteram Partem

Du Preez v Truth and Reconciliation Commission 1997 3 SA 204 (A)

- Referred to *Re Pergamon Press Ltd* 1970 3 All ER 535 (CA) 539A-F
 - Court concerned with procedures in investigative enquiry conducted by inspectors in terms of Companies Act
 - Directors claimed that inspectors should conduct inquiry same as if it were judicial inquiry in court of law



Audi Alteram Partem

Du Preez v Truth and Reconciliation Commission
1997 3 SA 204 (A)

- Referred to *Re Pergamon Press Ltd* 1970 3 All ER 535 (CA) 539A-F
 - Lord Denning MR

"...It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings ... They are not even quasi-judicial for they decide nothing; they determine nothing. They only investigate and report. They sit in private ... But this should not lead us to minimise the significance of their task. They think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal proceedings or to civil actions ... Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly."



Audi Alteram Partem

What about precautionary suspensions?

- No requirement in law that employee be heard before being placed on precautionary suspension
- Suspension is precautionary, not punitive
- What is required?
 - ongoing investigation
 - suspension seeks to protect integrity of process
(see *Long v South African Breweries (Pty) Ltd and Others*, Case no CCT61/18, 19-1-2019)
- Employer required to hear representations if obligation found in
 - employment contract
 - employer's policy
 - collective agreement
 - government regulation





Legal Privilege / Confidentiality

Legal Privilege / Confidentiality

- Doctrine of legal professional privilege often misunderstood
- Sometimes confused with confidentiality
 - documents/information subject to confidentiality not necessarily legally privileged
 - confidentiality component of privilege – does not establish privilege in its own right
- Important consideration in relation to investigations and possible disclosure of investigation reports
- Reliance on legal professional privilege on investigation reports sometimes misplaced



Legal Privilege / Confidentiality

- Why is it important?
 - clients seeking legal advice in confidence – full disclosure of facts
 - forced disclosure undermines administration of justice
- Legal professional privilege
 - legal advice privilege
 - litigation privilege



Legal Privilege / Confidentiality

- *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (CCT 89/07, CCT 91/07) [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (31 July 2008) at 184

“The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial in terms of section 35 of the Constitution, and for that reason it is to be taken very seriously indeed.”

Legal Privilege / Confidentiality

- *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (CCT 89/07, CCT 91/07) [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (31 July 2008) at fn124

“See Schwikkard et al Principles of Evidence (2ed) (Juta, Cape Town 2002) 135-7 where the requirements are set out as follows: The legal advisor must have been acting in a professional capacity at the time; the advisor must have been consulted in confidence; the communication must have been made for the purpose of obtaining legal advice; the advice must not facilitate the commission of a crime or fraud; and the privilege must be claimed.”

Legal Privilege / Confidentiality

- Key features of legal professional privilege
 - Right of privilege belongs to client only
 - Client must claim it
 - Only client can waive it
 - Waiver can be express or by implication
 - Does not extend to non-lawyers
 - Does not apply when advice is sought for fraudulent / criminal purpose



Legal Privilege / Confidentiality

- Difference between privilege and confidentiality?
 - Privilege fundamental right afforded to litigants as means of resisting disclosure of sensitive and confidential material / information
 - Confidentiality broader concept
 - Contractual confidentiality between parties
 - Nature of information inherently makes it confidential e.g. confidential proprietary information of company
- Marking something as “legally privileged” doesn’t necessarily make it so





Recent Judgments

Recent judgments

Mamphe Daniel Msiza / Advocate Terry Motau SC (N.O) and The Prudential Authority of the South African Reserve Bank (Case number: 78587/2018)

- Applicant sought to review, set aside and have declared as prejudicial and unconstitutional, adverse findings made against him
- Primary issue
 - whether findings, remarks and conclusions subject of complaint reviewable under Constitution and PAJA
 - basis that adverse findings made without affording opportunity to be heard



Recent judgments

Mamphe Daniel Msiza / Advocate Terry Motau SC (N.O) and The Prudential Authority of the South African Reserve Bank (Case number: 78587/2018)

- First respondent's mandate
 - investigate certain allegations of impropriety in VBS Bank
 - investigative powers conferred in terms of sections 136 and 139 of Financial Sector Regulation Act No 9 of 2017 (FSR Act)
- Required to establish whether or not
 - business was conducted to defraud depositors or any creditors of the bank or any other fraudulent conduct
 - VBS' business conduct involved questionable and/or reckless business practices or material non-disclosure, with or without the intent to defraud depositors and other creditors
 - there had been irregular conduct by VBS shareholders, directors, executive management, staff, stakeholders and/or related parties



Recent judgments

Mamphe Daniel Msiza / Advocate Terry Motau SC (N.O) and The Prudential Authority of the South African Reserve Bank (Case number: 78587/2018)

- During course of investigation
 - interviews conducted
 - documents analysed
 - data stored on mobile phones and computers analysed
 - financial transactions and bank statements of those implicated in misappropriation of funds analysed
 - documents obtained during search and seizure at VBS' offices and branches analysed



Recent judgments

Mamphe Daniel Msiza / Advocate Terry Motau SC (N.O) and The Prudential Authority of the South African Reserve Bank (Case number: 78587/2018)

- Applicant's contentions
 - sections 136 to 140 of FSR Act intended to ensure fairness in investigation
 - obliged first respondent to observe rules of natural justice and afford implicated individuals opportunity to be heard
 - reference to him as 'kingpin' who has 'facilitated bribes to municipal officials with no 'shred of empirical evidence' infringed constitutional right to freedom of trade as a businessman
 - first respondent
 - failed to observe *audi alteram partem* rule
 - failed to ensure he was treated procedurally fairly
 - was biased against him
 - had he been approached, he would have co-operated to give explanations



Recent judgments

Mamphe Daniel Msiza / Advocate Terry Motau SC (N.O) and The Prudential Authority of the South African Reserve Bank (Case number: 78587/2018)

- Respondents' contentions
 - investigation was preliminary step which did not attract legal consequences
 - section 136 of FSR Act did not oblige investigator to interview every person mentioned or implicated
 - applicant failed to prove that failure to afford him a hearing rendered findings and impugned statements irrational
 - merely recommendations that further investigation had to be conducted
 - failure to afford applicant hearing did not infringe constitutional rights
 - applicant does not have general right to be heard
 - general misconception that requirement of natural justice to afford interested parties right to be heard during investigation



Recent judgments

Mamphe Daniel Msiza / Advocate Terry Motau SC (N.O) and The Prudential Authority of the South African Reserve Bank (Case number: 78587/2018)

- Judgment

"... it is important in the interests of justice to extend the principle of the rule of law and rules of natural justice even to those individuals who are suspected like in this instance of wrongdoing by the investigator, being the individual's right to be heard before adverse findings, remarks and conclusions are made in investigations such as the one envisaged in sections 136 and 137 of the FSR Act. There is no merit whatsoever in the argument that the affected individual shall have the opportunity in proceedings which might be engaged in the future to clear his or her name; or that he or she may have recourse to a claim for damages." (at 53)



Recent judgments

Mamphe Daniel Msiza / Advocate Terry Motau SC (N.O) and The Prudential Authority of the South African Reserve Bank (Case number: 78587/2018)

- Judgment

"...An investigator in the position of the first respondent, was in my view obliged to ensure that the rule of law, the rules of natural justice were observed as provided for in section 33 of the Constitution and section 3 of PAJA. It is a duty placed on him as the investigator even if the Authority would not have implemented any of his recommendations after receiving his report." (at 54)

"In my view where an investigator knows or is expected to foresee that his findings, remarks and conclusions will have consequences for the party on whose behalf an investigation is conducted and for the party against whom findings will be made, he is obliged to listen to both sides and, the party who is likely to be affected by adverse finding is entitled to demand the right to be heard before an adverse remark or finding conclusion or decision is made against him or her." (at 55)

Recent judgments

Mamphe Daniel Msiza / Advocate Terry Motau SC (N.O) and The Prudential Authority of the South African Reserve Bank (Case number: 78587/2018)

- Order
 - Adverse findings, remarks and conclusions in paragraphs 72, 73, 80, 81 and 90 reviewed and set aside
 - First respondent's failure to afford applicant right to procedural fairness (*audi*) prior to release of report unlawful and unconstitutional and violated applicant's right in terms of section 34 of Constitution



Recent judgments

Tiso Blackstar Group (Pty) Ltd and Others / Steinhoff International Holdings N.V (Case No 18706/2019)

- Application for access to forensic report held by Steinhoff
- Brought in terms of Promotion of Access to Information Act No 2 of 2000 (“**PAIA**”)
- Background
 - Investigation concluded during February 2019 and report handed over during March 2019
 - 28 March 2019, Tiso requested access to report in terms of PAIA
 - 26 April 2019, Steinhoff refused PAIA request: relied on legal privilege
 - 2 September 2019, amaBhungane requested access to report in terms of PAIA
 - 30 September 2019, Steinhoff refused PAIA request: relied on legal privilege



Recent judgments

Tiso Blackstar Group (Pty) Ltd and Others / Steinhoff

International Holdings N.V (Case No 18706/2019)

- Both Tiso and amaBhungane identified right they sought to exercise or protect in seeking report was right to freedom of expression which right includes freedom of the press and other media as well a freedom to receive or impart information or ideas (section 16 of Constitution)
- Court held that right to freedom of expression among rights which would entitle requester to records held by private body
- Refusal to provide report limited applicants' rights to freedom of expression
- Relevant enquiry was whether such limitation justified in terms of section 67 of PAIA



Recent judgments

Tiso Blackstar Group (Pty) Ltd and Others / Steinhoff International Holdings N.V (Case No 18706/2019)

- Steinhoff claimed litigation privilege as basis for refusal of access
- This required Steinhoff to establish that report was obtained/brought into existence for purpose of submitting it for legal advice in respect of litigation either pending or contemplated as likely at the time
- Court found that there were no facts placed before the court to support assertion that litigation was in contemplation at time of appointment of PwC



Recent judgments

Tiso Blackstar Group (Pty) Ltd and Others / Steinhoff International Holdings N.V (Case No 18706/2019)

- Order
 - Decision of Steinhoff refusing Tiso and amaBhungane's PAIA request set aside
 - Steinhoff directed to supply each with a copy of report within 10 days of order





What does this mean for investigations?

What does this mean for investigations?

- Always give thought to investigative procedures
- Every step taken must have a specific purpose
- Ensure impartiality and objectivity: act accordingly
- Investigative findings must be substantiated
- Make sure you understand fully privilege vs confidentiality





Questions

Questions



The background features a complex, abstract pattern of wavy, flowing lines. The colors transition from deep blue on the left, through vibrant orange and red, to bright yellow and gold on the right. The lines are smooth and curved, creating a sense of movement and depth. The overall effect is reminiscent of liquid or a digital wave pattern.

Contact

Contact



Zaakir Mohamed

Director

Head of Corporate Investigations & Forensics

(m): +27 63 620 6022

(e): zaakir.mohamed@cms-rm.com



Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.
cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS locations:

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Beirut, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sheffield, Singapore, Skopje, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law