IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISON, PRETORIA)

Case No.: **1930/2021**
(1) REPORTABLE: YES**/NO**
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED**. Yes**
DATE: 22/8/2023
SIGNATURE:

In the matter between:

MOTHOBI GODFERY KEELE	Applicant
and	
LEGAL PRACTICE COUNCIL	First Respondent
KALIPA KAGISO MANGALISO MAFUNGO	Second Respondent

JUDGMENT

SARDIWALLA J:

[1] The Applicant seeks to review and set aside the recommendation of the Investigating Committee set out in the report of first respondent dated 31 August 2020.

[2] The applicant alleges gross violation of fundamental human rights emanating from acts of professional misconduct on the part of the second respondent, an attorney, and that the investigation that was conducted by the first respondent was procedurally and substantively unfair.

Background Facts

[3] The Following are the material facts of this matter:

3.1 The applicant lodged a complaint with the first respondent on the 13 November 2019.

3.2 On 11 December 2019 the first respondent informed the applicant that it would not be conducting an investigation. The letter held that:

"we acknowledge receipt of your complaint dated 13 November 2019. Kindly note that the powers of the Legal Practice Council are of disciplinary nature only and we only investigate concerning allegations of unprofessional conduct of Legal Practitioners practicing within our jurisdiction. ***Kindly be advised that the nature of your complaint does not fall within the scope of our powers of investigation.*** *We noted that you are not requesting legal advice or legal assistance, but we are of the view that you* ***require*** *assistance of an attorney in order for your matter to be resolved. We unfortunately will not be able to assist you as we only have disciplinary powers. We therefore suggest that you contact an Attorney, the Legal Aid Board or Legal Clinic (as can be found at the various universities) for assistance."*[1]

3.3 On the 27 December 2019 the applicant wrote to the first respondent wherein I pointing out that the decision not to investigate was not competent[2].

3.4 Without explaining what had changed in its letter dated 11 December 2019 on the 6 February 2020 the first respondent placed the second respondent under investigation[3].

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[1] Annexure "KMG4": Record Vol 2 at pg 272.
[2] Annexure "KMG5": Record Vol 2 at pg 273-276
[3] Annexure "KMG6": Record Vol 2 at pg 277

3.5 On the 13 March 2020 the first respondent requested submissions from the applicant in response to the second respondent's affidavit.

3.6 On the 11 June 2020 the applicant responded to the first respondent's request.

3.7 On or around the 14th of September 2020 the first respondent the applicant that on available evidence no unprofessional conduct could be found on the part of the second respondent. The first respondent stated that "*we confirm that we are closing our file.*"[4]

3.8 The applicant requested reasons and on 7 October 2020 the first respondent provided a report[5].

3.9 In a number of correspondences exchanged between the parties the applicant noted his intention to appeal the decision.

3.10 On the 30 September 2020 Messr. Masedi wrote to the applicant and stated that:

"we acknowledge receipt of your letter dated 21 September 2020. Please be advised that you can reduce your appeal to the Decision of the Investigation Committee in writing and send it to us. It will then be considered and we will revert back to you."

3.11 On the 29 October 2020 the applicant lodged an appeal to the Investigating Committee of the first respondent through Messr. Masedi against the recommendation of no unprofessional conduct on the part of the second respondent.

3.12 On the 4 November 2020, Messr. Masedi informed the applicant that an appeals tribunal in terms of Section 41 of the Legal Practice Act28 of 2014 was not in place when held that

[4] Annexure "KMG10": Record Vol 6 at pg 652
[5] Annexure "KMG1": Record Vol 1 at pg 64-65.

"I have discussed your appeal in length with my HOD…unfortunately we are still waiting on the department of Justice and LPC to have those structures in place for us to deal with appeals. As it stands we are unable to process any appeal given the reason above. Please note that in the mean time you can exercise your civil remedies if you are not happy with the outcome. We apologise for the inconvenience."

[4] The applicant brought the present application seeking the following relief in terms of section 6(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"):

"1. Reviewing and setting aside the recommendation of the Investigation Committee set out in the report of the First Respondent dated 31st August 2020 titled: "Complaint 7- Investigating Committee- National Office -legal Practice Council, meeting on 31 August 2020, Mothobi Godfrey Keele (Complainant) and Kalipa Mafingo (Respondent) Recommendation" attached to the founding affidavit as annexure "KMG1".

2. Declaring that the Second Respondent failed to comply with the provisions of a. 9.7, 9.7.1 and 9.7.2 of the Code of Conduct for All Legal Practitioners, Candidate Practitioners and Juristic entities and/ or Rule 6(4) of the Rules regulating the conduct of the proceedings of the Magistrate's Court of South Africa in relating to stating the material facts relied on in the pleadings as per paragraph 3 below.

b. Section 33(5)(b) of Act No. 38 of 2005 and/or Clause 3.3.3 of the Code of Conduct for All Legal Practitioners, Candidate Practitioners and Juristic entities in relation to attempts at mediation of a parenting plan as per the correspondence of the 10th and 11th October 2019 attached to the founding affidavit as Annexure "KMG3" and Annexure 1.1 of Annexure "KMG2".

c. Section 9 of Act No.16 of 1963 in relation to false statements under oath in para 9, 24 and 25 attached to the founding affidavit as Annexure "KMG8".

3.Directing the Second Respondent to state the material facts relied on for the

allegations of emotional, and psychological abusive conduct by the Applicant towards the client of the Second Respondent per para 10(iv) of the Particulars of Claim in the Combined Summons dated 31st October 2019 attached to the founding affidavit as Annexure "8" of Annexure "KMG2" failure which declare that the conduct of the Second Respondent is a gross violation of the dignity of the Applicant.

4. Granting of costs in the event of opposition of the application.

6. Granting further and/or alternative relief as this court may deem fit."

[5] The applicant filed a notice to amend the notice of motion for the relief as follows:

1. *"Calling on the First Respondent, in terms of Rule 53(1)(a), to show cause why the abovementioned decisions should not be reviewed and set aside."*

2. *"Calling on the First Respondent, in terms of Rule 53(1)(b), to despatch within fifteen (15) days after receipt of this Notice, to the Registrar any additional record (s) of the proceedings of the 31st of August 2020 that the Applicant seeks to have set aside, together with such reasons that the First Respondent is by law required or desires to give or make, and notify the Applicant after doing so."*

[6] The first and second respondents opposed the application.

Grounds of Review

[7] The Applicant's ground of review essentially are that:

7.1 That the first respondent failed to observe the legal provisions of Section 40(7)(b) of Act No. 28 of 2014 that holds that:

"if a disciplinary committee finds that the legal practitioner...is not guilty of misconduct it must inform the complainant of the right of appeal as provided for in terms of Section 41."

7.2 In terms of sections 6(1)(e)(iii) of PAJA in that irrelevant considerations were made; and

7.3 In terms of section and 6(1)(e)(vi) that this lead to an arbitrary and capricious decision-making.

The Applicant's submission in support of the relief

[8] The applicant submitted that the first respondent did not comply with the legal provision of Section 40(7)(b) of Act No, 28 of 2014 and on the authority of Section 41 of Act No. 28 of 2014 which holds that the conduct or finding of a disciplinary committee is appealable. In his initial correspondence regarding his appeal he was advised on how to structure his appeal. Thereafter, on 4 November 2020 he was then told that the appeal structures that are contemplated in Section 41 are not yet in place. That the first respondent misled him in its letter by holding that;

> *"please note that the act provides that an Ombudsman and an appeals tribunal should be established in order to deal with the appeals from parties who are not satisfied with the outcomes of the Investigation committee"*

[9] He submits that Section 37(1) of Act No. 28 of 2014 holds that "The Council must, when necessary, establish investigating committees, consisting of a person or persons appointed by the Council to conduct investigations of all complaints of misconduct against legal practitioners..."

[10] The administrative action taken by the first respondent in dismissing the complaint was not lawful, reasonable and procedurally unfair. The respondent failed to provide adequate reasons in terms Sections 5(2) and 5(3) of PAJA are such that the dismissal of my complaint is without good reason. In addition in terms of Sections 6(1)(e)(iii) and 6(1)(e)(vi) of PAJA in that irrelevant considerations were made leading to an arbitrary and capricious decision-making. In the circumstances, the recommendation and/or decision of the Investigation Committee of the first respondent stands to be reviewed and set aside.

[11] The second respondent acted *ultra vires* owing to his attempts at mediating a parenting plan when he is not the suitably qualified person as contemplated in Section

33(5)(b) of the Children's Act. Failure of the second respondent to state the material facts that he relied on for the allegations of emotional, and psychological abusive conduct towards his client is a gross violation of the applicant inherent human dignity.

[12] That this Honorable Court has inherent powers to regulate its own process to consider the general conduct of the second respondent.

The first respondent's submissions

[13] The first respondent only filed an answering affidavit and did not file heads of argument. The first respondent raised a preliminary point of non-joinder of the Investigation committee and/or its Chairperson stating that the current application was vexatious, scurrilous and scandalous.

[14] The submissions of the first respondent were essentially that:

14.1 The second respondent is an attorney and notary of the Honourable Court. He is a general practitioner and he has practised for a period of approximately eight years.

14.2 The applicant is a member of the general public and a former client of attorney CR Ramakgaphola.

14.3 There was no professional relationship between the applicant and the second respondent.

13.4 The second respondent acts on behalf of, and on the instructions of, the applicant's wife/former wife, Dr Mbali Keele.

14.5 Dr Mbali Keele left the matrimonial home on 9 September 2019.

14.6 During or about the end of October 2019 Dr Mbali Keele filed for divorce. The second respondent was Dr Mbali Keele's attorney of record in the divorce proceedings.

14.7 Attorney Ramakgaphola acted for the applicant in the divorce, but he subsequently terminated her mandate.

14.8 The applicant did not take well to Dr Mbali Keele's departure from the matrimonial home. He accused Dr Mbali Keele of having deserted him. According to the applicant Dr Mbali Keele demeaned him and sullied his reputation. In the complaint against the second respondent the applicant recorded that he had suffered great indignity and depression as a result of Dr Mbali Keele’s conduct.

14.9 The applicant recorded his views on his purported matrimonial rights in correspondence, including that:

14.9.1 Dr Mbali Keele failed to obtain his consent to leave the matrimonial home.

14.9.2 He remained entitled to his conjugal rights.

14.9.3 Dr Mbali Keele's departure from the matrimonial home was without legal standing and without legal basis.

14.9.4 Dr Mbali Keele had to be compelled to return to the matrimonial home and to reconcile with him.

14.10 The applicant instructed attorney Ramakgaphola to, on his behalf:

14.10.1 demand that Dr Mbali Keele return to the matrimonial home; and

14.10.2 insist that the parties reconcile.

14.11 Attorney Ramakgaphola executed the applicant's abovementioned instruction. Dr Mbali Keele, however, was not prepared to return to the matrimonial home and did not share the applicant's views regarding his marital rights and her marital duties.

14.12 The applicant demanded that the second respondent advises Dr Mbali Keele to return to the matrimonial home. The second respondent did not however take instructions from the applicant. Dr Mbali Keele was not prepared to return to the matrimonial home and she instructed the second respondent accordingly.

14.13 The applicant found it to be exasperating and intolerable that Dr Mbali Keele and the second respondent did not comply with his demands and did not share his views. The applicant in no uncertain terms expressed his displeasure with the second respondent's failure to follow his instructions.

14.14 During October 2019 Dr Mbali Keele instructed the second respondent to prepare a parenting plan, the purpose of which was to facilitate the joint exercise by the parties of their parental responsibilities.

14.15 The second respondent executed his last mentioned instruction and submitted the parenting plan to the applicant for comment during early October 2019. The applicant did not deal with the parenting plan suggested by Dr Mbali Keele meaningfully or at all. He, instead, without further ado launched an offensive upon the second respondent. He did so by questioning:

14.15.1 the second respondent's qualifications, experience, skills and abilities;

14.15.2 the soundness of the instructions received by the second respondent from Dr Mbali Keele; and

14.15.3 the execution by the second respondent of Dr Mbali Keele's instructions.

[15] That the applicant intently sought to establish whether Mr. Mafungo’s areas of legal practice, experience or interest as it were would cover legislation connected to family law. The applicant's conduct constituted an inappropriate, malevolent and improper response. The divorce proceedings did not advance smoothly and swiftly and the applicant did not wish to cooperate, did not comply with the Uniform Rules of Court and acted obstructively. The applicant attacked the second respondent and Dr Mbali Keele personally and

threatened them on several occasions. In correspondence addressed to the second respondent the applicant said, *inter alia*, the following:

> 15.1 *"Trust me Sir, you will account for your conduct even if its the last thing that I do. I will take you to the High Court for not being a fit and proper person to practise law."*
>
> 15.2 The applicant informed Dr Mbali Keele to dig two graves when she goes to war, as she may need a grave herself.

[16] It is against the abovementioned background that the applicant's complaint against the second respondent must be examined. It was evident that the complaint by the applicant was motivated by his annoyance at the second respondent for:

> 16.1 not complying with his demands;
>
> 16.2 not advising Dr Mbali Keele in accordance with his dictates; and
>
> 16.3 not advising and forcing Dr Mbali Keele to return to the matrimonial home.

[17] The applicant seems to blame the second respondent, unjustifiably so, for the fact that Dr Mbali Keele had left the matrimonial home; his son has "digressed", his daughter experienced anxiety, his reputation had been tainted; and he had suffered indignity. The applicant alleges that he has produced irrefutable proof of the second respondent's contravention of the abovementioned provisions of the Code of Conduct. The first respondent submits that to contrary no o such evidence has been provided and it cannot be found in either the complaint or the annexures thereto. The applicant has failed to provide *prima facie* evidence of misconduct on the part of the second respondent the applicant should pay the costs of this application on the attorney and client scale as the application is ill-advised and patently without merit; constitutes an abuse of the Court process, is vexatious; and has not been brought *bona fide*. The second respondent replied to the applicant within reasonable time limits and therefore his allegations were unfounded.

[18] The applicant's proposal sent "in mediation" was rejected by the client. The applicant contends that the assertion that the client is not legally obliged to return to his

residence is legally unsound. When the applicant's threats had not deterred the client from suing for divorce. The applicant then proceeded to threaten the Second Respondent in the following manner:

> *"Trust me Sir, you will account for your conduct even if it is the last thing that I do…. You were made privy to a complaint that I lodged with the Legal Practice Council and you have been copied in my response to their non-response. I copied you so that you should be aware that you need to be cognisant of the Code of Conduct that binds you in your practice… I am not sure if, Mr. Tough Lawyer, you still opine that "she has no desire to return to her prior residence and is not legally obliged to do so! If you consider this a threat you are welcome to do so, but I will take you to the High Court for not been a fit and proper person to practice law…"*

[19] It is clear that if the second respondent failed to adhere to the applicant's instructions; the threat of disciplinary action by the first respondent would loom large over the head of the second respondent and even materialize. The applicant persists with unsolicited approaches made toward the second respondent for the express purpose of having the second Respondent take the applicant's instructions. The applicant's advances toward the second respondent totally disregard and seek to undermine the client's rights to independent legal counsel. The applicant prioritizes his own interests and seeks to procure the assistance of the second respondent in prioritizing his interests at the expense of the second respondent's client. The applicant's conduct is reprehensible, inconsistent and incompatible with the client's rights to access the Court through an independent legal practitioner. The applicant is not entitled to issue instructions to the second respondent nor is he entitled to demand that the second respondent carry out same.

[20] The applicant took issue with summons in that the applicant had been emotionally and psychologically abusive towards the client. In an attempt to persuade the second respondent of his good nature the applicant liberally shared his own views of himself with the second respondent, issuing the Second Respondent with an ultimatum that he explain himself as to what swayed him to draft particulars of claim including the allegations of abuse. Not only does the Applicant attempt to persuade the second respondent of his good nature, but the applicant's expectation is that the Second respondent's point of departure in attending to the instructions received by Dr Mbali Keele ought to be his account of events. The applicant's conduct, if it were to be permitted, would make a

mockery of the independence of legal practitioners and compromise the client's rights to access to the Courts and legal representation.

[21] The second respondent submitted that in presiding over the applicant's complaint, for the first respondent to have found in favour of the applicant, the following presuppositions would have been required to have been made:

21.1 that the Applicant was entitled to issue instructions to the attorney of Dr Mbali Keele (the Second Respondent) in respect of the living arrangements of the parties, the parenting plan and the allegations traversed in the divorce summons and particulars of claim through the Applicant's erstwhile attorney Mrs Ramakgaphola;

21.2 That the second respondent was obliged to adhere to instructions issued by the applicant to him in respect of the living arrangements of the parties, the parenting plan and the allegations traversed in the divorce summons and particulars of claim;

21.3 That the second respondent was obliged to adhere to instructions issued by the applicant to him, through Mrs Ramakgaphola, in respect of the living arrangements of the parties, the parenting plan and the allegations traversed in the divorce summons and particulars of claim;

21.4 That, notwithstanding allegations of emotional and psychological abuse contained in the particulars of claim, Dr Mbali Keele was compelled to reside with the applicant until such a time that a divorce was granted;

21.5 That Dr Mbali Keele was legally obliged to return to the applicant's residence (the matrimonial home);

21.6 That the applicant's communication to the effect that the Social Worker had advised that the matter now requires the intervention of the Courts; however, in the interim the lawyers *must mediate*, did not contemplate the mediation of issues addressed in the parenting plan. Further, that the applicant's instruction to his erstwhile attorney to engage in mediation with the second respondent and the

subsequent carrying out if this instruction did not contemplate the mediation of issues addressed in the parenting plan;

21.7 That the mediation between lawyers referred to by the Social Worker did not contemplate the issues addressed in the parenting plan;

21.8 That the second respondent's obligation to maintain the highest standards of integrity and honesty contemplated at paragraph 3.1 of the Code would allow for him to take instructions from the applicant and the applicant's erstwhile attorney;

21.10 That the Constitution and the principles and values enshrined therein, as contemplated at paragraph 3.2 of the Code, would be upheld by the second respondent in the event that he acceded to the applicant's instruction to advise Dr Mbali Keele to return to his residence;

21.11 That the interests of Dr Mbali Keele would have been treated as paramount, as contemplated at paragraph 3.3 of the Code, by the second respondent acceding to the demands of the applicant to explain himself and account to the applicant regarding the allegations contained in the particulars of claim;

21.12 That the applicant was present at, participated in or somehow had access to the interactions between the second respondent and the client at their consultations so as to be in a position to positively aver that the instructions given by the client to the second respondent do not substantiate the allegations of abuse contained in the summons as contemplated in paragraphs 9.7, 9.7.1 and 9.7.2 of the Code;

21.13 That it is appropriate for the applicant to seek redress with the first respondent in relation to an allegation of non-compliance with the Magistrate Court Rules pertaining to the particularity of pleadings (Rule 6); and, that the first respondent is vested with the requisite jurisdiction to entertain such a dispute;

21.14 That the second respondent, in his affidavit responding to the applicant's complaint, made false statements knowing them to be false in contravention of section 9 of the Justices of the Peace and Commissioners of Oaths Act No 16 of 1963. In this regard paragraphs 72 -82 of the second respondent's answering affidavit provide a complete response.

[22] It submitted that the first respondent in observing its obligation not to infringe the Bill of Rights was enjoined to:

22.1 Recognize Dr Mbali Keele's rights to equality before the law, inclusive of the right to equal protection and benefit of the law;

22.2 Recognize that the right to equality includes the full and equal enjoyment of all rights and freedoms;

22.3 Recognize that no person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds referred to in section 9 (3). Gender, sex, marital status, conscience, belief and culture are listed as grounds of discrimination in section 9 (3);

22.4 Recognize the fact that Dr Mbali Keele has inherent dignity, and the right to have her dignity respected and protected;

22.5 Recognize the fact that Dr Mbali Keele has the right to bodily and psychological integrity, inclusive of the right to security in and control of her body;

22.6 Recognize the fact that Dr Mbali Keele has the right to freedom of movement and residence including the rights to reside anywhere in South Africa;

22.7 Recognize the fact that Dr Mbali Keele has the right to have the dispute between herself and the Applicant before the Divorce Court and

Children's Court resolved by the application of law decided in a fair public hearing[72].

[23] The second respondent submitted that applicant is no more deserving of protection of the first respondent than she is. Secondly, the applicant's complaint loses sight of the fact that the second respondent owes specified professional obligations toward Dr Mbali Keele, as his client, in the discharge of the mandate furnished to him and the applicant who has no direct claim to any entitlements owed by the second respondent to him.

THE APPLICABLE LAW

Non-Joinder

[25] It is now settled law that any party who has a direct and substantial interest in the subject matter must be joined in the proceedings to safeguard their interests.[6] The Supreme Court of Appeal in *Absa Bank Ltd v Naude NO [2015] ZASCA 97 at para 1.*, formulated the test for non-joinder as follows:

"The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined."

[26] In light of the above, if the answer is in the affirmative, the party that has a direct and substantial interest in the subject matter must be joined in the proceedings as failure to do so may result in the matter not being heard. If the answer is in the negative, a court may depending on the circumstances of the case, proceed to adjudicate over the case as the outcome will not have a dire impact on third parties who are not cited in the proceedings.

[27] There is what is referred to as a "necessary joinder", where the failure to join a party amounts to a non-joiner and the court can decline to hear such an application until such joinder has been effected and/or "*the parties have consented to be bound by the judgment or waived their right to be joined."*[7] Further, there is what is referred to as

[6] Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) para at 21
[7] Mahlangu v Mahlangu and another [2020] ZAMPMHC 5 at para 5.

the “joinder as a matter of convenience, where the joinder of the party was permissible and would not give rise to misjoinder”.[8]

The code of Conduct

[28] 3.3.2 of code of conduct states that:

> “3. Legal practitioners, candidate legal practitioners and juristic entities shall –
>
> 3.3 treat the interests of their clients as paramount, provided that their conduct shall be subject always to:
>
> 3.3.1 their duty to the court;
>
> 3.3.2 the interests of justice;
>
> 3.3.3 observance of the law; and”

[29] 3.13 of code of conduct states that:

> “3.13 remain reasonably abreast of legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the fields in which they practise;”

[30] 9.2 of code of conduct states that:

“A legal practitioner shall not, in giving advice to a client, advise conduct that would contravene any law; more particularly, a legal practitioner shall not devise any scheme which involves the commission of any offence.”

[31] 9.7 of the code of conduct states that:

> “9.7 A legal practitioner shall in the composition of pleadings and of affidavits rely upon the facts given to him or her by the instructing attorney or client, as the case may be, and in so doing:

[8] Ibid

9.7.1shall not gratuitously disparage, defame or otherwise use invective;

9.7.2 shall not recklessly make averments or allegations unsubstantiated by the information given to the legal practitioner."

PAJA

[32] Section 6 of PAJA sets out when a person can institute Judicial review of administrative action as follows:

"6

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

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

(a) the administrator who took it-

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering
provision; or

(ii) was biased or reasonably suspected of bias;

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

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith;

(vi) arbitrarily or capriciously;

(f) the action itself-

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2) *(g)* , he or she may in respect of a failure to take a decision, where-

(a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period."

[33] In ***Pepcor Retirement Fund and Another v Financial Services Board 2003 (6) SA 38 (SCA)*** the Supreme Court of Appeal held that administrative decision has to be

taken on an accurate factual basis as a result of which a material mistake of fact renders an administrative decision subject to review. The court held at paragraph 32 that:

> *"Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or ma/a fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter: Johannesburg Stock Exchange v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152C-D; Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 938 -C. There are decisions in other jurisdictions, however, which go further."*

[33] The factual mistake is required to be uncontentious and objectively verifiable. If there is a material error of fact it will then make a decision subject to review if the relevant decision has been made in ignorance of the true facts material to that decision or for not considering relevant material and/or all of the material provided and/or personal circumstances[9].

[34] In ***Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration*** **2007 (1) SA 576 (SCA)** at para [34] it was held that:

"Once the bad reasons played an appreciable or significant role in the outcome, it is in my view impossible to say that the reasons given provide a rational connection to it."

[35] An error of law which has a material impact on the decision renders the decision subject to review[10] where it was decided that a material error of law is an error that influence the outcome of a decision.

[36] Section 33(1) of the Constitution of the Republic of South Africa, 108 of 1996, gives anyone a right to administrative action that is procedurally fair. Section 6(2)(c) of PAJA allows review of an administrative action on the ground that the action was procedurally

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[9] Minister of Home Affairs and Others v Somali Association of South Africa and Another 2015 (3) SA 545 (SCA)

[10] **Section 2(d)** of PAJA & Hira and Another v Booysen and Another **1992 (4) SA 69** (A

unfair. Hoexter points out that procedural fairness is a principle of good administration where context is all important. She states that *"the content of fairness is not static but must be tailored to the particular circumstances of each case*[11]*.*

Principle of legality

[37] The principle of legality requires rational decision-making. Both the process by which the decision is made and the decision itself must be rational[12].

[38] ***In Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council (1999 (1) SA 374 (CC))*** – where the Constitutional Court held that the exercise of public power is only legitimate when it is lawful. The principle of legality has expanded and encompasses several other grounds of review, including lawfulness, rationality, undue delay and **vagueness** ***(see Hoexter "Administrative Justice in Kenya: Learning from South Africa's Mistakes" 2018 62(1) Journal of African Law 105 123).***

[39] In the case of ***Law Society of South Africa v President of the Republic of South Africa (2019 (3) SA 30 (CC)*** the Court in dealing with the point of irrationality referred to the case of ***Masetlha v President of the RSA (2008 (1) SA 566 (CC)) (Masetlha)*****.** It was held that the principle does not encompass the requirement of procedural fairness. It was, therefore, essential to distinguish between these two requirements. Procedural fairness provides that a decision-maker must grant a person who is likely to be adversely affected by a decision a fair opportunity to present his or her views before any decision is made. Procedural rationality provides that there must be a rational relation not only between a decision and the purpose for which the power was given, but also between the process that was followed in making the decision and the purpose for which the power was given (par 63). The Court held the following at paragraph 64:

> *"The proposition in Masetlha might be seen as being at variance with the principle of procedural irrationality laid down in both Albutt and Democratic Alliance. But it is not so. Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that, there is a rational connection between the*

[11] Hoexter *supra* p 3-6
[12] Democratic Alliance v President of the Republic of South Africa and Others **2013 (1) SA 248** (CC) para [33] - [34] & [36] - [37]

exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power."

[40] The critical issue in that case was not whether a fair hearing was given or not. Instead, the critical issue was whether the process followed before the deciding effectively to suspend the Tribunal and deprive it of its existing jurisdiction to hear individual complaints was rationally connected to the purpose for which the power to amend the Treaty had been given to him. The Court found that it was not.

ANALYSIS AND FINDINGS

[41] It was not clear from the reading of the notice of motion that the applicant grounds of review were, however from the reading of the papers in entirety the applicant relied on section 6(1)(e)(iii) and 6(1)(e)(vi) of PAJA.

[42] On the point of the non-joiner of the Investigating Committee was not a necessity as the judgment of this Court does not have the effect of taking the committee's jurisdiction as that jurisdiction falls under the first respondent who is a party to the current proceedings.

[43] With regards to the applicant's contention that the first respondent misled him by advising him on how he should submit his appeal and later on 4 November 2020 advising him that the first respondent did not have an appeal structure as envisaged in terms of the Act was confirmed by the first respondent in its answering affidavit. However, in the same letter the applicant was advised that he can exercise his civil remedies in this regard which the applicant through this application has done. Therefore, I find no prejudice has been caused to the applicant in regard to the first ground of review.

[44] Section 6(2)(e)(iii) of PAJA: The decision was taken because irrelevant considerations were taken into account. The applicant did not take this Court into his confidence on what irrelevant considerations the first respondent had taken into account in reaching its decision and what relevant considerations were not considered.

[45] Section 6(2)(e)(vi) of PAJA: The decision was arbitrary and capricious as it was not based on the true facts, again the applicant fails to identify what facts were not true or

misconstrued by the first respondent. This Court cannot consider facts and evidence that are not before it.

[46] The applicant submitted his complaint to the first respondent, the first respondent requested written submissions from the applicant and then advised the applicant he failed to provide prima facie evidence of misconduct on part of the second respondent. Notably, the second respondent is not the applicant's attorney and is his wife's attorney in the pending divorce proceedings that were instituted by his wife. Rule 3.3 of the Code of Conduct clearly states that legal practitioners must "treat the interests of their clients as paramount". The applicant is not the second respondent's client and therefore there is no duty on the second respondent to the applicant and this rule therefore does not apply.

[47] The applicant requested reasons and was provided with a report but has asserted before this Court that no reasons were given. This is contradictory and this submission must be rejected. It is clear that a report was given and attached to the founding papers.

[48] The applicant claims the second respondent committed perjury as he made submission on the summons and particulars of claim regarding the issue of abuse the applicant alleged subjected the second respondent's to and therefore acted against the Rule 9.2 and 9.7 Code of Conduct as the facts provided to him where unsubstantiated. In saying so the applicant has not taken this Court into his confidence as to how the averments in the pleadings are unsubstantiated or provide any evidence of same in order to review the first respondent's decision that there was no misconduct by the second respondent.

[49] The applicant took issue with the fact that the second respondent is not qualified to mediate and/or draft parenting plans. The second respondent is a qualified Legal practitioner and this is confirmed by his submission of his complaint to the first respondent which oversees the conduct of legal practitioners and the profession. Again the applicant fails to identity how the second respondent is not suitably qualified and provide proof. I agree with the first respondent that parenting and mediation plans are drafted by persons with far lesser expertise, and in fact sometimes by parties themselves. The second respondent is a qualified legal practitioner and there is no evidence to suggest that he is not legally capable. In any event, the Office of the Family Advocate has oversight over mediation and parenting plans and that the Court as the upper guardian of all children in

matters involving children require the recommendation of the Office of the Family Advocate in making its determinations. Therefore, the fact that the second respondent drafted the parenting plan did not exclude the authority of the Family Advocate or Court nor did the second respondent breach any conduct rules in doing so.

[50] The applicant alleged that the second respondent was guilty of misconduct by virtue of Rule 9.2 and 9.3. This Rule states that a legal practitioner may not give advice to his or her client that may contravene any law or devise a scheme which involves the commission of an offence. The legal Practitioner can give the client on advice as to whether any act, omission or conduct contravenes any law. The applicant does not state what advice the second respondent gave his client, the applicant's wife, that contravened a law or what law was contravened.

[51] I am satisfied that there was no evidence of misconduct on part of the second respondent and that the decision of the first respondent did not act irrational, arbitrarily or capriciously. I see no reason why the costs should not follow the result. I grant the following order:

1. The application is dismissed with costs.

Sardiwalla J
Judge of the High Court

Appearances:

For the Applicant:	The applicant appeared in person
For the Second Respondent:	Kalipa Mafungo
Instructed by:	Mafungo Attorneys