**Republic of South Africa**

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

Before: The Hon. Mr Justice Binns-Ward
Hearing: 22 March 2017
Judgment: 26 April 2017

Case No. 8572/2016

In the matter between:

**FRANCINE ANN DU PLESSIS** Applicant

and

**THE INDEPENDENT REGULATORY BOARD FOR AUDITORS** First Respondent

**ALAN DODSON SC N.O.** Second Respondent

**THE DISCIPLINARY COMMITTEE OF THE INDEPENDENT REGULATORY BOARD FOR AUDITORS** Third Respondent

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**JUDGMENT**

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**BINNS-WARD J:**

[1] The applicant, Ms Francine-Ann Du Plessis, is an auditor registered as such in terms of the Auditing Profession Act 26 of 2005 ('the Act'). She practised her profession as a director of a firm of public accountants, Loubser Du Plessis Inc. ('LDP'), at Stellenbosch.

Together with one of her co-directors, Mr Petrus Johannes (Pieter-Jan) Bestbier, she was arraigned, in terms of ss 49 and 50 of the Act, on various charges of misconduct. As the alleged misconduct predated 1 January 2011, the charges were framed with reference to rule 2 of the 'Old Disciplinary Rules' promulgated under the Public Accountants and Auditors Act 80 of 1991. [1] The practitioners denied that they had misconducted themselves in the respects alleged. A hearing ensued before a disciplinary committee. The committee was that established by the Independent Regulatory Board for Auditors[2] ('the Board') in terms of ss 20(2)(f) and 24(2) of the Act.[3]

[2] The charges brought against Mr Bestbier were found by the committee not to have been proven, notwithstanding the opinion that it felt constrained to record that 'the conduct of LDP as a firm in relation to the audit of [of Ripple Effect 3 (Pty) Ltd's] 2006 annual financial statements left much to be desired'. The committee considered that Bestbier, as the responsible audit partner, had to 'bear ultimate responsibility for this'. But it concluded that 'that responsibility [did] not align with the particular complaints that were brought against him', and held that '[o]n a proper application of the requirement of procedural fairness, no finding [could] be made … that any charge [had] been proven against him'. Those remarks have resonance in the circumstances of the current case, which, as will appear, is in essence about the procedural fairness of the proceedings against the applicant having regard to the findings of the committee measured against the content of the charge sheet.

[3] The applicant was found guilty on the charges listed on the charge sheet as counts two (that she had been party to a fraud on the Department of Trade and Industry ('the DTI')) and five (that she had breached her duty in terms of s 45 of the Act to report to the Board the occurrence of a 'reportable irregularity'), and sanctioned accordingly. She now applies for

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[1] Act 80 of 1991 was repealed in terms of s 58 of the Auditing Profession Act 26 of 2005. The Old Disciplinary Rules remained in force, notwithstanding the repeal of Act 80 of 1991, by virtue of s 59(8)(b) of Act 26 of 2005.

[2] The Board is a juristic person established in terms of s 3 of the Act.

[3] Section 20(2)(f) provides:
*The Regulatory Board must, at least, establish the following permanent committees:*
*(f) a disciplinary committee.*

Section 24(2) provides:
*The disciplinary committee-*
*(a) must be chaired by a retired judge or senior advocate;*
*(b) must consist of a majority of persons not registered as auditors in terms of this Act, but must include registered auditors; and*
*(c) may include other suitably qualified persons.*

the judicial review and setting aside of those decisions. In attacking the conviction on the second charge, the applicant relies on what, in the language of the disciplinary committee, might be termed a factual 'non-alignment' between the charge and the committee's findings – in other words, that she was convicted on matter that the charge had not called upon her to meet. The sanctions imposed by the committee are impugned solely on the basis that they fall to be set aside if the attack on the convictions is upheld on review.

[4] The Board, which was cited as the first respondent, does not resist the relief sought by the applicant in respect of the committee's finding on count five, but it opposes the application concerning the verdict on the second charge. (The chairman of the committee was cited as the second respondent and the committee itself as the third respondent. The chairman and members of the committee have not participated in the litigation.[4]) The three 'primary grounds' upon which the Board opposed the application were (i) that the applicant's alleged reading of the charge sheet was incompatible with the language used in it; (ii) that her alleged reading of the charge sheet was inconsistent with her own conduct and that of her legal representatives in the hearing and (iii) that even if the applicant had been convicted on the basis of facts not specifically referred to in the charge sheet, the evidence had been before the committee and in the peculiar circumstances of the case there had been no prejudice to her in the committee having taken it into account. I understood it to be implicit in the last-mentioned basis of opposition that were to the court to find that the charge sheet had been defective to the degree that it failed to comply with the prescribed formalities, the Board's position would be that the irregularity was not material in circumstances of the case; cf. *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, And Others* 2014 (1) SA 604 (CC), at paras. 28-30 and 62. In oral argument, the Board's counsel submitted that the case raised in essence a single question: 'Was the applicant not afforded a fair hearing?'

## Does the case engage PAJA?

[5] The application was framed in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), it being accepted by both sides that the decisions of the disciplinary

[4] The Board's Director: Legal who deposed to the answering affidavit averred that she did so on behalf of the first and third respondents. In context it is clear, I think, that she did not purport to do so on behalf of the individual members of the committee, but on behalf of the committee as an organ of the Board.

committee constituted 'administrative action' as defined in that Act. The provisions of s 6 upon which the applicant founded her application were –

(i) subsection (2)(b) – that a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(ii) subsection (2)(c) – that the committee's findings were procedurally unfair,

(iii) subsection (2)(d) – that the committee's findings were materially influenced by an error of law;

(iv) subsection (2)(e)(iii) – that irrelevant considerations were taken into account by the committee in making its findings or relevant considerations were not considered; and

(v) (2)(f)(ii)(cc) – that the committee's findings were not rationally connected to the information before it.

During the argument of the case I queried whether the characterisation of the committee's decisions as 'administrative action' was necessarily correct.

[6] Both Mr *Newdigate* SC, who (together with Mr *Jansen van Rensburg*) appeared for the applicant before the disciplinary committee and in these proceedings, and Mr *Marcus* SC, who (together with Ms *Hofmeyr*) represented the Board in this forum, supported the characterisation. They did so on the basis that the decisions in question were made in the exercise of a public power under the Act by a statutorily constituted body that qualified as an organ of state and had had a direct and adverse external effect on the applicant rights.[5] The decisions also did not fall within the exclusions in the definition of 'administrative action' in s 1 of PAJA. Those features are indisputable, but they do not end the enquiry.

[7] In raising the query, my mind was exercised by the requirement that the decisions in issue – which were plainly adjudicative in character – had to be 'of an administrative nature' within the meaning of PAJA. That follows from the defined meaning of 'decision' in s 1 of PAJA, which, in turn, is a critical component of the statutory definition of 'administrative action'. The requirement is the first of seven elements of the statutory concept of

[5] Footnote 4 in para. 219 of the disciplinary committee's decision suggest that the applicant's counsel had, for what it was worth, expressed a different opinion when the matter was argued before that tribunal. The observation is, however, inconsistent with the applicant's counsel's heads of argument before the committee and the attribution may therefore have been erroneous, and may actually have reflected the position of the pro-forma complainant. The only relevance of the point is that different views on the question were reportedly expressed at any earlier stage.

'administrative action' identified by the Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC), 2014 (8) BCLR 930, at para. 33.[6] In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] 3 All SA 33 (SCA), 2005 (6) SA 313, 2005 (10) BCLR 931, at para 22, Nugent JA held that '[a]t the core of the definition of administrative action is the idea of action (a decision) *of an administrative nature* taken by a public body or functionary'.[7]

[8] Professor Cora Hoexter has remarked, aptly in my view, that the 'purport of the phrase is not entirely clear'. She discounts the theory that it 'could … be regarded as an attempt to revert to the classification of administrative functions themselves as "judicial" and "quasi-judicial", "legislative" and "purely administrative",[8] and to exclude those that are not "purely administrative"'.[9] The jurisprudential treatment of the statutory definition supports that view. The judgments of the Constitutional Court in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) that characterised administrative law-making by way of statutory regulations as 'administrative action' serve as a prominent example. The diversity of the approaches by the members of the court in that case to characterisation of the action in question in terms of PAJA highlighted, however, the difficulties to which the statutory definition can give rise. The division in opinion between the members of the court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) as to whether the functions of the CCMA in terms of the Labour Relations Act[10] are judicial or administrative in nature is perhaps an even more pertinent example.

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[6] The seven elements identified are *'(a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions*'. Hoexter commented on the elements in the statutory definition as follows in '*"Administrative Action" in the Courts*', 2006 *Acta Juridica* 303, at 306: '*They are a curious combination of substantive features — those that relate clearly to the characteristics of administrative action — and procedural ones that relate more obviously to issues such as standing and ripeness. Trained lawyers find the definition of administrative action puzzling, and one can only imagine how bemused legally untrained administrators must be by it*'.

[7] Italicisation supplied for emphasis.

[8] An incisive discussion about the 'classificatory system' used by the courts under the common law in respect of various types of administrative acts is to be found in Baxter, *Administrative Law* (Juta, 1984), at pp.344-353.

[9] Cora Hoexter, *Administrative Law in South Africa*, 2 ed. (Juta, 2012), at pp. 203-205.

[10] Act 66 of 1995.

[9] It has been emphasised, with reference to s 33 of the Constitution, that the object of PAJA is to codify the law of judicial review in respect of acts and functions that would have been characterised as administrative under the common law; the purpose of s 33 being to entrench and strengthen the right to lawful, reasonable and procedurally fair 'administrative action' in the sense of the term as it was generally understood in South African law at the time when the Constitution was adopted.[11] In para. 95 of his judgment in *New Clicks*,[12] Chaskalson CJ remarked that 'PAJA is the national legislation that was passed to give effect to the rights contained in s 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so'. Consistently with this view, the learned chief justice appears, in para. 128 of his judgment, to have regarded the phrase 'of an administrative nature' as pertaining to any function that would have been characterised as administrative action susceptible to judicial review under the common law.[13]

[10] But how the statutory concept of administrative action is to be delineated with regard to the componential element introduced by the phrase 'of an administrative nature' remains imprecise. Absent legislative improvement of the definition (which seems unlikely after so long), case law is going to be the main driver towards attaining the desirable objective of more certain characterisation.[14] The determination that government tender award decisions

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[11] Cf. *New Clicks* supra, at para. 97, where Chaskalson CJ referred with approval to the following statement in a paper delivered by Professor Hoexter in March 2005 entitled '*"Administrative Action" in the Courts*' (later published in 2006 *Acta Juridica* 303):

> *The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in s 33. This follows logically from the fact that the PAJA gives effect to the constitutional rights. (The PAJA itself can of course be measured against the constitutional rights, but that is not the same thing.) Nor is it possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act.* (Underlining supplied for emphasis.)

Cf. also *Grey's Marine* supra, at para. 22.

[12] Note 11 above.

[13] Essentially the same view was expressed by Wallis J in *Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Other* 2010 (5) SA 574 (KZP), at para. 82.

[14] Cf. *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA), at para. 53.

are administrative action is a salient example of the heuristic exposition of 'administrative action' within the meaning of PAJA.[15]

[11] That the query to counsel was appropriately raised finds support in the view expressed by Wallis J in *Sokhela*[16] as to the 'two important purposes' served by the element 'of an administrative nature' in the statutory definition; viz. (i) enjoining a case by case judicial determination whether the public function entailed does constitute 'administrative action', for only if it does, and a positive finding to that effect is made, is the court's power of judicial review under PAJA engaged;[17] and (ii) 'to make it clear that the mere fact that an exercise of public power or the performance of a public function does not fall within one of the exclusions in subparas. (*aa*)-(*ii*) of the definition of "administrative action" does not necessarily mean that the exercise of public power or the performance of a public function in question constitutes administrative action'.[18]

[12] In support of the characterisation of a decision of the disciplinary committee as administrative action in terms of PAJA, counsel cited the recent judgment of Meyer J in *Defries v Independent Regulatory Board for Auditors and Others* [2016] ZAGPJHC 352 (23 December 2016). The question was not investigated in that case, however. The learned judge merely recorded (at para. 28) that '[t]here is no dispute that the committee's decision is reviewable under PAJA'.

[13] Mr *Marcus* also referred me to the judgment in *Graham and Another v Law Society, Northern Provinces and Others (Road Accident Fund Intervening)* 2014 (4) SA 229 (GP).

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[15] See *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) and *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA). (Cancellation of a tender before adjudication, however, does not constitute 'administrative action' as defined; see *Tshwane City and Others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) at paras. 22-24.)

[16] Note 13 above.

[17] In this connection, Wallis J observed (at para. 61) '*... the determination of what constitutes administrative action does not occur by default, on the basis that, if it does not fit some other juristic pigeonhole, it is administrative action*'.

[18] Id. This passage in *Sokhela* was referred to with approval by the Supreme Court of Appeal (per Nugent JA) in *Scalabrini* supra, at paras. 51-52; see also *Tshwane City and Others v Nambiti Technologies* supra, at para. 25, and *University of the Free State v Afriforum* [2017] ZASCA 32 (28 March 2017), at para. 17. Cora Hoexter has bemoaned the effects of the judicial enquiries necessitated by the convoluted and confusing multi-element definition of 'administrative action', and illustrated how the resultant potential distraction from the substance of cases brought on judicial review has on occasion led to regrettable failures of substantive administrative justice; see Hoexter, *"Administrative Action" in the Courts*, 2006 *Acta Juridica* 303, at 309-311. That the exercise can indeed be a distraction has been borne out by my own experience in dealing with the issue in the preparation of this judgment. It would not have been an issue if the court were applying the common law, or able to apply s 33 of the Constitution directly.

That matter concerned an application for remedial directions by the complainants in a case of alleged misconduct by two attorneys. The application had allegedly been necessitated by the failure of the relevant law society to deal with the complaint effectively. A point was taken by the law society that the proceedings had not been competently instituted because the application had not been framed as a review in terms of s 6 of PAJA.[19] Mothle J held (at para. 80) that 'Where the Law Society takes disciplinary steps against a legal practitioner, it does so as an organ of state in the exercise of a public power and in the performance of a public function in terms of the Act. The decision to institute a disciplinary enquiry on a practitioner constitutes an administrative action as defined in s 1 of PAJA' (footnotes omitted).[20] While the analogous import of the learned judge's finding in *Graham* is manifest, the approach enunciated in *Sokhela* enjoins a discrete consideration – certainly in the absence of any pertinent precedent - of the nature of the functions of the disciplinary committee in the peculiar context of the different statute that is applicable in the current case.

[14] Even in the pre-Constitutional era, disciplinary proceedings were long accepted to be amenable to judicial scrutiny on review, especially in respect of questions arising out of alleged procedural unfairness and other breaches of natural justice. This was so irrespective of whether or not an organ of state was involved. [21] But whether PAJA applies or not now requires a determination of whether the administrative act concerned is a public law function characterised by all seven elements of the statutory definition. If PAJA does not apply because the act in issue does not qualify as 'administrative action', the review would be a matter to be brought and determined under the common law.

[15] In the now largely disparaged classificatory system to which resort was frequently had in the common law administrative law cases prior to decisions such as that in *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A),[22] the functions of the disciplinary committee would be called 'quasi-judicial' – a description that in itself served to

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[19] *Graham* at para. 29 (second bullet point).

[20] The type of decision under the Attorneys Act to which Mothle J was referring would in fact be more closely analogous, in the context of the Act, to that of the investigating committee established in terms of s 20(2)(e) to refer a matter for hearing before the disciplinary committee (see s 49(1)) than it would be to the impugned decision in the current case.

[21] See *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* 2002 (5) SA 449 (SCA), at para. 23.

[22] At pp. 762G-763, with reference, inter alia, to the discussion in Baxter, *Administrative Law* (Juta, 1984) at pp. 344-348 and 575-576.

distinguish the truly judicial functions of the judicature from the adjudicative functions of tribunals that are not courts. There are several examples in the case law in which the functions of such, or comparable, creatures of statute exercising an essentially 'judicial' role have been characterised as administrative in nature.[23]

[16] The application concerns a review, brought on the grounds of alleged procedural irregularity and unfairness, of disciplinary proceedings before a statutory committee exercising a public power. The statutory character of the disciplinary committee is not, by itself, enough to characterise its acts as administrative in nature.[24] It is the character of the function concerned that is determinative criterion. The functions of the disciplinary committee are amongst the mechanisms of the Act provided in order to obtain the achievement of some of its objects.[25] The relevant objects include the maintenance of ethical standards in the auditors' profession, and dealing with infringements and other improper conduct by members of the profession. The functions are an inherent feature of the Act's regulatory purposes for the ultimate protection of the public.[26] They do not entail policy-making. Their nature and statutory context, including the provision in the Act for public funding to the extent necessary,[27] marks their character as unmistakeably those of an administrative agency.

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[23] See e.g. *SA Medical & Dental Council v McLoughlin* 1948 (2) SA 355 (A), in which the available right of review of the proceedings of a statutory disciplinary body was said to that under the second category of review identified by Innes CJ in *Johannesburg Consolidated Investment Co. v Johannesburg Town Council* 1903 TS 111 at 115, *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) and *South African Veterinary Council and Another v Veterinary Defence Association* 2003 (4) SA 546 (SCA), at para 34.

[24] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059, at para. 141.

[25] Section 2 of the Act provides:

*The objects of this Act are-*

*(a) to protect the public in the Republic by regulating audits performed by registered auditors;*
*(b) to provide for the establishment of an Independent Regulatory Board for Auditors;*
*(c) to improve the development and maintenance of internationally comparable ethical standards and auditing standards for auditors that promote investment and as a consequence employment in the Republic;*
*(d) to set out measures to advance the implementation of appropriate standards of competence and good ethics in the auditing profession; and*
*(e) to provide for procedures for disciplinary action in respect of improper conduct.*

[26] A function that entails the implementation of legislation as distinct from the development of policy in terms of a statutory power is ordinarily regarded as 'administrative action' within the meaning of s 33 of the Constitution; see e.g. *President RSA v South African Rugby Football Union* supra, at para. 142.

[27] Section 25(c) of the Act.

[17] However, as O'Regan J emphasised in *Sidumo* supra,[28] the assessment of the function must occur cognisant of and sensitive to its peculiar constitutional context. The disciplinary committee's judicial function has an administrative context in that it is derived from a regulatory statute and is directed at the execution of some of the objects of the statute. In that sense the nature of its functions is materially distinguishable from that of the judicial functions of the courts, which are directly and originally founded in the Constitution and, congruently with the doctrine of separation of powers, thereby fundamentally distinguished from those of the public administration. The absence in the Act of any provision for appeals against the decisions of the disciplinary committee is also a telling factor weighing in favour of characterising its functions as administrative within the meaning of s 33 of the Constitution, rather than judicial.[29]

[18] I am therefore satisfied, having considered the question on the approach discussed above, that the impugned proceedings in the current matter were indeed of an administrative nature and that the application was properly framed in terms of PAJA.

***The factual and legal context of the complaint against the applicant and the consequent charges tried before the disciplinary committee***

[19] The court is not concerned in this application for the judicial review of the disciplinary committee's findings with the merits of the decision. This is not an appeal. It is not the correctness of the conviction that is in issue, but the legality of the process in terms of which it was obtained. The essential basis of the review application – as mentioned, procedural unfairness reflected in an alleged non-alignment between the charge and the factual findings upon which the conviction was founded – nevertheless requires that the factual allegations that formed the basis of the investigation into the applicant's conduct and the evidence adduced at the hearing be described in some detail.

[20] The charges were brought against the applicant and Mr Bestbier consequent upon a so-called whistle-blower report by a former employee of LDP, one Garth Muller. The second

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[28] At paras. 122-141.

[29] Cf. *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC), at para. 140, where O'Regan J, with reference (in fn 29) to the observation in Hoexter *Administrative Law in South Africa* (Juta, 2007) at p.53, note 6, '*it is because administrative tribunals dispense with some of the procedural protections of the ordinary judicial process that they are subject to review, or even appeal, by the ordinary courts*' stated '*Our Constitution recognises the need for the conduct of administrative agencies to be scrutinised, to ensure that they act lawfully, reasonably and procedurally fairly*'.

charge concerned events that had allegedly occurred while Mr Muller worked at the firm. He ceased working for LDP in 2010. Mr Muller had been unemployed for some considerable time at the time he made the report. His action in belatedly making the report at that stage would appear to have been motivated by festering personal grievances, particularly against the applicant.

[21] The whistle-blower report was not included in the culled version of the record in the disciplinary proceedings that was placed before court in the review application. I have gathered, however, that the substance of it was set out in the affidavit deposed to by Muller in April 2013 that was included in the evidence. The New Disciplinary Rules of the Board that have been in force since 1 January 2011 require that any report or complaint of improper conduct against a registered auditor shall be on affidavit, unless the chief executive officer of the Board or its Director: Legal otherwise decides.[30] Inclusive of the annexures thereto, the affidavit ran to 53 pages.

[22] The Act provides, in s 48, that the Board must refer a matter brought against a registered auditor to the investigating committee appointed under section 20 if the Board, on reasonable grounds, suspects that a registered auditor has committed an act which may render him or her guilty of improper conduct; or is of the opinion that a complaint or allegation of improper conduct, whether prescribed or not, which has been made against a registered auditor by any person appears to be justified. Whatever was done in compliance with s 48 is not apparent on the record in the review. What does appear is that the Board put Mr Muller's affidavit to Ms Du Plessis and Mr Bestbier and requested their response within 30 days.[31] The Board's covering letter, dated 28 May 2013, warned that 'any explanation, answer or documentation' furnished by the practitioners in response might be used in evidence against them. In their heads of argument before the disciplinary committee, the applicant's counsel appositely referred to this communication from the Board as the commencement of 'the current disciplinary process'.

[23] I shall first discuss the relevant content of Muller's affidavit and thereafter describe the response to it that was submitted on behalf of the practitioners. An informed appreciation

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[30] See para. 2.2 of the rules.

[31] Paragraph 2.3 of the 'New Disciplinary Rules', which governed the procedural aspects of disciplinary proceedings instituted after 1 January 2011, provides that the Board may, for the purpose of deciding whether to refer the matter to the investigating committee, notify the respondent of the nature of the complaint and call upon the respondent to furnish a written explanation in answer to the complaint within 30 days of the notice.

of the facts alleged in Mr Muller's affidavit would be assisted by an understanding of certain of the Act's requirements in respect of audit work. I think it would be fair to accept that the applicant, as a registered auditor, would have considered the affidavit, and any charge sheet arising from the complaints set out therein, with such an appreciation.

[24] Section 44 prescribes the duties of registered auditors in relation to audits. Subsections (1) to (3) thereof provide as follows:

> (1) *(a)* Where a registered auditor that is a firm is appointed by an entity to perform an audit, that firm must immediately after the appointment is made, take a decision as to the individual registered auditor or registered auditors within the firm that is responsible and accountable for that audit.
> *(b)* The first name and surname of the individual registered auditor referred to in paragraph *(a)* must be made available to the entity on taking of the decision and to the Regulatory Board on request.
> (2) The registered auditor may not, without such qualifications as may be appropriate in the circumstances, express an opinion to the effect that any financial statement or any supplementary information attached thereto which relates to the entity-
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> *(a)* fairly presents in all material respects the financial position of the entity and the results of its operations and cash flow; and
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> *(b)* are properly prepared in all material aspects in accordance with the basis of the accounting and financial reporting framework as disclosed in the relevant financial statements,
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> unless a registered auditor who is conducting the audit of an entity is satisfied about the criteria specified in subsection (3).
> (3) The criteria referred to in subsection (2) are-
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> *(a)* that the registered auditor has carried out the audit free from any restrictions whatsoever and in compliance, so far as applicable, with auditing pronouncements relating to the conduct of the audit;
>
> (b) that the registered auditor has by means of such methods as are reasonably appropriate having regard to the nature of the entity satisfied himself or herself of the existence of all assets and liabilities shown on the financial statements;
>
> (c) that proper accounting records in at least one of the official languages of the Republic have been kept in connection with the entity in question so as to reflect and explain all its transactions and record all its assets and liabilities correctly and adequately;
>
> (d) that the registered auditor has obtained all information, vouchers and other documents which in the registered auditor's opinion were necessary for the proper performance of the registered auditor's duties;
>
> (e) that the registered auditor has not had occasion, in the course of the audit or otherwise during the period to which the auditing services relate, to send a report to the Regulatory Board under section 45 relating to a reportable irregularity or that, if such a report was so sent, the registered auditor has been able, prior to expressing the opinion referred to in subsection (1),

to send to the Regulatory Board a notification under section 45 that the registered auditor has become satisfied that no reportable irregularity has taken place or is taking place;

(f) that the registered auditor has complied with all laws relating to the audit of that entity; and

(g) that the registered auditor is satisfied, as far as is reasonably practicable having regard to the nature of the entity and of the audit carried out as to the fairness or the correctness, as the case may be, of the financial statements.

It is apparent from the aforegoing that an auditor cannot lawfully give an unqualified audit certificate in respect of the financials of any entity unless he or she, after obtaining all information, vouchers and other documents which in his or her [reasonably formed] opinion were necessary for the proper performance of his or her duties, has been satisfied, amongst other matters, that proper accounting records have been kept to reflect and explain the entity's business transactions. In the current case, Mr Bestbier would have been the 'individual registered auditor' referred to in s 44(1)(a).

[25] In terms of s 41(6)(b) of the Act, a registered auditor may not 'sign any account, statement, report or other document which purports to represent an audit performed by that registered auditor, unless the audit were (sic) performed by that registered auditor, under the personal supervision or direction of that registered auditor or by or under the personal supervision or directions of that registered auditor and one or more of the partners, co-directors or co-members of the registered auditor, as the case may be, in accordance with prescribed auditing standards'. Section 41(8) provides 'Nothing in subsection (6)(b) prevents any registered auditor from signing the firm name or title under which the registered auditor practises'.

[26] It is necessary to treat of Muller's affidavit only insofar as it bore on matters concerning the second charge and the findings of the disciplinary committee in relation to that charge, bearing in mind, however, the factual interconnection between the first and second charges. I shall deal with the content of the second charge in detail presently. It suffices at this stage to record that it had to do with the treatment of the reported income of Ripple Effect 3 (Pty) Ltd ('Ripple Effect' or 'the company') in the audited financial statements of that company for its 2006 financial year and the use thereof in representations made to the DTI. The period in question extended over 14 months ending on 30 April 2006. This was due to a change during the reporting period of the company's financial year-end from 28 February to the end of April.

[27] Ripple Effect was an applicant for an incentive grant from the DTI. To qualify for the grant it had to prove that its business had generated more than a stipulated minimum turnover in the 2006 financial year. The application form contained provision for an auditor's certificate confirming the applicant entity's reported turnover. The company was a client of LDP and the auditing work in respect of its 2006 financial report was undertaken by Mr Muller under the auspices of Mr Bestbier, as the responsible engagement partner.

[28] The moving spirit behind Ripple Effect was Mr Dennis Tucker, who was the company's sole director. Notwithstanding Mr Bestbier's role as the audit partner, Ms Du Plessis was responsible, as director, in respect of managing the client relationship between LDP and Mr Tucker. She also dealt with the tax affairs of Mr Tucker and the company.

[29] The business of Ripple Effect was the ownership and operation of a guesthouse in Plettenberg Bay. As will appear, Mr Tucker and his friends and business associates were the main source, by far, of the guesthouse's business. They used its facilities at Mr Tucker's instance for no cash consideration. Indeed, the company's cashbook for the period under consideration reflected receipts totalling only R42 892, which would appear to have been the extent of the company's turnover in respect of transactions with unrelated parties.

[30] As mentioned, the company had applied for an incentive grant for small and medium businesses from the DTI. It had actually obtained a grant in the amount of R820 750 from the Department in respect of its 2005 financial year on the basis of a reported turnover of only R150 703. It used the services of a specialist advisor, Formentco Consultants (Pty) Ltd, a company that appears to have been based in Pretoria, to assist it in respect of the submission of its application. Formentco initially advised that, in order to qualify for the further grant in the amount of R469 000 that Ripple Effect was seeking in respect of the 2006 financial year, the company's audited financial statements would need to reflect turnover for the year in the amount of at least R503 000. Mr Muller averred that he had been made aware of this requirement while he was in the course of doing the audit work for the company's 2006 financials. The requirement was communicated in an email from Anna-Mart Geyser of Formentco to Mr Tucker's personal assistant, Jacqui Du Triou, dated 23 January 2006, a copy of which was attached to Muller's affidavit.

[31] In his affidavit to the Board, Mr Muller stated that he had discussed the DTI's requirements with Mr Bestbier. Muller made the following averments in that respect (at paras. 59-62):

59. Mr Bestbier and I discussed the fact that, on Ms Du Plessis' instruction, LDP had assisted the Company in fabricating fictitious income in its previous financial year (2005) in order to meet the minimum requirements for it's (sic) 2006 DTI Grant Application.

60. Mr Bestbier informed me that LDP would again assist the Company in fabricating fictitious income for the 2006 financial year in order to meet the minimum requirements for its 2006 DTI Grant Application.

61. Mr Bestbier instructed that I amend the draft AFS by writing the following adjusting journal:

| | | | |
|---|---|---|---|
| DT | DENNIS TUCKER LOAN ACCOUNT | R465 000 | |
| CR | TURNOVER | | R465 000 |

62. The Company's total turnover increased from R42 982 to R507 892 for the 2006 financial year.

It can be inferred from Mr Muller's affidavit that his evidence was that he had complied with Mr Bestbier's reported instruction. In the result, it may also be inferred (and indeed it was common ground) that Ripple Effect's draft financials would have then reflected the increased turnover figure.

[32] At that time (2006) the annual turnover threshold before an enterprise was required to register as a vendor for value-added tax purposes was R300 000. Ripple Effect had not been registered as a vendor by 2006.

[33] Mr Muller attached to his affidavit an email, dated 7 September 2006, from Ms Du Plessis to Mr Tucker in which she raised the VAT registration implications of the company's turnover exceeding R300 000. The email read as follows:

> Hi Dennis
>
> We have the signed financials ready for you for 2006 but before I courier[,] the following:
>
> 1. The rental of a guesthouse is classified as a "rental establishment" in terms of the VAT Act – refer my email regarding Tirade Props.
> 2. As soon as the turnover of a rental establishment exceeds R300 000 one is required to register as a VAT Vendor.
> 3. Ripple Effect has gone from a turnover of R150 000 to R500 000 within one year.
> 4. We are therefore required to register the Company for Vat purposes with effect from the 28th February 2006 at the latest.
> 5. We are then required to pay over R70 000 as VAT and as we shall be late in paying it there will be R7 000 penalty plus interest on R77 000 for the 8 months until end of September. We can ask for the penalty to be waived based on first registration etc and may be successful but do not bank on it. The interest will be leviable in any event. We may of course also claim input Vat on the costs incurred and if so we should maybe backdate registration, the penalty will still be the same but interest will increase.

> 6. Do you want me to proceed with the registration or do you want to reduce the 2006 turnover below R300 000, register now and then increase the turnover for the 2007 year?
> 7. I am not sure of what effect this will have on your DTI claim and that is why I am asking? (sic)
>
> Please revert asap so that I can finalise the accounts.
>
> Regards
>
> Fran Du Plessis

[34] Mr Tucker sought Ms Du Plessis' advice on which of the suggested options Ripple Three should take. A copy of Ms Du Plessis' reply by email, also dated 7 September 2006, was attached to Muller's affidavit. It read:

> If it does not effect (sic) your DTI (sic) I would reduce it to say R295 000 and then register with effect from 1st May [the beginning of the company's 2007 financial year]. If, however, you lose part of your claim I would pay the Vat and penalty.

[35] The chain of email correspondence attached to Muller's affidavit reflected that the question concerning the effect of a reduction in the company's reported turnover on the its DTI claim was referred to Ms Anna-Mart Geyser of Formentco for comment. Ms Geyser responded by email on 8 September 2006 as follows:

> The DTI requires a minimum Turnover for each application submitted to them depending on the investment amount. The minimum turnover for year 1 and year 2 always differs a lot according to the DTI's guidelines.
>
> The turnover of R150 000 enabled us to claim for 1 year and 3 quarters which will amount to R820 750 which will be paid out in the next 4 weeks. The amount of minimum R503 000 turnover which is needed in Feb 2006 is required to enable us to claim for the next 12 months (Last quarter year 2 and 3 quarters up to Nov 2006) which will amount to R469 000. (As per your auditors notes then you will have to register for VAT to get the R469 000.) To claim for the last quarter based on Feb 2007 financials next year, there is no minimum turnover required as in year 1 and 2.

(It may be deduced from the content of Ms Geyser's email that she must have been under the misapprehension that Ripple Effect's 2006 financial year had ended at the end of February 2006.)

[36] When Ms Geyser's email came to Ms Du Plessis' notice, she emailed Mr Tucker and his personal assistant on 8 September 2006, with a copy to Muller, saying:

> Hi Jacqui/Dennis quite obviously we should stick with R503 000 (Where does the R500 000 come from??) and register for Vat etc. Please confirm and also whether we should make the turnover R503 000.
>
> Garth please note.

[37] It is notable that the content of Ms Du Plessis' aforementioned emails shows that a consistent theme is her concern about the relationship between the reported turnover of Ripple Effect and the company's application for a grant from the DTI.

[38] Mr Tucker thereafter sent an email to Ms Du Plessis, copied to Muller, instructing them to proceed with the company's registration for VAT purposes. It was common ground that the audited financial statements of Ripple Effect in respect of the company's 2006 financial year were signed by LDP on 12 September 2006. In the absence of Mr Bestbier, Ms Du Plessis signed the auditor's certificate using the firm's name. In doing so, Ms Du Plessis purported to act in terms of s 41(8) of the Act.

[39] Mr Muller's affidavit to the Board continued the narrative by turning to events in December 2006, when he received the following email concerning Ripple Effect's DTI claim from Ms Geyser of Formentco on the first of that month:

> Dear Garth
>
> I received the financials for Ripple Effect yesterday. As discussed with Jacqui [Mr Tucker's personal assistant] the turnover for 12 months had to be +- R503 000. We also did not know that the year end changed to April – therefor (sic) maybe the misunderstanding?? Please advise about a possible solution.
>
> If the following can also be amended in 2006 financials it would be great otherwise this requirement must be met in 2007 financials.
>
> HR (salaries, wages and directors emoluments) must be 30% of total operating costs (including water and lights, depreciation and rent). There is no mention of any HR expenses in 2006??
>
> Please contact me in this regard.

(The committee appears, understandably in my view, to have considered this request to have been extraordinary. On the assumption that it was accepted that the audited financials signed off by the applicant on 12 September 2006 had been audited in compliance with the auditor's duties in terms of s 44 of the Act,[32] quite how was the auditor now expected to find additional turnover and previously unreported expenses? It is noteworthy that there was no indication that in the discussion that Ms Geyser reported to have had with Ms Jacqui Du Triou had it been suggested that the entity's reported turnover had been understated or that expenses actually incurred had been omitted in the company's audited income statement.)

[40] Mr Muller's affidavit proceeded as follows (at paras. 97-99):

---

[32] See paragraph [24] above.

97. As I was not authorised to answer any of these questions, I discussed these matters with Mr Bestbier.

98. Mr Bestbier informed me that the Company would simply need to declare director's remuneration to Mr Tucker for the 2006 tax year. LDP would then be required to amend Mr Tucker's personal income tax return to account for the additional income. In Mr Bestbier's word (sic): '*This was an easy problem to fix*'.

99. Mr Bestbier was reluctant to make any decisions regarding the further addition of fictitious income. Mr Bestbier instructed me to confirm with Ms Du Plessis directly whether the turnover should be increased again and whether it should be done in the same manner as the turnover was originally increased from R42 892 to R507 892.

[41] Mr Muller averred that he passed on Ms Geyser's email of 1 December to Ms Du Plessis under an email dated 4 December 2006. The covering email from Muller to Du Plessis (a copy of which was attached to Muller's affidavit) went as follows:

> Hi Fran
> Please see email below [Ms Geyser's aforementioned email of 1 December].
> Turnover
> The turnover is currently R507 892. Should I increase it to R550 000 against Dennis' loan account for debtors?
> Salaries & wages
> Currently no provision has been made for any salaries, wages or director's remuneration. This is solved easily by declaring director's remuneration of R115 000. If Dennis carries this in his personal capacity, he would have an extra tax liability in his own name at 40%. The company would also save 29% on the same amount. Dennis does not own 100% shares in this company. Could you please confirm with him the amounts to be declared as director's remuneration and in whose name. (We need at least R115 000 in total)
> Kind regards
> Garth

[42] Ms Du Plessis reacted to Muller's email of 4 December by sending an email to Muller and Tucker's personal assistant, Jacqui Du Triou, later the same day, in which she said:

> Jacqui/Anna Mart we can still change the 2006 AFS as we have not submitted it anywhere.
> Will you please peruse Garth's suggestions and get back to us. Anna Mart will Director's remuneration suffice or is the company expected to employ outside workers.

The email was copied to Ms Geyser.

[43] Ms Geyser responded by email (apparently addressed only to Ms Du Plessis) shortly afterwards, as follows:

> Goodday (sic)

> Herewith our comments:
> Turnover should reflect +- R590 000 as the financials is (sic) for 14 months and the turnover for 12 months must be +-R503 000.
> Please change the heading in the income statement from rent received to Revenue.
> To meet the HR requirement you can reflect either salaries and wages / directors emoluments of +- R65 000, but then the figures for depreciation and interest received must stay the in place (sic) and not change.
> Thank you for your assistance.
> Regards
> Anna-mart

(No indication was given of there having been any response from Mr Tucker or his personal assistant.)

[44] Ms Du Plessis replied thanking Ms Geyser for her comments. She forwarded Ms Geyser's email to Tucker's assistant and to Muller.

[45] It would be striking to any critical reader, I think, that none of the emails exchanged concerning material changes to the company's reported turnover and operating expenses in its already signed audited financial statements was addressed to Mr Bestbier, as the engagement partner for the audit.

[46] After treating of the abovementioned email exchanges, Mr Muller's affidavit proceeded to set out the following allegations (in paras. 109, 114, 115, 117-120 and 123):

> 109. On or about 4 December 2006 Ms Du Plessis instructed that I amend the Company's 2006 AFS with the following adjusting journals:
>
> | | | | |
> |---|---|---|---|
> | DT | DENNIS TUCKER LOAN ACCOUNT | R85,000 | |
> | CR | TURNOVER | | R(85,000) |
> | DT | DIRECTOR'S EMOLUMENTS | R70,000 | |
> | CR | DENNIS TUCKER LOAN ACCOUNT | | R(70,000) |
>
> … …
>
> 114. After the abovementioned journals were passed, Ms Du Plessis instructed that I reprint the 2006 Audited Annual Financial Statements.
>
> 115. During the month of December 2006 Ms Du Plessis personally, and in my presence, signed the "REPORT OF THE INDEPENDENT AUDITORS" to the Audited Financial Statements of Ripple Effect3 (Pty) Ltd for the 14 months ended 30 April 2006.
>
> … …
>
> 117. Ms Du Plessis was not authorized to sign the abovementioned Auditor's Report on behalf of Loubser Du Plessis Inc ….

118. Ms Du Plessis took this action as Mr Bestbier was unavailable on the day the reprinted AFS needed to be signed.

119. When Ms Du Plessis signed the Auditor's Report in December 2006 she remarked to me that she might as well sign the report because if the truth ever came out, it would be the least of her problems.

120. Ms Du Plessis then personally backdated her signature by completing the date as "12/09/2006".

… …

123. This back-dating was also done in my presence.

[47] Mr Muller's affidavit also dealt with certain events flowing from an email sent to Ms Du Plessis (and copied to himself) on 10 January 2007 by Mr Gerrit Potgieter of Formentco. A copy of the email was attached to the affidavit. It went as follows:

> Dear Mr (sic) Du Plessis
> Please find attached the SMEDP claim for your perusal and signature.
> If you are in agreement with our workings, you are requested to please initial each page (pg.1-9), the asset list and also to sign in full on page 10 at the appropriate space.
> Annexure B as well as the letter in respect of the Tucker Boys Trust [a shareholder of Ripple Effect] must be transferred onto your letterhead and signed in full.
> We trust you will find this in order.
> Please do not hesitate to contact me if you have any queries.
> G. Potgieter

[48] It is evident that the DTI claim form in respect of Ripple Effect's grant application was attached to Potgieter's aforementioned email. Page 10 of the claim form contained a 'DECLARATION BY THE EXTERNAL AUDITOR / ACCREDITED PERSON'. This was the place on the page at which Potgieter wanted Ms Du Plessis to sign in full. The declaration read:

> I hereby declare that the information submitted with this claim is true and fair and I have initialled each page of this form to this effect. I declare that the financial statements is (sic) final and correct and that the financial statements used to prepare the claim is (sic) the same as those submitted to South African Revenue Services.

The copy of the (unsigned) claim form, attached as annexure N to Mr Muller's affidavit, reflected (on page 8 thereof) that Ripple Effect's qualifying revenue was 'R508 193*'. The asterisk referred to a note or postscript that read 'R592 892 * 12/14 = 508 193'. Mr Muller averred that the signed claim form and accompanying documents were couriered later to an address in Pretoria provided by Mr Potgieter in an email dated 16 January 2007.

[49] Muller's affidavit made various other factual allegations. It is unnecessary to describe them as they did not in any way identifiably pertain to the subject matter of what subsequently became the second charge on the charge sheet put to Ms Du Plessis and Mr Bestbier, or the findings that the disciplinary committee made in respect of that charge. The clear import of Mr Muller's aforementioned allegations was that Ms Du Plessis had been party to an amendment of Ripple Effect's financial statements to misrepresent the company's financial results for the purpose of supporting its DTI grant application. This, by inflating turnover by R85 000 and by reflecting an expense in respect of director's emoluments.

***The applicant's response to the content of Muller's affidavit***

[50] The practitioners responded through their attorneys to the allegations of misconduct set out in Mr Muller's affidavit. The response, set out in a 22-page letter dated 31 August 2013, pointed to the time lapse since the alleged events and highlighted the prejudicial effects of the delay, most notably the destruction in the meanwhile of much of the relevant documentary material, including the relevant working papers in respect of the audit. It denied any wrongdoing or improper conduct as alleged by Mr Muller.

[51] The allegation that Ms Du Plessis and Mr Bestbier had been party to reporting 'fictitious income' of Ripple Effect was expressly denied. It was pointed out that the guesthouse had been used by Tucker and his family and his friends and business associates and asserted that as 'Tucker should have paid for the accommodation in the guesthouse … a reasonable price for such accommodation had to be declared as part of Ripple Effect's turnover'.

[52] The attorneys' letter proceeded 'The turnover was therefore made up of amounts paid by unrelated third parties as well as reasonable amounts that Tucker had to pay for the use of the guesthouse by his family, friends and business associates. The transactions between Ripple Effect and Tucker, his family, friends and business associates were not fictitious, and it was responsibility of Tucker, in his capacity as director of Ripple Effect, to determine a reasonable amount attributable to those transactions.' It was stated that the use of the guesthouse by Tucker had not been previously accounted for 'and this resulted in the low initial turnover reflected in the 2006 draft financial statements prepared by Muller … An adjustment was therefore necessary to account for this use'. (That might account for the statement of turnover in the amount of just under R508 000 in the financial statements signed

in September 2006, but it did not address the amendments effected after the exchange of emails in December 2006.)

[53] The attorneys' letter argued that there were a number of ways in which the adjustment in respect of turnover could be effected. One of them was by debiting Tucker's loan account in the company and crediting the company's turnover commensurately. Insofar as this was how the required adjustment was effected, it was suggested that the email correspondence attached to Muller's affidavit showed that it had been done on Tucker's instructions. (This appears to have been a reference to the email from Tucker described in para. [38] above.) It was contended that it was reasonable for LDP to have received these instructions bearing in mind that Tucker, as sole director, had been 'responsible for maintaining adequate financial records and for the internal financial control of the company'. The attorneys' letter noted that the financial statements were 'the responsibility and prerogative of its directors'. It was stated that there could be 'no notion of fictitious income as the income was clearly derived by Ripple Effect'.

[54] The applicant's attorneys pointed out that the company had declared the amount 'received' from Tucker on the basis of the debiting of his loan account as part of its gross income and paid income tax thereon. (According to the finally adjusted financials, the income tax paid was in the amount of R11 529.) The reported turnover had also resulted in the company complying with the resultant obligation to register as a vendor in terms of the VAT Act. It was stated that the company had been subject to two VAT audits by the tax authority, in which everything had been found to be in order.

[55] Dealing with the aforementioned email correspondence in September 2006 between Ms Du Plessis and Tucker in respect of the registration of the company as a vendor, the attorneys contended that '[i]t is clear from the email that Du Plessis does not know specifically how the turnover of Ripple Effect affects the DTI claim'. The attorneys' letter proceeded in this respect (at para. 5.3):

> Ripple Effect's turnover in relation to the transactions with Tucker and his associates was determined by three factors: (a) the number of guests, (b) the number of nights and (c) the rates charged per guest per night. The number of guests and the number of nights are facts that cannot be changed. The rates per guest per night, however, were determined in his discretion by Tucker – provided the rates appeared to fall within a reasonable range. It was on this basis that Du Plessis asked Tucker in this email if he wanted to reduce the turnover of Ripple Effect. Ultimately this did not happen and Ripple

> Effect registered for VAT with retrospective effect and all amounts due to SARS in this regard were duly paid.

(In her evidence before the disciplinary committee, Ms Du Plessis asserted that this part of her attorneys' response to the Board had been incorrect. The question was really, she asserted, a question of deciding whether part of the value received by Tucker from his personal use of the guesthouse should not be reflected as a fringe benefit provided by Ripple Effect taxable in his hands. The value of the fringe benefit given would not be reflected as part of the company's turnover. The applicant's email, however, made no reference to the fringe benefit alternative – which, as she acknowledged in her oral testimony, would have had income tax implications for Tucker personally and PAYE-penalty-and- interest implications for the company – it referred only to the possible effect of a reduction in turnover below the VAT registration threshold on the company's application for a DTI grant.)

[56] Dealing with the aforementioned exchanges of emails between Formentco, Muller, Tucker's personal assistant and Ms Du Plessis in early December 2006, the applicant's attorneys stated (at paras. 3.1.24 – 3.1.26 of the letter):

> 3.1.24 As Tucker was the director of Ripple Effect, he was responsible for maintaining adequate accounting records and for the internal financial control of the company. It was therefore reasonable for our clients to have received instructions from him via Ms Jacqui Du Triou, Tucker's personal assistant ("Du Triou") and Anna-Mart Geyser ("Geyser"), an employee of Formentco. In email 018, Annexure J to the Affidavit, on 4 December 2006, Geyser requested that the turnover, the heading in the income statement, and remuneration in the 2006 financial statements be amended. On the same day, Du Plessis responded that the financials have not been submitted anywhere and therefore could be changed. At no point in time did Du Plessis and/or Bestbier instruct Muller and/or any employee of LDP to pass journal entries in respect of Ripple Effect without the requisite instruction and/or consent from Tucker or his agents. Du Plessis only deemed the passing of the journal entries aforementioned as being appropriate in light of the fact that the guesthouse in question was indeed used by Tucker, his friends, family and associates.
>
> 3.1.25 In addition to the above, our clients submit that it was Muller himself that amended the 2006 financial statements before same were issued. In email 014 on page 26 of the Affidavit, Muller proposes the idea of amending the 2006 financial statements of Ripple Effect as per paragraph 3.1.20. Therefore the allegation that our clients proposed the passing of the journal entries in order to create *"fictitious income"* is denied. To illustrate this point, and to support the notion that Muller has conveniently appended certain correspondence to reflect badly on our client, we hereby attach a thread of emails, attached hereto, marked "l", pages 138 to 140

between Muller, Geyser and Du Plessis. The thread of emails clearly indicates that Du Plessis was, insofar as the turnover of Ripple Effect is concerned, guided by Muller and Geyser.

3.1.26 Our clients therefore submit that there was no improper conduct by Du Plessis, Bestbier and/or LDP in recording the journals in their audit software in order to amend the financial statements in accordance with Tucker's instructions as in 3.1.11 above as this was simply done to reflect the correct positions.

[57] As to the signature of the auditor's report in respect of the company's 2006 annual financial statements, it was stated that Ms Du Plessis had in fact signed the report, not in her own name but in that of the firm, LDP. It was contended that that was permissible in terms of s 41(8) of the Act read with section 150.5 of the Code of Professional Conduct issued under the Act.[33] The allegation at para. 119 of Muller's affidavit (quoted in paragraph [46] above) was 'vehemently denied'.

[58] The alleged backdating of the auditor's report, and Muller's allegations concerning the circumstances in which that happened, were also denied.

[59] The attorneys' letter recorded (with reference to annexure N to Muller's affidavit, which, it will be recalled, was an unsigned copy of the DTI claim form couriered to Formentco in February 2007) that they had been unable to obtain a signed copy of the DTI claim form from Formentco. In addition, it was pointed out that, as the complaint had been made more than five years after the events, the audit file was no longer available. (It was common ground that LDP had not been required to preserve the audit file beyond five years.)

[60] The letter, having noted that Muller was attempting to implicate Du Plessis and/or Bestbier and/or LDP as having individually or collectively 'conspired to defraud the DTI insofar as Ripple Effect's claim for the DTI grants are concerned' placed on record (in para. 6.1.3) that:

> Du Plessis had no knowledge of DTI's requirements insofar as the grant was concerned. Her only involvement with Ripple Effect subsequent to having signed the Auditor's report [i.e. on 12 September 2006] was to register Ripple Effect for VAT purposes as is evident in her email to Tucker of 7 September 2006 (refer to Annexure F of [Muller's affidavit] as well as the email to [Jacqui] Du Triou

[33] The Code of Conduct cited in the attorneys' letter was published in June 2010, and came into effect on 1 January 2011. It was therefore not in force when the 2006 AFS auditor's report was signed. It is not necessary for present purposes to determine whether the applicant's interpretation of s 41(8) was well-founded, or whether section 150.5 of the Code (which the Code itself tells us is based on an adaptation to the equivalent provision in the *Code of Ethics for Professional Accountants* of the International Ethics Standards Board of Accountants published by the International Federation of Accountants in April 2010) is congruent with the statutory provision.

> on 8 September 2006 where she questions where the R500 000 comes from (refer to Annexure G of the Affidavit).

(This was plainly incorrect, for Ms Du Plessis' advice in September 2006 that the company should register as a vendor for VAT purposes with effect from 28 February 2006 had been expressly predicated on the information provided to her by Formentco concerning the DTI's turnover requirements for the incentive grant. She was similarly informed in December 2006 of the amendments required to the company's (signed) 2006 financials if the qualifications for the DTI grant were to be satisfied.)

***The second charge***

[61] At the end of October 2014, the Board formally notified the applicant and Mr Bestbier that a disciplinary hearing would be convened. The hearing commenced on 20 April 2015. The Board's notification of the hearing had attached to it, amongst other things, a charge sheet. Section 49 of the Act prescribes that a charge sheet must inform the subject of the disciplinary proceedings of various things. Of relevance in the current case is the requirement, in terms of s 49(3)(a), that the charge sheet 'must inform the registered auditor charged of the details and nature of the charge'. The requirement in s 49(3)(a) is echoed in subrules 4.10.1 and 4.10.2 of the New Disciplinary Rules.[34]

[62] Although only the second charge is germane to the current case, it reads sensibly only if construed together with the first charge – as the applicant indeed acknowledged in her founding affidavit. Those charges, which were set out in paragraphs 4 to 7 of the charge sheet, read as follows (Ms Du Plessis was 'the First Respondent' and Mr Bestbier, 'the Second Respondent'):

> 4. **<u>The First Charge</u>**
>
> 4.1 The First Respondent and the Second Respondent are guilty of improper conduct within the meaning of rule 2.1.3 of the old disciplinary rules in that they committed any offence involving dishonesty, and in particular (but without prejudice to the generality of the foregoing) theft, fraud, forgery or uttering a forged document, perjury, bribery or corruption; and/or;

[34] Subrules 4.10.1 and 4.10.2 of the New Disciplinary Rules provide:

*4.10 The charge sheet shall:*

*4.10.1 set out the nature of the charge(s);*

*4.10.2 set out the relevant facts upon which the charge(s) are based with sufficient particularity as to allow the respondent to plead;*

*4.10.3 … .*

4.2 The First Respondent and the Second Respondent are guilty of improper conduct within the meaning of rule 2.1.4 of the old disciplinary rules in that they were dishonest in the performance of any work or duties devolving upon them in relation to any work of a type commonly performed by a practitioner or any office of trust which they have undertaken or accepted, and/or;

4.3 The First Respondent and the Second Respondent are guilty of improper conduct within the meaning of rule 2.1.5 of the old disciplinary rules in that they without reasonable cause or excuse failed to perform the work or duties commonly performed by a practitioner with such a degree of care and skill as in the opinion of the Regulatory Board may reasonably be expected, or failed to perform the work or duties at all, and/or;

4.4 The First Respondent and the Second Respondent are guilty of improper conduct within the meaning of rule 2.1.20 of the old disciplinary rules in that they without reasonable cause or excuse, contravened or failed to observe paragraph 4.4 of the Code by failing to perform their services with professional competence and due care, and/or;

4.5 The First Respondent and the Second Respondent are guilty of improper conduct within the meaning of rule 2.1.21 of the old disciplinary rules in that they conducted themselves in a manner which is improper or discreditable or unprofessional or dishonourable or unworthy on the part of a practitioner or which tends to bring the profession of accounting into disrepute.

5. **Facts giving rise to the First Charge**

5.1 Ripple Effect trades as a guest house in Plettenberg Bay.

5.2 Tucker is a director of Ripple Effect.

5.3 Loubser du Plessis Incorporated ("LDP"), provided tax and auditing services to Ripple Effect.

5.4 Ripple Effect applied for a grant from the DTI based on its 2006 audited annual financial statements, in the amount of R469 000.

5.5 In order to qualify to obtain the DTI grant, Ripple Effect was required to have a turnover of at least R503 000 per annum.

5.6 At the time of preparing the annual financial statements of Ripple Effect for the 14 month period ended 30 April 2006 the cash book of Ripple Effect reflected that its turnover for the period March 2005 to 30 April 2006 was R42 892.

5.7 Mr Garth Muller ("Muller"), who was at all material times an employee of LDP, compiled the draft annual financial statements for Ripple Effect for the 14 months ended 30 April 2006.

5.8 The First Respondent indicated in email correspondence dated 7 September 2006 to Tucker that she was willing to adjust the turnover amounted reflected in the annual financial statements of Ripple Effect for the period ended 30 April 2006, either upwards or downwards in order to achieve the best net result for Ripple Effect insofar as the VAT liability and DTI grant were concerned. This was irrespective of whether there was in fact any audit evidence to justify the increase or decrease in Ripple Effect turnover.

5.9 The First Respondent was willing to assist and/or facilitate that the annual financial statements of Ripple Effect did not reflect the true income position of Ripple Effect but that it reflected a

misstated financial position instead in order to deceive the DTI and/or the Commissioner of Revenue.

5.10 The Second Respondent instructed Muller to amend the draft annual financial statements by including an adjusting journal entry which debited Tucker's loan account in the amount of R465 000 (four hundred and sixty five thousand rand) and credited turnover in the amount of R465 000 (four hundred and sixty five thousand rand). This resulted in the turnover of Ripple Effect for the 14 months ended 30 April 2006 being inflated to an amount of R507 892 (five hundred and seven thousand eight hundred and ninety two rand). Accordingly, Ripple Effect's annual financial statements were materially misleading insofar as it did not reflect the actual turnover that was generated by the company for the period in question.

5.11 Fictitious income in the amount of R465 000 (four hundred and sixty five thousand rand) was added to the original turnover figure in order to increase Ripple Effect's turnover to over R503 000 (five hundred and three thousand rand) in order for it to qualify for the DTI grant.

5.12 The Second Respondent instructed Muller not to perform any audit procedures on the additional income of R465 000 (four hundred and sixty five thousand rand) and on Ripple Effect's application to the DTI for a grant.

5.13 The DTI granted Ripple Effect a grant in the amount of R469 000 (four hundred and sixty nine thousand rand) based on its turnover as reflected in the annual financial statements for the 14 month period ended 30 April 2006.

5.14 The increase in turnover resulted in Ripple Effected being required to register as a VAT vendor in terms of the VAT Act. The First Respondent advised Tucker pertaining to the registration of Ripple Effect for VAT as a result of the increased turnover.

5.15 The First Respondent was therefore aware, alternatively should have reasonably been aware of the fictitious income and the fraud that was being perpetrated relative to the DTI grant.

5.16 The First and Second Respondents acted dishonestly and were a party to a fraud being perpetrated on the DTI, as Ripple Effect did not legitimately have an entitlement to the DTI grant.

5.17 Both the First and Second Respondent, by their conduct as described above, contravened rule 2.1.3 and/or rule 2.1.4, and/or rule 2.1.5 and/or rule 2.1.20 and/or rule 2.1.21 of the old disciplinary rules.

6. **The Second Charge**

6.1 [As per para. 4.1.], and/or;

6.2 [As per para. 4.2], and/or;

6.3 [As per para. 4.3], and/or;

6.4 [As per para. 4.4], and/or;

6.5 [As per para. 4.5].

7. **Facts giving rise to the Second Charge**

7.1 Ripple Effect trades as a guest house in Plettenberg Bay.

7.2 Tucker is a director of Ripple Effect.

7.3 Loubser du Plessis Incorporated ("LDP"), provided tax and auditing services to Ripple Effect.

7.4 Ripple Effect applied for a grant from the DTI based on its 2006 audited annual financial statements, in the amount of R469 000 (four hundred and sixty nine thousand rand).

7.5 In order to qualify to obtain the DTI grant, Ripple Effect was required to have a turnover of at least R503 000 (five hundred and three thousand rand) for a 12 month period. LDP were advised that in order to qualify to obtain the DTI grant for a 14 month period, Ripple Effect was required to have a turnover of approximately R590 000 (five hundred and ninety thousand rand).

7.6 At the time of preparing the annual financial statements of Ripple Effect for the 14 month period ended 30 April 2006 the cash book of Ripple Effect reflected that its turnover for the period March 2005 to 30 April 2006 was R42 892 (forty two thousand eight hundred and ninety two rand).

7.7 Mr Garth Muller ("Muller"), who was at all material times an employee of LDP, compiled the draft annual financial statements for Ripple Effect for the 14 months ended 30 April 2006.

7.8 The Second Respondent instructed Muller to amend the draft annual financial statements by:

7.8.1 firstly including an adjusting journal entry which debited Tucker's loan account in the amount of R85 000 (eighty five thousand rand) and credited turnover in the amount of R85 000 (eighty five thousand rand); and

7.8.2 secondly including an adjusting journal entry which debited director's emoluments and credited Tucker's loan account in the amount of R70 000 (seventy thousand rand).

7.9 The adjustments made as described above in paragraph 7.8.1, resulted in the turnover of Ripple Effect for the 14 months ended 30 April 2006 increasing from R507 892 (five hundred and seven thousand eight hundred and ninety two rand) to R592 892 (five hundred and ninety two thousand eight hundred and ninety two rand). Accordingly, Ripple Effect's annual financial statements were materially misleading insofar as it did not reflect the actual turnover that was generated by the company for the period in question.

7.10 The adjustment made in paragraph 7.8.2 was required in order to demonstrate that Ripple Effect had met the staffing requirements imposed by the DTI in order to obtain the grant.

7.11 Fictitious income in the amount of R85 000 (eighty five thousand rand) was added to the original turnover figure in order to increase Ripple Effect's turnover to over R590 000 (five hundred and ninety thousand rand) whilst a fictitious expense of R70 000 (seventy thousand rand) was reflected in order for Ripple Effect to qualify for the DTI grant for the 14 month period ended 30 April 2006.

7.12 The Second Respondent instructed Muller not to perform any audit procedures on the additional income of R85 000 (eighty five thousand rand) and on the director's fees of R70 000 (seventy thousand rand) and was therefore fully aware of the fictitious income and expense.

7.13 The increase in turnover resulted in Ripple Effect being required to register as a VAT vendor in terms of the VAT Act. The First Respondent advised Tucker pertaining to the registration of Ripple Effect for VAT as a result of the increased turnover.

7.14 The First Respondent was therefore aware, alternatively should have reasonably been aware of the further fictitious additional income of R85 000 (eighty five thousand rand) and expense of R70 000 (seventy thousand rand) and the fraud that was being perpetrated relative to the DTI grant in this regard as the First Respondent was involved in and/or provided advice to Ripple Effect relative to it registering as a VAT vendor.

7.15 The Second Respondent as the audit partner responsible for the audit of Ripple Effect was at all material times aware of, alternatively should have reasonably been aware of, the fictitious income added to the turnover amount of R503 000 (five hundred and three thousand rand).

7.16 The First and Second Respondents acted dishonestly and was a party to a fraud being perpetrated on the DTI, as Ripple Effect did not legitimately have an entitlement to the DTI grant as it did not meet the requirements set by the DTI.

7.17 Both the First and Second Respondent, by their conduct as described above, contravened rule 2.1.3 and/or rule 2.1.4, and/or rule 2.1.5 and/or rule 2.1.20 and/or rule 2.1.21 of the old disciplinary rules.

[63] It is evident that paragraphs 4 and 6 of the charge sheet merely recited, without any elaboration, the respective categories of misconduct under paragraph 2 of the Old Disciplinary Rules with which the practitioners were being charged. This may be illustrated by comparing the wording of paragraphs 4.1 and 6.1 of the charge sheet with that of subrule 2.1.3 of the Old Disciplinary Rules therein referred to. Subrule 2.1.3 provided: '… any practitioner shall be guilty of improper conduct if he/she –commits any offence involving dishonesty, and in particular (but without prejudice to the generality of the foregoing) theft, fraud, forgery or uttering a forged document, perjury, bribery or corruption'. Those paragraphs described 'the nature' of the charges within the meaning of s 49(3) of the Act and subrule 4.10.1 of the New Disciplinary Rules. The content of paragraphs 5 and 7, respectively, of the charge sheet was plainly intended to provide particularity to the baldly stated charges recorded in paragraphs 4 and 6. Paragraphs 5 and 7 would therefore appear to have been intended to provide 'the details' of the charges as required by s 49(3) and 'the relevant facts upon which the charge(s) are based with sufficient particularity as to allow the [practitioners] to plead' within the meaning of subrule 4.10.2 of the New Disciplinary Rules.

[64] The statement in Baxter, op cit supra[35] at p. 546, echoed in Hoexter's work,[36] that 'at common law the subject of disciplinary proceedings is entitled to have the charge clearly formulated with sufficient particularity in such a manner as will leave him/her under no

[35] See note 8 above.

[36] Hoexter, *Administrative Law in South Africa*, 2ed at p. 369.

misapprehension as to the specific act or conduct to be investigated' was endorsed by the Supreme Court of Appeal in *Roux v Health Professions Council of SA* [2012] 1 All SA 49 (SCA), at para. 26, where Mhlantla JA held that it was in accordance with 'fundamental principles of administrative law' that 'decisions "affecting individuals" should be based on substantiated information and that the person at the receiving end of disciplinary action should be clearly apprised of the nature of the charges he or she has to face to enable a proper defence to be mounted'. Similarly, in *Coetzee v Financial Planning Institute of South Africa (Association Incorporated Under Section 21) and Others* 2015 (3) SA 28 (SCA) (in which, in the context of private law disciplinary proceedings, the issue on review was also whether the charge had been put with sufficient particularity), Swain JA held that 'although the same degree of formality is not required [in a charge sheet in a disciplinary enquiry as in a charge in a criminal trial], the same degree of particularity of the factual information underlying the allegations made, is required to enable the accused to know what case he or she has to meet. This is particularly so where the disciplinary body has the power (as in the present case) to make findings with far-reaching consequences'.[37] Section 49(3)(a) of the Act and subrules 4.10.1 and 4.10.2 of the New Disciplinary Rules are plainly intended to confirm the incidence of this rule of natural justice.

[65] In *Coetzee*, the preferring of the charges had, like in the current matter, been preceded by a process in which the accused financial practitioner had been informed by letter of the nature of complaint against her and requested to furnish a response.[38] Having regard to the import of the initial advice given to the practitioner concerning the complaint, the court held, when considering the adequacy of the particularity conveyed in the subsequently preferred charges, that '[i]n order to determine whether Ms Coetzee was properly informed of the case she was called upon to meet, as set out in paragraph 1.2 of the formal charges, the allegations made must not be considered in isolation, but in the context of the initial letter which set out the essence of the formal complaint. It would be artificial not to do so, because the enquiry is whether Ms Coetzee had adequate knowledge of the facts forming the basis for the charge to enable her to answer that charge'.

[66] In *Coetzee*'s case the appeal court also thought it relevant, in assessing the prejudice that the practitioner in that case alleged that she had suffered as a result of a lack of

[37] *Coetzee v Financial Planning Institute of South Africa* supra, at para. 17.

[38] It is not apparent from the judgment whether a response was given.

particularity in the charge sheet, that she had been legally represented, and that had she been uncertain about the case she had to meet her legal representative could have sought clarificatory particularity, notwithstanding the absence of any formal provision for such a step in the pertinent rules.

[67] In the Board's answering affidavit, its Director: Legal averred that 'the relevant parts' of the charge sheet were sub-paragraphs 7.13, 7.14 and 7.16. These, and in particular, sub-paragraph 7.16, made it clear, it was argued, that it was being alleged that the applicant had been party to a fraud on the DTI arising out of the representation of 'fictitious additional income of R85 000 and expense of R70 000' for the purposes of meeting the requirements set by the DTI for the incentive grant that Ripple Effect had applied for.

[68] In their heads of argument before the disciplinary committee, a copy of which was attached to the applicant's replying affidavit, the applicant's counsel in relevant part (i.e. with footnoted cross-reference to parts of para. 7 of the charge sheet) summarised the import of 'the Ripple Effect charges' as 'relat[ing] primarily to – 'the alleged creation and insertion of adjusting journal entries in the 2006 Ripple Effect financial statements in respect of turnover, the loan account of its sole director and director's emoluments ("**the adjusting journal entries**"; an adjustment of the 2006 Ripple Effect financial statements in December 2006, to reflect turnover in an amount of R592 892,00 ("**the second revenue adjustment**"); [and] the events that occurred in 2006 relating to Ripple Effect's registration as a VAT vendor'. The subparagraphs of paragraph 7 of the charge sheet to which reference was made in these respects were subparagraphs 8, 9, 13 and 14. Oddly, notwithstanding the express reference to 'fraud' in relation to the charge brought under paragraph 2.1.3 of the Old Disciplinary Rules (referred to in paras. 4.1 and 6.1) and in subparagraph 16 of para. 7 of the charge sheet, counsel omitted any mention thereof in their description of the 'primary' import of the charges. Nor did they make any connection in their introductory summary of the Ripple Effect-related charges between the first and second revenue adjustments and the DTI grant application. I say 'oddly' because it seems to me conspicuous on an overall reading of those charges that fraud was the most serious allegation advanced against the practitioners in the charge sheet, and that it plainly related to the alleged misrepresentation of the company's financial position in respect of the year in question for the purposes of claiming an entitlement to a DTI grant. It was for that reason that I asked the applicant's counsel on more than one occasion during argument what the applicant could have thought she was being charged with.

[69] Later passages in the applicant's counsel's heads of argument before the disciplinary committee did, however, identify that the charges against the practitioners contained allegations of fraud and dishonesty, and that the fraud was one on the DTI. Thus, at para. 115.2 of the heads of argument, counsel acknowledged that the 'facts alleged by the Board relative to the second charge, are that - … [s]he allegedly acted dishonestly and was party to a fraud perpetrated on the DTI in circumstances where Ripple Effect did not legitimately have an entitlement to receive the DTI grant'.

[70] The committee articulated its appreciation of the 'essence of the second charge' and the evidence concerning it in paras. 265 and 266 of its decision as follows:

> 265 The essence of the second charge against Du Plessis is that –
>
> 265.1 she was aware or should reasonably have been aware of further fictitious additional income of R85 000 and expense of R70 000 and the fraud that was being perpetrated relative to the DTI grant in this regard;
>
> 265.2 she was or ought to have been aware of this because of her role in advising Tucker in relation to Ripple Effect's registration as a VAT vendor;
>
> 265.3 Du Plessis acted dishonestly and was party to a fraud being perpetrated on the DTI, as Ripple Effect did not legitimately have an entitlement to the DTI grant as it did not meet the requirements set by the DTI.
>
> 266 At the heart of the second charge lies an exchange of email correspondence that took place between 1 and 4 December 2006.

***The disciplinary committee's findings***

[71] The disciplinary committee found the applicant guilty on the second charge on the basis of the factual findings described below. It proceeded on the assumption in her favour that no communications 'extraneous to the exchange of email correspondence' had taken place between her and Muller, notwithstanding what it regarded as 'the inherent improbability of her assertion in [that] regard'.

[72] The committee considered that the exchange of email correspondence, in December 2006, had to be read in the context of Ms Du Plessis' signature for LDP of the company's financials, in September 2006, 'which already accounted in the turnover figure for substantial personal use of the guest house by Tucker for himself, his family and friends'. The implication was that when the applicant signed the financials in September she would have done so knowing that the financial year involved covered a period of 14 months and being

satisfied, having regard to the duties on auditors in terms of s 44 of the Act, that their content was supportable, at least on the basis of the firm's working papers.

[73] The committee held that it was evident from the content of Ms Geyser's email of 1 December 2006, quoted in paragraph [39] above, that she was seeking an amendment of the reported turnover of Ripple Effect in its signed financial statements, as well as 'further amendments to introduce human resources expenses … in order to meet a requirement that such expenses be 30% of total operating costs'. It held that the applicant would have appreciated that these were the requirements that had to be met in order for the company to qualify for the DTI grant. It considered that Muller's email to Ms Du Plessis of 4 December 2006, quoted in paragraph [41] above, clearly conveyed Muller's understanding of the email from Ms Geyser as a request to amend the previously signed financials so as to increase the company's reported turnover against a further debit of Tucker's loan account and to introduce a previously unreported expense in respect of human resources. It regarded it as 'important' in its assessment of the applicant's conduct that Muller's email was 'clearly framed as a request to [the applicant] for authorisation of his proposed amendments'.

[74] The committee held (at para. 277 of its decision) that '[a]n honest and rational response by Du Plessis to the emails from Geyser and Muller would have been one of considerable concern. Changes were being requested to financial statements on which she had already signed off and which already incorporated a significant amount of turnover based on personal use. The changes were manifestly aimed at meeting targets set for qualification for a grant from the DTI'. The committee considered that it was clear in the circumstances that a 'risk of fraud had entered into the picture' and that the applicant ought 'at the very least to have told Muller that under no circumstances would she permit him to make any such adjustments unless it could be shown that they were the result of turnover truly earned and that there was a good reason for its not already been included in the financial statements when she signed them'.

[75] The committee contrasted what it considered should have been the applicant's reaction to the emails from Ms Geyser and Mr Muller with her actual conduct in writing the email quoted in paragraph [42] above. It considered that the content of that email demonstrated that the applicant had not been 'simply acting as a go-between, as she contended'. Having analysed the content of the email, the committee concluded that it showed 'a willingness to accommodate Formentco's requirements for meeting the

requirements of the grant' irrespective of the factual position. It rejected the applicant's explanation of the email as having been intended merely to convey her understanding that the financials could be amended without difficulty because she understood (wrongly) that they had not yet been published to third parties.[39] It found the explanation was not consistent with the manner in which the email had been worded and that in any event the circumstances were such that there was such an evident risk of fraud that, had she been acting with professional propriety, Ms Du Plessis would have been 'most hesitant' about any adjustments to the financials to meet the requirements stated by Formentco.

[76] The committee then referred to the email from Ms Geyser quoted in paragraph [43] above and observed that that had made it abundantly apparent that the source of the information for the requested adjustments to Ripple Effect's financials had been Formentco, not Tucker or Ripple Effect, and that the amendments were 'DTI claim-target-driven' and represented very close to a 14/12ths arithmetical adjustment to the R503 000 figure for a 12-month period indicated in the September 2006 email correspondence quoted in paragraphs [35] and[36] above. The committee found that all the indications pointed to the amendments to the financial statements having been 'driven by DTI targets and not by the true operations and cash flows of the guest house'.

[77] Ms Du Plessis' endeavour to explain her conduct on the basis that she had understood that two months' actual turnover had not been accounted for in the financials she had signed in September 2006 was rejected by the committee. It gave three reasons for doing so. Firstly, it pointed out that the financial statements signed by the applicants had indicated on each of the first four pages that they were 'for the 14 months ended 30 April 2006'. One of those pages had been the one incorporating the audit opinion that the applicant had signed on 12 September 2006. The committee considered that Ms Du Plessis 'would therefore have known that it was purely a misunderstanding on the part of Formentco and no-one else'. Secondly, the amendments effected were in line with the information provided by Formentco, which was concerned only with meeting the DTI's requirements and was not 'a logical source of information about additional actual income from operations'. Thirdly, it considered that the wording of the emails from Ms Geyser did not correlate with Ms Du Plessis' 'purported [?professed] understanding of them'.

[39] No consideration was given to the question of whether in fact Formentco was not itself a 'third party' in the relevant sense.

[78] The committee rejected the applicant's claim to have been reliant on the information provided by Muller. It considered it to be clear that the source of the information was Formentco, and held that it was evident from the email correspondence that Muller 'was the one asking her for authorisation'. It held that '[s]he was called upon to take responsibility'. In the context of the December 2006 exchange of emails, the committee concluded that the forwarding by the applicant of Ms Geyser's second email[40] could 'only be interpreted as authorisation [by the applicant to Muller] to proceed with the amendment of the financial statements on the basis set out in Geyser's second email'.

[79] It was noted in the committee's decision that Ms Du Plessis was aware that the financials had in fact subsequently been amended consistently with the DTI grant application requirements conveyed by Formentco. This much was implicit in the applicant's concession under cross-examination that she had considered the amended financials before signing off on the DTI grant application documentation, which had used the values reflected in the amended financials.

[80] The committee also regarded it as significant that the applicant had signed annexure B to the DTI grant application, entitled 'Report of the Independent Auditors to the Board for Manufacturing Development in terms of the Small/Medium Enterprise Development Programme', as auditor. It quoted the following parts of the report signed by Ms Du Plessis:

> **Findings**
>
> Our findings are reported below:
>
> We found that:
>
> 1. The financial statements have been prepared in accordance with South African Statements of Generally Accepted Accounting Practice.
> 2. The accounting policies have been applied consistently.
> 3. The amounts per the claim form agree to the financial statements and/or accounting records of Ripple Effect 3 (Pty) Ltd.
> 4. The financial statements are for the same period as that of the claim.
> 5. The casts/cross casts and extensions are correct.
> 6. The approved tourism activity of Ripple Effect 3 (Pty) Ltd are (sic) as set out in the contract …
> 7. Ripple Effect 3 (Pty) Ltd has complied with the terms and conditions including any special condition as set out in the contract …
> 8. …

[40] The email quoted in paragraph [43] above.

> 11. Turnover. No discrepancies were found.
>
> Because our procedures were limited to those agreed with the Board, our report is limited to the above findings and we do not express any assurance on the attached claims. Furthermore, had we performed additional procedures, other matters might have come to our attention that would have been reported.
>
> …
>
> **Preparation of Financial Statements**
>
> On the basis of information provided by the entity's management, we have prepared the financial statements for the entity for the year ended 30 April 2006.
>
> **Audit of Financial Statements**
>
> We have audited the financial statements of Ripple Effect 3 (Pty) Ltd for the year ended April 2006 in accordance with the statements **[?requirements]** of the South African Auditing Standards

[81] Consideration was given by the committee to the defence advanced by both practitioners that the absence of the audit file containing the working papers meant that there was no evidence to support a finding of fraud apart from the oral evidence of Muller, which had been discredited in certain respects. The committee recorded the practitioners' position in this regard that the working papers would have contained the information necessary to show the reasonableness of the amounts reflected in the financial statements.

[82] In rejecting this defence the committee pointed to the unlikely combination of coincidences between the reported figures stated in the company's financials during the relevant periods and the DTI application requirements. So, in 2005, when a minimum of turnover of R150 000 had been required, the reported turnover was R150 703. And for the 2006 financial year, when a minimum turnover of R503 000 was required, the reported turnover in the financials signed by Ms Du Plessis was R508 000. And that was subsequently amended to R592 000 for the same period after Formentco belatedly became astute to the fact that the financial year in question had spread out over 14 rather than 12 months, and indicated that the financials would have to reflect turnover in that amount for the 14-month period. The committee held that '[s]uch a sequence of coincidences is highly improbable' and concluded that once that was taken into account it was apparent, at least on a balance of probabilities, that the figures in the company's 2006 financial statements had been dishonestly manipulated. It held that the exchange of emails in December 2006 indicated that the applicant was aware of and complicit in the manipulations.

[83] The committee concluded its findings in respect of the second charge by setting out the elements of the offence of fraud and proceeding to find that, by allowing the amended financial statements incorporating the misstated turnover and directors' emoluments to be

attached to and submitted with the DTI grant application, the applicant misrepresented in the documentation forming part of the claim information that the amended financial statements were 'true and fair', that the financial statements were final and correct and that no discrepancies had been found in turnover. The committee held that the prejudice to the DTI was patent and therefore found that fraud and dishonesty by the applicant had been established. The committee found that the applicant was guilty for purposes of the second charge of improper conduct within the meaning of subrules 2.1.3[41] and 2.1.4[42] of the Old Disciplinary Rules.

[84] The applicant was fined R100 000 in respect of her conviction on the second charge and R50 000 on the fifth charge. It was directed that her name, the charges against her, a summary of the material facts, the findings in respect of the charges and the sanction be published in the IRBA News. She was also ordered to pay a contribution of R320 000 towards the costs of the investigation committee and the disciplinary committee in connection with the investigation and hearing. The sanction was suspended pending the final determination of judicial review proceedings to be instituted by the applicant.

***The applicant's case on review***

[85] The applicant's case is founded principally on her allegation that the committee's verdict was premised on findings of fact in respect of matters that had not been adumbrated in the factual allegations made in the charge sheet in support of the charge brought against her and in the face of findings that some of the alleged facts that were material to the charges had been found by the committee not to have been proved. The conviction had therefore been brought in on a charge that had been formulated in a manner materially non-compliant with the requirements of s 49(3)(a) of the Act and subrules 4.10.1 and 4.10.2 of the New Disciplinary Rules. The applicant averred that the schedule of charges had been 'important' to her 'as it reflected the factual allegations made against [her] in respect of the individual charges … on which [her] legal representatives and [she] prepared for the hearing; and to which [she] responded in [her] evidence during the course of the hearing'.

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[41] The relevant part of rule 2.1.3 has been quoted in paragraph [63] above.

[42] Rule 2.1.4 provided in relevant part that '*any practitioner shall be guilty of improper conduct if he/she – is dishonest in the performance of any work or duties devolving upon him/her in relation to –*
*2.1.4.1 any work of a type commonly performed by a practitioner; or*
*2.1.4.2 any office of trust which he/she has undertaken or accepted*'.

[86] The applicant contended that it was evident that the allegations in the charge sheet concerning the adjustments to Ripple Effects financials in December 2006 (what Ms Du Plessis terms 'the second revenue adjustment') were levied 'in the first instance' against Mr Bestbier, and not herself. She averred that it appeared from the charge sheet that the 'sole basis' upon which the Board had sought to implicate her in the second charge was in respect of her dealings with regard to the VAT registration issue, which had occurred in September 2006. The applicant submitted that as there had been no evidence connecting her dealings in respect of the VAT registration issue with the second revenue adjustment, which she said 'form[ed] the basis of the second charge, the 'factual basis for the allegations against [her] had not been proved, and accordingly, the second charge was not proved either'. Insofar as the Board relied on the provisions of paragraph 7.16 of the charge sheet, she contended that it was lacking in any 'primary facts',[43] maintaining that the primary facts upon which the allegations therein appeared to her to have been premised were those stated in paragraphs 7.13 and 7.14. The applicant argued that paragraph 7.16 could not implicate her 'in any conduct beyond that which is alleged in the charge sheet'.

[87] The applicant alleged that the committee's reliance on the emails exchanged during December 2006 was impermissible because they comprised factual matter the relevance of which had not been adumbrated in the content of the charge sheet. She contended that the correspondence relied upon by the disciplinary committee for its finding had been 'extraneous to the set of alleged facts relied upon by the Board in the Schedule of Charges'. Ms Du Plessis acknowledged that she had dealt with the emails in her evidence, saying, however, that this had been to explain her view at the time that it was possible to change financial statements that had not yet been released and to explain her understanding at the time that the change in the reported turnover resulted from the fact that 14 months, as opposed to 12 months, were to be accounted for. (The applicant did not make it clear how that could have been considered by her to have been relevant to any advice that she had given in September in respect of the company's registration for VAT.)

[88] The applicant emphasised that the disciplinary committee had placed significant reliance on her signature of the DTI grant application in January 2007 in convicting her on the second charge. She pointed out that her conduct in that respect had not been referred to at

[43] The term was employed in the sense described in *Die Dros (Pty) Ltd v Telefon Beverages CC* [2003] 1 All SA 164 (C), 2003 (4) SA 207, at para. 28.

all in the charge sheet and was therefore 'not part of the set of facts which [she] was required to deal with, either in [her] preparation for the hearing, or at the hearing itself'. Ms Du Plessis annexed a copy of the transcript of her evidence in chief before the committee and highlighted that she had not dealt in it with her signature of the DTI application claim form. She pointed out that it was only during her cross-examination that the issue was raised with her, when, she said, she had dealt with the pro-forma complainant's questions as best she could at the time considering that she had not prepared on that aspect of the facts. She also alleged that there had been nothing in Muller's affidavit to the Board that had required her to deal with her signature of the claim form. In reply, the applicant emphasised that the signed DTI application form had been added to the bundle only six days before the commencement of the hearing.[44] She argued that it fell to be inferred in the circumstances that the signed document could not have been in the possession of the pro-forma complainant when the charges were framed, and thus could not have been something upon which he had intended to rely when he formulated the charges.

[89] Ms Du Plessis contended that she had not been in a position to deal at the hearing with her signature of the DTI claim as she would have done had she been given advance notification that it would be relied on to substantiate the charge against her. In para. 57 of her founding affidavit she set out five subparagraphs, in which she sought to 'explain how [she] would have addressed the issue had she received such notification'.

[90] The applicant said that she would have signed the claim documentation in the knowledge that LDP's auditing division would have complied with the agreed upon

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[44] Rule 6.2 of the New Disciplinary Rules provides for a bundle of the documents intended for use in the hearing to be put before the disciplinary committee. The subrule reads as follows:

> ***6.2 Documents to be adduced in evidence***
> *6.2.1 The Director: Legal or the CEO shall cause bundles of documents to be adduced in evidence in the hearing under this Rule and under Rule 7 (if any) to be distributed to such members of the Disciplinary Committee who indicated that they would attend the hearing under this Rule, to the respondent and to the pro forma complainant.*
> *6.2.2 The bundles shall comprise:*
> *6.2.2.1 the notice and charge sheet(s) sent to the respondent under 4.4;*
> *6.2.2.2 any plea(s) and written explanation(s) furnished by the respondent;*
> *6.2.2.3 any documents which the pro forma complainant and the respondent may agree are admissible in evidence;*
> *6.2.2.4 at the discretion of the pro forma complainant, a certified copy of the record of the trial and conviction of the respondent if the respondent*
> *is charged with improper conduct which amounts to the offence of which the respondent was convicted, unless the conviction has been set aside by a superior court.*
> *6.2.3 Nothing in 6.2 shall prevent any evidence not included in any bundle referred to in those sub-rules from being adduced at the hearing under this Rule or Rule 7.*

procedures and that the working papers (which were in any event not available, having been destroyed) would have been there to confirm that.[45] She pointed out that the audit had been 'under the control and supervision' of Muller.[46]

[91] The applicant averred that she would have made reference to an email from Mr Gerrit Potgieter of Formentco to Muller, dated 3 April 2008 (which was in the bundle of documents put in before the committee in terms of rule 6.2 of the New Disciplinary Rules[47]) to indicate 'that it was Muller's duty to examine the DTI claim documentation and to ensure that the documentation was compiled in accordance with the financial statements for the particular year'.[48] The applicant averred in this respect that 'The reference in the email to "in the usual manner" refers to Muller's usual responsibility of ensuring that the agreed upon procedures for the Ripple Effect audit engagement were met'.

[92] In subparagraph 57.4 of her affidavit, the applicant pointed out that she would also have relied on the correspondence between Potgieter and Muller, at pp. 293-296 of the bundle of documents, to bear out that 'Muller had communicated with Potgieter regarding certain proposed amendments [to the DTI claim documentation], in accordance with his managing role in that regard'.

[93] The correspondence consisted of a chain of emails.

[94] The first was an email from Potgieter of Formentco to the applicant, dated 11 January 2007 (09:38), in which Potgieter requested the applicant (whom he addressed as 'Mr du Plessis') to check and sign the enclosed DTI application. The full text of the email, which

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[45] Subpara. 57.1.

[46] Subpara. 57.2.

[47] See note 44 above.

[48] The 3 April 2008 email from Potgieter to Muller read as follows:
*Dear Garth*
*Please find attached the reconciliation clam as set out. We request that you examine the claim in the usual manner to ascertain that it was compiled in accordance with the financials and also in terms of the rules of the scheme.*
*Should you have any queries, you are requested to direct them either to myself, Gerri Potgieter or Anna-Mart Geyser on the number xxx.*
*When you have completed your procedure, please intial each page and sign in full where applicable, also contact us in order to collect the claim.*
*Please note this claim will expire on 30 April 2008.*
*Regards*
*Gerrit Potgieter.*

was copied to Muller, and attached to Muller's affidavit to the Board, has been quoted in para. [47] above.

[95] The next email in the chain was one from Muller to Potgieter, dated 16 January 2007 (10:03AM), which was copied to the applicant. Muller addressed Potgieter concerning three 'proposed amendments' to the DTI claim form 'as discussed this morning'. The three amendments concerned (i) the particulars of Ripple Effects shareholders, on page 1 of the form, (ii) LDP's contact details, on page 2 of the form, and (iii) s.v. 'TOURISM', particulars of the company's revenue (R592 892.00), on page 8 of the form. Muller concluded the email to Potgieter inviting the latter to '[p]lease contact [him] with any further enquiries in this regard'.

[96] Potgieter responded to Muller 33 minutes later (10:36) stating:

> Hi Garth
> Herewith the amended pages to the claim.
> The turnover for 14 months is R592 892, however we need to adjust this to 12 months (592 892 x 12/14 = R508 193). We adjust the turnover to indicate the turnover is more than the min requirement of R502 058.
> Please advise if there is (sic) any further amendments.
> Kind regards
> Gerrit

[97] Muller responded shortly thereafter (at 10:46AM) advising that he would 'amend and send it though'. He enquired whether the documents should be couriered and requested confirmation of the destination address. Potgieter confirmed that the documents should be couriered and furnished a street address in Pretoria. At 11:01AM, Muller sent an email to the applicant, as follows:

> Hi Fran
> Ek sal hierdie dokumente gereed kry maar wag eers vir 'n faks vanaf Jacqui voordat ek die goodies deur stuur.
> Groete
> Garth[49]

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[49] '*Hi Fran*
*I shall get these documents ready but I am just awaiting a fax from Jacqui before I send through the goodies.*
*Regards*
*Garth*'
(My translation.)

[98] Referring to the aforementioned matters, Ms Du Plessis averred in subparagraph 57.5 of her founding affidavit:

> Had the DTI claim documentation, and the fact that I had signed the 2006 DTI claim documentation on behalf of LDP, formed part of the facts relevant to the charges against me, I would have addressed these aspects more fully at the hearing. Moreover, I would have been at pains to indicate to the Disciplinary Committee that I would not have signed the claim documentation unless Muller had shown me the signed working papers in the audit file and confirmed that he had ensured that all auditing aspects were in order, with no matters outstanding.

***The Board's answer***

[99] The first respondent's answering affidavit was largely argumentative in content, not surprisingly having regard to the nature of the case. I have already outlined in broad strokes, in paragraph [4] above, the essence of the Board's grounds for opposing the application in respect of the second charge. The deponent to the Board's answering affidavit responded as follows to the points advanced in para. 57 of the founding affidavit:

1. The evidence that the applicant said she would have adduced about checking the working papers before signing the independent auditor's declaration in Ripple Effect's DTI grant application form was in point of fact adduced at the hearing. A number of passages in the transcript of the applicant's evidence before the committee were cited in support of this observation.

2. The email of 3 April 2008, at p. 297 of the bundle,[50] did not relate to the charge, which pertained to the 2006 financials, dated 12 September 2006, that were submitted to the DTI via Formentco and certified by the applicant on 7 February 2007.

3. The Board also contended that the correspondence at pp. 293-296 of the bundle was irrelevant, because it had been only the applicant, not Muller, who had made the false representation to the DTI that company's 2006 financials were true and correct.

[100] As to the point described in subparagraph 1 of the preceding paragraph, it does indeed appear from the passages in the transcript cited by the Board that the applicant did not profess any actual recollection of signing the application form. Her evidence was rather to the effect of what she must have done, or would have done in the circumstances. In answer to a question from a member of the committee, however, the applicant had replied that she was

[50] See note 48 above.

'absolutely convinced' that there had been an audit file in place and that all the work had been completed and signed off. The applicant has not indicated, and it is difficult to conceive, how she could have improved on the evidence that she did give had she been expressly forewarned in the charge sheet that the pro-forma complainant would rely on her signature of the auditor's declaration in the grant application form in support of the second charge. It was common ground that the audit file had been destroyed, and would therefore in any event have not been available.

[101] As to the point made by the Board as described in subparagraph 2 of paragraph [99] above, it also bears mention that it is apparent from the copy of the email at p. 297 of the bundle that Muller does not appear to have responded to it. The document at p. 297 suggests that Muller immediately forwarded the email from Potgieter to Hendrik Du Plessis (without comment). The evidence before the committee established that Hendrik Du Plessis was a qualified chartered accountant in the employ of LDP, who acted as Muller's superior. The applicant's assertion that reference to the email would have confirmed that Muller 'usually' did the necessary checking would have fallen to be assessed by the committee in the context of Ms Du Plessis's evidence that one Betsie Botha, not Muller, had been in charge when the previous DTI grant application supported by the company's financial statement for the 2005 year had been submitted, and that it was with Ms Botha that she had interacted when she signed those financials, because Mr Bestbier had, yet again, not been available.

[102] As to the Board's third point mentioned in paragraph [99] above, I am not persuaded that the committee would have disallowed evidence concerning the correspondence as irrelevant. I fail to see, however, and the applicant has not explained, how the reference to the correspondence could have influenced the committee's findings on the effect of the December 2006 emails which, as discussed, were the primary basis for the committee's decision to convict her on the second charge. The correspondence at pp. 293-296 may well have served to confirm Muller's complicity in the fraud, but that was not the issue. I therefore agree with the Board that there is nothing in the correspondence that is relevant to the committee's findings, or that would have affected its decision.

***Discussion***

[103] The issue of whether the conviction was misaligned with the charge requires a determination in the first place of what it was that the applicant was accused of in terms of the second charge.

[104] A useful point of departure when considering the charge put to the applicant is to look at the objective requirements for its formulation in compliance with s 49(3) of the Act and subrule 4.10 of the New Disciplinary Rules. The Board's counsel drew an analogy with the requirements for drawing a pleading in a civil case. Mr *Marcus* referred in this respect to rule 18(4) of the Uniform Rules, which in relevant part reads 'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim … with sufficient particularity to enable the opposite party to reply thereto'. In that connection, counsel cited the judgment in *Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T), at 146, in which Basson J emphasised the phrase '*with sufficient particularity to enable the opposite party to reply thereto*' as the determining criterion for compliance.

[105] In my judgment the analogy was well-drawn for the purpose of explaining the object of the pertinent requirement of the Act and the related procedural disciplinary rule. The object is that the practitioner who is the subject of the disciplinary proceedings should know what he or she is alleged to have done by way of the alleged misconduct with sufficient particularity to know the case he or she is called upon to answer. That much is borne out in the wording of subrule 4.10.2 of the New Disciplinary Rules in particular. As remarked earlier, the requirement does no more than to articulate the rule of natural justice that is in any event applicable, which is founded squarely on simple fairness. The object of the provisions is not to introduce an undue degree of nicety or technicality in the formulation of charges.

[106] Consideration of the alleged incongruence between the charge and the basis for the conviction must also take place cognisant that the basis of the attack on the disciplinary committee's findings is also founded on an application of the principle of fairness. Any question falling to be determined by reference to what would be fair in the circumstances has to be approached with appropriate flexibility, astute to the peculiar circumstances of the given case; cf. e.g *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC), at para. 56. The approach of the appeal court in *Coetzee*, discussed earlier,[51] exemplified this in a closely comparable context; cf. also the remarks of Harms DP in *National Director of Public Prosecutions v King* 2010 (7) BCLR 656 (SCA), at para. 5, in respect of the fair trial

[51] At paras. [64] - [66] above.

rights enshrined in s 35 of the Constitution.[52] It is appropriate to have regard to the rights and interests of both sides and also, if applicable, to the objects of the statutory provisions in the context of which the proceedings are being conducted or have taken place. This principle would also bear on the assessment of the materiality of any non-compliance with s 49(3) and/or subrule 4.10, should there be a finding that the provisions had not been complied with.

[107] I should say at once that I think it is beyond debate that the second charge was somewhat ineptly drafted. Notwithstanding Muller's unimpressive attempts during his oral evidence to tailor his evidence to it, it was obvious, for example, that nothing in Muller's affidavit, which everyone concerned appreciated was the source of the complaint, supported the allegation in para. 7.8 of the charge sheet that Mr Bestbier had instructed Muller to effect the second set of adjustments to Ripple Effect's financials in December 2006. Muller's affidavit had attributed that instruction to Ms Du Plessis; and some of the emails attached to the affidavit were obviously provided in elaboration of the allegation. The affidavit and emails were thereafter also included in the bundle provided in terms of rule 6.2 of the New Disciplinary Rules.[53] In my view, the evident blemishes in the formulation of the charge sheet, regrettable as they were, did not, however, obscure the substance of the charge that the practitioners were called upon to meet.

[108] On a purposive reading of paragraphs 6 and 7 it is obvious that the nature of the charge being preferred against both practitioners was one of fraud. So, for example, despite the rehearsal, *ipsisimmis verbis*, in the charge sheet of clause 2.1.3 of the Old Disciplinary Rules, which itemises a variety of offences including theft, fraud, forgery or uttering a forged document, perjury, bribery or corruption, it is nonetheless clear on a contextual reading of the charge, in particular subparagraph 7.16, that it was only about fraud; it did not concern any of the other itemised offences. The fact that the other offences were quite superfluously listed in the charge sheet did not detract from its much narrower actual import.

[109] What then did the alleged fraud entail? A charge of fraud should state the *facta probanda*. The *facta probanda* are the facts stated in broad terms which the prosecution will seek to establish in order to prove the essential elements of the offence. They give a broad

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[52] Referred to with approval in *Estate Agency Affairs Board v Auction Alliance and Others* 2014 (3) SA 106 (CC), at para. 71, fn 81 and *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (5) SA 317 (CC), at para. 68.

[53] See note 44 above.

outline of what the case is about; hence the analogy mentioned earlier that the Board's counsel drew with Uniform Rule 18(4). If the *facta probanda* are apparent on the face of the charge sheet, the accused has enough information to plead to the charge. He or she does not need to be in possession of the particulars of all the evidence (the *facta probantia*) that the prosecutor will lead to prove the commission of the alleged offence. In the commentary on s 84 of the Criminal Procedure Act ('Essentials of charge') in *Hiemstra's Criminal Procedure*[54] it is appositely remarked that 'The touchstone is and remains the question whether the accused got a fair chance by being informed about what called for a response'. As it was, in the current matter, the applicant was placed in possession, before the hearing, of all of the documentary evidence on which the pro-forma complainant intended to rely and of the witness statement, on oath, of its only witness in respect of the alleged conduct of the practitioners.

[110] The applicant graduated from Stellenbosch University with a Bachelor of Laws degree, and before she decided to make a career move into accountancy she had worked for a while as a public prosecutor, attaining the position of senior public prosecutor at Stellenbosch.[55] I have little doubt therefore that she was aware of the essential elements of the offence of fraud; (a) unlawfully, (b) with the intention to defraud; (c) making a misrepresentation (d) causing prejudice. She was legally represented. Certainly, her legal representatives, who included senior counsel and an experienced junior, would have been alive to the essentials of the offence. The questions they put to the applicant during her evidence confirmed that.

[111] Appreciating that the preferred charge was one of fraud – whether as perpetrator, *particeps* or *socius* does not matter - an informed reader of the charge sheet would read it asking themselves the questions 'what was the misrepresentation that the practitioners allegedly made and who was prejudiced thereby and how?', and looking to find the answers in the document. They would be looking for the *facta probanda*. That is what I meant earlier[56] when I referred to 'a purposive reading'.

[112] If the charge of fraud on the second count was to make any sense at all, it had to be read to be related to the alleged misrepresentation of the company's turnover by means of

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[54] A. Kruger, *Hiemstra's Criminal Procedure* (LexisNexis) (looseleaf, last updated May 2016 – SI 9), at 14-9.

[55] See para. 32 of the Disciplinary Committee's decision on sanction.

[56] At paragraph [108].

'the second revenue adjustment' in the company's financial statements; that is by inflating the represented turnover by R85 000 to an amount of R592 892 and by representing an incurred expense of R75 000 merely for the purpose, by such devices, of qualifying the company for a DTI grant in the amount of R469 000 for which it would otherwise not have qualified. On such a reading, the nature of the misrepresentation is clear, as is the nature of the prejudice and identity of the party prejudiced. The December emails and the signature of the auditor's declaration on the DTI grant application form were *facta probantia*, not *facta probanda*.

[113] The content of the alleged misrepresentation is conveyed in para. 7.11 of the charge sheet. The nature of the prejudicial conduct alleged and the identity of the victim of it are evident from the content of paras. 7.10 to 7.16 of the charge sheet. Any lack of clarity that might be ascribable to the somewhat garbled recitation of facts set out in paragraph 7 of the charge sheet if read in isolation is resolved when the document is read in the context of the other information that had been provided to the applicant, namely Muller's affidavit and the bundle of documents in terms of rule 6.2. Frankly, if the document were not read in that context, it would be impossible to make out what the detail of the charge of fraud in terms of subrule 2.3.1 against the applicant was. In which case it might have been expected of the applicant, or certainly her legal representatives, to have objected to the charge as not disclosing an offence within the meaning of the subrule and not complying with subrule 4.10 of the New Disciplinary Rules. I am not surprised, however, that they did not.

[114] For these reasons I am disposed to uphold the argument of the Board's counsel that the charge was pleaded with sufficient particularity. That determination necessarily disposes of the applicant's review challenge based on an alleged non-compliance with s 49(3) of the Act and subrule 4.10 of the New Disciplinary Rules.

[115] Ms Du Plessis has claimed, however, that she was misled by the charge sheet into understanding that the charge she had to meet on the second count was premised on her advice to Tucker concerning the obligation on Ripple Effect to register as a vendor in terms of the VAT Act. There is indeed a basis for that contention in para. 7.13 of the charge sheet. The difficulty is, however, that if the charge sheet were read in that way that it would not afford a comprehensible basis for the charge of fraud that the Board was clearly preferring. How could the advice concerning registration for VAT, which the applicant knew, and the charge sheet (in para. 5) confirmed, had occurred in September 2006 bear on a

misrepresentation to the DTI in respect of the second adjustment, which it was common ground happened in December 2006 or January 2007, to which Ms Du Plessis was alleged to have been party? The construction that the applicant would have the court accept that she had given to the charge requires paragraphs 6 and 7 of the charge sheet to be read in isolation from the other information with which she had been provided. Read in that manner the charge would have been incomprehensible. It requires reference to be had to the broader context described above to be read sensibly.

[116] I agree, for the reasons set out elsewhere in this judgment, with the submission by the Board's counsel that the manner in which the applicant's case was conducted before the disciplinary committee does not bear out her allegations in the current application as to how she had understood the second charge. On the contrary, I consider that it would have been clear to Ms Du Plessis on a contextual reading of the document that the relevance of her advice on the VAT issue was that that allegedly served to confirm her knowledge that the company's *audited* turnover had been in the order of only R507 000, which would go to showing that she must have appreciated, when that amount was increased to R592 000 in the second adjustment, that the increased amount was contrived solely for the purpose of representing to the DTI that Ripple Effect had achieved the qualifying criteria for the grant.

[117] The applicant's evidence in chief before the committee on the second charge was adduced by her counsel on the basis of a systematic reference sub-paragraph by sub-paragraph to the content of paragraph 7 of the charge sheet. There was little reference in her evidence in chief to the evidence that had been adduced in Board's case, most especially to that of Muller. Her counsel did, however, also take her to various passages in Muller's affidavit even though they had not been replicated in any of the sub-paragraphs of paragraph 7. So, for example, counsel pointed to the contradiction between paragraph 7.8 of the charge sheet, in which it was alleged that *Bestbier* had instructed Muller to make the set of adjustments, and the content of para. 109 of Muller's affidavit, in which Muller had averred that *the applicant* had given the instruction. Counsel asked her whether she had given such an instruction, which she vehemently denied. Indeed, counsel observed, while leading the applicant, that one had to bear in mind 'that we are dealing with somewhat different versions, depending on whether you are looking at the affidavit or looking at the charge sheet'.

[118] Leaving aside the (already determined) question whether express reference to them in the charge sheet had been necessary, any suggestion that the applicant had not been alerted that the December emails were material to the allegation that she had been aware that the second adjustment to the company's income provided fictitious additional income in the sum of R85 000 does not withstand scrutiny. That she and her legal representatives were astute to their evidential materiality was conveyed clearly in the following question put to her by her counsel during her evidence in chief: 'We have seen the exchange of emails. The suggestion appears to be that you knew that the figure of R85 000 in respect of additional income, that there was such a figure and that it was fictitious'.

[119] It was in fact the applicant herself who spontaneously first made reference to the December emails in her evidence in chief. She did that when asked by her counsel to respond to the content of para. 7.10 of the charge sheet.[57]

[120] In written argument submitted at the conclusion of the hearing on the charges, the applicant's counsel engaged in an analysis of the emails exchanged in December 2006, and submitted that they showed that the second revenue adjustment came about as a result of Muller's suggestions and the direct instructions of Ms Du Triou. As indicated earlier, the disciplinary committee took a different view and held that the emails demonstrated that Muller had sought authorisation from the applicant and that she had authorised him to adjust the financials to comply with the requirements conveyed by Formentco, not information given by Ms Du Triou. I cannot find that the inferences drawn by the committee from the content of the emails were of a nature that no disciplinary tribunal, acting reasonably, could have drawn on the evidence. As also indicated earlier, the committee dealt in addition with the applicant's argument that, in the absence of the audit working papers, the adjusted figures had not been shown to have been fictitious.

[121] The heads of argument demonstrate that the applicant's legal representatives regarded the email correspondence exchanged in December 2006, and thus its effect, to be relevant to the second charge. It is difficult to find any connection between the import of the correspondence and the advice concerning registration for VAT given by the applicant in September 2006, other than that identified by me in paragraph [116] above. By contrast, the relevance of the correspondence as arguably implicating the applicant as party to a fraudulent

[57] See page 28 above for the wording of para. 7.10.

misrepresentation of Ripple Effect's turnover for the purposes of supporting its application for a DTI grant (the matter alleged in terms of para. 7.16 of the charge sheet) was obvious.

[122] It is evident from the questioning of the applicant by her counsel during her evidence in chief that she was informed by the charge sheet that she was party to a fraud on DTI arising from the second adjustment to the company's financials. Counsel, referring to the charge sheet, put it to the applicant 'The suggestion is that you were either aware or should have been aware of the fraud being perpetrated on the DTI. What is your response?' In context, it was clear that the alleged fraud in issue was understood by the applicant and her legal representatives to have entailed the misrepresentation of the company's income by way of the second adjustment. The questioning of the applicant also demonstrated that they appreciated the evidential significance of the December emails in the determination of the issue.

[123] It was also put to the applicant by her counsel 'It [is] said that you acted dishonestly and were party to a fraud on the DTI as Ripple Effect did not have an entitlement to the DTI grant. Your response to that?' Ms Du Plessis' response was 'I do not know whether they were entitled to the DTI grant. I was not party to the application or to meeting the requirements or knowing what the requirements were. They had a professional firm Formentco that was advising them in that regard.'

[124] In my view, the questions and answers indicated quite clearly that the applicant was well aware that the second charge concerned her alleged complicity in the misrepresentation to the DTI that the company's income for the 2006 financial year was correctly reflected as per the financials as amended in terms of the second adjustment. Despite the applicant's assertions to the contrary, Muller's affidavit to the Board did allege quite clearly her complicity in misrepresenting Ripple Effect's turnover for the purpose of meeting the requirements of the company's DTI grant application. The point was illustrated with reference to the attached graphs showing how the turnover was adjusted irrespective of underlying reality and copies of the December emails. The finally adjusted turnover figures and employment remuneration, which were in accordance with the implementation of Ms Geyser's requests in the December email correspondence, were reflected in the unsigned copy of the claim application form attached as annexure N5 to Muller's affidavit. The adjustment s.v. 'Tourism' on that page indicates that the date of provenance of the unsigned claim form attached to the affidavit postdated Mr Potgieter's email of 16 January 2007,

quoted in paragraph [96] above. The applicant clearly had regard to the claim form in preparing her response to Muller's affidavit. Why else, and for what purpose, would she have sought to obtain a copy of the signed copy from Formentco?

[125] The focus placed by the applicant on the role of her signature of the claim form (which was not a fact alleged in charge sheet) in her conviction on the second charge is in any event misplaced in my view. The conviction was in point of fact founded originally in the committee's finding that she had authorised the second adjustment to be effected knowing the reported turnover to have been based only on the requirements to meet the DTI claim, and intending that the unsubstantiated information would be used for the purpose of representing to the DTI that the minimum required turnover had been achieved by the company. In the context of the committee's findings on the December emails, it would not have mattered if someone else – Mr Bestbier or any other director of LDP, for example – had signed the application form containing the 'second adjustments', the falsehood would have been represented at her instance; *qui facit per alium facit per se*.

[126] The applicant stated in her evidence in chief that she was not aware of any changes to the financial statements after 12 September 2006, when she had signed them. That was plainly untrue. And it is most unlikely, even in the context of the omission of any express reference in the charge sheet to her certification of the amended financials, that she would not have been reminded thereof by the exchange of December emails of which she had plainly been cognisant in her preparation for the hearing. As mentioned, her attorneys had attempted to obtain a copy of the signed DTI grant application form from Formentco for the purpose of preparing the response by the applicant and Mr Bestbier to Mr Muller's affidavit sent to them under cover of the Board's letter of 28 May 2013. An unsigned copy of the form had been attached to Muller's affidavit, and a signed copy had been furnished by the Board to her legal representatives on 14 April 2015, six days before the commencement of the hearing before the disciplinary committee and more than six months before she testified at the hearing. What relevance could that document have had other than to the second charge? (It bears mention that Mr Muller, who was the only witness called by the Board to give direct evidence in support of the events giving rise to the second charge, was recalled at the instance of the applicant's legal representatives for further cross-examination when the hearing resumed after a more than six-month interval in November 2015.)

[127] The applicant attacked what she contended was an implied finding by the disciplinary committee, in para. 296 of its decision, that she had signed the auditor's certificate in the DTI grant application aware that the figures reflected in the company's amended financials were incorrect. She asserted that such finding was wrong and unsupported by the evidence. The applicant appears in this regard to have considered that the only evidence that had been relevant in this connection had been her replies to questions under cross-examination in which she had admitted that she must have checked the content of the application before signing the certificate. The committee's finding was in fact that the applicant had authorised Muller to effect the second adjustments to the company's financials solely to meet the requirements conveyed in Ms Geyser's email of 4 December 2006, quoted in paragraph [43] above. Its reasons for so finding have already been described. The signed application form reflected those adjustments.

[128] I am unable to find that the committee could not reasonably have made these findings. The company's accounts had already been audited in September 2006. The financials had been signed off by the director of the company and LDP (represented by the applicant) at that time, presumably on the basis of fieldwork and working papers that substantiated the results reflected in the statements. There was no suggestion in any of the available source material that two months' turnover had been omitted and that remuneration paid or determined in favour of Mr Tucker had been overlooked. Even if there had been such shortcomings in the financials signed off by LDP and the company's director in September, it would indeed have been a most unlikely coincidence that the extent of the turnover that had been overlooked should match virtually exactly what was required to be made up for the company to qualify for DTI grant. The chance that director's remuneration had been overlooked, also in an amount that closely matched the belatedly stated requirements for the company's DTI grant application conveyed by Ms Geyser merely underscored the basis for the committee's findings in this respect.

[129] The contextual effect is that the applicant's admission that she had been aware of the adjusted figures submitted in support of the grant application necessarily affirmed her awareness at the time that manipulated results were being used in support of the application. This attack on the committee's findings on the grounds that they were not supported by the evidence comes close to one of the sort that might be advanced in an appeal. I assume, however, that it was advanced on the basis of an allegation of the sort of gross irregularity that would be comprehended by sub-secs 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA. On that

assumption, the attack is groundless because it is clear that the implication that the applicant signed the auditor's certificate knowing that the results therein reflected were not correct was founded on her own admissions and the inferential findings that the committee had made as to her state of mind arising from its analysis of the December email correspondence. As this is not an appeal, it is not for this court to consider whether those findings were correct. It suffices to point out that there was evidence to support the finding and that, in the face of the committee's reasoned analysis of the December email correspondence, there is no basis to hold that the findings were not rationally connected to the information before it.

[130] In the context of the conduct of the hearing before the disciplinary committee as described above, I conclude that even were I wrong in holding that the second charge was formulated in a manner substantially compliant with s 49(3) and subrule 4.10, the effect of the irregularity was not material in that, for the reasons I have given, it did not result in the proceedings before the committee being procedurally unfair. The deficiencies in the charge sheet did not result in the applicant being tried or convicted in respect of a count of misconduct other than that which it is clear she was aware that she had been called upon to meet. The purpose of s 49(3) and subrule 4.10 of the New Disciplinary Rules was thus not thwarted or subverted in any material manner. As to the averments by the applicant in para. 57 of her founding affidavit,[58] it should be apparent from my observations at paragraphs [100] – [102] above that I consider that the Board has effectively refuted them.

[131] In the result I have not been persuaded that there is any merit in the applicant's challenge on review of the committee's decision to convict her on the second charge.

***The fifth charge***

[132] The review challenge to the findings in respect of the fifth charge is premised on the contention that it was legally misdirected to visit non-compliance with s 45 of the Act on Ms Du Plessis, as she was not the engagement partner seized of the audit. The implication is that the duty in terms of s 45 is specifically imposed only on the engagement partner. As mentioned at the outset, the Board does not oppose the relief sought by the applicant in respect of the fifth charge and neither side addressed any argument on the question.

[58] See paragraphs [89] – [98] above.

[133] The point taken by the applicant in this connection does appear to find support in the wording of s 45(1)(a) of the Act. The substantive relief that she seeks in that regard will therefore be granted. Having not heard any argument on the point, I would, however, wish to make it clear that this judgment should not be regarded as precedential on the reach of the provision.

***Effect of the result of the review application on the ancillary directives of the disciplinary committee***

[134] In addition to the fines that it imposed on the applicant in respect of each of the counts of misconduct on which it convicted her, the disciplinary committee directed, in terms of s 51(4) of the Act, that she must pay a contribution of R320 000 towards the Board's costs in the hearing and that a summary of its findings be published in the Board's periodical publication, IRBA News.[59] The applicant did not argue, that in the event of the review application being successful only in respect of the committee's decisions on the fifth charge, that these ancillary directions should be affected. It would obviously be appropriate, however, that any publication of the committee's findings should be supplemented to record the fact that its decisions in respect of the fifth charge were set aside by this court on review in proceedings that were not opposed by the Board.

***Costs***

[135] The applicant's counsel submitted that as it had been necessary for the applicant to come to court to get the decision in respect of the fifth charge set aside the applicant should be awarded her costs of suit, even if her application in respect of the second charge did not succeed. In my view such an order would not do justice in the case. There is no suggestion that the Board acted mala fide in preferring the charge, and it was bound by the Act to accept the decision of the disciplinary committee, the bona fides of which were also not called into question. The Board did not oppose the relief sought by the applicant in respect of the fifth charge. The opposing and replying papers were given over entirely to dealing with the case on the second charge, as, indeed, were the heads of argument and the hearing before this court. I consider that that it would be fair in the circumstances that there should be no order as to costs in respect of the application for relief in respect of the fifth charge, and that the applicant should be directed to pay the costs of the first respondent in respect of the opposed

[59] Notwithstanding rule 8.3 of the New Disciplinary Rules, the question of publication in fact appears to be one within the discretion of the Board, rather than the disciplinary committee; see s 51(5) of the Act.

application for the review and setting aside of the decision on the second charge. How the division is to be made is a question for determination by the taxing master. I am satisfied that the engagement of two counsel was reasonable.

[136] An order is made as follows:

1. The decisions of the third respondent (the disciplinary committee) to convict the applicant on the fifth charge (that is of having acted in breach of the duty imposed in terms of s 45 of the Auditing Profession Act 26 of 2005) and to impose a sanction of R50 000 in respect thereof are reviewed and set aside.
2. Any publication of the findings of the committee in terms of s 51(5) of the Act shall, insofar as it contains any reference to the committee's decisions in respect of the fifth charge, record that they were set aside on review.
3. There shall be no order as to costs in respect of the application for the review and setting aside of the decisions of the third respondent in respect of the fifth charge.
4. The application for the review and setting aside of the decisions of the third respondent in respect of the second charge is dismissed.
5. The applicant is ordered to pay the first respondent's costs of suit in respect of the application for the review and setting aside of the third respondent's decisions in respect of the second charge, including the fees of two counsel where such were engaged.

**A.G. BINNS-WARD**
**Judge of the High Court**