

REPUBLIC OF SOUTH AFRICA



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

Case No: 2021/55430

<b><u>DELETE WHICHEVER IS NOT APPLICABLE</u></b>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
<b>6 June 2023</b> DATE	..... SIGNATURE

In the matter between:

**MARY FISHER**

**FIRST APPLICANT**

**SILVERBIRCH ESTATE**

**HOMEOWNERS ASSOCIATION NPC (RF)**

**SECOND APPLICANT**

and

**JOSEPH MOKONDO**

**FIRST RESPONDENT**

**COUNCIL FOR DEBT COLLECTORS**

**SECOND RESPONDENT**

**DAIMCON FINANCIAL RECOVERY'S  
& TRACING AGENTS (PTY) LIMITED**

**THIRD RESPONDENT**

## JUDGMENT

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### **BERGER AJ:**

[1] At the core of this matter is a dispute over R4500. Ordinarily, a dispute such as this ought to have received the attention of the Small Claims Court. The matter comes before this Court, sitting as a court of first instance, because it has been launched as a review of administrative action, as envisaged in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[2] The first applicant, Ms Fisher, is a director of the second applicant, a non-profit company known as Silverbirch Estate Homeowners Association NPC (RF). They seek, amongst other relief, the reviewing and setting aside of a decision made by the first respondent, Mr Mokondo, in his capacity as the legal officer assigned by the second respondent, the Council for Debt Collectors, to rule on a complaint against the third respondent, a company registered as a debt collector, known as Daimcon Financial Recovery's & Tracing Agents (Pty) Limited.

[3] The full relief sought by the applicants is set out in the notice of motion as follows:

*"1. Reviewing and setting aside the first respondent's revised decision/ruling of 23 August 2021.*

*2. Ordering the third respondent to refund all monies received for blacklisting services and issuing summonses.*

3. *Interdicting the third respondent from extorting or attempting to extort monies from the [first] applicant and the Silver Birch Estate Homeowners Association NPC (RF), with company registration number 2005/003035/08.*
4. *Cancelling the registration as a debt collector of the third respondent and/or its director, Lynetta Linda Verrall. Furthermore, in light of cancelled registration, ordering the third respondent to return all certificates of registration issued by the Council for Debt Collectors "CFDC" to the CFDC within three (3) days of such an order.*
5. *Granting the applicant further and or alternative relief."*

[4] I shall refer to the second applicant as "*Silverbirch*", to the second respondent as "*the Council*", and to the third respondent as "*Daimcon*".

### **The points *in limine***

[5] Throughout these proceedings, Silverbirch and Daimcon have been represented by their respective directors, Ms Fisher and Ms Verrall. Ms Fisher and Ms Verrall also appeared, on behalf of their companies, in argument before me.

[6] Silverbirch and Daimcon have taken various points *in limine* against each other, and against their respective representatives. The points *in limine* are all aimed at disqualifying either Ms Fisher or Ms Verrall from acting on behalf of Silverbirch or Daimcon. In my view, there is no merit in any of the points *in limine*. However, even if I am wrong, it is clearly in the interests of justice that I determine the merits of the dispute between Silverbirch and Daimcon. It is therefore not necessary for me to say anything more about the points *in limine*.

## The PAJA review

- [7] The Council is a juristic person established by section 2(1) of the Debt Collectors Act 114 of 1998 (the Act). Section 2(2) of the Act provides that the objects of the Council “*are to exercise control over the occupation of debt collector.*” In terms of section 3A, the Council has the power, in general, to “*perform such acts as may be necessary or expedient for the achievement of its objects.*”
- [8] The Regulations relating to Debt Collectors, 2003 were promulgated in terms of the Act. Regulation 7 deals with allegations of improper conduct. Regulation 7(1) provides that the Council may nominate a person to investigate any allegation of improper conduct against a debt collector. Regulation 7(7) mandates the Council to “*consider the allegations and deal with it in the manner it deems fit.*”
- [9] Section 239 of the Constitution of the Republic of South Africa, 1996 defines an “*organ of state*” to include any functionary or institution “*exercising a public power or performing a public function in terms of any legislation*”. Similarly, section 1 of PAJA defines “*administrative action*” to mean “*any decision taken, or failure to take a decision, by (a) an organ of state, when ... (ii) exercising a public power or performing a public function in terms of any legislation; ...*” and “*administrator*” to mean “*an organ of state or any natural or juristic person taking administrative action;*”.
- [10] It follows that the Council is an organ of state, and an administrator, as defined in PAJA. Mr Mokondo, who was nominated by the Council to investigate and deal with the complaint against Daimcon, is also an administrator, as defined.
- [11] On 15 July 2021, Mr Mokondo wrote to Daimcon to advise it that Silverbirch had lodged a complaint against it with the Council. The complaint alleged that:

- 11.1. Ms Verrall “*extorted*” R4500 from Silverbirch and said that she was going to pay the money to a law firm, Andrew Peens and Associates, to issue summons against members of Silverbirch who were in arrears with their levies;
- 11.2. Ms Verrall misled Silverbirch by presenting irregular summonses which she claimed to have been drafted by the law firm;
- 11.3. The law firm denied drafting or signing any summonses; and
- 11.4. The law firm (through Mr Peens and Mr Essack) denied receiving R4500 from Ms Verrall.

[12] On 20 July 2021, Daimcon (through Ms Verrall) wrote to Mr Mokondo to respond to the complaint against it. The allegations against Daimcon were disputed. In its explanation, Daimcon stated that Mr Peens was the company’s attorney and that Ms Fisher was the company’s client “*until she made [a] request that I can’t assist with*”. Daimcon alleged that Ms Fisher prepared the summons and particulars of claim, and requested that Mr Peens sign them; and Mr Peens was not prepared to sign the documents prepared by Ms Fisher. Daimcon denied defrauding Ms Fisher in any way: “*I took instructions for Mary Fisher to assist with collections of monies owing to the home owners association. ... I deny all the allegations made. I followed procedure and protocol.*”

[13] On 17 August 2021, Mr Mokondo issued his ruling on the complaint. The ruling was emailed by Mr Mokondo to Silverbirch and Daimcon. After having considered the evidence before him, Mr Mokondo ruled as follows:

*“Respondent or Debt Collector Lynette Verrall on behalf of Daimcon Financial Recoveries and Tracing Agents is therefore ordered by the Council. To refund Silver Birch Homeowners Association ... the sum of R4500.00 paid on 31 May 2021 for agreed service of summons and particulars of claim (POC’s) not rendered. The above said amount of R4500.00 must be paid back on or before 30 September 2021 to Silver Birch Homeowners Association. Any allegations of extortion of money under false pretence and or misrepresentation by committing fraud falls within the ambit of the South African Police Service (SAPS). If necessary a criminal case may be opened by an aggrieved party with SAPS for possible prosecution by the National Prosecuting Authority (NPA). That finalizes this matter for present purposes with the Council.<sup>1</sup>”*

[14] That ought to have been the end of the matter before the Council. The Council had ruled. However, on 19 August 2021, Daimcon (through Ms Verrall) emailed Mr Mokondo to inform him that “... *I don’t agree with your decision.*” In the email Ms Verrall went through Mr Mokondo’s ruling and inserted numerous comments as to why she disagreed with the ruling. Silverbirch was not copied in the email.

[15] Instead of informing Daimcon that he was *functus officio*, Mr Mokondo requested further information from Ms Verrall before his “*possible review consideration of the matter.*” Once again, Silverbirch was not copied in the email. This provoked a further response from Ms Verrall, on 22 August 2021, which was not copied to Silverbirch.

[16] On 23 August 2021, Mr Mokondo issued a “*review*” or “*reconsideration*” of his previous decision. This time the email was sent to both Daimcon and Silverbirch. In the email, Mr Mokondo wrote: “*Council have re-considered complaint lodged and*

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<sup>1</sup> Underlining added.

*submissions from both ... Silver Birch ... and ... Daimcon ... with supporting documents provided by each party.”*

[17] In his “review”, Mr Mokondo ruled: “*The Council concludes this is a civil matter between complainant Mary Fisher of Silver Birch Homeowners Association and respondent Lynette Verrall of Daimcon Financial Recoveries and Tracing Agents. Which must be resolved by the parties themselves involved amicably. Each party[’s] rights are reserved and not excluding other legal remedies available. If it becomes necessary be ventilated in a court of law. ... That finalizes this matter with the Council and we therefore close our file herein.*”<sup>2</sup>

[18] In his ruling of 17 August 2021, and in his ruling of 23 August 2021, Mr Mokondo invoked his powers under regulation 7(7). The question is whether regulation 7(7) empowered Mr Mokondo to change his mind and issue a revised decision.

[19] Regulation 7(7) mandates the Council to “*consider the allegations and deal with it in the manner it deems fit.*” There is nothing in regulation 7(7), or in any of the other regulations, that expressly empowers the Council to vary or revoke a final decision on the allegations before it.

[20] The common law *functus officio* doctrine provides that an official who discharges official functions, by making a final decision, is unable to change their mind and revoke, withdraw or revisit the decision. A decision is final when it is published to those affected by it. In the absence of statutory authority to alter a decision that has been published, the common law position remains.

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<sup>2</sup> Underlining added.

[21] All this is well established in our law.<sup>3</sup> This is particularly so where the published decision has created rights, and its alteration will affect the rights so created.

[22] The statutory authority relied upon by Mr Mokondo, regulation 7(7), does not give the Council, even impliedly, the power to vary or revoke its final decisions. In my view, Mr Mokondo was *functus officio* after issuing his decision of 17 August 2021 and had no power to issue his revised decision of 23 August 2021.

[23] To make matters worse, the steps taken by Mr Mokondo, first in entertaining the “*appeal*” from Daimcon without notice to Silverbirch, then in communicating with Daimcon to the exclusion of Silverbirch, and finally in failing to give Silverbirch an opportunity to be heard before revising his decision, were procedurally unfair within the meaning of section 6(2)(c) of PAJA.

[24] It follows, in my view, that the decision of 23 August 2021 is invalid and falls to be reviewed and set aside.

#### **Prayers 2, 3 and 4**

[25] Once the decision of 23 August 2021 is set aside, Silverbirch will be entitled to rely on the decision of 17 August 2021. Daimcon will then be obliged to refund the R4500 to Silverbirch.

[26] There is no basis for this Court to order Daimcon to refund any further amounts to Silverbirch. No further amounts were considered in Mr Mokondo’s ruling of 17 August 2021.

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<sup>3</sup> Hoexter & Penfold, *Administrative Law in South Africa (Third Edition)*, Juta, 2021, at pp. 380 – 388



[27] There is no evidence of extortion before me. Daimcon issued invoices for work to be done. If the work was not done, Silverbirch could have claimed a refund, as it did in relation to the R4500. In any event, the requirements for a final interdict have not been pleaded or proved in the applicants' founding papers.

[28] Insofar as the requested cancellation of registration is concerned, this is a matter that Silverbirch must take up with the Council. This has not been done, and it is therefore not appropriate for this Court to entertain such an application.

### **Order**

[29] Accordingly, I make an order reviewing and setting aside the first respondent's revised decision/ruling of 23 August 2021. There is no order as to costs.

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**D I Berger**

**ACTING JUDGE  
OF THE HIGH COURT  
GAUTENG LOCAL DIVISION  
JOHANNESBURG**

*Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 6 June 2023.*

**Heard on : 20 April 2023**

**Delivered: 6 June 2023**

**Appearances:**

For the Applicant:

Ms M Fisher (in person)

For the Third Respondent:

Ms L Verrall (in person)