Original.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / (NO)
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

15/12/17
DATE

SIGNATURE

CASE NUMBER: 16434/2017

15/12/17

In the matter between:

MAMOLATELO ALFRED SELOTA	First Applicant
M A SELOTA ATTORNEYS	Second Applicant
and	
LAW SOCIETY OF THE NORTHERN PROVINCES	First Respondent
IRIS RAMASELA MAROPOLA	Second Respondent

JUDGMENT

MOKOENA AJ,

INTRODUCTION

[1] The applicants are approaching this court, with a review application as contemplated in Rule 53 of the uniform rules of court, coached in the following terms:-

> *"1. Declaring the decision of the first respondent to conduct a fee assessment, of their professional fees levied by the applicants against the second respondent as unlawful;*
>
> *2. Reviewing and setting aside the decision of the first respondent, of the 8th December 2016, in terms whereof the applicants were found guilty of unprofessional conduct; and*
>
> *3. Directing that any of the respondents, who opposes the application, to pay costs of the application."*[1]

[2] This matter is not without its own unique history:-

[3] On 10 October 2016, the first respondent addressed a letter to the applicant, advising it to appear before a disciplinary committee of the first respondent which was to be held on 8 December 2016.

[4] The applicant was charged with having contravened Rule 89.24 and Rule 49.6, in that it had overreached its client or charged a fee which was unreasonably high.

[5] The notice also required the applicant to bring all relevant documents, files and accounting records to the enquiry.

---

[1] Vol. 1, applicants' notice of motion, p. 1, para 1 – p. 2, para 3.

[6] The disciplinary enquiry against the applicant was initiated as a result of a complaint made by the second respondent to the first respondent in relation to a RAF matter which the second respondent has instructed the applicant to prosecute on its behalf in claiming damages pursuant to the personal injuries sustained during a motor vehicle collision.

[7] Flowing from the aforesaid instructions, the applicant lodged a claim on behalf of the second respondent with the RAF. Summons was issued and the RAF defended the action. The RAF made an offer to settle and tendered party and party costs. On 1 April 2010, the RAF effected payment of the agreed settlement amount including the costs of suit.

[8] Prior to the RAF effecting the entire agreed amount, the applicant was approached by another law firm, i.e. K.J. Jordaan Attorneys who conveyed to the applicant that they were instructed to pursue a professional negligent claim against the applicant as a result of having under settled the second respondent's claim with the RAF. However, K.J. Jordaan Attorneys never pursued such an action against the applicant.

THE DISCIPLINARY HEARING SCHEDULED FOR 8 DECEMBER 2016

[9] The applicant, despite having been duly notified, did not appear before the disciplinary enquiry on 8 December 2016, instead, counsel appeared on behalf of the applicant.

[10] Prior to 8 December 2016 disciplinary enquiry, the applicant despatched a letter to the first respondent wherein he notified the first respondent that he will not attend as he required clarity on certain issues.[2]

[11] On 17 November 2017, the first respondent in no uncertain terms informed the applicant that it was not excused from attending the 8 December 2016 scheduled disciplinary enquiry.

[12] On 8 December 2016, as stated above, the applicant was represented by counsel as it failed to attend. Counsel applied for a postponement of the enquiry, of which application was refused as the disciplinary committee was not satisfied with the explanation proffered by counsel pertaining to the applicant's absence. The disciplinary enquiry had to be stood down in order to allow counsel to contact the first applicant.

[13] When the disciplinary enquiry resumed, only then did counsel apply for a postponement premised on the alleged ill health, of the first applicant. No medical certificate was produced and/or submitted by counsel. The application for postponement was refused premised on the reasons furnished by the first respondent in its answering affidavit.[3]

[14] A plea of not guilty was recorded and the disciplinary committee proceeded with a disciplinary enquiry in the absence of the applicant. The applicant was found guilty, as charged.

[15] This review application is brought against the abovementioned background.

---

[2] Vol. 2, annexure 2, p. 234 – p. 235.
[3] Vol. 2, first respondent's answering affidavit, p. 162, para 7.58 – p. 164, para 7.62.

APPLICANT'S GROUNDS FOR REVIEW

[16] The applicant's grounds of review are coached, in the following terms:-

> *"19 On 26 February 2016, the first respondent caused to be published, in Government Gazette No: 39740, Rules for the Attorneys' Profession ("the Rules for the Attorneys Profession"). The Rules were made under the authority of Section 74(1) of the Attorneys Act 53 of 1979 and, were approved by the Chief Justice of South Africa, Judges President of the Gauteng and North West Divisions of the High Court.*
>
> *20 These Rules, whose copy is attached hereto for ease of reference as annexure **FA4**, came into operation on the 01 March 2016. I was charged with unprofessional conduct for contravening Rule 49.6 of the Rules of the Attorneys' Profession, on 14 October 2016 alternatively on the 08 December 2016.*
>
> *21 Rule 28.1.3 provides that:*
>
> *It shall be competent for the Council or any committees appointed by the Council for that purpose, at the request of any person or member, to assess the fees and reasonable disbursements payable by such person to a member in respect of the performance of work in his or her capacity as a practitioner, provided that the Council or the committee shall not assess fees or disbursements: in litigious matters, unless the parties agree that the fees and disbursements are subject to assessment by the Council or a committee appointed by the Council for that purpose.*

22 *Neither I nor the Firm M.A. SELOTA Attorneys, have consented that the fees and disbursements be subjected to assessment by the Council or a Committee appointed by Council.*

23 *The finding of the first respondent that I and/or our Firm overreached and/or overcharged must have been precipitated by an assessment of our fees in relation to the matter between the second respondent and the Road Accident Fund.*

24 *Regrettably the first respondent made a pronouncement on the unreasonableness of the fees levied by our Firm, without consideration of either: the party and party bill of costs or the Attorney and client bill of costs and the disbursements.*

25 *On my own analysis, of the decision of the first respondent, it appears that the first respondent in dealing with the matter assumed that our Firm had concluded a contingency fee agreement with the second respondent.*

27 *I wish to set the record straight, and state that our Firm has not concluded a contingency fee agreement, in terms of Act 66 of 1997, with the second respondent.*

28 *As such, we were entitled to levy fees on the scale as between attorney and client."*[4]

[4] Vol. 1, applicants' founding affidavit, p. 14, para 19 – p. 16, para 28.

THE PARTIES' CONTENTION

Applicant's main contention

[17] Having regard to the grounds of review as set out above, the applicant in its heads of argument submits that the decision of the first respondent constitutes an administrative action.

[18] In addition, the applicant contends that Rule 28.1.3 of the Rules for the Attorneys' Profession, prohibits the first respondent from conducting an assessment of fees or disbursements, in litigious matters, unless the parties involved consent.

[19] The applicant contends that despite this prohibition, the first respondent conducted an assessment of fees and disbursements, without the required consent.

[20] In addition, the applicant contends that the first respondent conducted an assessment of fees and disbursements levied by the applicant, in the matter between the second respondent and the RAF and it assumed that the applicant and the respondent had concluded a contingency fee agreement.

[21] It is on these bases that the applicant seeks the decision of the first respondent to be reviewed in terms of the provisions of PAJA as alluded to in the applicant's heads of argument.[5]

---

[5] Applicant's heads of argument, paras 19 – 39.

First Respondent's main contention

[22] On the other hand, the first respondent contends that it did not conduct a fee assessment. In addition, the first respondent contends that the applicant was disciplined by the disciplinary committee of the first respondent as a result of overreaching and overcharging the second respondent.[6]

APPLICABLE LEGAL PRINCIPLES

[23] The statute mandated to give effect to the rights to administrative justice in section 33 of the Constitution is PAJA.

[24] The PAJA now provides the most immediate justification for judicial review, drawing its own legitimacy from the constitutional mandate in section 33(3) to '*give effect to*' the administrative justice rights and to '*provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal*'.

[25] The PAJA does not, of course, replace section 33 or amend it in any way, it is not possible for ordinary legislation to repeal or amend constitutional rights. However, the PAJA is now the primary or default pathway to review. This follows logically from its main purpose, which is to give effect to the constitutional rights in section.

[26] This purpose is achieved largely by section 6 of the Act, which confers powers of review on a '*court or tribunal*' and which contains a fairly comprehensive list of grounds of review familiar at common law.[7]

---

[6] First respondent's heads of argument, p. 3, para 4.1 – p. 10, para 5.7.
[7] *eTV (Pty) Ltd v Judicial Service Commission* 2010 (1) SA 537 (GSJ).

[27] In view of this intention to codify the law, a purpose that has been acknowledged by the Constitutional Court,[8] and in light of the displacing effect of statutes on the common law, it is logical to require applicants for review to bring their cases under the PAJA where possible.

[28] Thus in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*, O'Regan J, confirmed that '*[t]he cause of action for the judicial review of administrative action now ordinarily arises from the PAJA, not from the common law as in the past*'.[9] She summed up the post-PAJA position as follows:-

> *"The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution."*[10]

[29] Section 33 of the Constitution confined its operation to "*administrative action*". PAJA does so too.

---

[8] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 25; **see also** *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 95.
[9] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environmental, Mpumalanga Province* 2007 (6) SA 4 (CC) at para 37.
[10] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 22.

[30] It follows therefore that to determine whether a conduct is subject to review under section 33 and thus under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action.

[31] The appropriate starting point is to determine whether the conduct in question constitutes an administrative action within the meaning of section 33 of the Constitution. If it does, it must then be determined whether PAJA nevertheless excludes it from its operation.

[32] The test for determining whether conduct constitutes "*administrative action*" under section 33 is whether the *function* performed by the public official constitutes administrative action. The enquiry thus focuses on the nature of the function that the public official performs.

[33] In section 33 the adjective "*administrative*" not "*executive*" is used to qualify "*action*".

[34] This suggests that the test for determining whether conduct constitutes "*administrative action*" is not the question whether the action concerned is performed by a member of the executive arm of the government.

[35] What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.

[36] It is apparent from this formulation that some acts of a public official will constitute administrative action as contemplated in section 33 while others will not. This must be so because public officials and public bodies may be entrusted with a number of responsibilities.

APPLYING THE LEGAL PRINCIPLES TO THE FACTS

[37] One of the issues in this matter is whether a decision of the Law Society's disciplinary committee constitutes an administrative action/conduct. In the case of **Graham and Others v Law Society of the Northern Provinces and Others**[11], Mothle J held at paragraph 80 that:-

"... *where the law Society takes disciplinary steps against a legal practitioner, it does so as an organ of state in the exercise of a public power and in the performance of a public function in terms of the Act. The decision to institute a disciplinary enquiry on a practitioner constitutes an administrative action as defined in section 1 of PAJA.*"[12]

[38] Even in the pre-Constitutional era, disciplinary proceedings were long accepted to be amenable to judicial scrutiny on review, especially in respect arising out of alleged procedural unfairness and other breaches of natural justice. If PAJA does not apply because the act in issue does not qualify as administrative action, the review would be a matter to be brought and determined under common law.

[39] In common law administrative law cases prior to decisions such as that in **Administrator, Transvaal, and Others v Traub and Others**[13], the functions of the disciplinary committee would be called '*quasi-judicial*', a description that itself served to distinguish the truly judicial functions of the judicature from the adjudicative functions of tribunals that are not courts.

---

[11] 931790/2012 [2014] ZAGPPHC 207; 2014 (4) SA 229 (GP).
[12] *Supra*.
[13] 1989 (4) SA 731 (A) at para [18].

[40] In the case of **Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others**[14], Nuget JA held that:-

"[a]t the core of the definition of administrative action is the idea of action (a decision) of an administrative nature by a public body or functionary."

[41] The concept of "*administrative action*", as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review.

[42] The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.

[43] The requirement of the first of the seven elements of the statutory concept of '*administrative action*' identified by the Constitutional Court in the case of **Minister of Defence and Military Veterans v Motau and Others**.[15]

[44] In the case of **Du Plessis v Independent Regulatory Board for Auditors**[16] per Binns-Ward J the following was stated in paragraph 5 of his judgment:-

"[5] The application was framed in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), it being accepted by both sides that the decisions of the disciplinary committee constituted

---

[14] [2005] ZASCA 142; [2005] All SA 33 (SCA), 2005 (6) SA 313, 2005 (10) BCLR 931 at para 22.
[15] *Supra.*
[16] (8572/2016 [2017] ZAWCHC 49 (26 April 2017); [2017] 3 All SA 137 (WCC).

'administrative action' as defined in that Act. The provisions of s 6 upon which the applicant founded her application were –

(i) *subsection (2)(b) – that a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*

(ii) *subsection (2)(c) – that the committee's findings were procedurally unfair,*

(iii) *subsection (2)(d) – that the committee's findings were materially influenced by an error of law;*

(iv) *subsection (2)(e)(iii) – that irrelevant considerations were taken into account by the committee in making its findings or relevant considerations were not considered; and*

(v) *(2)(f)(ii)(cc) – that the committee's findings were not rationally connected to the information before it. During the argument of the case I queried whether the characterisation of the committee's decisions as 'administrative action' was necessarily correct."*

[45] The relevant objects include the maintenance of ethical standards in the profession, and dealing with infringements and other improper conduct by members of the profession.

[46] The disciplinary committee's function has an administrative context in that it is derived from a regulatory statute and is directed at the execution of some of the objects of the statute.

[47] In that sense the nature of its functions is materially distinguishable from that of judicial functions of the courts, which are directly and originally founded in the Constitution and, congruently with the doctrine of separation of powers, thereby fundamentally distinguished from those of the public administration.

[48] With reference to the above information, it my view that a decision of the Law Society's disciplinary committee constitutes an administrative action. The functions of the disciplinary committee are amongst the mechanisms of the Act provided in order to obtain the achievement of some of its objects.

[49] What is common cause between the parties is the following undisputed facts:-

49.1 the applicant received a notification to appear before the disciplinary committee of the first respondent;

49.2 the applicant failed to appear before the first respondent's disciplinary committee;

49.3 the applicant failed to produce any medical certificate justifying its failure to appear before the disciplinary committee of the first respondent premised on the alleged justification of ill health;

49.4 the applicant was found guilty for overreaching and overcharging the second respondent;

49.5 the applicant did not lodge an internal appeal against the findings of the disciplinary committee.

[50] The grounds of review which are raised in these review proceedings were not raised, at all, by the applicant when he was afforded an opportunity, to do so, before the disciplinary committee.

[51] Fundamentally, the applicant does not even challenge the correctness or otherwise of the decision of the disciplinary committee which found it guilty for overreaching and overcharging the second respondent.

[52] It is apparent from the record of these review proceedings that the first respondent did not conduct a fee assessment but summoned the applicant to appear before its disciplinary committee to answer the specific allegations and complaints made by the second respondent pertaining to overreaching and overcharging.

[53] The decision of the first respondent's disciplinary committee in finding and concluding that the applicant overcharged and overreached its client are indeed rational and can be sustained and corroborated with the documents and evidence placed before the first respondent's disciplinary committee.The documents and information relied upon by the first respondent's disciplinary committee remained unchallenged as the applicant elected not to appear and place its version before the first respondent's disciplinary committee.

[54] It follows, having regard to the totality of the information, documents and evidence placed before the first respondent's disciplinary committee, that the disciplinary committee properly applied its mind to the issues it was called upon to determine and arrived at a rational conclusion which could be justified in relation to the reasons proffered.

[55] Accordingly, the applicant's grounds of review are misconceived as the first respondent and/or its disciplinary committee did not conduct a fee assessment.

[56] It follows as a matter of logic that reliance by the applicant on Rule 28.1.3 of the Rules for the Attorneys' Profession is indeed misconceived and cannot be sustained in the light of the facts and circumstances of this case.

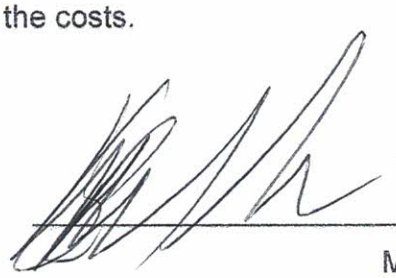
[57] It also follows that the second ground of review advanced by the applicant is also misconceived and without merit, more so, if one has regard to the conclusion and findings made by the first respondent's disciplinary committee which was premised on the information, documents and evidence at its disposal.

ORDER

[58] In the circumstances, I make the following order:

58.1 the applicant's application for review is dismissed;

58.2 the applicant is ordered to pay the costs.



MOKOENA AJ

ACTING JUDGE OF THE HIGH COURT