THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 20556/2014

In the matter between:

THE SOUTH AFRICAN DENTAL ASSOCIATION NPC	**APPELLANT**
And	
THE MINISTER OF HEALTH	**FIRST RESPONDENT**
THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	**SECOND RESPONDENT**
THE CHAIRPERSON OF THE PROFESSIONAL BOARD FOR DENTAL THERAPY AND ORAL HYGIENE	**THIRD RESPONDENT**
THE DENTAL ASSISTANTS ASSOCIATION OF SOUTH AFRICA	**FOURTH RESPONDENT**

Neutral citation: *South African Dental Association v Minister of Health* (20556/2014) [2015] ZASCA 163 (24 November 2015)

Coram: Navsa, Shongwe, Willis, Swain and Zondi JJA

Heard: 2 November 2015

Delivered: 24 November 2015

Summary: Health Professions Act 56 of 1974 – discussion of steps required to establish a new regulated health profession in terms of that Act – challenge to Regulations by Minister setting up regulatory regime in respect of dental assistants – challenge time-barred in terms of s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 in respect of most of the regulations – challenge in respect of remaining regulations defining scope of the profession as contemplated in s 33 of that Act rejected – exception to general rule relating to costs in constitutional matters applied due to the manner in which litigation conducted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ismail J sitting as court of first instance).

The following order is made:

The appeal is dismissed with costs, including the costs of two counsel where employed by each of the respondents.

JUDGMENT

Navsa and Swain JJA (Shongwe and Zondi JJA concurring):

[1] In this appeal, as in the court below, the appellant, the South African Dental Association (SADA), an association incorporated in terms of section 21 of the Companies Act 61 of 1973 read with the Companies Act 71 of 2008 and which represents a sizeable majority of dentists in South Africa, sought to set aside regulations promulgated by the first respondent, the Minister of Health (the Minister), purportedly made under the Health Professions Act 56 of 1974 (the Act), in terms of which he recognised dental assistants as professionals, set qualifications to enable their registration, and defined the scope of the profession. The appeal will deal with the power of the Minister in terms of the Act to make regulations establishing and regulating a profession, more particularly in relation to the recognition of dental assistants as health professionals and represents, in juxtaposition, the interests of dentists and those of dental assistants and involves the role of the Minister in regulating health-related professions.

[2] If the fourth respondent, the Dental Assistants Association of South Africa (DAASA), an advocate for the protection and promotion of the rights of dental assistants, is to be believed, the appellant has been nothing but obstructive and has steadfastly resisted their struggle, since 1995, to be recognised as professionals in terms of the Act. Furthermore, DAASA contended that the real and underlying objection of SADA to the recognition and regulation by the Minister of dental assistants as professionals is the economic impact it might have on individual dentists who are accustomed to their dental assistants' low wages. In short, DAASA adopted the attitude that SADA is motivated purely by self-interest. Conversely, if SADA, which represents a sizeable majority of the country's dentists, is to be believed, they are particularly

concerned about the welfare of dental assistants and the interests of the public and were motivated in the litigation leading up to the present appeal by their concerns that the requirement of registration for dental assistants coupled with prescribed minimum qualifications would result, on pain of criminal sanction, to a gross shortage of dental assistants. In addition it was contended before us that SADA was intent on ensuring that the Minister adhered to the principle of legality and that in its view, the Minister, in promulgating the regulations in question, had acted beyond his powers. SADA complained that years of representations made by it had not been taken into account by the Minister and that in promulgating the regulations the Minister acted irrationally in that he did not consider the consequences, particularly criminal sanctions that would attend upon dentists and dental assistants who failed to meet the criteria for the recognition and registration set out in the regulations. They were emphatic that the existing long established practice of on-the-job-training conducted by dentists for dental assistants, had adequately served the dental profession.

[3] The second respondent, the Health Professions Council of South Africa (HPCSA) was established in terms of s 2 of the Act and has among its objectives the coordination of the activities of professional boards and the promotion and regulation of inter-professional liaisons between health professions, in the interest of the public and the promotion of the health of the citizens of the country. The third respondent is the Chairperson of the Professional Board for Dental Therapy & Oral Hygiene (the Chairperson of the Board), established in terms of s 15 the Act.

[4] SADA applied to the Gauteng Division of the High Court, Pretoria, for an order setting aside a series of regulations made by the first respondent, the Minister of Health, in terms of which he purported to establish a professional board for dental assistants, set qualifications to enable their registration, and defined the scope of the profession. The court below (Ismail J), dismissed the application and granted leave to appeal to this court. As in the court below, the respondents are united in their opposition to SADA. Even though this appeal is to be decided within a narrow compass it is nevertheless

necessary, for reasons that will become apparent, to set out the detailed background which follows.

[5] It is common cause that over the years dental assistants have assisted dentists with dental procedures that require contact with patients. DAASA was founded in 1983 with the stated objective of protecting and advancing the interests of dental assistants nationally. DAASA's membership is comprised almost entirely of women, a large percentage of whom are also Black. It is clear that dental assistants is a group representative mostly of people who have been previously disadvantaged and discriminated against. Since 1995, as stated above, DAASA has been advocating for the statutory recognition and regulation of the work of dental assistants. It contended that this was to be achieved, inter alia, by formal *and* on-going job training to ensure a minimum quality of service by dental assistants. In its opposition to the relief sought by SADA, DAASA stated that statutory professional recognition would have the following results: first, it would provide dental assistants with recognition for the value of their work and it would protect them in the workplace; second, quality minimum training and regulation would ensure the best possible service to the public and create a mechanism for redress. The parameters within which they were to be recognised would be determined by the scope of their work which the Minister would define.

[6] For approximately two decades DAASA has been in communication with the HPSCA and the Boards for Dental Therapy and Oral Hygiene regarding the professional recognition of dental assistants and in that regard submissions were made to the Minister. DAASA was emphatic in its support for the Minister in his attempts to recognise and regulate dental assistants within professional boundaries. Before us it became apparent, for reasons that will be discussed in due course, that the only regulations that remained in dispute were those relating to the scope of work of dental assistants. DAASA described the type of work that they are accustomed to doing which includes:

(i) Preparation and clinical maintenance of the dental surgery;

(ii) Application, adherence and observance of universal infection control procedures;

(iii) Assisting dental practitioners in clinical procedures where appropriate;

(iv) Mixing and handling of dental materials;

(v) Performance of administrative functions in practice management;

(vi) Application of knowledge of radiographic examinations and processing of radiographs;

(vii) Application of the necessary measures to assist during emergencies in the dental surgery;

(viii) Implementation of occupational health and safety procedures;

(ix) The promotion of oral health; and

(x) Understanding and application of judicial and ethical aspects associated with dentistry in South African including patient confidentiality.

[7] It appears to us, to be incontrovertible that dental treatment is invasive and involves body fluids such as saliva and blood and that individuals living with blood-borne diseases will on occasion be patients and/or dental health care practitioners. This would mean that both patients and dental health care practitioners may be exposed to a variety of microorganisms which include:

- Cytomegalovirus;
- Hepatitis B Virus (HBV);
- Hepatitis C Virus (HCV);
- Herpes Simplex Virus Types 1 and 2;
- Human Immunodeficiency Virus (HIV);
- Mycobacterium Tuberculosis;
- Streptococci; and
- Other viruses and bacteria: specifically, those that infect the upper respiratory tract.

[8] It cannot be contested that in a dental practice infections may be transmitted in a number of ways, including the following:

(i) direct contact with blood;

(ii) oral fluids; or

(iii) other secretions;

(iv) indirect contact with contaminated instruments;

(v) operatory equipment, or environmental surfaces; or

(vi) contact with airborne contaminants present either in droplet spatter or aerosols of oral and respiratory fluids.

[9] The assertion by SADA that it is the dentist, and not dental assistant who is at the forefront of infection control in a dental practice, is not the whole truth. If regard is had to the type of work they do, set out in para 6 above, it is clear that, working alongside dentists, they too are exposed to the dangers of communicable diseases and, more importantly, they play a significant role in the prevention of such diseases.

[10] It is necessary to record that DAASA, was not originally a party to the litigation initiated by SADA. It only later became a party after the Minister had taken the point that DAASA's exclusion was a material non-joinder, and DAASA then sought leave to intervene, which SADA opposed, on the basis that the former did not have *locus standi* because it lacked the power to sue or be sued. DAASA sought its own relief in the form of a provisional counter claim, in the event that SADA was successful in its application. The order sought was as follows:

'6.1 The First Respondent (The Minister of Health) must formally prescribe a professional category or additional professional category for dental assistants in terms of section 35(2) of the Health Professions Act 59 of 1974 (the Act), or in terms of such other section/s as may be found to be applicable.

6.2 The First, Second (HPCSA) and Third Respondents are ordered to comply with all legal prerequisites in order to give lawful effect to paragraph 6.1, more particularly to comply with the provisions of sections 15(1) to 15(5), section 24, section 33 and all such other provisions of the Act required to normalise the profession of dental assistants.

6.3 It is declared that regulations made for the profession of Dental Assistant in terms of the Act shall be deemed to have been made regularly.'

[11] According to the Minister, his department had over the years identified the need to ensure a higher standard of assistance in dental care and was intent on ensuring that

dental assistants, who played a vital role in preparing and sanitising a patient, and assisting a dentist in providing efficient dental care, were properly trained. This, according to the Minister, prompted various consultative processes over an extended period of time, which led to the promulgation of the regulations that are the subject of the present litigation.

[12] As stated earlier, SADA challenged the adequacy of the consultation processes, insisting that its many written representations over a number of years, stretching from 2001, were ignored and not considered by the Minister and contended that, in any event, he had no statutory power to promulgate the regulations at the heart of the present dispute. In short, the basis of SADA's case was first, that the Minister had no statutory power to make the regulations in question. Second, he failed to have regard to the representations by SADA. Third, that his actions in promulgating the impugned regulations were irrational in that he failed to take into account that while there are currently 4 200 practicing dentists in South Africa, there are only approximately 2 500 dental assistant who meet the qualification and registration requirements and are registered. The consequence of the impugned regulations would thus be, so the argument went, that around half of all persons currently employed as dental assistants could no longer practise as such and that the disproportion between dentists and dental assistants would be maintained or worsen. In addition, dental assistants as well as the dentists employing them would be liable to criminal prosecution since their employment would be unlawful. We will, in due course, deal with the Minister's statutory powers and the nature and extent of the representations by SADA and consider whether they were taken into account by the Minister. We will also deal with the contention that dental assistants and dentists would be liable to criminal sanctions in the event of the remaining regulations remaining extant.

[13] The affidavits filed by the HPCSA and the Chairperson of the Board, in opposition to the relief sought by SADA, provide a comprehensive account of the fifteen year history leading to the formulation and promulgation of the regulations in question and set out the details of what they considered to be an extensive consultative process.

A description is also provided of the statutory structure of regulation of health related services during the pre-democracy era and of the evolution of the statutory regime since then, culminating in the Act in its present form. During the apartheid years and the existence of the then South African Medical and Dental Council (SAMDC), the Professional Board for Dental Therapy and the Professional Board for Oral Hygiene were two distinct professional boards. According to the HPCSA and the Chairperson of the Board the struggle to establish the Professional Board for Dental Therapy as part of the erstwhile SAMDC was a long and bruising one. Simply put, it appears that dental therapists faced a struggle similar to the one alleged by DAASA. During the existence of the SAMDC the 'Council' was constituted overwhelmingly or solely of medical and dental professionals. During that period the SAMDC consisted of 34 counsellors, all of whom came from medical and dental professions

[14] A sea change occurred with the advent of democracy in South Africa. As part of the general transformation process an interim SAMDC was created with a transformative agenda. As a result, ultimately, the Act in its present form came into being following a number of significant amendments. It transformed the Council and the professional boards making them more representative, transparent, accessible and accountable to the greater interest of public health and safety. We will, in due course, deal in some detail with the legislative evolution.

[15] At this stage it is necessary to consider more closely SADA's case, as presented in its founding affidavit, and to explore more fully several representations it made to the Minister. At the outset, in attacking the regulations made by the Minister, SADA categorised the promulgation of those regulations as administrative action and sought to have them set aside on the basis that, *inter alia*, the Minister had acted beyond his powers in making them. It is necessary to set out verbatim their assertion in this regard:

'[T]he actions of the HPCSA, the Minister and the Board are susceptible to review in terms of section 33 of the Constitution and provisions of sections 6(2)(*a*)(i), (*b*), (*c*), (*d*), (*e*)(i), (*e*)(iii), (*e*)(v), (*e*)(vi), (*f*), (*h*) and (*i*) of the PAJA [Promotion of Administrative Justice Act 3 of 2000].'

[16] The series of regulations that were challenged by SADA is set out hereafter:

(a) Regulations relating to the qualifications for registration of dental assistants, GN R338, *GG* 27464, as amended by GN R580, *GG* 31084, 30 May 2008 (the Original Qualification Regulations). These regulations make provision for the qualifications required for registration as a dental assistant. Regulation 2(2) provides that any person who has worked as a dental assistant for a minimum period of five years prior to 31 March 2002 may apply to the Professional Board for Dental Therapy and Oral Hygiene (the Board) for registration as a dental assistant and the board in its discretion may exempt such person from the qualification requirements. These regulations were then amended on 30 May 2008, to extend the registration period for those who had previously worked as dental assistants, for a further three month period from the date of publication of the amendment.

(b) Regulations relating to the constitution of the Professional Board for Dental Therapy and Oral Hygiene, GN R1255, *GG* 31633, 28 November 2008 (the Board Regulations). These regulations established the Board consisting of 13 members, two of whom were dental assistants appointed by the Minister.

(c) Regulations relating to the qualifications for registration of dental assistants: Amendment, GN R120, *GG* 35045, 14 February 2012 (the Revised Qualification Regulations). These regulations again provided that any person who had worked as a dental assistant for a period of five years prior to the date of these regulations, without being registered as such, may apply to the board for registration as a dental assistant and the board could exempt such person from the qualification requirements. These amended regulations simply extended the period within which practising dental assistants could be exempted from the qualification requirements.

(d) Regulations relating to the registration of student dental assistants: Amendment, GN R395, *GG* 35363, 21 May 2012 (the Student Qualification Regulations). These regulations amended previously promulgated regulations concerning student dental assistants (GN R581, *GG* 31084, 30 May 2008) with the effect that persons who had worked as dental assistants for a period of less than five years, prior to the publication

of this amendment, could apply for registration as student dental assistants within four months of the date of the publication of this amendment.

(e) Regulations defining the scope of the profession of dental assistants, GN R396, *GG* 35364, 21 May 2012 (the Scope Regulations). These regulations specified the acts which would be deemed to be acts pertaining to the profession of dental assistants and thereby defined the scope of work of the profession. While largely in line with the work DAASA ascribed to dental assistants they are more extensive and detailed.

[17] A careful examination of the founding affidavit on behalf of SADA and a consideration alongside it, of the heads of argument as well as the oral submissions before us, demonstrates confused thinking on its part. In the affidavit of the principal deponent on behalf of SADA it sets out what it considers to be the architecture of the Act. It asserts that in terms of s 17(1) a prerequisite for practising as a health professional is registration with the HPCSA. In paragraph 20 of the affidavit of the principle deponent of SADA, the following appears:

'20. Therefore, the [Act] creates a legislative system in terms of which –

20.1 a person may only practice certain professions if he or she is registered with the HPCSA in terms of the [Act] to practice such a profession;

20.2 only those professions recognised in terms of the HPA by the Minister, pursuant to a decision in terms of section 15(1), attract the obligation of registration by persons intending to practice those professions; and

20.3 a professional board may only be established in respect of a health profession which is registrable.'

In this paragraph SADA has sketched a chicken and egg situation, namely, a situation in which it is impossible to say which of the two things have to exist first and which causes the other. However, in SADA's heads of argument and in submissions before us, the following was stated:

'The primary challenge to the impugned regulations in this case is a legality one. The appellant contends that the regulations are *ultra vires* the [Act] because that Act provides for a logical sequence in which the creation of a new health profession must proceed. To the extent that the [Act] permitted of the establishment of a new profession at all, a register for the new profession must first be created, then a board must be constituted and finally qualifications must

be prescribed. The regulations challenged in this application did not follow that order and are consequently invalid.'

As can be seen, the latter contention is that the first step for the recognition and regulation of a profession is the establishment of a register. As best as can be discerned, the argument on behalf of SADA from there developed along the following lines: Although the register for the new profession must be opened as the first step in the process, there is no express provision in the Act in terms of which a register for any profession must be opened. Thus, it was argued, there is a lacuna in the Act and, following on the principle of legality, because of the absence of a provision in the Act of the first step of registration, the Minister, was precluded from establishing a profession, setting qualification parameters and otherwise regulating the profession. Thus, according to SADA, the Minister, in promulgating the series of regulations referred to above, acted beyond his powers. The logical consequence of this contention is that, as things presently stand, no new health profession may be established at all.

[18] At this stage the chronology of events is important. It is necessary to record that in March 2000 the Board resolved and recommended to the HPCSA that a register for dental assistants be established in terms of s 18 of the Act to fall under the auspices of the Board. In April 2000 the HPCSA resolved that recommendations by the Board be agreed to. The decision by the council was published in a newsletter during August 2000 in which the following appears:

'The Professional Board for Dental Therapy and Oral Hygiene recommended and Council resolved to establish a register for dental assistants in terms of section 18 of the Act, to fall under the auspices of the Professional Board for Dental Therapy and Oral Hygiene. The said Professional Board believes that registering dental assistants would in the interest of the patient, because dental assistants do perform professional dental acts and should therefore be properly regulated.'

[19] Before us, counsel on behalf of SADA submitted that although its primary contention was that there was no statutory power to establish a register, there was in any event no evidence provided by the respondents that a register had *in fact* been established and that the best that they could show was that there was an 'in principle'

decision to initiate a register for dental assistants. That submission is fallacious. Counsel on behalf of the Minister, the HPCSA and SADA all pointed to the statement in the answering affidavit by the National President of DAASA that the registration of dental assistants began formally in 2006 and that a register continues to exist. She stated further that there were approximately 2522 dental assistants registered with the HPCSA and that at least that many dental assistants were complying with and benefiting from the statutory regime created by the Minister. Furthermore, in a supplementary replying affidavit, in response to supplementary answering affidavits, the following two paragraphs on behalf of SADA are relevant:

'86. However, no register for dental assistants was, in fact, created prior to the promulgation of the Qualification Regulations. In terms of paragraph 22 of the Minister's further affidavit, the [HPCSA and the Board] allegedly resolved to establish a register for dental assistants in April 2000. On the second and third respondents' own version, however, in terms of annexure "TEM7" to the HPCSA affidavit, as at 9 April 2001, the establishment of a register for dental assistants had been approved only in principle and only by the Council.

87. There is no evidence in the Minister's further affidavit or any other affidavit filed by the respondents and DAASA in this matter, that, prior to the promulgation of the impugned Regulations –

87.1 dental assisting was a registrable profession;

87.2 a professional board regulating dental assistants had been constituted; or

87.3 registration in respect of dental assisting was a requirement.'

[20] From what is set out immediately preceding this paragraph, it is clear that there is an acceptance on behalf of SADA that in fact registration of dental assistants took place from the time alleged by DAASA, namely 2006. There is in any event no substantiated challenge by SADA to the assertion on behalf of DAASA in respect of the dental assistants, that they were in fact being registered from 2006. SADA, however, maintained its position that any registration that might have taken place was unlawful, particularly because a register could not be established in terms of the Act as an empowering provision was lacking.

[21] For completeness, we record that it is clear from an information leaflet, issued by the Professional Board for Dental Therapy and Oral Hygiene, dated 22 January 2007, encouraging dental assistants to register, that at that time a register was in existence. The minutes of a meeting of a task team set up to facilitate the registration and regulation of dental assistants dated 16 April 2007 records that the actual registration of dental assistants was on-going. The task team was initially set up as an *ad hoc* committee during the latter part of 2005 and was initiated by the Board. It comprised Professor Chikte, Dr Campbell who was at the time the Chief Executive Officer of SADA, Ms Majake from the Department of Health, Ms Dlamini and Ms Rhapiri, the President of SADA. The following appears from the minutes of a meeting of the task team, dated 11 November 2005:

'Noted that the Senior Manager Mr J H Coetzer advised that the Professional Board for Dental Therapy and Oral Hygiene was approached by the Dental Assistants Association of South African (DAASA) to initiate the establishment of a register for Dental Assistants. The Board then started a process of consultation with the relevant stakeholders including DAASA, the South African Dental Association (SADA) and the Medical and Dental Professions Board whereafter the regulations relating to the registration of Dental Assistants were compiled and forwarded to the Minister of Health for promulgation. These regulations were promulgated on 15 April 2015.'

[22] In the answering affidavit of the HPCSA and the Chairperson of the Board the following appears:

'17.7 In appointing this Task Team that was not only led by members of Medical and Dental Board, but had as one of its members the erstwhile Executive Director of the Applicant, SADA, the Board hoped to avert any perception that it was not taking the concerns of dentistry and the private sector employers seriously. Furthermore, the Board was hopeful that this would minimise any unnecessary delays to the process.

17.[8] SADA was actively involved in the activities of the Task Team and immediately, when the unavailability of its Executive Director Dr Campbell begun to slow the progress of the Task Team, SADA immediately ensured its representation by replacing Dr Campbell with Dr Tsiu, a qualified dentist and the Vice President of SADA. A copy of the minutes of the Task Team meeting of 25 November 2005 is attached hereto and marked Annexure "TEM13".'

[23] SADA's response, in its replying affidavit, was to deny its active involvement in the task team. Furthermore, it stated that Dr Campbell and Dr Tsiu did not serve as representatives of SADA and did not act on its behalf.

[24] The principal deponent on behalf of the Minister was Dr Thamizhanban Pillay who was the Deputy Director General: Health Regulations and Compliance Management of the Department of Health. According to him the Minister did have regard to SADA's representations before he finalised the regulations in question. The Minister was rightly criticised by SADA for not having himself attested to that fact. However, the Minister subsequently filed an affidavit in which he stated that he confirmed Dr Pillay's assertions. At this stage it is necessary to consider that the Minister and his department were regrettably slow in providing SADA with the full record of decision for the purposes of their review application. SADA adopted the position that the paucity of the record and the absence of any direct written proof that the Minister had regard to their representations ought to be held against him.

[25] It is also necessary to record that the HPCSA has as one of its professional boards the Board for the Medical and Dental Profession, which represents the interests of those two professions. It is axiomatic that a decision of the HPCSA comprises the view of its constituent boards. This would mean it would comprise the views of the medical and dental professions.

[26] The chronology in respect of the promulgation of the regulations set out in paragraph 16 above, spanning the period 15 April 2005 to 21 May 2012, is significant and ought to be borne in mind not only when the legal issues are discussed later in this judgment, but when the chronology and nature of submissions made by SADA to the Minister are dealt with.

[27] We turn now to deal with the representations by SADA and the responses, or lack thereof. During 2003, 2007 and 2009 a number of proposed regulations by the Minister were published for general comment. They related to the qualification for

registration of dental assistants and of persons who qualify outside of the Republic as well as the registration of student dental assistants. SADA participated actively in commenting on the proposed legislative regime that the Minister intended applying to dental assistants. SADA was strident in its objections to the creation of such a legislative regime. It adopted that attitude because of its perspective related to the task performed by the dental assistants within the scope and ambit of their employment by dentists. It made its first written representations to the HPCSA on 25 April 2001. We pause to consider the nature and tenor of those representations. In its first set of representations SADA recorded that although it appreciated the opportunity to submit comments it placed on record its 'disappointment at the fact that the Board did not see fit to consult with [SADA] as an important stakeholder as employers of dental assistants . . . prior to circulating the proposals.' Significantly – particularly as SADA has not always been consistent in this – it noted that it 'supports in principle the establishment of a register of dental assistants.' SADA then proceeded to comment on the precision, or otherwise, of the language used in the proposed regulations. SADA also commented on the substance of the provisions. The representations consisted of just over three pages and at the end they record a concern that there may not be sufficient training institutions to train the number of dental assistants.

[28] SADA is adamant that it received no response to those representations. The HPCSA, on the other hand, contends that on 11 July 2001 the registrar on behalf of the Board sent the proposal for the regulation of the profession of dental assistants to all stakeholders, including SADA. The Board's proposed regulations were an amendment of an earlier draft and incorporated all the comments that had been received from the stakeholders that had responded. According to the HPCSA and the Board the letter thanked all stakeholders, including SADA, for the constructive comments which, according to the Board, served to confirm to the Education Committee that it was still on the right track with regard to regulating the profession. SADA denies that it received a response from the HPCSA and points out that no proof of dispatch or receipt was provided by the HPCSA.

[29] On 10 July 2003 further representations were made by SADA. It recorded, once again, that it was disappointing that the dental profession had not been adequately consulted. For the first time SADA records that the Board was not the correct vehicle to consider applications for registration and conduct examinations of dental assistants. The following was stated:

'The reconstitution in the name of the proposed Board would be a misnomer in that this professional board has hitherto been primarily responsible for those auxiliary professions that carry out limited clinical work which dental assistants do not.'

SADA records that in its view dental patients are not unduly prejudiced by the conduct of dental assistants 'presently employed'. It goes on to state that in the absence of registration requirements and accountability the dentist as employer has assumed responsibility for the conduct of dental assistants employed by them.

[30] In the representations currently under discussion, SADA reversed its earlier stance in terms of which it welcomed registration in principle. This time it stated the following:

'It is not clear whether a dental assistants register is entirely in the interests of the patient. There is insufficient evidence to suggest that "unregistered" dental assistants have in any way prejudiced the interests of patients.'

In these representations SADA adopted a seemingly altruistic stance and submitted that registration requirements might adversely affect the ability of dental assistants to find gainful employment 'if too many dental assistants are trained at technikons and enter the marketplace'. This is in stark contrast to the submissions before us that there were insufficient training and distance learning institutions to supply the required number of qualified dental assistants to meet demand. Concern was also expressed that some dental assistants may leave their employment rather than comply with registration requirements. SADA submitted that registration would make dental assistants liable in their own capacity to patients and that insufficient thought appears to have been given to the implications of vicarious liability for dentists. The latter representation is difficult to comprehend since it appears self-evident that presently dentists might in any event be liable vicariously for acts or omissions of the dental assistants they employ. The

following recommendation made at the end of the representations by SADA also deserves attention:

‘Sufficient provision must be made to accommodate the presently employed dental assistants who are trained by dentists. We suggest a “grandfather clause” be included to allow trained dental assistants who do not possess “approved qualifications”, to register within a period of time. This will ensure continuity of employment and retention of acquired skills, experience and training.’

SADA received no written response to these representations.

[31] On 19 August 2005 SADA made yet further written representations to the then Minister of Health, Dr M Tshabalala-Msimang. Right at the outset, SADA reiterated that the Board had not seen fit to consult with it knowing full well that dentists were the main employers of dental assistants. It recorded that although the Board requested its views in 2001 on proposed regulations it had received no further communications or requests for input until the publication of the regulations in their final form. It accused the Board of failing to conduct an impartial and analytical assessment and failing to use objective criteria to develop the proposed registration regulations. It noted the provisions for compulsory registration of dental assistants and submitted that:

‘[T]hose parts of the regulations that provided for exemption from the qualification requirements for dental assistants and in particular the minimum period of in-service [on the job] training of 5 years would cause unintended and undue hardship to both dentists and dental assistants as employees.’

SADA proceeded to note that there were limited training institutions for dental assistants. It also had regard to the provision made:

‘for any person who worked as a dental assistant for a minimum period of 5 (five) years prior to 31 March 2005 to apply for exemption from the qualification requirements and that the Board may exempt such persons from having to obtain formal qualifications and in its discretion require applicants to write an examination to test their knowledge.’

The Board was criticised for its imposition of a five year in-service training period. SADA submitted that it was arbitrary and capricious. It considered the former qualification period of one year at training institutions to be excessive, if regard were to be had to the nature of the work of a dental assistant. No doubt that view would be seen by DAASA

as being patronising and condescending. Once again, SADA stated that in its view mandatory registration would not lessen the risk of harm to a patient and stated that it feared for the loss of jobs by dental assistants. In SADA's own representations it recommended that no further mandatory registration be required until all the implications and consequences were properly considered and a review of the extent of a grandfather-clause in the regulations is undertaken. SADA states that it received no response on these representations.

[32] SADA continued making representations and engaged the HPCSA and the Minister. On 18 January 2008 SADA made written representations to the Department of Health regarding regulations relating to the registration of dental assistants and the qualifications for their registration. Confusingly, this time the following was recorded:

'We wish to place on record that we accept and support the principle of registering dental assistants . . . . We have problems however in the detail of how this is to be achieved without crippling the dental profession.'

In its replying affidavit SADA was adamant that it 'objects to the regulation of dental assisting *at all*'. (My emphasis) Counsel on behalf of SADA's attempts, to explain why SADA should not be considered to be historically schizoid on the basis that the quotation should be viewed contextually, is without substance. What is demonstrated above is that SADA vacillated between seemingly expressing support for and resisting the official registration of dental assistants. In the January 2008 representations, SADA accused the HSCPA of demonstrating 'a lack of understanding of the many practical and logistical problems that have arisen since the introduction of compulsory registration of dental assistants.' It reiterated its concerns about the paucity of training institutions. SADA recorded its recognition of the 'important role that dental assistants play in increasing the efficiency of a dentist in delivering quality oral health care'. It warned, yet again, of the danger of job losses that would redound in the event of compulsory registration and regulation of dental assistants. It went on to further accuse the HPCSA of failing to recognise that dental assistants perform 'no clinical services' on patients. SADA suggested that the training time for dental assistants could be severely reduced or compacted. SADA contended that frequent extensions of grandfather

clauses was not the solution. It was particularly concerned about ‘the plight of dentists especially in smaller towns who are unable to find qualified assistants or even assistants with five years or more training.’ Lastly, SADA recorded that once proper distance learning opportunities exist SADA’s members would be glad to support the grandfather clause.

[33] All, but two, of the written representations referred to above were signed by Dr N Campbell, mostly in his capacity as Chief Executive Officer of SADA.

[34] SADA insisted that none of their representations referred to were taken into account by the Minister, the Department of Health or the Board in the drafting and/or finalisation of the regulations in question. Further representations were made by SADA on 2 April 2008 and 16 March 2009. The first of these appears to deal in the main with the auxiliary dental services of dental therapists and oral hygienists, and displays a resistance to the increasing scope of *their* professional status. The last, in the main, contained submissions already made. On 29 November 2010 representations were made to the present Minister of Health in relation to the registration of dental assistants with the HPCSA. These representations repeat much of what was contained in prior representations. SADA recorded what it considered to be problems with the registration process and the problems that might arise upon the termination of employment contracts of those who were unregistered and stated that this placed many dentists in an untenable condition in that they would be breaking the law in that they would be employing unregistered dental assistants. It urged as an option, retaining the status quo and for a repeal of the regulation regime in its entirety. As an alternative, it submitted that if the registration for dental assistants were to be retained, it should be subject to a full review. According to SADA no response was received to these further representations.

[35] It is necessary at this stage to refer to a letter dated 11 March 2004, by the Department of Health, addressed to the Board. It dealt with the contemplated registration of dental assistants, in which the issue of training institutions was raised,

together with hands-on training, and registration compliance being extended by twelve months. In that letter it was noted that most of these issues 'have been covered in SADA inputs'. Furthermore, in a letter to the HPCSA dated 24 March 2004, entitled 'Regulations relating to the qualifications for registration of dental assistants and registration of persons qualified outside the republic', the Director-General of the Department of Health enclosed comments received, apparently from interested parties. The contents of the letter bear repeating:

'Please find enclosed comments.

The major concern raised is that should the regulations be promulgated as they are, most experienced Dental Assistants would be disadvantaged as the regulations only recognize formal training. There is no provision made for professionals who received in service training or who qualified through Distant Learning Institutions.

The Department supports the SAQA policy of Recognition of Prior Learning (RPL) and would like to draw the Council's attention to the fact that the Regulations do not cover this aspect as far as Dental Assistants with experience but no recognized qualification are concerned.'

[36] Having sketched the necessary detailed background, we now turn to the issues for adjudication.

[37] In resisting SADA's application, DAASA took a point *in limine*, namely, that it was not competent as it had not been brought within the time period prescribed for review applications under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Section 7(1)(*b*) of PAJA provides:

'(1) Any proceedings for judicial review in terms of section 6(1) shall be instituted without unreasonable delay and not later than 180 days after the date –

. . .

(*b*) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

[38] PAJA, does, of course, provide for an application for condonation to extend the 180 day period. However, despite being alerted by DAASA to the restrictive provisions of s 7, SADA deliberately chose not to pursue an application for condonation. It will be

recalled that the principal basis for an attack on all the regulations was that the Minister had acted beyond his power in making them. SADA classified its review application as one brought in terms of the provisions of PAJA. It contended that the Minister, in making the regulations, was engaged in administrative action and it relied expressly on the provisions of s 6(2) which includes a challenge on the basis that the administrator whose act is being challenged had acted beyond his or her powers. From the chronology set out in para 16 above, all of the regulations set out in that paragraph, save the Scope Regulations, are struck by the restrictive provisions of s 7.

[39] In the court below, Ismail J rejected the submission by counsel on behalf of SADA that the 180 day restrictive period did not apply when the challenge was based on the principle of legality as a distinct ground of challenge and as an alternative to a review brought in terms of s 6 of PAJA. Counsel had submitted that, properly construed, the challenge was based on that Constitutional principle rather than on the provisions of PAJA. There is, with respect, no consistent thread in the judgment of the court below. The following is stated in the four concluding paragraphs of the judgment of the court below:

'[44] The time delay aspect has been dealt with above, see *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [par 31] and the *New Clicks* matter, supra.

[45] I am of the considered view that the prejudice dental assistants would suffer if the regulations were set aside far outweighs any defects which might exists in the promulgation of the regulations.

[46] I would recommend that the Minister continues with his regulations in furtherance of the legislation regarding dental assistants, however, the Minister should afford the parties a two year moratorium period before the failure to register as dental assistants would be met with criminal sanctions. This recommendation would equally apply to hiring dental assistants, by dentists, who are not registered during the moratorium period.

[47] Accordingly I make the following order:

(1) The application is dismissed.

(2) The fourth respondent is joined to this proceedings and its application for condonation is granted.

(3) The applicant is ordered to pay the costs of the respondents.'

It appears then that the application was dismissed on the basis that it was not brought within the time limits provided for in s 7. However, the court did not deal with the challenge to the Scope Regulations which was within the time limits provided for in s 7 of PAJA.

[40] In SADA's written heads of argument in this court, it made the following submissions:

(a) Although the court a quo dismissed the challenge to the regulations promulgated in 2008, being the Original Qualifications Regulations and the Board Regulations, on the delay principle, it is unclear whether the court a quo also dismissed the challenge to the 2012 regulations, being the Scope Regulations, on the same basis. If this was the case, it was submitted that the court a quo erred because the 2012 regulations were promulgated on 21 May 2012 and the application for their review was instituted on 6 December 2011, within the 180 day period stipulated in s 7 of PAJA.

(b) The court a quo ought to have considered the Dental Association's challenge to the 2008 regulations by extending the period in terms of s 9(2) of PAJA as it was in the interests of justice to do so. It was submitted that there are three reasons for this proposition:

(i) The challenge to the 2012 regulations was brought in time and because these regulations depended in part upon the validity of the 2008 regulations, it was appropriate for the court to also consider the challenge to the 2008 regulations, despite the delay.

(ii) The regulations are 'qualitatively equivalent to primary legislation' to which the delay rule in PAJA does not apply.

(iii) Although s 9(2) of PAJA refers to an 'application' for condonation no formal application supported by an affidavit is required. It is sufficient that the request is made informally in the course of the proceedings.

[41] Regarding the argument that the application was brought in terms of the principle of legality and not PAJA, in oral argument before us, counsel on behalf of SADA was faced with the decision of this court in *City of Tshwane Metropolitan*

Municipality v Cable City (Pty) Ltd [2009] ZASCA 87; 2010 (3) SA 589 (SCA), in which the following was stated (para 10):

'I agree with the appellant's contention that the making of regulations by a Minister constitutes administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000, which must comply with the requirements of this Act in accordance with the doctrine of legality'.(footnotes omitted.)

In *City of Tshwane*, this court followed the decision of the Constitutional Court in *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC) para 135, where the following was said:

'It follows that the making of the regulations in the present case by the Minister on the recommendation of the Pricing Committee was "a decision of an administrative nature". The regulations were made "under an empowering provision". They had a "direct, external legal effect" and they "adversely" affected the rights of pharmacists and persons in the pharmaceutical industry. They accordingly constitute administrative action within the meaning of PAJA.' (footnotes omitted.)

[42] Before us, counsel on behalf of SADA was belatedly constrained to concede that the challenge against the regulations it had brought in the court below fell properly within the provisions of PAJA and that the application in respect of all the regulations, save the Scope Regulations, was time-barred. The submission in written heads of argument that an application for condonation in terms of PAJA did not have to follow the conventional route was not persisted in. Even though counsel on behalf of SADA conceded that the only regulations that fell for adjudication were the Scope Regulations he suggested that without them the remaining structure of the regime would be unworkable. It appeared that what SADA was intent on doing was to use its remaining challenge in respect of the Scope Regulations to revisit the challenge it accepted was time-barred. The primary problem for SADA was that all the regulations, other than the Scope Regulations, have been in existence since 2008 and continue to exist as a fact until they are set aside. Many dentists, dental assistants and the State must have conducted themselves over many years on the basis that there was no challenge to the statutory regime and would suffer prejudice if it were now, many years later, to be set

aside. However, in dealing with the challenge to the Scope Regulations, it is necessary to deal with the architecture of the Act for the purposes of adjudicating the legality of the Scope Regulations, not for revisiting the regulation in terms of which SADA was time-barred. It is to that task that we now turn.

[43] In oral argument before us the submission on behalf of SADA was that the Minister was precluded from putting into effect the Scope Regulations because there was no provision in the Act that provided for the creation of a register for any profession. According to SADA, since it must be accepted that one cannot practice a profession without registration in terms of the Act, dental assistants could not have their scope of work defined because the Act has no mechanism for a register to be opened to enable them to be registered. This stance represented a significant shift from the position adopted in SADA's written heads of argument in which it was contended that no professional board for dental assistants had been lawfully established and consequently the scope of work of dental assistants could not be defined. Simply put, the argument now appeared to be that there was no point in defining the scope of work for a non-existent profession. This shift in tack was probably prompted because of the time-bar problem faced by SADA.

[44] The long title to the Act reads as follows:

'To establish the Health Professions Council of South Africa and professional boards; to provide for control over the education, training and registration for and practising of health professions registered under this Act; and to provide for matter incidental thereto.'

'Health profession' is defined in s 1 of the Act as 'any profession for which a professional board has been established in terms of section 15 and includes any category or group of persons provided for by such a board'.

[45] Section 2 established the HPCSA as a juristic person. In terms of s 3 of the Act the HPCSA has, among its objectives and functions, to 'advise the Minister on any matter falling within the scope of the Act in order to support the universal norms and values of health professions, with greater emphasis on professional practice,

democracy, transparency, equity, accessibility and community involvement'. As stated above, it also has as one of its functions, to co-ordinate the activities of professional boards in terms of the Act and to act as an advisory and communicatory body for such professional boards. Importantly s 3(*c*) of the Act provides:

'The objects and functions of the council are –

. . .

(c) to determine strategic policy in accordance with national health policy as determined by the Minister, and to make decisions in terms thereof, with regard to the professional decisions in terms thereof, with regard to the professional boards and the health professions, for matters such as boards and the health professions, for matters such as finance, education, training, registration, ethics and professional conduct, disciplinary procedure, scope of the professions, inter-professional matters and maintenance of professional competence.'

[46] Section 4 of the Act sets out the powers of the HPCSA and includes the power, after consultation with the relevant professional board, to 'consider any matter affecting the health professions registrable under [the] Act and, consistent with national health policy determined by the Minister, make representations or take such action in connection therewith as [it] deems necessary. It also has the power to 'delegate to any professional board or committee or any person such of its powers as it may determine'. It also has the wider power to 'perform such other functions as may be prescribed, and do all such things as [it] deems necessary or expedient to achieve the objects of [the] Act within the framework of national health policy determined by the Minister'. The HPCSA consists of, inter alia, not more than 16 persons designated by the professional boards.

[47] Sections 15(1) and (2) of the Act read as follows:

'(1) The Minster shall, on the recommendation of the council, establish a professional board with regard to any health profession in respect of which a register is kept in terms of this Act, or with regard to two or more such health professions.

(2) The Minister may, on the recommendation of the council, reconstitute the professional boards with regard to the health professions for which the boards have been established, and establish other boards.'

[48] Section 15A sets out the objects of a professional board. They are, amongst others, to consult and liaise with other professional boards on matters affecting them and to assist in the promotion of the health of the population of the country on a national basis. It is envisaged that they are enabled to make representations to the HPCSA, to advise the Minister 'on any matter falling within the scope of this Act as it relates to any health profession falling within the ambit of the professional board in order to support the universal norms and values of such professional professions with greater emphasis on professional practice, democracy, transparency, equity, accessibility and community involvement'. A notable power of a professional board in performing its regulatory power is set out in s 15B(1)(*a*), which states:

'A professional board may –

(*a*) in such circumstances as may be prescribed, or where otherwise authorised by this Act, remove any name from a register or, upon payment of the prescribed fee, restore thereto, or suspend a registered person from practising his or her profession pending the institution of a formal inquiry in terms of section 41; . . . .'

[49] Section 18 of the Act provides for the keeping of a register. Section 18(1) provides:

'(1) The registrar shall keep registers in respect of persons registered in terms of this Act, and must enter in the appropriate register the name, relevant contact details, qualifications, date of initial registration and such other particulars (including the registration category in which they hold registration and the name of their speciality, subspeciality, professional category or categories, if any) as the relevant professional board may determine, of every person whose application for registration in terms of s 17(2) has been granted.'

[50] Section 24 of the Act provides that the Minister may on the recommendation of the HPCSA make provisions for the requisite qualification that entitles a person to be registered.

[51] Section 33(1), which is particularly pertinent to the issues in dispute, reads:

‘(1) The Minister may, on the recommendation of the council and the relevant professional board, by regulation define the scope of any health profession registerable in terms of this Act by specifying the acts which shall for the purposes of the application of this Act be deemed to be acts pertaining to that profession: Provided that such regulations shall not be made unless any professional board established in terms of section 15 in respect of any profession which may in the opinion of the Minister be affected by such regulation, has been given an opportunity of submitting, through the council, representations as to the definition of the scope of the profession in question: Provided further that if there is a difference of opinion between the council and such professional board as to the definition of the scope of the profession concerned, the council shall mention this fact in its recommendation.’

[52] The long title of an Act can serve the purpose of showing the object or purpose of the Act. It is clear from the long title that the object of the Act is to provide for the regulation of a health profession through the HPCSA and Professional Boards and to make provision, amongst others, for the registration of health professionals.

[53] The scheme of the Act is such that the Minister is advised by the HPCSA on whether to establish a Professional Board with regard to any health profession. The provisions of s 15(1) appear in paragraph 47 above. SADA submitted that a reading of that subsection leads to the ineluctable conclusion that the establishment of a register for that profession is a prerequisite to the establishment of a professional board. We disagree. There would, as a matter of logic, be no point to establish a register for a profession that has not yet come into being. It is sequentially incongruent. At best for SADA the decisions could be made simultaneously and the Board and its register could come into existence at the same time. Section 12, the provisions of which are referred to above, envisages that a registrar is appointed by the Minister. In prior incarnations the Act provided for the HPCSA to appoint a registrar. In terms of s 12(2) the registrar is the accounting officer and secretary of the HPCSA and of *each* professional board and is obliged to carry out the functions and duties imposed by the Act. Section 18, the provisions of which have already been referred to, obliges the registrar to keep registers in respect of persons registered in terms of this Act and to enter the name and other relevant details, including the registration category.

[54] These provisions, all read together purposively, when practically applied, must mean that a register shall be kept either consequent to or attendant upon a decision to establish a professional board. In the present case, the Minister reconstituted the Board to include dental assistants within its ambit and as demonstrated above a register was kept, certainly at a time before the Scope Regulations were promulgated. We also know that more than 2000 dental assistants have already been registered.

[55] There is thus in our view no substance to the submission by SADA that no provision is made in terms of the Act for the opening of a register for any profession. In any event, if one were to follow the submission on behalf of SADA, the Act would be unworkable and no new health profession could be established. This would have the effect of rendering the Act nugatory. As already alluded to, the establishment of the board and all the other regulations are beyond review.

[56] The heading of s 33 of the Act, which deals with the powers of the Minister to create regulations that define the scope of dental assistants, bears the following title:

‘Definition of scope of other health professions registrable in terms of this Act and registration of certain persons.’

This might have been an additional prompt for the stance adopted by SADA. However, sequentially it makes sense to first establish a board for a particular profession and then, if the Minister were to elect to exercise the powers referred to in s 33, to first define the scope of the profession before the obligation to register kicks in. The unassailable logic must be that one would have to first consider whether one falls within the scope of that health profession in order to decide whether one is obliged to register or not. Put differently, regulation cannot occur and compliance cannot be ensured until and unless the scope of the profession has been defined. What now requires to be addressed are two further submissions on behalf of SADA: that the Minister failed to take into account its written representations which warned about the possibility of large scale unemployment amongst dental assistants, as well as the real threat of criminal prosecutions faced by dentists and dental assistants.

[57] As set out in para 35, the inputs of SADA were considered in the draft regulations. In addition, on 5 April 2005, as SADA expressed its concerns regarding the draft qualification regulations, the HPCSA in a letter dated 13 June 2005 that individual dental assistants who had not obtained their qualification from a University of Technology, will be subjected to an examination set by the Board, alternatively they would be exempted from sub-regulation (2). In terms of the draft qualification regulations, it was stipulated that the HPCSA would be an examining authority for the formal qualification in dental assisting. In addition, in terms of s 25(2) of the Act, provision was made for a person who applied for registration to pass to the satisfaction of the Board an evaluation to determine whether such person possessed adequate professional knowledge, skill and competence to be admitted to registration as a dental assistant. It is therefore clear that from the outset the Minister as well as the HPCSA were well aware of the dangers of unemployment and potential criminal sanctions to be imposed upon unregistered dental assistants and made adequate provisions in the qualification regulations as well as the Act to cater for any such eventuality. The fact that solutions were provided for the potential problem clearly indicates that the Minister considered the issue right from the outset. Moreover, what should not be lost sight of is that dentists' interests nationally are advanced within the HPCSA, through the Medical and Dental Board. Furthermore, we take a dim view of the nondisclosure in SADA's founding affidavit, of Dr Campbell and Dr Tsiu's involvement in the task team in which the matters currently up for discussion were debated and supported. In these circumstances to suggest that SADA's views were not considered is disingenuous. As demonstrated above the threat of criminal sanctions is more imagined than real. Finally, from the evolution of the statutory regime created by the regulations it is palpably clear that SADA's views had been taken into account. The steps taken by the Minister, the HPCSA and SADA is in line with a world-wide trend to regulate health related professions in the public's interest.

[58] For all the reasons set out above, the appeal must fail. It was submitted on behalf of SADA that in the event of its failure in this appeal, it was in any event protected

against an adverse costs order in terms of the order by the Constitutional Court in *Biowatch Trust v The Registrar, Genetic Resources & others* [2009] ZACC 14; (2009) 6 SA 232 (CC) para 21, where it was noted that 'as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs'. However, in that case the Constitutional Court said the following at para 20:

'20. Nevertheless, even allowing for the invaluable role played by public interest groups in our constitutional democracy, courts should not use costs awards to indicate their approval or disapproval of the specific work done by or on behalf of particular parties claiming their constitutional rights. It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken. Thus, a party seeking to protect its rights should not be treated unfavourably as a litigant simply because it is armed with a large litigation war-chest, or asserting commercial, property or privacy rights against poor people or the State. At the same time public-interest groups should not be tempted to lower their ethical or professional standards in pursuit of a cause. As the judicial oath of office affirms, judges must administer justice to all alike, without fear, favour or prejudice.' (footnote omitted.)

And further, para 24:

'24. At the same time, however, the general approach of this court to costs in litigation between private parties and the State, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.' (footnote omitted.)

[59] We will bear in mind what was referred to immediately above in dealing with the facts of this case. As set out earlier in this judgment, SADA adopted an inconsistent attitude towards the professional regulation of dental assistants. First, it was equivocal about the envisaged statutory regulation of dental assistants; then committed in principle to the recognition of dental assistants as professionals; and, finally, after many years, it assumed an adamant and resistant attitude to the regulation of dental assistants as professionals. As stated in paras 22 and 23 above, SADA failed to disclose that high ranking officials within its ranks engaged as members of the task

team with the issues they were concerned about and apparently in support of a statutory regime. In addition, when alerted to the time-bar provision of PAJA, SADA nevertheless elected not to pursue an application for condonation. Faced with the time-bar, SADA contrived an argument in an effort to revisit decisions that were beyond review. In our view, this conduct in the litigation leading up to the present appeal should count against it. Throughout the litigation, SADA also maintained a condescending and patronising attitude with regard to dental assistants, even adopting the contradictory, if not disingenuous, stance of claiming to act in their best interests while at the same time failing to cite the largest organisation representing that profession, and ultimately in fact going so far as to oppose their intervention as a party in the litigation on the basis that they lacked *locus standi*. It is not insignificant that of all the litigant parties, DAASA's members are without doubt the most financially vulnerable. All of these factors have to be seen against the emphatic assertion by counsel on SADA's behalf that it was committed to democratic principles and against the allegations in its founding affidavit of its concern for the welfare of dental assistants. SADA's attitude to DAASA's intervention is ironic and deplorable. Before us, right at the outset, counsel for SADA was asked to consider whether the attitude adopted by it did not have the potential for a public relations disaster. SADA's attitude was to reiterate that it was an adherent to the principle of legality and should be lauded for its efforts rather than criticised. For the reasons set out earlier in this paragraph, we disagree.

[60] The following order is made:

1. The appeal is dismissed with costs, including the costs of two counsel where employed by each of the respondents.

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M S Navsa

Judge of Appeal

_____

K G B Swain
Judge of Appeal

WILLIS JA:

[61] I have had the privilege of reading the draft judgment prepared my brothers Navsa and Swain. I agree with the order that they have proposed as well as their reasoning, except for what appears in paragraph 59. The stance of SADA may have been unfortunate. Its attitude towards the registration and regulation of dental assistants may also have been less than astute and even unwise. This does not entail that its attitude has been 'condescending', or 'patronising' or 'disingenuous' or 'deplorable' to the extent that it deserves moralistic censure from this court.

[62] It needs to be clear that the appellant has failed in this case because the law is against it and not because judges are, necessarily, inherently enthusiastic 'regulators'. Our personal views should, ordinarily, be irrelevant. It is not, however, entirely irrelevant or undeserving of judicial comprehension that the dental profession has functioned fairly well for decades, if not centuries, without the benefit of the regulation of the occupation of dental assistants. Teeth have, by and large, successfully been extracted, drilled, filled, replaced with implants and crowns and so on, without there being a register of dental assistants. We have survived the discomforts of the dentist's chair with some grins and plenty of forbearance, unassisted by the regulation of dental assistants.

[63] The notion that SADA should be excused from an award of costs if it lost the appeal seems to have been an afterthought: it was not even raised in its heads of argument. When confronted with this by the court, Mr Leech, SADA's counsel, demurely replied that he had never even considered that SADA might lose.

[64] The award of costs in this case requires no judicial fulmination. The principles relating to the strict application of the 180 day guillotine in respect of bringing applications for review in terms of PAJA are now trite. The late bringing of the application has been the unanswerable reason why the SADA cannot succeed, even

though there are other substantive issues that operate against it. It cannot be said, in the words of *Biowatch*, that this application was ‘fresh constitutional terrain for all’ or that ‘all the parties have had to feel their way’ or that the State has been shown ‘to have failed to fulfil its constitutional and statutory obligations’. For this reason, the ordinary principles relating to the award of costs in litigation should apply.

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N P Willis

Judge of Appeal

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