REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 4939/2018

(1)	REPORTABLE: YES / (NO)
(2)	OF INTEREST TO OTHER JUDGES: (YES) NO
(3)	REVISED.
.....	18. 10. 2018
SIGNATURE	DATE

In the matter between:

THOMAS HENDRICK SAMONS **APPLICANT**

And

TURNAROUND MANAGEMENT ASSOCIATION SOUTHERN AFRICA (NPC) (Reg no 2005/033371/08) **FIRST RESPONDENT**

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **SECOND RESPONDENT**

JUDGMENT

Windell J

INTRODUCTION

[1] The applicant was a licensed business rescue practitioner and a member of the first respondent, *Turnaround Management Association Southern Africa (NPC)* ("TMA"). His license to practise as a business rescue practitioner was revoked on 1 February 2018 by the second respondent, *the Companies and Intellectual Property Commission* ("the CIPC"), after he was found guilty of misconduct and expelled from the membership of TMA.

[2] This is an application to review and set aside the finding of guilt by TMA and its decision to expel the applicant from its membership, as well as the decision made by the CIPC in terms of which the business rescue license issued to the applicant was revoked in terms of section 126 (7) of the Companies Act 71 of 2008 ("the Act"). The matter was initially brought as an urgent application but was struck from the roll for lack of urgency.

[3] TMA is a non – profit company registered in terms of section 13 (1)(A) (I) of the Act and conducts business as an association with the primary focus on business rescue corporation renewal and turnaround management. TMA has adopted a code of conduct in terms of which its members must conduct themselves ethically and in line with the necessary prescripts set out in the relevant legislation. The members of TMA are voluntary members and have by their membership agreed to be bound by the code of conduct. TMA is an association recognized and accredited by the CIPC.

[4] TMA and the CIPC oppose the application. The CIPC however conceded that in the event that the applicant is successful in its review of TMA's decision, and it is set aside, that the decision of the CIPC to revoke the applicant's license must also be set aside.

[5] The main issues to be decided in the review are:

[5.1] Is the decision of the first respondent reviewable under the Promotion of Administrative Justice Act [1]("PAJA")?

[5.2] If PAJA is applicable, was the procedure followed by the first respondent procedurally unfair and irrational?

[5.3] Is the conduct of the first respondent in any event *contra* the rules of natural justice?

BACKGROUND FACTS

[6] The applicant joined TMA in 2013 and had been a member in good standing until September 2017. He was also issued a conditional license to practise as a business rescue practitioner by CIPC on 5 May 2015. The applicant practices as 'Restructuring SA' and was appointed business rescue practitioner of Le Rendz-Vous Café CC ("the close corporation") on 7 December 2015 in terms of a resolution passed by the members of the close corporation. Two of the main reasons for the close corporation being placed under business rescue was the fact that it fell in arrears with its monthly rental payments to its landlord, Kythera Court, and the payment of franchise fees due to the franchisor. The applicant contends that in accordance with his duties, he prepared a business rescue plan that envisaged a

[1] Act 3 of 2000.

new lease agreement with Kythera Court in terms of which all amounts to creditors would have been paid by means of post commencement finance, which the members of the close corporation were prepared to advance. The intended business rescue plan was however dependent on the co-operation of Kythera Court. Kythera Court did not co-operate but instead brought an application for the eviction of the close corporation. Judgment was granted on 22 June 2016 and the court ordered the eviction of the close corporation from the premises. The applicant contends that he was therefore unable to develop the business rescue plan and was requested by the members of the close corporation to place the close corporation under liquidation which occurred in February 2017.

[7] Ms. Murray, one of the members of the close corporation blamed the applicant for the failure of the business rescue and laid a complaint against him at TMA. On 6 September 2016 TMA's disciplinary committee convened in the absence of the applicant. On 11 October 2017 he was found guilty of *inter alia* misconduct and a fine of R 10 000 was imposed. He was also suspended from TMA for a period of 3 months subject to the condition that he is not found guilty of a further serious breach of the disciplinary code. It was also ordered that the particulars of the suspension be published on TMA's website with the recommendation that the applicant not receive further appointments for the duration of the suspension.

[8] The applicant lodged an appeal against the disciplinary committee's findings. On 15 January 2018 the Disciplinary Appeals Committee confirmed the disciplinary committee's findings and increased the sentence by expelling the applicant from the membership of TMA. On 1 February 2018 the CIPC revoked the applicant's license

as a business rescue practitioner based on the fact that he was no longer a member in good standing of a 'business management profession' as provided for in section 138 (1) (a) of the Act.

GROUNDS OF REVIEW

[9] The review is based on PAJA,[2] alternatively on the rules of natural justice.

[10] In order for the applicant to succeed under PAJA it must establish one or more grounds for review under section 6(2). The essence of the review application is that the procedure followed by the first respondent was procedurally unfair (s 6 (2)(c)) and irrational (s 6(2)(f)(ii)). Firstly, at the disciplinary committee hearing, the first respondent amended the charge sheet in the absence of the applicant and found him guilty on an amended charge without notifying the applicant of the amendment or affording him an opportunity to comment to the amended charge. Secondly, the first respondent, on appeal, confirmed the guilty finding on the amended charge and increased the sentence without prior notification to the applicant of its intention to do so. The applicant further contends that the proceedings conducted by TMA's disciplinary committee and Disciplinary Appeals Committee were subject to the principles of natural justice and that TMA violated these principles by following a procedure that was fatally flawed.

[11] The first and second respondents contend that the decision by the first respondent is not administrative action and is not reviewable under PAJA. It is

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[2] Act 3 of 2000

contended that TMA observed the rules of natural justice and that the applicant can only blame himself for not attending the disciplinary proceedings.

REVIEWABILITY OF FIRST RESPONDENT'S DECISION

[12] The question that needs to be answered before unfairness or irrationality is even considered is if the impugned decision constitutes administrative action and therefore subject to review in terms of s 6(1) of PAJA? Applicant contended that TMA exercised a public power and/or public function when it conducted a disciplinary hearing and its decisions are therefore reviewable under the provisions of PAJA. The respondents contend that TMA is a voluntary association which finds its life in its Constitution. The regulation of members arises *ex contractu* with members having to voluntarily accept the provisions of its Constitution and the misconduct provisions included therein and the decision therefore did not constitute administrative action.

[13] Administrative action in section 1 of PAJA includes, among others, any decision taken by a natural or juristic person other than an organ of state when exercising a public power or performing a public function in terms of an empowering provision. The test for determining whether an act constituted an administrative action is an elastic one. In *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [3] Nugent JA referred to the scope of public law review in other countries who have consistently looked to the presence or absence of features of the conduct concerned that is 'governmental in nature'. He observed that in some instances what had been considered to be

[3] 2010 5 SA 457 SCA at [40].

relevant is the extent to which the functions concerned are 'woven into a system of governmental control', or 'integrated into a system of statutory regulation'. The learned judge reflected as follows:

> *"[40] It has been said before that there can be no single test of universal application to determine whether a power or function is of a public nature, and I agree. But the extent to which the power or function might or might not be described as 'governmental' in nature, even if it is not definitive, seems to me nonetheless to be a useful enquiry. It directs the enquiry to whether the exercise of the power or the performance of the function might properly be said to entail public accountability, and it seems to me that accountability to the public is what judicial review has always been about. It is about accountability to those with whom the functionary or body has no special relationship other than that they are adversely affected by its conduct, and the question in each case will be whether it can properly be said to be accountable, notwithstanding the absence of any such special relationship."*

[14] Can it be said that TMA's decision to expel the applicant was the exercise of a public power in this sense? It is so that TMA is a voluntary association with its own code of conduct and memorandum of agreement with its members. In the preamble of TMA's code of conduct the association's purpose is to give credence and effect to the objectives mission, and values of the association as set out in the association's memorandum of incorporation. The code of conduct further provides that it is not a mere restatement of legislation and regulations, but rather a set of principles and guidance based on standards of conduct founded in established precedent.

However, this does not mean that the powers it exercises are necessarily private, rather than public, as TMA contends.

[15] TMA is an association of business rescue practitioners. Members of the profession (who are also members of TMA) derive their powers from, and are regulated by, the Companies Act. In fact, the profession would not exist but for the business rescue provisions of that Act.

[16] Section 138 of the Companies Act deals with practitioner's functions and terms of appointment and provides as follows:

"Qualifications of practitioners

(1) A person may be appointed as the business practitioner of a company only if the person-

(a) Is a member in good standing of a legal, accounting or business management profession accredited by the Commission.

(b) Has been licensed as such by the Commission in terms of subsection (2);

(c) is not subject to an order of probation in terms of section 162 (7);

(d) would not be disqualified from acting as a director of the company in terms of section 69 (8);

(e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; and

(f) is not related to a person who has a relationship contemplated in paragraph (d).

(2) For the purposes of subsection (1) (a) (ii), the Commission may license any qualified person to practise in terms of this Chapter and may suspend or withdraw any such licence in the prescribed manner. (Reference to subsection 1 (a) (ii) must read s 138 (1)(b))

(3) The Minister may make regulations prescribing-

(a) standards and procedures to be followed by the Commission in carrying out its licensing functions and powers in terms of this section; and

(b) minimum qualifications for a person to practise as a business rescue practitioner, including different minimum qualifications for different categories of companies.

[17] From this it is clear, not only that business rescue practitioners in certain circumstances must be licensed to operate by the CIPC, but also that business management professions must be accredited by the CIPC. It is common cause that TMA is a 'business management profession' accredited by the CIPC. Regulation 126 (1)*(a)* stipulates that the CIPC "*must, when considering an application for accreditation of a profession under section 138(1), have due regard to the qualifications and experience that are set as conditions for membership of any such profession, and the ability of such profession to discipline its members and the Commission may revoke any such accreditation if it has reasonable grounds to believe that the profession is no longer able to properly monitor or discipline its members*" *(my emphasis)*

[18] Business rescue practitioners are in a position of trust and owe substantial duties of care to the public and to the court. They are officers of court in terms of s 140 of the Act and their powers and duties are prescribed in s 140 of the Act.

[19] These provisions demonstrate that albeit that an association like TMA may be formed as a private association, its purpose and its functioning serves a broader public purpose: its function in disciplining its members is critical to the public trust that can be placed on the profession of business rescue practitioners, and, indeed, on the whole scheme of business rescue. The Act and the Regulations expressly ensure that the CIPC has an interest in ensuring that only those associations who meet certain standards are accredited. One of the factors the CIPC will consider is the ability to monitor and discipline its members.

[20] TMA's decision to expel the applicant from its membership resulted in the applicant no longer being a member of good standing of a 'business management profession' which then resulted in the revoking of his license by the CIPC. Thus, if one considers the statutory context, when TMA, as an accredited business management profession, makes a finding following a disciplinary hearing into one of its members, it is carrying out a function that entails public accountability, in the sense described earlier. It is exercising a public power. I conclude in this regard that its decision amounts to administrative action, and is subject to review under PAJA.

THE DECISION OF THE FIRST RESPONDENT

[21] After a preliminary assessment of the complaints received by Murray the applicant was charged with misconduct in terms of TMA's Code of Conduct. In the charge sheet the applicant was *inter alia* charged with the following:

> Charge 1.3: The defendant failed to inform the members of the close corporation of the liquidation application.
>
> Charge 1.5: The defendant failed to issue a business rescue plan within 25 days of appointment as per section 150 (5) of the Companies Act and further failed to obtain an extension for the publication of the business rescue plan from the affected parties.
>
> Charge 2: The defendant failed to uphold his fiduciary duties to exercise care, skill and diligence, having failed to secure the liquor license of the close corporation; protect the assets of the close corporation and maintain a fixed asset register and stock inventory resulting in an inaccurate and undervalued valuation.
>
> Charge 3.1: The defendant failed to provide a reconciliation of fees and disbursements with supporting documentation when requested by the complainant.
>
> Charge 3.2: In terms of section 18.4 the defendant is obliged to fully disclose all relevant invoices, receipts and information pertaining to the fee or expense and the TMA will then make a final determination.

[22] The applicant was given the opportunity to reply in the form of an affidavit to the charges. The applicant deposed to an affidavit and answered to the various charges.

The applicant was then informed, in writing, of the date the disciplinary hearing would be held. On 7 September 2017 the applicant failed to attend the disciplinary hearing and was found guilty on three charges. The committee found as follows:

> ***"Amended charge 1.3: The failure by the defendant to properly secure assets and equipment of the close corporation and is further failure to liquidate the close Corporation.***
>
> *The charge sheet was found to be defective in respect of the original charge 1.3 and the Disciplinary Committee allowed the claimant as (pro forma) prosecutor to amend the charge sheet at the disciplinary hearing in accordance with paragraph 24.18 of the TMA Disciplinary Code. The disciplinary hearing thereafter proceeded with the alternative and more serious charge of the failure by the defendant to liquidate the close corporation at the point where he no longer believed that there was reasonable prospect to rescue the close corporation.*
>
> *The failure by the defendant to properly secure the assets and equipment of the close corporation and his further failure to liquidate the close corporation is a serious dereliction of his duties as BRP and he is found guilty.*
>
> ***Amended charge 1.5: Failure by the defendant to timeously obtain the requisite consent for the extension for the publication of the business rescue plan.***
>
> *The charge sheet was found to be defective in respect of the original charge 1.5 and the disciplinary committee allowed the claimant as (pro forma) prosecutor to amend the charge sheet at the disciplinary hearing in*

accordance with paragraph 24.18 of the TMA disciplinary code. The disciplinary hearing thereafter proceeded with the alternative and more serious charge of failure by the defendant timeously to obtain the requisite consent for an extension for the publication of the business rescue plan. As a result of the defendant's failure to engage with creditors, and timeously obtain their consent to an extension for the publication date of the business rescue plan, the defendant elected to embark on an unnecessary, costly court process to obtain the requisite extension which he could have obtained by active engagement with the creditors.

The defendant is found guilty of the amended charges insofar as he failed to properly exercise his duties as a BRP by not having obtained the requisite extension for the publication date of the business rescue plan and thereafter having engaged a legal team for the purposes of an unnecessary, costly illegal application.

***Charge 2.1:** The defendant is found guilty of failure to secure the assets of the close corporation and to maintain a fixed asset register and stock in the entity.*

***Charge 3.2 In terms of section 18.4 the defendant is obliged to fully disclose all relevant invoices, receipts and information pertaining to the fee or expense and the TMA will then make a final determination:** The defendant was requested by the disciplinary committee in an email dated 26 July 2017 to provide a reconciliation of fees and disbursements with*

supporting documentation in accordance with paragraph 18.4 of the TMA's code of conduct. The defendant has failed and neglected to comply with his request and is therefore found guilty of the charge."

[23] The applicant was fined an amount of R 10 000 payable to the bank account of TMA and suspended from TMA for a period of three months, subject to the condition that during the period of suspension the defendant is not found guilty of a further serious breach of the disciplinary code. The disciplinary committee proposed to use this period of suspension to further investigate the conduct of the defendant as a business rescue practitioner in other business rescues where the defendant has been involved and/or appointed as business rescue practitioner. The disciplinary committee further ordered that the detail of the defendant's suspension be published on TMA's website with a recommendation that the defendant should not receive further appointments as a turnaround professional for the duration of the suspension, and pending the outcome of the further investigation to be conducted by the disciplinary committee.

[24] The applicant appealed the guilty finding and the sentence of the disciplinary committee. The appeal was upheld by the disciplinary appeals committee on all grounds except for the two charges relating to the extension of the publication of the business rescue plan and the non-disclosure of relevant invoices. The appeals committee found that the defendant's total disregard of his obligation to provide all business rescue costs and fee information in a transparent fashion to be a fundamental and inexcusable breach of TMA's code of conduct. Furthermore the committee found the conduct of the applicant was reckless and unprofessional with

regard to publication and extension of the deadline for publication of the business rescue plan. As a result the appeals committee expelled the applicant from TMA's membership.

The amendment of the charge sheet in the absence of the applicant

[25] The disciplinary committee appointed Ms. Murray as prosecutor and instructed her on the day of the hearing to amend the charge sheet. In accordance with paragraph 23.4 of TMA's disciplinary code the disciplinary committee will 'observe the rules of natural justice but will not be bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before a court of law'. In accordance with paragraph 24.17 of the disciplinary code the chairperson may determine the procedure to be followed at a hearing whilst ensuring that the proceedings remain procedurally fair and in accordance with the principles of natural justice.

[26] On receipt of the charge sheet the applicant responded to Ms. Murray allegations in writing, in the form of an affidavit. He made written submissions in response to the charges as it was set out in the charge sheet at that stage. He never had the opportunity to consider or to respond to the amended charges. He was subsequently found guilty on a charge that did not form part of the original charge sheet. He was not notified of the amendment and the committee was, in my view, not entitled to amend and proceed in his absence. The procedure followed was unfair and *contra* the rules of natural justice.

Increase of the sentence

[27] It is common cause that TMA's appeal committee has wide ranging powers and was entitled to re-visit the sentence.

[28] The appeals committee found the applicant guilty of fewer charges but imposed a harsher sentence. They did so without informing the applicant of its intention to do so. In my view this is procedurally unfair and irrational. A similar scenario can be found in criminal appeals. The power of a court of appeal to increase a sentence imposed by the trial court is well established in our law. It has become practise that if a court of appeal is *prima facie* of the view that there is a prospect that the sentence might be increased on appeal, that notice is given before the hearing of the appeal to the interested parties, that such an increase is being considered. This is done so that the parties, including the appellant, are not taken by surprise at the hearing.

[29] In *S v Bogaards* [4] the Constitutional Court held that given the importance of the right to a fair trial and the substantive notion of fairness which it embraces, the failure to give notice, constituted a failure of justice and the appeal was rendered unfair and the sentence imposed was set aside. In *S v Joubert*[5] the court held that a failure to give such notice had materially prejudiced the accused; a prejudice that goes further than a mere lack of adequate opportunity to prepare properly. The court held that the requirement of prior notice to an accused person by the appellate court balances the appellant's right to a fair trial and the court's duty to ensure that the sentence is appropriate and, where necessary, to increase an inappropriate sentence.

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[4] 2013 (1) SACR 1 (CC)
[5] 2017 (1) SACR 497 (SCA)

[30] There is no reason why these principles enunciated by the Constitutional Court and the SCA would not be applicable to a disciplinary hearing. The appellant focused his submissions on appeal on the sentence imposed by the disciplinary committee. There was no reason for him to reconsider his position or to make submissions on a possible increase of sentence by the appeals committee. The applicant, if notified, could even have withdrawn the appeal. The prejudice is self-evident.

THE SECOND RESPONDENTS DECISION

[31] Section 138 of the Act empowers the CIPC to license any qualified person to practice as a business rescue practitioner and to suspend or withdraw such license. Regulation 126 (7) (b) provide for the suspension or revoking of a license if the Commissioner has reasonable grounds to believe that the person is no longer qualified to be licensed and has contravened the conditions of the license.

[32] The second respondent pleaded as follows in its answering affidavit:

> *"29.1 The disciplinary appeals committee decided to expel the applicant from its membership. It follows therefore that once the applicant was expelled from membership of the first respondent, the applicant was no longer a member of good standing of the association and could no longer be appointed as a practitioner of a company as required by section 138 of the Act. Accordingly the applicant was no longer qualified to be licensed.*
>
> *29.2 It is for the above reason that a decision by the second respondent was taken to revoke the applicant's license".*

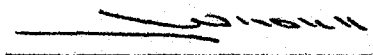
in good standing of a business management profession. The second respondent conceded that the applicant would be entitled to have its decision reviewed and set aside in the event that TMA's decision is reviewed and set aside.

[34] In the result the following order is made:

[34.1] The decision of the first respondent is reviewed and set aside.

[34.2] The decision of the second respondent is reviewed and set aside.

[34.2] The first and second respondents to bear the costs of the review jointly and severally, the one paying the other one to be absolved.



L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Instructed by:	Hogan Lovels Inc
Counsel for the second respondent:	Advocate M.R. Maimele
Instructed by:	The State Attorney
Date of hearing:	23 August 2018
Date of judgment:	15 October 2018