REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 84260/2015

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

13/03/18
DATE

SIGNATURE

13/3/18

In the matter between:

MAXWARD NCEBAZAKHE MADUBANE Applicant

and

MINISTER OF MINERAL RESOURCES First Respondent

CHIEF INSPECTOR OF MINES Second Respondent

J U D G M E N T

TEFFO, J:

INTRODUCTION

[1] The applicant seeks an order reviewing and setting aside the decision taken by the first respondent on appeal confirming the decision of the second

respondent whereby the second respondent withdrew his Mine Manager Certificate of Competency (MMCC). The applicant further seeks an order reviewing and setting aside the decision taken by the second respondent withdrawing his MMCC. He further seeks an order that the court award an appropriate remedy in terms of section 8(c) of the Promotion of Administrative Justice Act 3 of 2006 (PAJA) with costs.

THE PARTIES

[2] The applicant is an employee of the Department of Mineral Resources (the Department) who held the position of Principal Inspector of Mines in the Gauteng Region by virtue of having obtained a MMCC on or about 30 November 2005 in terms of the provisions of Regulation 28.

[3] The first respondent is the Minister of Mineral Resources (the Minister) and the second respondent is the Chief Inspector of Mines, Gauteng.

BACKGROUND

[4] In June 2013 the applicant received a letter from the second respondent notifying him that his MMCC was cancelled pursuant to an investigation that was conducted by him.

[5] The applicant's MMCC was subsequently cancelled by the second respondent.

[6] It is common cause between the parties that there was an investigation of the allegations against the applicant by the Audit Services Committee (the Committee) and the Committee compiled a report which was handed to the second respondent. During the course of the investigation, the applicant was requested to state his case which he did in the form of an affidavit. On the basis of the Committee's report, the second respondent formed an opinion that the applicant has been guilty of non-compliance with the regulations.

[7] Paragraph 4 of the letter from the second respondent dated 3 June 2013 reads:

> *"After careful consideration of the said Audit Services Report, I, D Msiza, Chief Inspector of Mines, Mineral Resources of the Republic of South Africa, by virtue of the powers conferred on me in terms of the aforementioned Regulations, has decided to forthwith cancel the MMCC issued to you as contemplated in Regulation 28 with immediate effect, for the following reasons interalia:*
>
> 1. *An irregularity occurred with your exemption from Parts A and B of the examinations regarding the recognition of your degree not recognized for the purposes of exemption as contemplated in Regulation 28.1.3.*
> 2. *The MMCC is null and void as a result of the irregularity.*
> 3. *The irregularity occurred despite lack of evidence that you made any contribution in the commitment of the irregularity."*

[8] He appealed the decision to the first respondent. On 23 February 2015 the first respondent dismissed the appeal.

[9] Aggrieved by the dismissal of his appeal by the first respondent, the applicant launched the current review proceedings in terms of Rule 53 of the Uniform Rules of Court.

[10] The respondents filed a notice of intention to oppose the proceedings, the record, a supplementary record and an answering affidavit.

[11] The applicant did not supplement his papers after receipt of the record. He eventually filed a replying affidavit after having been served with an answering affidavit by the respondent.

THE GROUNDS FOR REVIEW

[12] The applicant challenges the decision of the second respondent on the following grounds:

12.1 He contends that the second respondent cancelled his MMCC arbitrarily without affording him a fair opportunity to defend himself in a lawful tribunal.

12.2 He was never found guilty of misconduct or gross negligence or non-compliance with the regulation by anyone.

12.3 The decision to cancel his MMCC was based on the contents of the investigation report. It was contrary to the requirements of Regulation 29.1.1 which prescribes that an individual must be found guilty of misconduct or gross negligence or non-compliance with the regulations prior to cancellation of a certificate.

12.4 Similar if not identical allegations were made against him in 2011. It was alleged that he was irregularly exempted from a part of the examinations he was not entitled to be exempted from. The allegations were investigated and the outcome thereof was that the allegations were declared null and void.

12.5 He addressed his concerns to the first respondent on appeal and presented all available evidence to support his appeal. An inquiry into his appeal was held. The first respondent dismissed his appeal thereby confirming the decision of the second respondent.

[13] He challenges the decision of the first respondent on the following basis:

13.1 The first respondent found that his qualification does not correspond with the qualification which allows exemption from Parts A and B of the examinations. Regulation 28.13.3 of the

Mine Health and Safety Act Regulations (MHSA) considers all qualifications, provided that such qualifications are recognised by the Chief Inspector for exemption purposes. The fair and reasonable criteria to exclude any qualification from the provisions of Regulation 18.13.3 should be that the qualification fails to be recognised by the Chief Inspector by failing to be in Mining Engineering and failing to meet the requirements of Regulations 28.15 and 28.13.2. His Graduate Diploma cannot therefore be excluded from the qualifications mentioned in Regulation 28.13.3 on the basis that it is a Graduate Diploma in Engineering, even if it meets the requirement of the purpose.

13.2 The granting of his exemption for Parts A and B as applied for, was not in error. The same applied to the subsequent granting of his MMCC by the then Chief Inspector.

13.3 At the enquiry no evidence was presented which suggested that the syllabus of his qualifications did not cover the scope of the syllabus contemplated in Regulation 28.12.2. No evidence was presented that he lacked sufficient knowledge required in terms of Regulation 28.15 at the time he applied for Parts A and B and subsequent to the granting of his MMCC.

13.4 The first respondent's decision does not comply with the provisions of section 6 of PAJA.

THE RESPONDENTS' ARGUMENTS:

[14] In opposition to the review application, the respondents made the following submissions:

14.1 In relation to the applicant's contention that the second respondent's decision was contrary to the provisions of Regulation 29.1.1, it was contended that other than merely alleging that he was not found guilty of gross negligence or misconduct or non-compliance with the Regulations, the applicant has not stated any fact or circumstance as a ground for seeking the review of the second respondent's decision. It was submitted that the reason for the cancellation of the applicant's MMCC was non-compliance with the Regulations.

14.2 Regarding the second respondent's findings of fact that the applicant's qualifications were technical and incorrect, it was submitted that the applicant fails to make out a case and to substantiate the facts, circumstances and grounds upon which he relies for the said assertions, given that the required qualifications are set out and governed in terms of the Regulations.

14.3 As to the applicant's allegations that the findings of the first respondent fall to be reviewed on several basis in terms of

section 6 of PAJA, the respondents submit that applicant has failed to place facts before court in support of the allegations. It was contended that instead the provisions of PAJA have been set out without laying any basis thereof.

14.4 In respect of the applicant's submissions that the decisions of the first and second respondents were reviewable according to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) 507C-D and *Bhungweni v JSE Ltd* 2010 (3) SA 335 (GSJ) at 430D-J, in their answering affidavit, the respondents submitted that the applicant failed to provide any grounds, facts and/or circumstances why he alleges their decisions were reviewable in terms of the cases referred to and in what manner the cited cases were relevant to the decisions of the first and second respondents.

14.5 It was further submitted that the vague allegations made by the applicant in his review application makes it difficult for the respondents to understand what case they have to meet. The respondents have only the opportunity of a single affidavit in answer to the applicant's allegations. It was essential for the applicant to set out all the facts, grounds and circumstances upon which he relies for seeking to set aside the decisions of the respondents with greater particularity and sufficiency in order to allow the respondents to adequately respond thereto.

14.6 It was submitted that the applicant had an opportunity to amend and/or supplement his founding papers but he failed to do so. The allegations contained in the applicant's founding affidavit do not make it clear to the respondents as to what the real facts, grounds and circumstances that form basis of his objections are to the decisions of the first and second respondents.

14.7 The respondents further submitted that although, the applicant's notice of motion is clear as to the relief sought, the applicant neglected and omitted to make any allegations in his founding affidavit to support the relief sought.

14.8 The respondents submitted that the application should fail on that ground alone.

14.9 The respondents submitted that the second respondent's decision was not arbitrary as alluded to by the applicant. It was preceded by a factual investigation in which the applicant provided a written affidavit.

14.10 The second respondent's decision was based on an evaluated investigation report, supplied pursuant to the provisions of Regulation 29, and the representation by the applicant.

14.11 The second respondent's decision was lawful as it was authorised to be made under the Regulations and complied with the stipulations and the requirements set out thereunder.

14.12 The first respondent's decision on appeal was made and taken pursuant to a full inquiry being held in terms of the Act in which the applicant was fully represented.

14.13 The inquiry was conducted by an independent panel of industry practitioners who followed a fair and reasonable procedure.

14.14 Both respondents, in separate and independent processes, found the applicant to be non-compliant with applicable provisions pertaining to his MMCC's validity.

14.15 The respondents submitted that the applicant's review proceedings are without merit and ought to be dismissed with costs.

THE ISSUE

[15] Does the applicant's founding affidavit contain sufficient grounds, facts or circumstances as required by Rule 53(2) of the Rules of the High Court?

[16] Whether the decisions taken by the respondents are reviewable.

THE LAW

[17] Rule 53 reads:

> "*1. Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the tribunal or board or to the officer, as the case may be, and to all other parties affected –*
>
> *a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside,*
>
> *b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.*
>
> *2. The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds, the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.*"

[18] The court in *The Only Professional Modern Autobody CC t/a Modern Collision Centre v Missa obo P J Gouws, E Richter N.O.* and *The Dispute Resolution Centre For the Motor Industry Bargaining Council*, Case Number JR 2811/2010 and J 2215/10 heard on 26 January 2012 and handed down on 14 June 2012, emphasised the importance of placing sufficient details to the grounds of review as contemplated in Rule 53(2) of the Uniform Rules of Court by referring to other authorities:

"*[41] In Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA), the court held at [32] that the grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on opinion information which has become available (see Lefuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another 2008 (2) SA 448 at para 15).*

[42] In the present instance, except for the application for legal representation, the postponement and the awarding of compensation, the applicant has set out very broad and general legal grounds upon which it relies on for its review application. The legal grounds are however not supported by factual grounds or allegations as to why the arbitration award of the arbitrator is susceptible to review. This means that the applicant has failed to place before the court all the material facts upon which it relies on to have the arbitration award reviewed and set aside. In fact the applicant states in its founding affidavit that it does not have to set out all the material facts concerning its review application. This makes the applicant's review application fatally defective. In MIT Tissue v Theron and Others, the court held: Rule 7A(2)(c) requires that an application for review should set out the factual and legal grounds upon which the applicant relies ... Such failure would normally be fatal.

[43] In Terblanche v Wiese en Andere, the then Transvaal Provincial Division dismissed the review application on the ground that the applicant's affidavit did not contain sufficient grounds, facts or circumstances as required by Rule 53(2) of the Rules of the court. That decision was upheld on appeal. The provisions of rule 7A(2) of the Rules of the Labour Court are similar to those of Rule 53 of the Rules of the High Court."

[19] Review is a reconsideration of a decision and it is not concerned with the merits of the decision but whether the decision was arrived at in an acceptable fashion. The Supreme Court of Appeal held in *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration* [2007] 1 SA 576 (SCA) at para [31] that the focus is on the process, and on the way in which the decision-maker came to the challenged conclusion. Instead of asking whether the decision was right or wrong, a court of review concerns itself with issues such as the impartiality of the decision-maker and

the admissibility of the evidence taken into account. Significantly, a decision may be set aside on review even if the court is confident that the same decision would have been reached by an impartial decision-maker or on the proper evidence, an indication that the focus is not on the merits.

[20] Section 3 of PAJA reads:

> "*3. Procedurally fair administrative action affecting any person*
>
> *(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*
>
> *(2) (a) A fair administrative procedure depends on the circumstances of each case.*
>
> *(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –*
>
> *(i) adequate notice of the nature and purpose of the proposed administrative action;*
>
> *(ii) a reasonable opportunity to make representations;*
>
> *(iii) a clear statement of the administrative action;*
>
> *(iv) adequate notice of the right to request reasons in terms of section 5.*
>
> *(3) ...*"

[21] Section 6 of PAJA reads:

> "*Judicial review of administrative action*
>
> *(1)*

(2) A court or tribunal has the power to judicially review an administrative action if –

a) the administrator who took it –

i) ....

ii) ....

iii) was biased or reasonably suspected of bias;

b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

c) the action was procedurally unfair;

APPLICATION OF THE LAW TO THE FACTS

[22] The thrust of the applicant's criticism of the second respondent's decision to cancel his MMCC is that the wrong regulation, Regulation 29.1.1 of the Mine Health and Safety Regulations was applied to arrive at the decision. He was never found guilty of misconduct or gross negligence or non-compliance with the regulations.

[23] Regulation 29.1.1 reads:

> "*If the Chief Inspector is from information laid before him, of the opinion that the holder of a mine manager's, mechanical or electrical engineer's, mine surveyor's, mine assayer's or mine overseer's certificate issued in accordance with these regulations or any amendments thereof or heretofore is under any law in force in any province of the Republic, has been guilty of gross negligence or misconduct or non-compliance with these regulations, he may forthwith suspend or cancel such certificate or may submit the matter for inquiry and report to the respective commission of examiners appointed under the said regulations, and may, on the recommendation of such commission suspend or cancel such certificate, in which case the*

holder thereof may appeal to the Minister, who shall, if the matter has not been reported on by the commission of examiners, submit it for enquiry and report to a person or persons designated by him: Provided that all suspended or cancelled certificates, including an engine-driver's or boiler attendant's certificate, shall be returned by the holder to the Chief Inspector within two weeks of the date of suspension or cancellation."

[24] My understanding of the above regulation is that where the Chief Inspector formulates an opinion on the basis of the information before him that the holder of the MMCC has been guilty of gross negligence or misconduct or non-compliance with the regulations, he may exercise his discretion of either suspending or cancelling the MMC of the holder thereof immediately or submit the matter for inquiry and report to the respective commission of examiners appointed under the regulation.

[25] The regulation does not stipulate that the holder of the certificate (MMCC) must first be found guilty of misconduct or gross negligence or non-compliance with the regulations, before it could be invoked. What it simply says is that once the Chief Inspector forms that opinion on the basis of available information, he may act immediately.

[26] It was argued on behalf of the applicant that the decision taken by the second respondent only refers to an irregularity in obtaining the certificate. It does not state what regulation he has breached. The second respondent exonerates the applicant by stating that he is not guilty.

[27] I have already found that the regulation does not state that the holder of the MMCC must first be found guilty before it can be invoked. In the same

breath the fact that the words "*the irregularity occurred despite lack of evidence that you made any contribution in the commitment of the irregularity*", does not take away the fact that there was no tribunal that made a finding that the applicant was guilty or not guilty. The second respondent took the decision in terms of Regulation 29.1.1 after forming an opinion based on the Committee's report. The fact of the matter is that he formed an opinion that the applicant was guilty of non-compliance with the regulations. The reason was that an irregularity had occurred with the applicant's exemption from Parts A and B of the examinations, as his degree was not recognised for the purposes of exemption as contemplated in Rule 28.13.3. It is immaterial. According to the information before the second respondent the irregularity existed. The irregularity relates to the exemption of the applicant from part of the examinations he was supposed to take. Obviously he is the better person to explain what had really happened. It cannot therefore be argued that the second respondent stated in the letter that there is no evidence that he was involved in the commission of the irregularity and therefore the second respondent has exonerated him. In my view there was no error of law on the part of the second respondent when he invoked Regulation 29.1.1 in order to arrive at the decision to cancel the MMCC of the applicant.

[28] The applicant also contended that the second respondent failed to give him adequate notice of the intended action and to afford him a hearing or an opportunity to make representations prior to taking the decision to cancel his certificate. He bases this contention on the provisions of section 3 of PAJA.

[29] At paragraphs 86, 87, 88, 89, 90 and 95 of the supplementary record the inquiry of the appeal against the second respondent's decision dealt with the issue as follows:

> "*86. Regulation 29.1.1 however operates independently of the employment relationship between the Department and the Appellant and is silent on the procedure to be followed by the Chief Inspector prior to cancelling a certificate. In the absence of a mandatory procedure, the general requirements of procedural fairness contemplated by PAJA apply. Of relevance in this regard is whether the Appellant was given adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations.*
>
> *87. It is common cause that the Chief Inspector and the Appellant enjoyed a healthy working relationship and that there was extensive engagement between them regarding the allegations against the Appellant, both before and after the submission of the audit services investigation report to the Chief Inspector. Apart from the Appellant's email of 15 March 2013, the engagements prior to the Chief Inspector's decision to cancel the Appellant's certificate were not reduced to writing.*
>
> *88. In his evidence to the Committee, the Chief Inspector stated that, following receipt of the audit services investigation report, he had engaged with the Appellant on the two key issues arising from the report: the contravention of the departmental cellular telephone policy and the irregularities concerning his mine manager's certificate of competency. According to the Chief Inspector he engaged the Appellant on the recommended course of action arising from the report and his intention to withdraw the certificate and gave him the opportunity to say why he should not do so.*
>
> *89. He informed the Committee that on 15 March 2013 the Appellant emailed him the sworn statement that he had previously provided to the audit services investigation. The Chief Inspector understood that this was provided in response to their engagement on the matter.*
>
> *90. The Chief Inspector informed the Committee that a copy of the audit services investigation report had not been provided to the Appellant at the time. The Appellant's request for the report was declined by the Department as it felt there was a risk of victimization or intimidation. The Chief Inspector stated that he had indicated to the Appellant the content of the report in*

relation to the irregularities concerning the nature of the Appellant's qualifications and the exemption.

95. In the Committee's view it would have been prudent for the Chief Inspector to have recorded in writing his invitation to the Appellant to make representations and to have provided a copy of the relevant extracts from the audit services investigation report to the Appellant (albeit appropriately redacted in order to protect the identities of witnesses) or at least to have indicated in writing the substance of the findings and recommendations of the report. This would have avoided the dispute of fact regarding the matter. However, while the Chief Inspector can be criticized for not following a more formal written process, it does not follow that the process he followed was not procedurally fair."

[30] The Committee further concluded at paragraphs 96, 97 and 98 that it was satisfied on the basis of the evidence before it, that the Chief Inspector informed the appellant of the substance of the findings and the recommendations of the audit services investigation report, his intention to withdraw the certificate and had invited the appellant to make representations. It was also satisfied that the appellant was given adequate notice of the proposed cancellation of his MMCC and the opportunity to make representations prior to the Chief Inspector cancelling the certificate. According to the Committee any prejudice to the appellant which may have resulted from any procedural deficiencies in the action taken by the Chief Inspector, has been cured by the appeal injury.

[31] I agree with the Committee which dealt with the appeal inquiry that Regulation 29.1.1 is silent on the procedure to be followed by the Chief Inspector prior to cancelling the certificate. I also agree that in the absence of the aforesaid procedure, the general requirements of procedural fairness as provided for in PAJA apply. In this regard the provisions of section 3 of PAJA

referred to *supra* at paragraph 20 of the judgment, applies. There was no evidence before the inquiry that the applicant was given adequate notice of the nature and purpose of the proposed administrative action and he was not granted a reasonable opportunity to make representations by the second respondent prior to him taking the decision to cancel his MMCC. What was presented before the Committee was the second respondent's word which was not supported by any documentary evidence against the applicant's word. The applicant could have been invited to make representations orally. The Committee found that the second respondent should have reduced his invitation to the applicant to make representations in writing. The issue of the emailing of the affidavit by the applicant to the second respondent as alluded by him on 15 March 2013 does not assist the second respondent in any way. The affidavit was for the investigation. In any event the appellant disputed that he emailed it to him in the form representations after he was invited to do so. It is evident that the investigation of the allegations against the applicant related to other departmental issues which were not related to the issuing of his MMCC. The engagement of the applicant by the second respondent, which the applicant denies, was not in any event proper and sufficient. The second respondent should immediately after he had received the audit services report from the committee, looked at the recommendations of the committee. He then had to invite the applicant, by giving him notice of the intended action, to make representations. The notice and the invitation should have been in writing.

[32] It is furthermore evident, that the applicant was not provided with a copy of the report.

[33] The findings of the Committee that the applicant was informed of the substance of the findings and the recommendations of the Audit Services Investigation report, that the second respondent informed him of his intention to withdraw the certificate, that he was invited to make representations and that he was afforded adequate notice of the proposed cancellation of his certificate prior to cancelling cannot, therefore, be correct. In my view the first respondent's decision not to fault the second respondent in this regard was unfair in view of the evidence that was before the appeal inquiry.

[34] The contention that any prejudice which may have resulted from any procedural deficiencies in the action taken by the second respondent has been cured by the appeal inquiry, is in my view without any merit.

[35] The decision to cancel the MMCC of the applicant affected his rights materially and adversely. It should have been procedurally fair. He was not given adequate notice of the nature and purpose of the decision. He was also not afforded a reasonable opportunity to make representations. The Committee of the appeal inquiry should have dealt with the matter fairly after realising that section 3 of PAJA was not complied with. Therefore the Committee acted contrary to the provisions of section 6(2)(b) and (c).

[36] I am persuaded that the ground of review discussed above has been sufficiently dealt with in the applicant's founding affidavit.

[37] It is my view that the second respondent failed to give the applicant adequate notice of the intended decision to cancel his MMCC and to afford him a hearing or an opportunity to make representations prior to taking a decision to cancel it.

[38] I am not persuaded that the decision to cancel the certificate was based on an error of law and fact.

[39] To the extent that the first respondent confirmed the decision of the second respondent where he failed to give the applicant adequate notice of his intended decision to cancel his MMCC and to afford him a hearing or an opportunity to make representations prior to taking the decision to cancel it, the decision of the first respondent cannot stand. It therefore falls to be reviewed and set aside.

[40] In the result I make the following order:

40.1 The second respondent's decision of withdrawing the applicant's Mine Manager's Certificate of Competency is reviewed and set aside.

40.2 The first respondent's decision on appeal confirming the withdrawal of the applicant's Mine Manager Certificate of Competency by the second respondent is also reviewed and set aside.

40.3 The matter is remitted to the second respondent for reconsideration.

40.4 The first and second respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the applicant	Z Z Matebese and S Mpakane
Instructed by	Mketsu and Associates Inc
For the respondens	A Matjila
Instructed by	State Attorney
Date of judgment	13 March 2018