

**THE REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 16305/22**

In the matter between:

**MARKRAM JAN KELLERMAN** Applicant

and

**THE LEGAL PRACTICE COUNCIL,  
WESTERN CAPE OFFICE ("THE WCLPC")** First Respondent

**THE LEGAL PRACTICE COUNCIL (NATIONAL)  
("THE LPC")** Second Respondent

**MR PIERRE DU TOIT** Third Respondent

**THE LEGAL SERVICES OMBUD ("THE OMBUD")** Fourth Respondent

**(The Honourable Mr Justice Desai)**

Coram: Cloete *et Wille*, JJ

Heard: 27 February 2024

Delivered: 14 March 2024

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**JUDGMENT**

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## **THE COURT**

### ***Introduction***

[1] This is an application to review and set aside the decision of the first respondent's investigating committee concerning three complaints preferred against the third respondent by the applicant. These complaints arose because of unfortunate and acrimonious litigation between several entities in which the applicant had a vested interest. The third respondent is an attorney who acted for many of the parties adverse to the applicant's interests.<sup>1</sup>

[2] The decision rendered by the first respondent was to the effect that the third respondent had no *prima facie* case to meet in connection with the three complaints lodged against him and that, accordingly, there should be no disciplinary enquiry held against him. This decision was made in terms of the Legal Practice Act ("LPA"), its rules and its code of conduct dealing with the conduct of legal practitioners.<sup>2</sup>

[3] The first and second respondents have filed a notice indicating they will abide by the court's decision. The fourth respondent takes no part in these proceedings. The targeted legislation in this connection contemplated an internal appeal process to benefit the applicant. Regrettably, this intended internal appeal process has yet to be promulgated into law and is thus unavailable to the applicant.<sup>3</sup>

[4] The first respondent's decision recorded the following: (a) there was no reasonable prospect of success in proffering a misconduct charge against the third respondent, (b) a finding of professional misconduct could not be made against the third respondent, and (c) the applicant's complaints should not be considered, by way of *viva voce* evidence, before a disciplinary committee of the first respondent.<sup>4</sup>

[5] The third respondent applied to strike out specific material referenced in the applicant's founding affidavit. This application was not proceeded with as the applicant indicated he no longer intended to rely on this alleged offending material. The only issue remaining concerning this application was the issue of costs.<sup>5</sup>

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<sup>1</sup> The first respondent rendered its decision on the 21st of July 2022 ("the decision").

<sup>2</sup> In terms of Section 39 of the Legal Practice Act, No. 28 of 2014 ("the LPA")

<sup>3</sup> They do so expressly based on Section 41 of the LPA; this must be read with s 37(3)(b) thereof..

<sup>4</sup> As provided for in Section 39 of the LPA.

<sup>5</sup> The applicant indicated during the hearing that it no longer relied on paragraph 18 of his founding affidavit.

[6] Other than the primary relief sought by the applicant, one other issue remained in connection with the costs of an interlocutory discovery application that stood over for determination by this court. The applicant was ordered to comply with a discovery notice in connection with essentially the same material referenced by the applicant in the offending paragraph of his founding affidavit, which formed the subject of the striking-out application.<sup>6</sup>

[7] The decision taken by the first respondent was made by a single practitioner nominated to investigate these complaints. The applicant now accepts that a single practitioner can constitute an investigative committee.<sup>7</sup>

[8] This dispenses with the root of one of the applicant's complaints, being the contention that in these circumstances (considering the complexities of the complaints), the investigative committee should have been composed of more than one legal practitioner. Further, at least one should have experience dealing with liquidations and insolvencies.<sup>8</sup>

### **Grounds of review**

[9] The applicant's grounds of review set out in the founding papers and refined during argument are that the first respondent:

- (i) failed to give any consideration at all to the applicant's complaints against the third respondent;
- (ii) failed to properly determine whether there was a *prima facie* case against the third respondent in respect of any of the complaints, including failing to either call upon him to appear and explain himself or discuss the matter as contemplated in rule 40.2.3 of the LPA rules; and
- (iii) committed a material irregularity in accepting the third respondent's version over his.

[10] The applicant thus contends that the first respondent's decision was taken (a) arbitrarily or capriciously, (b) in a procedurally unfair manner, (c) materially influenced by an error of law and fact, and (d) in a way not rationally connected to

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<sup>6</sup> The costs of and incidental to this application stood over for determination by this court.

<sup>7</sup> The applicant advanced that because of the complexity of the matter a single practitioner was not adequate.

<sup>8</sup> The not yet promulgated appeal procedure envisages at least three but not more than five practitioners.

the information before her.<sup>9</sup>

### **History**

[11] This acrimonious and unfortunate litigation had its genesis in a sequestration application that commenced about four years ago. This sequestration application focused on the sequestration of the joint estate of the applicant's sister and brother-in-law. It was alleged that the applicant's brother-in-law was a fraudster. The third respondent acted for the petitioning creditors in this application.<sup>10</sup>

[12] Between the date of the provisional order and the final order of the sequestration of this joint estate, the applicant concluded a cession and pledge agreement with a discrete trust of which his sister and brother-in-law were the trustees, together with one other independent trustee. Regarding this cession and pledge, the applicant attempted to secure his position regarding a substantial loan that he had advanced to his brother-in-law. Through the cession and pledge, the applicant acquired fifty percent of the shareholding which this trust held in a private company.<sup>11</sup>

[13] This cession and pledge document was later declared void because the applicant's brother-in-law and his sister had been the subject of a provisional sequestration order at the time of the cession and pledge and were thus disqualified from conducting business as trustees on behalf of the trust. The shares disposed of were to ostensibly improve the applicant's unsecured position regarding his loan to his brother-in-law.<sup>12</sup>

[14] Provisional trustees were appointed to take control of the assets of the joint estate. The third respondent acted for the petitioning creditors of the joint estate, and he also acted for the provisional trustees of the joint estate, essentially against the alleged fraudster. Following investigations by the provisional trustees, they met with the alleged fraudster at the offices of the third respondent. At this meeting, specific information was obtained from the alleged fraudster, which resulted in the

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<sup>9</sup> As contemplated in s 6(2)(e)(vi); s 6(2)(c), s 6(2)(d), and s6(f)(ii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

<sup>10</sup> A provisional order of sequestration was granted in November 2018.

<sup>11</sup> This trust was named the 'HNP' Trust, and the company was styled 'Quintado' (Pty) Ltd/

<sup>12</sup> For the HNP trust to legally act, it required a minimum of three qualified trustees to transact.

drafting and filing of affidavits supporting the sequestration of the trust. This was the trust that disposed of its shareholding in a private company to the applicant.<sup>13</sup>

[15] It is these affidavits that are alleged to be problematic. The applicant complains that the third respondent was guilty of preparing these affidavits and confirming their content in the knowledge that the affidavits contained falsehoods, which were then used in the sequestration application of the trust.<sup>14</sup>

[16] The insolvency trustees of the joint estate of the applicant's sister and brother-in-law then applied to liquidate the discrete private company. Fifty percent of this company's shares were (at this point) ostensibly owned by the applicant in terms of the cession and pledge agreements, which had been concluded with his sister's and brother-in-law's trust.<sup>15</sup>

[17] The reasons for the liquidation of this company were allegedly underpinned by payments made to this company by the alleged fraudster and or payments made by the trust controlled by the alleged fraudster and his wife. After the provisional liquidation, the provisional liquidators brought an extension of powers application to conclude a lease agreement to preserve the immovable property which belonged to this company in provisional liquidation. The third respondent acted for the provisional liquidators who took positions adverse to the applicant's interests.<sup>16</sup>

[18] The joint trustees of the trust also piloted an application to declare the pledge and cession transaction to the applicant's benefit unlawful and for the applicant's security regarding his loan to his brother-in-law to be set aside. This matter was settled, and the security was set aside. The third respondent also acted in this litigation against the applicant.<sup>17</sup>

[19] Lastly, the provisional order of liquidation concerning the discrete company, which formed the subject of the disputed cession and pledge transaction, was eventually discharged. After this, the applicant filed his complaint with the first respondent. The chronology indicates that despite the applicant's pending

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<sup>13</sup> *The HNP trust disposed of its shareholding in 'Quintado' to the applicant.*

<sup>14</sup> *The third respondent and the provisional trustee concerned filed supplementary affidavits to correct their errors.*

<sup>15</sup> *This was the cession and pledge agreement that was eventually set aside by way of an agreed settlement.*

<sup>16</sup> *This is essential context for both the first and the second complaint.*

<sup>17</sup> *The chronology records that the third respondent continued with this litigation after the complaint to the first respondent.*

complaint, the third respondent continued to act against him, wearing several hats in connection with some sequestrated and liquidated entities.<sup>18</sup>

### **Consideration**

[20] In essence, the applicant seeks to review and set aside certain decisions made by an investigating committee constituted by the first respondent, which dismissed three complaints of professional misconduct against the third respondent. The applicant now confines his relief to the remittal of his complaints to the first respondent for reconsideration, seemingly before a differently constituted investigating committee.<sup>19</sup>

[21] We will deal with the last complaint first and the first complaint last. The last complaint relates to the alleged overreaching by the third respondent. These complaints are related to the fees levied for a lease agreement and the fees charged for an interlocutory application on behalf of provisional liquidators. The applicant is not pursuing the complaint about the alleged overreaching concerning the drafting of the lease agreement.<sup>20</sup>

[22] Then, the complaint about the fees charged for the interlocutory application remains. The third respondent's client was not the applicant. The third respondent acted on the instruction of the provisional liquidators in connection with an application to extend their powers to preserve the company's assets in provisional liquidation. The applicant advanced that the fees charged by the third respondent were excessive.<sup>21</sup>

[23] Regarding this complaint, the third respondent denied the allegation of overreaching because, among other things, of a fee agreement concluded with his client. The third respondent put up an itemized bill of costs regarding the relevant application, revealing that the fee he raised (according to him) was not unreasonable.<sup>22</sup>

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<sup>18</sup> The complaint was preferred on 3 December 2020, and the share transaction was set aside on 4 March 2022.

<sup>19</sup> The applicant relies on Section 6 and the sub-sections of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

<sup>20</sup> The lease agreement was not drafted by the third respondent but by one of his colleagues in the law firm.

<sup>21</sup> This was an application under section 386 (5) of the Companies Act 61 of 1973.

<sup>22</sup> The provisional liquidators have agreed to the amount of the fee charged.

[24] The parties subsequently agreed, subject to a reservation of rights, that a formal bill of costs about this fee would be prepared and submitted for taxation. The taxation has yet to take place. The applicant believes these fees should nevertheless have been scrutinized and have been the subject of a determination by the investigating committee of the first respondent.<sup>23</sup>

[25] However the applicant was never a client of the third respondent. Instead, his complaints arise from matters where the third respondent represented the litigants on the opposing side whose interests directly conflicted with those of the applicant, including in entities involved in an alleged unlawful scheme conducted by the applicant's brother-in-law.<sup>24</sup>

[26] Clause 12.6 of the code of conduct precludes an attorney (legal practitioner) from overreaching a client, overcharging the debtor of a client, or charging a fee which is unreasonably high, having regard to the circumstances of the matter. The first two categories do not apply to the third respondent *vis-à-vis* the applicant, and the third category will be determined by the taxing master as a consequence of the agreement reached between the parties.<sup>25</sup>

[27] Now, we turn to the second complaint raised by the applicant. It is alleged that the third respondent failed to maintain the highest standards of honesty and integrity concerning an error in the initial founding affidavit in the application launched for the sequestration of the trust controlled by the applicant's sister and brother-in-law. This is primarily because of the confirmatory affidavit by the third respondent himself. In essence, the applicant requires this explanation given by the applicant and the provisional trustee in this connection to be tested through a hearing comprising of *viva voce* evidence and cross-examination. The third respondent argues that what the applicant desires is irrelevant, considering the applicable statutory framework.<sup>26</sup>

[28] The third respondent contends that by advancing this complaint, the applicant merely seeks to revisit the same issues which were traversed in the sequestration

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<sup>23</sup> This was in the broader context of the allegation that the third respondent was conflicted and generating unnecessary fees.

<sup>24</sup> The third respondent received his instruction from the liquidators and trustees.

<sup>25</sup> It was agreed that the Taxing Master of the High Court would tax this bill of costs.

<sup>26</sup> Section 37 of the LPA provides only that an investigating committee may require a practitioner to produce documents.

application of this trust, together with all the failed applications to appeal the final sequestration order and also the subsequent application for the removal of the insolvency trustees appointed to the trust.<sup>27</sup>

[29] The relevant history to this complaint may be briefly stated as follows: (a) the third respondent prepared affidavits which contained allegations about what was said at a meeting with the alleged fraudster, which he allegedly knew to be false; (b) the third respondent then filed these affidavits in the sequestration application to generate fees and, (c) that this incorrect information related directly to the alleged claim of the petitioning creditor who was seeking the sequestration of the subject trust.<sup>28</sup>

[30] In response to these allegations, the third respondent and the provisional trustee of the joint sequestrated estate of the applicant's sister and brother-in-law obtained a transcript of the meeting's recording (in the same affidavits complained of, they earlier disclosed that the meeting had been recorded). They then admitted their errors and deposed to supplementary affidavits to correct the errors they made. By agreement, these supplementary affidavits were delivered and entered into the record before the final order of sequestration of the trust was granted. Mr Acting Justice Sievers found these issues were fully ventilated in the papers, and the explanations were accepted.

[31] The applicant complains that Sievers AJ only dealt with the acceptance of the explanation in passing; there is no indication that in dismissing the subsequent petition to the Supreme Court of Appeal and further petition for reconsideration that the abovementioned Court accepted the correctness of the finding by Sievers AJ; and that the Constitutional Court subsequently refused to entertain the further leave to appeal application on the basis that it did not warrant entertaining that Court's jurisdiction. But given that the explanations went to the cause of action itself, logic dictates that these Courts of Appeal would have considered such explanations and, as we understand it, the petitions themselves also canvassed this ground of complaint. A further important factor is that if the third respondent had intended to

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<sup>27</sup> *In all the subsequent proceedings, the supplementary affidavits correcting the errors in the affidavits were accepted.*

<sup>28</sup> *In essence, the complaint was that the court was presented with false and incorrect information to generate fees.*



mislead Sievers AJ deliberately, he would undoubtedly not have disclosed that the meeting had been recorded in the first set of affidavits.<sup>29</sup>

[32] Also significant was that the trust was sequestrated primarily because the joint estate of the fraudster had a loan claim against the trust on the basis described by the alleged fraudster himself to those present at an earlier meeting. It was alleged (and there was some documentary material supporting these allegations, including financial statements) that monies were loaned to the trust by the alleged fraudster himself. The monies so loaned were then loaned to another discrete entity. This information was made known at a prior meeting with the alleged fraudster.<sup>30</sup>

[33] It is not so much the incorrect information that is the issue. As stated above, the primary complaint is that the third respondent allegedly knowingly obtained false information and utilized this information unfavourably to sequestrate the subject trust. Sievers, AJ found in the judgment dealing with the final sequestration of the trust, as indicated above, that the error was *bona fide* (as opposed to the deliberate fabrication of a false claim by the third respondent to sequestrate the trust to generate fees).<sup>31</sup>

[34] What is more critical for us in dealing with this issue are the references made in the sequence of annual financial statements signed by the alleged fraudster and his co-director reflecting the existence of certain loans from the trust of substantial amounts that remained unpaid. The significance of this was that the trust had no source of income which would enable it to advance these amounts.<sup>32</sup>

[35] The bottom line is that the factual basis upon which the trust was finally sequestrated did not rest solely on the error relating to what the alleged fraudster had stated during the problematic meeting but was underpinned by the other contemporaneous statements and documents referenced earlier. In these circumstances the applicant's contention that because of the nature of his complaint, the third respondent should give *viva voce* evidence and be cross-examined thereon fails to withstand scrutiny. In any event, the relevant clauses of the conduct code do

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<sup>29</sup> Mr Acting Justice Sievers accepted this explanation.

<sup>30</sup> This meeting was held on 30 October 2018, and the other entity was styled "Pholaco" (Pty) Ltd.

<sup>31</sup> The court accepted the subsequent supplementary affidavits filed to explain the errors in the initial affidavits.

<sup>32</sup> The HNP trust was not in the first place possessed of sufficient income to advance these monies.

not provide for the compulsory cross-examination as part and parcel of the investigation of an investigation committee. Thus, we are unpersuaded by the applicant's arguments.<sup>33</sup>

[36] Turning to the last complaint. The applicant asserts that the third respondent is guilty of allegedly accepting briefs contrary to the provisions of the conduct code. The relevant clause of the conduct code indicates as follows:

*'...A legal practitioner who has accepted a brief from a liquidator or a trustee of an insolvent estate shall not at any time accept a brief to act in any capacity for an interested party in subsequent proceedings in the liquidation or insolvency...'*<sup>34</sup>

[37] The applicant complains that the third respondent acted as the attorney for the provisional trustees and later the final trustees in the insolvent joint estate of the alleged fraudster. The third respondent also acted in the sequestration of the subject trust. In addition, the complaint is that the third respondent accepted a brief to act for the provisional liquidators of a discrete third-party company where the petitioning creditor was the joint insolvent estate of the alleged fraudster.<sup>35</sup>

[38] The third respondent advances that the abovementioned clause in the code postulates a pre-existing situation where an estate has been sequestrated or liquidated and is under the control of the insolvency trustee or liquidator, as the case may be. The legal practitioner has thus already accepted a first brief from such insolvency trustee or liquidator. The issue then arises whether a legal practitioner is prohibited from accepting a further brief to act in any capacity for any interested party in subsequent liquidation or insolvency proceedings going forward.<sup>36</sup>

[39] We do not understand the clause as a blanket prohibition on a legal practitioner accepting a second or further brief from a liquidator or insolvency trustee. Instead, it is a prohibition that regulates the acceptance of a further brief that is one in subsequent proceedings, giving rise to a conflict of interest. Thus, there is no

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<sup>33</sup> Section 37 of the LPA provides that an investigating committee may only require a practitioner to produce documents.

<sup>34</sup> Clause 58.8 of the Code of Conduct.

<sup>35</sup> The possible conflict could only have been related to the third respondent's unnecessary generation of fees.

<sup>36</sup> The legal practitioner would, in the ordinary course, have acted for the petitioning creditor.

prohibition against a legal practitioner accepting a second or further brief from the liquidator, trustee, or any interested party in other proceedings.<sup>37</sup>

[40] Our interpretation is informed by the context that a legal practitioner who acts for a petitioning creditor in seeking to sequester an estate based on a debt owed is acting not to recover the debt owed but instead to place the hand of the law on the estate for the benefit of its creditors. Thus, when a legal practitioner subsequently accepts a brief from the duly appointed insolvency trustee or liquidator, the practitioner would not be acting for the petitioning creditor (anymore) but for the trustees or liquidators in the interests of the estate's creditors.<sup>38</sup>

[41] In the reasons for its decision about the wearing of the two hats complaint by the applicant regarding the conduct of the third respondent in representing the various trustees and liquidators (which is the main complaint and at the core of this review application), the first respondent had the following to say [*sic*]:

*'...There was no information before the committee which suggested that there was a conflict of interest which emerged subsequently either and that the legal practitioner did not comply with the ethical obligation to withdraw...'*<sup>39</sup>

[42] A conflict of interest is a situation in which a person or entity has competing interests or loyalties that could compromise their ability to act impartially or in the best interest of their clients. Conflicts of interest are taken very seriously in the legal profession, as they should be. They can undermine the integrity of the legal system and erode public trust in the profession. Legal practitioners have a fiduciary duty to act in the best interests of their clients and to avoid any conflicts that could compromise their ability to do so. Conflicts of interest can arise in various ways in the legal field.<sup>40</sup>

[43] A conflict of interest can also arise when a legal practitioner has a personal or financial interest that could affect their professional judgment. If a legal practitioner has a close personal relationship with a party involved in a case or has a financial stake in the outcome, his or her ability to provide unbiased advice and representation

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<sup>37</sup> This is because the practitioner now acts for and is paid by a different client (the liquidator or trustee).

<sup>38</sup> The interests of the creditors in the estate would be of priority.

<sup>39</sup> The first respondent believed they assessed this complaint fairly, reasonably and following the correct procedure.

<sup>40</sup> It is so that a financial interest may give rise to a conflict of interest.

may be compromised. This seems to be the real issue of the applicant in connection with all his complaints.<sup>41</sup>

[44] Thus, legal practitioners are subject to ethical rules and professional conduct guidelines that explicitly address conflicts of interest. These rules guide legal practitioners in identifying and managing conflicts. Legal practitioners must diligently identify and manage conflicts of interest to maintain the integrity of the legal profession and ensure the highest level of representation for their clients. Due to their roles and responsibilities, a conflict of interest may readily arise for legal practitioners when dealing with liquidators and trustees, which could compromise their ability to provide unbiased advice, especially if the legal practitioner has a financial relationship with the liquidator or trustee and/or the liquidator's or trustee's firm, or any parties involved in the liquidation or insolvency process.<sup>42</sup>

[45] As a matter of pure logic, such relationships could compromise a legal practitioner's objectivity and impartiality. Thus, legal practitioners should strictly adhere to ethical and professional standards to avoid conflicts of interest. Suppose a conflict of interest arises during representation. In that case, a legal practitioner should promptly inform the client and address the conflict, such as withdrawing from representation or obtaining informed consent from all affected parties. It is always essential for legal practitioners to prioritize their client's best interests and maintain their professional integrity when dealing with liquidators, trustees, and any other potentially conflicting parties.<sup>43</sup>

[46] Our jurisprudence has provided some invaluable guidelines in dealing with potential conflicts of interest when dealing with liquidators and trustees. In *Swart*, the essence of the standard required by legal practitioners was eloquently captured. This is in circumstances when faced with a potential conflict of interest in a similar type of matter. The following was indicated:

*'...I noted that whether a conflict of interest presents in any matter is dependent on the facts. If, on an analysis of the facts, the interests of the petitioning creditor and those of the liquidator correspond with each other, there will ordinarily be no conflict*

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<sup>41</sup> *The applicant's complaint goes to the fees charged, and that the third respondent unnecessarily generated fees.*

<sup>42</sup> *The evidence before us did not support a financial relationship between the trustees or liquidators and the third respondent.*

<sup>43</sup> *They should disclose potential conflicts to their clients and avoid representing conflicting interests.*

*of interest. On the contrary, there will often be much to be said in favour of the deployment of the petitioning creditor's attorneys because they may be steeped in the complexities of the issues with which the liquidator will have to engage, and it would be unduly costly and time-consuming in such circumstances to appoint other attorneys with no prior involvement to qualify themselves afresh. The fact that the liquidator may, as in the current matter, adopt a position adverse to the position of one or more of the other creditors does not, without more, derogate from the conclusion just stated. It is in the nature of a liquidator's responsibilities to interrogate creditors' claims and in that context he may have to adopt an adversarial position...'*<sup>44</sup>

[47] Wallis AJ (as he then was) held in the context of a potential conflict of interest between liquidators appointed to companies in the same group where there might be an indebtedness between the companies as follows:

*'...the existence of a disqualification conflict of interest under Section 139(2) must be determined on the facts of a particular case, and what is required is an actual conflict of interest, not a notional one...'*<sup>45</sup>

[48] We turn now to this issue and the position of the first and second respondents, being mindful that we should take care not to usurp the functions of the first and second respondents.<sup>46</sup> They delivered a notice to abide by the court's decision. Also, the second respondent delivered an explanatory affidavit explaining the process followed by the first respondent's investigating committee. In addition, following a request by the applicant, the written reasons for the investigating committee's decision were furnished to the attorneys acting for the applicant.<sup>47</sup>

[49] Further, the second respondent pointed out that, as yet, there is no internal appeal procedure as envisaged, as this portion of the relevant legislation still needs to be enacted. Because of this factual position, the first and second respondents elected to abide by the court's decision. However, the affidavit filed by the second

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<sup>44</sup> *Swart and Others v Fourie and Others (2488/2017) [2017] ZAWHC 58 (22 May 2017).*

<sup>45</sup> *Knoop and Another v Gupta (Tayob as intervening party) [2020] JOL 49131 (SCA).*

<sup>46</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 CC at para [45].*

<sup>47</sup> *The applicant avers that the first respondent "reverse-engineered" these reasons.*

respondent defended both the procedure followed and the decision made by its investigating committee.<sup>48</sup>

[50] The second respondent demonstrated that all the prescribed procedures and protocols were followed in dealing with the applicant's complaints. The investigating committee considered the complaints, made a decision and communicated both the decision and, a short while later, the reasons for the decision to the applicant.<sup>49</sup>

[51] It was pointed out that the hearing of *viva voce* evidence was not a mandatory requirement for dealing with complaints, and the fact that the applicant disagreed with the decision rendered did not ipso facto mean that the facts and evidence had been misconstrued.<sup>50</sup>

[52] In an appeal, a court may consider the evidence and how it was evaluated to establish whether the decision is correct. This is not permissible in a review,<sup>51</sup> where a material error of fact ground must be confined to one that is established in the sense that it is uncontentious and objectively justifiable.<sup>52</sup>

[53] Based on the uncontentious and objectively verifiable facts, we cannot find that the first respondent failed to properly determine whether there was a *prima facie* case against the third respondent regarding any of the complaints. She certainly gave all three complaints due consideration, as is borne out by her reasons, even though they are brief. In addition, for all the reasons already given, we are similarly unable to find that she conducted herself in a procedurally unfair manner, was materially influenced by an error of law, acted arbitrarily or capriciously in reaching her decision, or that the decision she made was not rationally connected to the information before her. It follows that the review application must fail.

### **Costs**

[54] As a general rule, costs should follow the result unless circumstances dictate otherwise. We believe some circumstances determine that costs should not follow the result in this case. As mentioned earlier, the applicant has no right to an internal

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<sup>48</sup> The second respondent believed that the investigating committee's decision was correct.

<sup>49</sup> The second respondent supported and confirmed the decision by the investigating committee.

<sup>50</sup> The investigation procedure envisages the calling for books, records, and documents.

<sup>51</sup> *Pepcor Retirement Fund v Financial Services Board 2003 (6) SA (SCA) 38 at para [48]*.

<sup>52</sup> *Dumani v Nair 2013 (2) SA 274 (SCA) at para [32]*.

appeal. This remedy, as contemplated, has yet to be promulgated through no fault of the applicant. Thus, the applicant was somewhat hamstrung. The only option open to the applicant (who was aggrieved by the decision) was to proceed through a review. At the root of this review process are issues that may have been otherwise determined through an internal appeal.<sup>53</sup>

[55] Also, we say the third respondent's conduct was not beyond reproach. We say this because, in an unfortunate letter written to the first respondent, the third respondent states that he was finalizing a criminal complaint against the applicant for perjury and participating in a fraudulent tax evasion scheme.<sup>54</sup>

[56] Further, the third respondent indicated he was filing a complaint against the applicant's professional regulatory authority as the applicant is a chartered accountant. This was unnecessary, and no possible good was gained for the law and the judicial process from a letter written in this fashion.<sup>55</sup>

[57] Significantly, in the opposing affidavit by the third respondent, he gratuitously opined that the applicant was aware of and participated in a fraudulent tax scheme conducted by his brother-in-law. This was irrelevant to the issues before us and unseemly and unnecessary.<sup>56</sup>

[58] For all these reasons, we believe that the most appropriate order would be for each party to be responsible for their respective costs. This includes the costs of the interlocutory discovery application and the costs incidental to the application to strike out.<sup>57</sup>

[59] For all these reasons, the following order is granted:

1. The application is dismissed.

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<sup>53</sup> *The distinction in our law between appeals and reviews continues to be significant.*

<sup>54</sup> *This letter was written to the first respondent in response to the complaints by the applicant.*

<sup>55</sup> *We understand that these threats never materialized.*

<sup>56</sup> *It was not necessary to have made these allegations.*

<sup>57</sup> *The third respondent could have launched the application to strike out before the discovery documents were sought.*

