IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION JOHANNESBURG)

CASE NO. 30870/2017

REPORTABLE NO
OF INTEREST TO OTHER JUDGES NO
REVISED 1 SEPTEMBER 2020
SIGNATURE

IN THE MATTER BETWEEN –

GWILIZA, LULAMA DINI — Applicant

and

THE COLLEGES OF MEDICINE OF SOUTH AFRICA — First Respondent

THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA — Second Respondent

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JUDGMENT

(Heard 31 August 2020 – remotely on the Zoom platform)

A. INTRODUCTION

1. This is a review application. It was ultimately aimed at a decision on the part of the first respondent, the Colleges of Medicine of South Africa, in its guise as the College of Psychiatry ("the College") to fail the applicant in an examination required for a fellowship bestowed by the Colleges, in September 2015.

2. The fail mark in September 2015 was subject to a re-mark in December 2015, which also yielded a fail. Subsequent to this, in circumstances outlined below, after the intervention of the office of the Public Protector, there was another re-marking exercise, which yielded another fail – which was communicated to the applicant in July 2017.

3. There had, in fact, been seven attempts between 2012 and 2015 on the part of the applicant to write and pass the relevant examination, all ending in failure. The applicant's notice of motion was aimed at reviewing and setting aside one such exercise, conducted in 2013, despite the subsequent and apparently superseding writing and re-marking exercises.

4. At issue is the written component of Part II of the relevant fellowship examinations requirements. Part I was successfully completed by the applicant in 2009. Part II comprises a written component, a clinical component and an oral component. All three components of Part II must be successfully completed, and this be done within six years of successfully completing Part I, to qualify for the fellowship.

5. In his supplementary papers, the applicant no longer persisted with challenging the 2013 decision on review. He now sought to challenge the September 2015 fail. Quite why he did not seek to challenge the December 2015 fail (pursuant

to the re-mark), or the fail communicated to him in July 2017 (pursuant to the further re-mark after the intervention of the Public Protector), was never made entirely clear. The 2013 fail could not be assessed as the script had got lost in the four years between the marking (there were two marking exercises of the 2013 script in 2013), the attempt to re-mark the script in 2017 after the intervention of the Public Protector, and the subsequent launch of these review proceedings in August 2017.

6. In fairness to the way the applicant views things, if the September 2015 fail was reviewable, subsequent apparently superseding re-marking exercises could arguably not undo his entitlement to review and set aside the September 2015 fail, on the hypothesis that it was a reviewable fail. Even if the subsequent fails were then not reviewable, the applicant could still challenge the fail that he says was reviewable. I am not sure this is a correct approach to the issue, as the College would act upon the last fail (or pass) as the extant mark, superseding all that went before, but for present purposes I am willing to assume that the subsequent re-marking in December 2015 of the September 2015 fail, and the renewed re-marking in 2017, did not in principle preclude a challenge to the September 2015 fail.

B. <u>THE NATURE OF THE DECISION – ADMINISTRATIVE ACTION?</u>

7. In argument I was referred to the decision of McAslin AJ in *Hlongwane v The Colleges of Medicine & Another* in this Division (unreported 29055/2017, 6 December 2019), a case that bore an uncanny resemblance to the instant in

several respects, and in which counsel for both parties who appeared before me[1] both also appeared.

8. In that case, it was held that the relevant decision of the relevant College (in that case the examination concerned orthopaedics) was not administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). This finding was based mainly on a failure by the applicant in that case properly to pinpoint the "empowering provision" in terms of which the Colleges acted such as to render their conduct sufficiently public for the purposes of the relevant definition.

9. The first respondent (College or Colleges) is not itself a statutory body directly exercising a statutory function. The second respondent HPCSA undoubtedly is, and relies upon the accreditation afforded by the Colleges when registering health professionals as specialists in exercising its statutory functions. It also exercises a statutory supervisory function over the Colleges under s3(f) read with section 31 of the Health Professions Act 56 of 1974, the latter which may also be said indirectly to render the functions of the Colleges in reporting to the HPCSA statutory for the purposes of PAJA.

10. Counsel for the Colleges did not press the issue before me and properly conceded that it was at least arguable that the functions of the Colleges were sufficiently interwoven with the statutory functions of the HPCSA to render the former administrative action for the purposes of PAJA review.

[1] The heads of argument for the first respondent in the instant matter were prepared by Mr Picas, and Mr Sikhakhane SC appeared before me for the first respondent. The applicant was represented by Mr Alcock.

11. The question whether any particular function or decision falls under the purview of PAJA review is a surprisingly perennial issue. In my view, the functions and decisions in the instant case are sufficiently interwoven with the statutory functions of the HPCSA to render them subject to PAJA review, if, however, accompanied by a high standard of deference, given the expertise of the body concerned and the extent to which a court ventures from its terrain when considering its examinations. More about this below.

12. Given my ultimate findings, however, I need not, and do not, arrive at a final conclusion on this issue and decide the matter on the assumption in favour of the applicant that the decision under review is in principle subject to PAJA review.

C. DELAY

13. The delay question is aligned to the question, alluded to above, of the appropriate decision to serve as the proper focus of any review. The initial review, aimed as it was at the 2013 decision, suffered from a rather egregious and obvious delay problem.

14. This is less so, but still significant, when it comes to the delay problem attendant upon the review of the September 2015 fail. If one were to regard the December 2015 re-mark as exhausting an internal remedy, the delay in relation to the September 2015 decision spans some 17 months.

15. If, however, one were to regard the digression entailing the involvement of the office of the Public Protector and the ensuing Alternative Dispute Resolution ("ADR") process as yet a further "internal remedy", or at least "alternative remedy" digression, as the applicant would have it, then the delay between having the outcome of this process relayed in July 2017 and launching the review is not significant.

16. I am content for purposes of this application to view the ADR process as an "alternative remedy" digression, akin to an internal remedy, the delay resulting from the exhaustion of which ought not decisively to be held against the applicant in any review of the September 2015 decision.

D. PEREMPTION OR "COMPROMISE" IN THE ADR PROCESS

17. More problematic for the review is the role played by the ADR process in the applicant's ability to pursue his review at all.

18. The ADR process was not an internal remedy. It was not some step the applicant needed to take or to which he needed to submit before he could challenge the decision in question. It was, instead, a process brokered by the Public Protector at the insistence of the applicant. On the papers, it led to an agreement to resolve the matter of the 2013 and the 2015 fails.

19. The pertinent allegations in the answering papers about the agreement are not disputed in reply. Instead, as also confirmed by counsel for the applicant in argument, the applicant adopted the following position with respect to the ADR

agreement: the agreement was to resolve both the 2013 fail and the 2015 fail by means of an ADR process (in essence, yet another independent re-mark). This proved impossible in relation to the 2013 fail, as the script had disappeared in the meantime. Although the ADR agreement was implemented with respect to the 2015 fail, because it was not implemented with respect to the 2013 fail, the agreement as to the ADR process was not implemented, and the applicant cannot be held bound by its outcome.

20. I cannot see how the fact that it proved impossible to re-mark the 2013 script in implementing the ADR agreement can be decisive as to whether the ADR process should be determinative in respect of the 2015 fail. After all, the challenge to the 2013 fail has been unequivocally abandoned – this much is clear from the supplementary founding papers.

21. The real question is whether the agreement relating to ADR should be seen to amount to a peremption of the review with respect to the 2015 decision.

22. A party may perempt his or her review right as much as any appeal right.[2] If this is so, I do not think there is anything wrong with perempting in favour of an alternative agreed process, as long as the peremption is sufficiently clear.

23. In the instant case, the peremption in favour of the agreed ADR process was sufficiently clear.

[2] *Liberty Life Association of Africa v Kachelhoffer NO & Others* 2001 (3) SA 1094 (C); *Mohamed & Another v President of the Republic of South Africa & Others* 2003 (4) SA 64 (C).

24. I leave aside the interesting question whether, as counsel for the Colleges submitted, any potential challenge to the outcome of the ADR process would have needed to be brought under the Arbitration Act 42 of 1965. There was no challenge to this outcome. Instead, it was essentially ignored, as a digression that did not yield the desired outcome for the applicant. The College, however, would have been bound by the outcome had it been favourable to the applicant. Indeed, this is so for every re-mark authorised by the College.

25. Where an applicant initiates the intervention of the office of the Public Protector and then succeeds in exacting an agreement by a body like the Colleges to accede to an ADR process to resolve the dispute, a process that involves submission to yet another decision in the form of a further re-mark, it is unfair on the Colleges, and an inappropriate recourse to the review powers of this court, for the applicant to repudiate the outcome of such a process and to seek to revert to an attempt to review the original decision.

26. I therefore find that the review had been effectively perempted.

E. REVIEW GROUNDS

27. In case I am wrong in regard to peremption, I find that the grounds of review sought to be made out against the 2015 decision are extraordinarily thin.

28. There are what can only properly be called completely unsubstantiated allegations of bias made against the Colleges on which the challenge is main

founded, and a wholly untenable attempt in the supplementary founding papers to craft a case of procedural fairness on the basis of alleged non-compliance with certain fundamental principles of assessment of these kinds of examinations for which no expert or other proper substantiation is offered in the papers.

29. As for bias, two allegations are made against Professor Burns of the Colleges, who acted as the convener of the examinations.

29.1. The first, about which the less said the better, is that Professor Burns was conflicted as a practising psychiatrist as he had a financial interest in ensuring that the applicant, as a potential competitor, did not enter the market. Were this suggestion not so ludicrous, it would be unjustifiably defamatory.

29.2. The second is put thus in counsel's heads of argument:

> *"Further the applicant submits that his constitutional right to an administrative action that is not biased, but which is lawful and reasonable is also hampered with by the first respondent's decision. This is clear from the fact that Professor J.K Burns, the head of Psychiatry who certified the applicant to have successfully completed his training as Psychiatry Registrar and later revoked it (by asking the applicant to defer taking the Part II examination) for no apparent reasons, is revealed by the Convenor's Report to be the overall convener of the 2015 examination."*

29.3. There is no factual foundation laid in the papers for suggesting anything sinister in the decision to ask the applicant to defer taking the Part II examination. Even if this were unfair, or unwarranted, it cannot begin to lay a foundation for a reasonable apprehension of bias.

30. Apart from these wholly unwarranted bases for suggesting bias on the part of Prof Burns, the allegation of bias contents itself with vague assertions of institutional bias, that, when shorn of the references to the above allegations relating to Prof Burns, are not supported by any allegation of fact.

31. Allegations of bias, even of a reasonable apprehension of bias, need to be made responsibly and with due regard to laying a proper foundation for them. This is in my view not the case of the allegations in the instant matter.

32. As for procedural fairness, the applicant invoked "*generally accepted principles of assessments which principles require that (a) any assessment be valid (meaning it should be guided by a publicised curriculum); (b) an assessment should be reliable and consistent (which demands a clear and consistent process for the setting, marking, grading and moderation of examinations); (c) information about assessments should be explicit, accessible and transparent; and (d) assessment should be inclusive and equitable.*"

33. I was asked to take "judicial notice" of these "generally accepted principles of assessments". Counsel for the Colleges submitted I could not, without expert evidence, venture there. I am not sure that this is really a matter of procedural

fairness. But I suppose in some respects what is at issue are principles of natural justice.

34. I think that, to a certain extent, principles of natural justice enter what one expects of examinations and that some basic core elements or principles can form the point of departure for an assessment of fairness without the need for expert evidence on the nuances of the principles that govern a specific type of examination. But the point is arrived at rather quickly when the terrain becomes treacherous, and a matter of specific expertise, and not something of which a court can take "judicial notice".

35. Be that as it may, there is no example given of anything that can reasonably be regarded as clearly demonstrating such a deviation from transparency and accountability that it could be said to rise to the level of reviewability. I reject the notion that a mark-by-mark breakdown of mark allocation, as for a primary school examination, was indispensable, or that the recommendation from a convener that there could be a greater degree of standardisation in the creation of a memorandum proved the case of procedural unfairness, or that the curriculum was so vague as not to make it clear what was expected. It is not for the court to consider whether the feedback for why the answers deviated from what was expected was persuasive, or would be persuasive to psychiatrists. The court is not the 2020 re-mark.

36. What is clear enough from the questions and answers at issue is that they entail a degree of judgment, and assessment of judgment, which by itself, in a field as specialised and advanced as Psychiatry, cannot be amenable wholly to a tick-box approach. Woe betide the day when our College of Psychiatry must

employ a paint-by-numbers method in marking examinations lest it be subjected to re-marking by the courts.

37. Suffice it to say that, had the applicant sought to make out a case for reviewably irrational marking, based on the published memoranda or guidelines, he would have needed to have done so in a far more rigorous and painstaking manner than what appeared in his papers. There is no indication in the papers of an inexplicable relationship between what was said to have been expected in the answers and a failure to find this in the applicant's answers, demonstrated to a degree that would satisfy any review test, even one of a low threshold. And for a case of procedural unfairness, which is where the complaint was nestled, something far more obviously raising red flags in the eyes of the reasonable observer was certainly required.

38. I am accordingly of the view that no case was in any event made out for any persuasive ground of review.

39. In the circumstances the application is dismissed with costs.

Snyckers AJ

31 August 2020

Counsel for applicant:	S. Alcock
Instructed by:	Zikhali Inc.
Counsel for first respondent:	M Sikhakhane SC
Instructed by:	Fasken Martineau