REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 29219/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE:

SIGNATURE:

In the matter between:

JOHAN CHRISTIAAN BEER	Applicant
and	
THE SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS	First Respondent
THE DISCIPLINARY COMMITTEE OF THE SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTS	Second Respondent

---

JUDGMENT

Todd AJ

Introduction

1. In this application for judicial review, brought in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("**PAJA**"), the applicant seeks to

challenge the findings of a disciplinary committee of the first respondent, of which he is a member.

Background and summary of relevant facts

2. The applicant was subjected to disciplinary proceedings by the first respondent following complaints brought by two creditors of a company which had been placed in business rescue. The complaints concerned the applicant's conduct in his capacity as the business rescue practitioner.

3. A disciplinary committee of the first respondent was convened during June 2020. Its three members produced a detailed and lengthy written ruling dated 22 December 2020.

4. The committee concluded that the applicant had been guilty of a breach of professional standards in three specific respects identified in the ruling. The sanction imposed was that he was required to pay a R150,000 fine to the first respondent, and that he was suspended as a member of the first respondent but with that portion of the sanction suspended for a period of 3 years from the date of the order on condition that the applicant was not found guilty of a punishable offence under any of the first respondent's by-laws or codes during that period. The applicant was also required to pay an amount equivalent to 25% of the costs incurred by the first respondent in conducting the disciplinary proceedings.

5. The three specific findings of misconduct were summarised in the ruling as follows. First the committee found that the applicant had failed to ensure that potential clients and creditors of the company in business rescue knew that the company was under business rescue before concluding contracts with it, or had failed to instruct employees to ensure that this occurred. The committee found this to be a contravention of by-law 41.10, by-law 41.8 read with section 130 of the first respondent's code, and by-law 41.8 read with section 150 of the code.

6. Second, the committee found that the applicant had failed to take reasonable steps to ensure that all creditors were informed of material events in the business rescue process, and that this amounted to a breach of his duties to act with professional competence and due care and tended to bring the profession of accountancy into disrepute.

7. Third, the committee found that the applicant had failed to prevent the company in business rescue from engaging in reckless trading, and that this amounted to gross negligence by the applicant in the exercise of his professional duties as a business rescue practitioner.

8. The applicant challenges all three of those findings by way of judicial review under the provisions of PAJA.

9. Although the founding papers set out a range of different grounds of attack on the ruling, when the matter was argued these had been whittled down essentially to an attack on the rationality of the committee's findings that the applicant had breached his professional duties in each of the three respects summarized above. Mr Rossouw, who appeared for the applicant, confirmed that the applicant confined himself in these proceedings to an attack on the rationality of the outcome of the committee's finding and that he did not persist with any complaint about the process that it followed in conducting its proceedings.

10. Mr Rossouw also confirmed that the applicant did not separately attack the rationality of the sanction imposed, but indicated that he sought to overturn the sanction on the grounds that it was predicated on unreasonable or irrational conclusions reached by the committee in respect of each of the three findings of professional misconduct.

Applicable legal principles

11. The applicable legal principles in a review of this kind are well established and have been set out in many cases, including by the Labour Appeal Court in *Carefone (Pty) Limited v Marcus N.O.*[1] and by the Constitutional Court in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims.*[2] Although when determining whether administrative action is justifiable in terms of the reasons given for it the "merits" of the matter will have to be considered in some way or another, a court determining the issue must be aware that it "*enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable*".[3]

[1] 1999 (3) SA 304 (LAC)

[2] 2015 (3) BCLR 268 (CC)

[3] *Carefone v Marcus* supra at para [36].

12. The court is not asked to substitute its opinions for those of the relevant administrative body. It is also not required that a decision of the administrative body should be perfect or, in the court's view, even the best decision on the facts.[4]

13. This is "particularly so" in the case of rationality review under PAJA:

> *"[a] crucial feature [of rationality review under PAJA] is that it demands merely a rational connection – not perfect or ideal rationality. In a different context, Davis J has described a rational connection test of this sort as 'relatively deferential' because it calls for 'rationality and justification rather than the substitution of the Court's opinion for that of the tribunal on the basis that it finds the decision… substantively incorrect'.*"[5]

14. Furthermore a court should be slow to second guess in judicial review proceedings an expert body's specific expertise or knowledge particular to a field:

> "*A level of deference is necessary – and this is especially the case where matters fall within the expertise of a particular decision-making body. We should, as this court counselled in Bato Star, treat the decisions of administrative bodies with 'appropriate respect' and 'give due weight to findings of fact… made by those with special expertise and experience*'."[6]

The parties' submissions

15. I turn now to the specific grounds on which Mr Rossouw submitted that the committee's findings in the present matter were irrational.

16. In relation to the first complaint against the applicant, he submitted that once the committee had found that the applicant had not breached a duty in law by failing to ensure that the complainants in the matter knew about the company's business rescue status before concluding contracts with the company, it was irrational to hold that it did not necessarily follow that the applicant had not committed a punishable breach of his professional duties.

17. Mr Rossouw submitted that in going on to find that while the applicant's conduct was lawful it was nevertheless unprofessional the committee reached a conclusion that

[4] *Bapedi* at paragraph [78]

[5] *Bapedi* at paragraph [78], quoting Hoexster Administrative Law in South Africa Juta, 2ed at 342

[6] *Bapedi* at paragraph [79], referring to *Bato Star* at paragraph [48]; and see *Preddy v Health Professions Council of South Africa* 2008 (4) SA 434 (SCA) at paragraph [6]

was not rationally connected to the factual and legal matrix that served before it. The applicant could not have been guilty of an action that could bring the profession into disrepute when he had acted lawfully. Mr Rossouw submitted that there was no proper explanation or reasoning for this finding of the committee. He further submitted that no reasonable person in the position of the committee could have reached that conclusion, and consequently that the conclusion was irrational.

18. In relation to the second complaint, Mr Rossouw submitted that the applicant had acted reasonably in delegating his duty to identify the company's creditors to a competent manager of the company, that he had instructed her to update the list of creditors on every occasion that he was required to send a notice to affected parties, and that the conclusion that he had failed in his professional duties in the circumstances was unreasonable.

19. The Applicant could not, he submitted, reasonably have been expected to perform these tasks himself, was reasonably entitled to delegate them, and the applicant had performed his functions in good faith and without gross negligence. Merely being negligent, Mr Rossouw submitted, could not be said to taint the good name of the profession. Once it had rejected the first respondent's contention that the applicant's conduct was grossly negligent in this respect, the committee's conclusion that it nevertheless constituted professional misconduct was irrational.

20. As regards the third complaint, Mr Rossouw submitted that the applicant had been faced with something of a Hobson's choice. He had either to continue trading and keep alive the possibility of the best or most likely offer to acquire the company in business rescue, or he had to cease trading and liquidate the company anyway. The applicant had ultimately chosen the option that would yield higher returns for creditors and would preserve employment. This meant that even after he had reached the conclusion that the company could not be saved he had good reason to believe that if it continued trading there was a reasonable prospect of creditors receiving better returns and that employees of the company would retain their jobs.

21. For this reason, Mr Rossouw submitted, the conclusion of the committee that the applicant had been responsible for reckless trading was materially influenced by an error of law, and was reached arbitrarily or capriciously. The conclusion was not rationally connected to the information before the committee.

22. In common with his submissions in relation to the other two complaints, Mr Rossouw submitted that the decision in relation to this complaint was so unreasonable that no reasonable person could have made such a decision.

23. Mr Rossouw submitted that if this court were to find the conclusions of the committee irrational in respect of any one of the three complaints it should set aside the decision and remit it to the committee for fresh consideration. It was not possible, he submitted, to determine from the award what weight the committee had attached to each of the three charges in formulating the sanction. As a result, if this court found that any one of the conclusions was unreasonable or irrational in the sense contended under PAJA the decision as a whole should be set aside and remitted.

24. Mr Rossouw made it clear that the applicant no longer sought the primary relief set out in the notice of motion, which was a request that his court should substitute the finding of the committee with a decision that all of the three complaints lodged against the applicant should be dismissed.

25. Mr Smit, who appeared for the first respondent, submitted that in fact on a proper consideration of the lengthy and detailed ruling of the committee, the conclusions in respect of all three charges were correct on the merits. Even if this were not so, however, the true question before this court was not whether the conclusions were correct, but whether they were justifiable in relation to the reasons given for them. Provided the relevant decisions of the committee were reasoned, justifiable and without misdirection, he submitted, there were no grounds for this court to interfere.

26. In respect of its conclusions in respect of each of the relevant complaints, Mr Smit submitted, referring to the express provisions of the relevant by-laws and code of conduct, the applicant could properly be said to have been in breach of his professional duties. The committee did not in its reasons need to set out in great detail the reasons for its finding by reference to each specific provision of the code or by-laws concerned, and it was sufficiently clear from its reasoning what those breaches were.

27. Mr Smith referred to the authorities which recognize the importance of showing deference to those professional bodies appointed to decide on professional standards of conduct required in particular professions[7] and submitted that value

[7] Referred to at footnote 6 above

judgments made by professional bodies of that kind should not be interfered with or readily second guessed on review.

Evaluation

28. I have carefully considered the submissions of Mr Rossouw in respect of the findings of the committee in respect of each of the three findings of professional misconduct against the applicant.

29. The committee's ruling is comprehensive, lengthy, and is carefully and coherently reasoned throughout.

30. In relation to the first complaint, after assessing the applicable legal principles, the committee concluded, in Mr Beer's favour, that he had not been under a legal duty to ensure that the complainants knew about the company's business rescue status before concluding contracts with it. The committee continued as follows:

> "*156. It does not automatically follow that Mr Beer did not commit a punishable offence. A SAICA member or associate may comply with the law yet fail to comply with his or her professional obligations. While it is unprofessional conduct to act unlawfully, merely acting lawfully does not necessarily mean one has acted professionally. The next question, then is whether Mr de Beer's omission amounts to lawful but unprofessional conduct.*
>
> *157. It is reasonable and prudent for a SAICA member acting as a business rescue practitioner to ensure that potential clients and creditors know that the company is under business rescue prior to concluding any contracts with them. Mr Beer himself appears to implicitly acknowledge that; he has now adopted that approach. We conclude that Mr Beer acted unprofessionally by not adopting that approach in the Den and Pine business rescue. By failing to inform [the complainants] of the business rescue, or instructing employees accordingly, Mr Beer acted in a manner that contravened By-Law 41.10; By-Law 41.8 read with section 130 of the Code – "Professional Competence and Due Care"; By-Law 41.8 read with section 150 of the Code – "Professional Behaviour"; and By-Law 41.10."*

31. In relation to the second complaint, after a detailed analysis of the facts, the committee concluded as follows:

> "*165. Mr Beer thus failed to ensure that the complainants, in their capacities as creditors and affected parties, received information they should have received under the Act. Mr Beer made two related arguments in an attempt to justify this failure.*
>
> *166 His first argument was premised on the fact that he did not know that [the complainants] were creditors of Den and Pine at the relevant time. He argued that he could not be held responsible to provide information to persons he did not know existed.*
>
> *167. In our view, this argument has no merit. It simply begs the question: why did he not know [the complainants] were creditors at the relevant time? After all, as accepted by Mr Beer, he was obliged as the business rescue practitioner to ensure that he knew all of Den and Pine's creditors. Mr Beer sought to answer this question with his second argument.*
>
> *168. Mr Beer's second argument was premised on the fact that he relied on Ms Strydom and others to provide him with an updated creditors list. He argued that he did not provide [the complainants] with the requisite information and notices because their names did not appear on the list. Had they been on the list, they would have received all the requisite information along with the other affected parties, or so the argument went."*

32. The committee then went on to consider Mr Beer's contention that he was entitled to delegate his powers and functions and had done so. The committee accepted that Mr Beer was entitled to delegate, but found that he ultimately bore responsibility and was accountable for the exercise of the delegated powers. The committee continued:

> "*184. Mr Beer asserted that this procedure was sufficient to comply with the statutory obligation to inform affected parties of important events in the business rescue procedure. We disagree.*
>
> *185. The procedure was haphazard. It failed to take account of the fact that Mr Beer had a continuous obligation to inform creditors of 'each court*

proceeding, decision, meeting or relevant event concerning the business rescue proceedings'. Mr Greef's complaint demonstrates the problem with the procedure adopted acutely. He became a creditor after Mr Beer sent the notice to creditors… on 15 March 2017. It was thus inadequate to assume that it was sufficient to update the creditor's list only on those occasions when Mr Beer intended to send a notice to creditors….

…

189. Mr Beer's failure to take reasonable steps to ensure that all creditors were informed of material events in Den and Pine's business rescue, as required by the Act, amounts to a breach of his duties under the Code to act with 'professional competence and due care' and to comply with the 'principle of professional behaviour'. It thus amounts to a breach of By-Law 41.8.

190. Mr Beer's abovementioned failure is also, in our opinion, irregular and tends to bring the profession of accountancy into disrepute. It therefore also amounts to a breach of By-Law 41.10. Even if Mr Beer acted lawfully (which we conclude he did not), his conduct was independently in breach of the above By-Law."

33. The committee went on to explain that it disagreed with a submission by SAICA that this failure also amounted to a breach of By-Law 41.1:

"*We disagree. The threshold for committing a punishable offence under that section is gross negligence. Gross negligence requires 'a total failure to take care' or 'a complete obtuseness of mind' and is an extreme form of negligence. While Mr Beer was negligent, it cannot be said that his failure to take care was total or extreme."*

34. These passages reflect a careful weighing up by the committee of the submissions of each party and a clear indication that the committee considered and in certain respects agreed with submissions made on behalf of Mr Beer in the process.

35. As regards the third complaint, the committee carefully considered the general test for reckless trading and did not agree with the primary submission made by SAICA regarding what on the facts constituted reckless trading. The committee

nevertheless found that the company had traded recklessly and that Mr Beer was grossly remiss in his professional duties in allowing it to do so.

36. The committee considered that any reasonable business practitioner in Mr Beer's position would not have allowed the company to continue trading and acquiring customers and to continue accruing creditors after a certain date. "*Yet that is precisely what Mr Beer failed to do.*" After considering Mr Beer's explanation for this, the committee continued as follows:

> "*203. But this does not provide Mr Beer with an excuse. On the contrary, it exacerbates matters for him. We say this for a number of reasons.*
>
> *204. First, it is contradicted by the quoted portion of Mr Beer's answering affidavit above. In that affidavit he testified that Den and Pine could not meet its obligations to creditors by March 2017.*
>
> *205. Second, Mr Beer implies that he did not honestly and in good faith send the notice under section 141(2) of the Act on 15 March 2017. He implied that he sent the notice to satisfy [the purchaser's] conditions for the possible sale, not to inform affected parties of the true state of affairs of Den and Pine's business rescue.*
>
> *…*
>
> *207. What Mr Beer told creditors was equivocal and confusing.*
>
> *…*
>
> *209. The point is that Mr Beer provided confusing and contradictory information to affected parties about arguably the most important topic in the business rescue procedure – whether Den and Pine could be rescued or not. His conduct in so doing also displays a reckless disregard of affected parties' interests.*
>
> *210. Mr Beer also sought to shift the blame. He argued that he was merely following the advice he received from his lawyers, as he was entitled to do. This argument is misconceived. If the lawyers' advice directly or indirectly undermined the Act, Mr Beer should not have accepted the advice. It was Mr Beer – not his lawyers – who was in ultimate management control of Den*

and Pine during its business rescue. Mr Beer was requested to produce such advice of his lawyers to the committee. He indicated that he was unable to do so."

37. These extracts from the committee's findings show a thorough, carefully reasoned, and in my view justifiable set of conclusions on the material issues.

38. I can find no reason to fault any of the conclusions reached. Even less so can I find reason to hold that the conclusions are not rational in the sense referred to in *Carefone* and *Bapedi*. On the contrary, I agree with Mr Smit that the decision is clearly reasoned and that the conclusions can be described, at the very least, as justifiable conclusions based on the established facts.

39. No doubt the applicant may believe that the committee sets the bar too high for the professional standards that it expects of a chartered accountant in the context of a business rescue. But that is not a ground on which to review or set aside the findings of the committee.

40. In summary, I have no reason to differ with any of the conclusions reached by the committee, but even if I did I would be required to show appropriate deference, for the reasons described in *Bapedi* and *Preddy* in the extracts set out earlier. Certainly those conclusions are rational in a sense that withstands scrutiny in judicial review proceedings.

41. In the circumstances the application stands to be dismissed.

Costs

42. As regards costs, Mr Smit submitted that a punitive costs award should be made in favour of the first respondent. In support of this submission he referred to the fact that the applicant had pleaded various unmeritorious grounds of review which have subsequently been abandoned, and that these included contentions that the complaints against him had been pursued for improper motives and that the committee had usurped this court's functions in various respects by seeking to interpret the law.

43. As a consequence, Mr Smit submitted, the first respondent had been put to unnecessary expense in opposing various grounds of review that had subsequently been abandoned. He further submitted that the applicant had continued to dispute the first respondent's jurisdiction to discipline him at all in the context of his work as a business rescue practitioner. Since he has been a member of the first respondent for 24 years, this has been an entirely unreasonable basis on which to approach the present litigation.

44. Mr Rossouw submitted in response that there were no reasonable grounds for making a punitive costs order. He attributed the fact that many of the applicant's grounds of review had been abandoned to changes in counsel, submitted that none of the grounds advanced fell outside the ambit of the kind of complaints an applicant might reasonably bring in these circumstances, and submitted that costs on an ordinary scale should follow the result.

45. Our courts will grant costs on a punitive scale where a party has been put to unnecessary expense in consequence of conduct by a litigant that can reasonably be characterized as unreasonable or obdurate.[8] An award of this kind requires "*special considerations arising either from the circumstances which gave rise to the action or from the conduct of the losing party*".[9]

46. Although there are elements of the applicant's conduct in pursuing this matter which would in my view fall within the ambit of conduct warranting a punitive costs order, I am unable to conclude that the litigation as a whole should not have been brought.

47. In addition, and although I have found there to be no merit in the grounds of review contended for, this is a matter in which the applicant's professional career is materially affected and the issues are not so clear that his conduct in seeking to challenge the decision of the committee should be characterized as irresponsible or unreasonable.

48. Since it is not possible to separate out what parts of the first respondent's costs are attributable to unreasonable conduct by the applicant, I have decided that costs should be awarded on the ordinary scale. Although the first respondent may consider this to let the applicant off a little lightly, the fact is that it will be entitled to

[8] *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at paragraph [11]

[9] *Swartbooi v Brink* 2006 (1) SA 203 (CC) at paragraph [27], approving *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607

recover, on the usual scale, all of its costs including those costs incurred in opposing grounds of review that were subsequently abandoned.

Order

49. In the circumstances I make the following order:

The application is dismissed, with costs.

_____

C Todd

Acting Judge of the High Court of South Africa

REFERENCES

For the Applicant:	Adv. A B Rossouw SC
Instructed by:	Jaco Roos Attorneys
For First Respondent:	Adv. D J Smit
Instructed by:	Webber Wentzel
Hearing date:	08 September 2022
Judgment delivered:	20 September 2022