



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

Case number: 18762/2019

In the matter between:

KEVIN AUGUSTUS WILLIAMS

Applicant

and

THE LEGAL PRACTICE COUNCIL EXECUTIVE

Respondent

JUDGMENT DELIVERED ON 31 OCTOBER 2022

VAN ZYL AJ:

Introduction

1. This is essentially an application for the judicial review of a decision taken by the then Cape Law Society's disciplinary committee on 9 July 2018. The application is brought under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The Cape Law Society was replaced by the South African Legal Practice Council ("the LPC") as a result of the provisions of the Legal Practice Act 28 of 2014 ("the LPA"). The LPC opposed the application, accepting that the applicant intended to refer to it.
2. I say that this is "essentially" a review application because, when regard is had to the papers, the issues are unfortunately clouded by a myriad of irrelevant and wide-ranging extraneous information which makes it difficult to ascertain precisely what the applicant

seeks. At the hearing of the application, and given the nature and extent of the papers, I confirmed with the applicant that what the Court was required to determine was a PAJA review. The applicant acknowledged that this was the case, but referred me to the other relief sought in the *“Final Ammended (sic) Notice of Motion”*.

3. I discussed the notice of motion with the applicant in court, dealing in turn with each of the prayers and indicating to the applicant where, and why, the relief sought therein was not competent. The prayers were as follows, and I set out in respect of which of them I am of the view that they do not seek relief that should (and in some instances, can) be granted by the Court:

3.1. *“Directing that the above Honourable Court review the findings of the Legal Practice Council in respect of their investigations into the conduct of Mr Nick Elliot and in respect of their reasons granted on December 13, 2018”*. This is the core of this application, and shall be dealt with below. (I ignore the manner in which the relief is formulated in this prayer and in the others because, as the respondent points out, such formulation seeks that the Court directs itself to make a finding or order, which is not competent. I accept that this is not what the applicant had in mind.)

3.2. *“Directing that the above Honourable Court make a finding that the current officials at the Legal Practice Council who had previously served as the Cape Law Society, had covered up egregious acts of malfeasance by their members between the periods of 2015-2020 which had corrupted all related investigations and findings”*. No officials were cited as parties to the application so as to state their version as against the applicant’s allegations, and the information put up by the applicant in support of this part of his case is speculative, clearly born of the applicant’s frustration with his situation. The relief sought is, in addition, vague in material respects. It is not apparent from the applicant’s papers what the purpose of the order sought is, how it would be given effect to, or who it should be directed at. In the circumstances, it is incompetent in law and the Court cannot grant it.

3.3. *“Directing that the above Honourable court review the 2018 findings of the Legal Practice Council Officials in respect Mr Nick Elliot”*. This relief is effectively a repeat of the relief sought in paragraph 3.1 above.

- 3.4. *“Directing that the above Honourable Court compel the Legal Practice Council to investigate separate complaints lodged with them in July 2019 against Mr Elliot for inter alia: fraud, theft of trust funds, forging of court documents, obtaining a default order of R102 000.00 by fraud etc”.* This relief involves issues that fall within the respondent’s powers and duties to be exercised under the LPA. If the respondent in fact did not investigate any such later complaints, there is no case made out on the papers for the judicial review of the respondent’s failure to take a decision as contemplated in section 6(3) of PAJA.
- 3.5. *“Directing that the Court review the corrupt findings of the LPA / Law Society officials who had presided over related collusion, theft and fraud complaints against Mr Elliot, Mr Viljoen and Mr Pienaar in related investigations conducted between 2015-2019 due to this administrative justice process being required (in order) to restore justice as contemplated in section 172(1)(a), section 172(1)(b) and section 173 of the constitution”.* This is again effectively the review relief sought in paragraph 3.1.
- 3.6. *“Directing that the above Honourable Court compel the Legal Practice Council to cover the costs of all litigation derived from the unprofessional conduct of the Legal Practice Council Officials and their members”.* The relief sought is lacking in particularity. This Court can in any event not grant costs orders in relation to other litigation not before it.
- 3.7. *“Directing that the above Honourable Court compel the relevant attorneys (Mr Viljoen, Mr Pienaar and Mr Elliot) to provide detailed pleas to the allegations contained in this application in order to facilitate that the civil litigation processes can be concluded”.* These attorneys are not before the Court, and they have, in the course of the respondent’s investigation into their conduct, already answered the applicant’s allegations (such as the allegations were at that time).
- 3.8. *“Directing that the above Honourable Court compel the Respondent to provide the public with the names of legal practitioners who have been found guilty of misconduct, specifying the nature of the misconduct in order that the public can be protected from any professional or ethical deficiencies that legal practitioners might have prior to their*

appointment". This relief again involves issues that fall within the respondent's powers and duties to be exercised under the LPA. It is of a general and uncircumscribed nature and is not relief that this Court can grant pursuant to the applicant's application for judicial review in the present matter. In any event, such an order is unnecessary because the respondent confirms that it complies with its obligations under section 38(3) of the LPA, which provides as follows:

- "(3) *Particulars of all disciplinary hearings, including the particulars of-*
- (a) the allegations of misconduct being dealt with;*
 - (b) the members of the disciplinary committees in question;*
 - (c) the legal practitioners, candidate legal practitioners or juristic entities involved in the dispute; and*
 - (d) the outcome thereof and any sanction imposed in terms of section 40(3), if applicable, must, subject to subsection (4) (a), be-*
 - (i) published on the website of the Council;*
 - (ii) updated, at least, once every month by the Council; and*
 - (iii) available for inspection by members of the public during business hours of the Council and relevant Provincial Councils."*

3.9. *"Directing that the Honourable Court grant costs on an own attorney client scale for this application in the event that Applicant appoints counsel"*. The applicant appeared in person.

3.10. *"Directing that the above Honourable Court provide compensation and further and ancillary relief, including relief as contemplated in terms of section 57(e) (sic), 79(1) and 79(2) of the Legal Practice Act"*. Sections 79(1) and 79(2) provide as follows:

- "(1) The Fund is not obliged to pay any portion of a claim which could reasonably be recovered from any other person liable.*
- (2) The Fund may pay all reasonable expenses and legal costs incurred by a claimant in exhausting his or her rights of action against another person."*

In section 57(1) the LPA sets out the purpose and application of the Fund, including, in subparagraph (e), the use of the Fund to reimburse claimants:

“57 Purpose and application of Fund

- (1) *Subject to the provisions of this Act, the Fund must be utilised for the following purposes: (e) refunding the costs or any portion thereof incurred by a claimant in establishing a claim or attempting to recover the whole or a portion of the claim from the person whose wrongful conduct gave rise to the claim;..”*

These provisions involve administrative matters falling within the powers of the Legal Practitioners’ Fidelity Fund in the assessment and payment of claims lodged against it under the LPA. They do not afford a remedy to the applicant in this application.

4. It is against this background that I now deal with the review relief sought.
5. The decision in question was made by a disciplinary committee of the respondent in relation to a complaint regarding a practising attorney, Mr Nick Elliot. The complaint was received from the applicant on 3 February 2017, and (very briefly stated) alleged that Mr Elliot had failed to hand over the applicant’s files and release money held in trust on behalf of the applicant. The applicant’s complaint was already replete with accusations of fraud, dishonesty, illegality, and of Mr Elliot being unethical and in “cahoots” with other attorneys and the Sheriff. He requested the respondent to (1) order the immediate release of all legal files relevant to the mandate that had been granted to Mr Elliot and (2) the immediate release of funds he regarded as owing to him into his account.
6. Mr Elliot responded to the complaint in detail on 10 February 2017. He explained that there were amounts owing to his firm by the applicant, and that he was in the circumstances entitled to retain the applicant’s files until such fees and disbursements had been paid. This was so because of the common law lien, and further because the mandate agreement that the applicant had signed entitled Mr Elliot to retain the files until he had been paid.
7. On 9 July 2018 the respondent’s disciplinary committee found that a finding of unprofessional conduct could not be made. On the applicant’s request, full reasons were furnished on 13 December 2018.

8. I have read all of the documents filed of record and have considered the application as a whole. In my view, the applicant does not cross a crucial initial hurdle that would allow for the determination of the merits of the dispute in accordance with PAJA – the issue of delay.

The principles underlying the issue of delay in the context of PAJA

9. Section 7(1) of PAJA provides as follows: “(1) *Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-*
- (a) *subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or*
 - (b) *where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”*
10. In *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) at para [26] the Supreme Court of Appeal held that this Court cannot determine the merits of the review application unless condonation has been granted in the event of non-compliance with section 7(1):

“At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg Associated Institutions Pension Fund and others v Van Zyl and others 2005 (2) SA 302 (SCA) para 47). Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain

the review application at all. ... That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg Camps Bay Ratepayers' and Residents' Association v Harrison [2010] 2 All SA 519 (SCA) para 54)." [Emphasis supplied.]

11. The statement to the effect that the Court should not entertain the merits at all was qualified in *South African National Roads Agency Limited v City of Cape Town* 2017 (1) SA 468 (SCA) at para [81], in which it was held that the *dictum* "cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictates that the delay should be condoned."
12. There are three main principles governing the delay rule. The first principle is that a party must institute review proceedings within a reasonable time. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) the Constitutional Court explained that the issue of delay is determined using a two-stage process.
13. In the first stage, the Court determines whether the delay is unreasonable. This is a factual enquiry in which all relevant circumstances are considered, and the Court makes a value judgment (*Buffalo City* at para [48]). The only difference between a legality review and a PAJA review is that there is no prescribed period for what will amount to an unreasonable delay in the former, whilst for the latter a delay of more than 180 days is *per se* unreasonable (*Buffalo City* at para [49]). The applicant's case is a PAJA review.
14. It is thus important to determine when the starting point of the delay is. In terms of section 7(1) of PAJA, proceedings for judicial review must be instituted without unreasonable delay and in any event not later than 180 days after the applicant (1) is notified of the administrative action or (2) became aware of the action or (3) might reasonably have been expected to have become aware of the action. These are three alternative sets of circumstances that trigger the running of the statutory 180-day period. The commencement of the 180 days will therefore be triggered by whichever alternative occurs first. In *Buffalo City* at para [49] it was held that for both PAJA and legality reviews

“the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken”. The clock does not start to run only when the applicant becomes aware of the irregularity or illegality complained of.

15. In the second stage, if the delay is unreasonable, the Court must determine whether it should exercise its discretion to overlook the delay. There must be a basis for the Court to do so, based on objective facts (*Buffalo City* at paras [48] and [53]). The test is flexible and is informed by several factors, including the potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision. Prejudice may be ameliorated by the Court's power to grant just and equitable remedies (*Buffalo City* at para [54]). It is, notably, the potential for prejudice, including prejudice to the efficient functioning of the decisionmaker, that informs the delay rule (*Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) at para [23]). Another factor to be taken into account is the nature of the impugned decision and the alleged irregularity. This requires a Court to “somewhat” consider the merits of the challenge. Where the prospects of success are strong, the Court is more likely to grant condonation. The converse is also applicable (*Buffalo City* at paras [55] to [58]).
16. The second principle underlying the delay rule is the need for certainty and finality, both for parties affected by a decision as well as for the administration of the State. It means that where a Court refuses to determine the validity of a decision (even a decision vitiated by irregularity) as a result of unreasonable delay, *“in a sense delay would ... ‘validate’ the nullity”* (*Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 381C).
17. The third principle is that in exceedingly rare cases, even if a review is unreasonably late and there is no basis to overlook the delay, a Court may still be required to declare conduct unlawful (*State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at para [41], read with paras [52] to [53]). This principle (the so-called “*Gijima* principle”) applies only where the unlawfulness of the impugned decision is clear and not disputed. In *Buffalo City* at para [71] it was held that this principle must be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay is not undermined. The *Gijima* principle has, for example, been applied in cases where an organ of State lacked authority to make a decision or violated a statutory requirement (see *ICT-Works Proprietary Limited v City of Cape Town* [2021] ZAWCHC

119).

18. In assessing whether to extend the 180-day period, the Court should have regard to, *inter alia*, the following factors as set out in *City of Cape Town v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at para [46]:

“ ... s 7(1) of PAJA states that '(a)ny proceedings for judicial review . . . must be instituted without unreasonable delay'. The SCA, relying on this court's decisions in *Van Wyk and eThekweni*, adeptly set out the factors that need to be considered when granting condonation as follows:

'The relevant factors in that enquiry generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success.' [Emphasis supplied.]

19. It is against this background that the delay in the institution of the applicant's application is considered.

The applicant's delay

20. It is common cause that the application was instituted after the expiry of the prescribed time period. This application was instituted on 24 October 2019, more than 10 months after the respondent had given reasons for its decision. The reasons were provided on 13 December 2018 and the 180-day period for the institution of the application thus expired in mid-June 2019. The delay of four and a half months was therefore, on the authority of *Opposition to Urban Tolling Alliance*, unreasonable *per se*. The applicant has not clearly sought condonation in respect of the delay or sought an extension in terms of section 9 of PAJA, and the respondent has raised this issue as a point *in limine*.

21. In his founding affidavit the applicant states that:

"I seek condonation of the review of finding by the Legal Practice Council for the following reasons:

My intention to have the findings taken on review has never changed and the Legal Practice Council has acknowledged the same by agreeing to view my reasons subject to it being submitted to the Constitutional Court.

“Systemic corruption exists at the offices of the legal Practice Council and the curtailing of this conduct is in the interests of justice.

The Constitution governs institutions that serve a public function. Section 22 of the Constitution, read in conjunction with Section 3 of the Legal Practice Act, provides us with protection of all our rights as contemplated in the Bill of Rights, but this is subject to an honest and functional Legal Practice Council and in the absence of this our rights cannot be guaranteed.

Unassailable evidence exists which proves that the officials of the Legal Practice Council had actively obstructed and obfuscated investigations, in order to clear their members who belong to three law firms related to this case, who had colluded, aided and abetted in the theft of a company. My ability to conclusively prove the aforementioned allegations, the broad public interest that a matter of this nature serves, compels the court to hear the matter and consider sanctions against all attorneys and the sheriff who are involved in these acts of corruption and malfeasance”.

22. In an “*Application for condonation*” delivered on 28 January 2021 the applicant simply asks the Court to condone “*any other technical deficiencies of time*”. The notice of application reads as follows:

“KINDLY TAKE NOTICE that an application will be made to the above to the above Honourable Court for an order on the following terms:

- 1. That the review of findings of inter alia fraud, theft and collusion between 3 attorneys namely, Mr Elliot, Mr Viljoen and Mr Pienaar be heard.*
- 2. That the court similarly hear the application to compel the Legal Practice Council Executive to investigate or instruct their Western Cape Office to investigate the*

charges filed in 2019 against Mr Elliot for inter alia:

2.1 Aiding and abetting in the theft of a company.

2.2 Theft of trust funds....

2.3 Also forging a writ and siphoning monies from a trust fund therewith.

2.4 Lying on a Practice Note for a secret Set Down...

2.5 Obtaining a fraudulent R102 000.00 default order therefrom.

2.6 In a separate case of forgery - Changing amounts on a court order to twice the amount submitted at a reviewed taxation and thereafter misleading the taxing master for a secret endorsement thereof.

3. That the above Honourable Court condone any other technical deficiencies of time, service or other to this application due to the following:

3.1 This is a novel case - these matters having been ventilated at the Constitutional Court in September 2020 seeking direct access.

3.2 The President of South Africa's appointment of a Legal Services Ombudsman on 22 December 2020.

3.3 Related matters being corrupted in the magistrate' courts, the High Court, the SABFS, the Law Society and the Legal Practice Council due to administrative justice being compromised.

3.4 Related matters currently being heard at the JSC a result hereof.

3.5 Numerous magistrates since 2015 and about 8 High court Judges over the past three years have presided over related and unresolved matters due to the maladministration/administrative of justice at the LPC.

3.6 I am a layperson.

3.7 This application has broad public interest.

3.8 This application serves the interest of Justice."

23. In his supporting affidavit accompanying the application he repeats the history of the matter and his conclusions of corruption, collusion, maladministration and more. The applicant does not refer to section 9 of PAJA at all. I am inclined to agree with the respondent that the condonation application, such as it is and even when read with the allegations in the founding affidavit quoted above, falls short of what is substantively

required to make out a case for condonation. The applicant relies on sweeping statements of a conclusory nature but provides little by way of objective facts.

24. In his replying affidavit delivered in July 2021 the applicant gave further reasons for the delay, including:

- 24.1. The respondent's delay in providing reasons for its decision. This is not a sound reason, because the time period stipulated in section 7 of PAJA only commences running after the giving of reasons.
- 24.2. The applicant had previously, in March 2019, instituted a review application in this Court under case number 4072/2019 against the respondent and eight others. That application involved the applicant's complaints against Mr Elliot and the respondent's decision, amongst other issues, although the relief sought differed in many respects from what is sought in the present application. He withdrew that application before instituting an application for direct access to the Constitutional Court in August 2019, so as to avoid a plea of *lis pendens*. It was only when the Constitutional Court application was not speedily resolved (and the applicant had been advised that the High Court was the proper forum for the review application) that he instituted this application anew, under a new case number and against the respondent only, in October 2019. Various amendments to the notice of motion followed until the final amended notice was delivered in March 2021.
- 24.3. The applicant cannot cut and paste the processes of litigation in various courts as he sees fit, and expect other to fall in with his course of conduct. He is not entitled to institute litigation in the High Court, withdrew it because he wants to proceed in the Constitutional Court, and then re-institute the application in the High Court with the expectation that the respondent will not or may not take a procedural point that arises as a result of the applicant's actions – especially where such procedural point constitutes a jurisdictional fact for the determination of the relief sought.
- 24.4. The fact that the respondent knew that the applicant wished to review the decision does not mean that the respondent agreed to the delay in the institution of this application. In the correspondence between the parties regarding the matter, the

respondent acknowledged the withdrawal of the first application, but very clearly indicated that it regarded the second application (the present application) as being out of time in the context of PAJA.

24.5. It seems from the papers that the applicant views the initial review applicant and the current one as one and the same. This is not correct, as the relief sought in the first application differs in material respects from the current application, apart from the fact that the current respondent is the only remaining respondent in these proceedings. The material relied upon by the applicant in these proceedings have moreover mushroomed to an extent not achieved in the previous application.

25. The further reasons given all relate to events that occurred after the institution of this particular application, and that are thus irrelevant to the question of whether the delay in the launch of the application should be condoned. They relate to the respondent's delay in delivering an answering affidavit and to correspond with the applicant, the Honourable Justice Wille's refusal to grant an order to compel because of a conflict of interest, further directions from the Constitutional Court and ultimately the Constitutional Court's order n 16 September 2020. Further litigation for declaratory relief against the respondent and its officials followed in June 2021 under case number 10097/2021.

26. A consideration of the chronology indicates that, at the latest, the applicant had all of the information necessary to launch review proceedings by the time that the respondent's reasons were given. He was in a position to launch these proceedings virtually immediately, especially when regard is had to the fact that the complaints levelled against the decision had to a substantial extent already been foreshadowed in the correspondence addressed by the applicant to the respondent prior to the receipt of the final reasons. The applicant refers, for example, to complaints lodged in 2015 (and there were many other between 2015 and 2017, and thereafter) against Mr Elliot which "*related to the exact same matter referred to in 2017*" (when the complaint that underlies the respondent's decision was lodged).

27. In the light of the discussion above, I return to the relevant factors identified in *Aurecon* in considering whether condonation should be granted:

28. The nature of relief sought: The applicant is seeking review relief. I do not think that the delay in this matter would necessarily have caused the respondent prejudice in the sense of memories having faded, documents no longer being available, or officials who had dealt with the matters in dispute and had knowledge of the impugned decisions having left its employ. Nevertheless, I do regard the vitriol with which the applicant's application is presented as prejudicial not only to the respondent, but to the administration of justice as a whole.
29. The effect of the delay on administration of justice and other litigants: Given the serious allegations levelled against the respondent's officials, the Sheriff's office and others, as well as the legal practitioners involved, the interests of finality loom large, even in the absence of actual prejudice. In *Gqwetha* at para [23] it was emphasised that "*actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration...*"
30. The extent and cause of the delay: The delay is serious given the fact that there is no sound explanation for it on the papers. I have dealt with the causes proffered by the applicant.
31. The reasonableness of the explanation for the delay: The explanation is not reasonable and does not cover the whole period. The fact that the applicant corresponded with the respondent throughout is not an excuse for the delay (see *Habitat Council v BPH Properties (Pty) Ltd* [2018] ZAWCHC 98 (17 August 2018) at para [34], albeit in relation to attempts to avoid litigation).
32. The importance of the issues to be raised, and the prospects of success: On the face of it the application raises important issues of public governance. The applicant contends that his "*litigation for civil, criminal and administrative justice has not wavered over this six year period, all matters under this review therefore still current with prospects of success being good*". A proper consideration of the papers indicates, however, that the applicant's case is built upon years of frustration and speculation. I agree with the respondent that the applicant's prospects of success must be regarded as poor. This is so mainly because the manner in which the case has been pleaded renders it difficult to determine precisely

what the applicant's complaint is about the legality of the decision. He lists conclusion upon conclusion without engaging with objective facts and reasons underlying those conclusions (which constitute his grounds of review). This is an inappropriate manner to litigate which prejudices the respondent. In *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* 2014 (6) SA 403 (GP) at para [29] it was held as follows:

"Unfortunately, by virtue of the fact that these grounds were not dealt with in the founding papers, it was left to the court to work out which are the relevant grounds, and what facts speak properly to those grounds. This is not acceptable. It is the duty of the legal representatives of litigants to ensure that their clients' cases are properly formulated and advanced before the courts. ... This is particularly so in cases like this one involving constitutional rights. It is now almost 15 years since PAJA was enacted; there is a substantial body of jurisprudence on judicial review under PAJA and it is taught in every law school. There is no acceptable reason for founding papers in a review application to fall short of identifying the facts and grounds of review clearly and with appropriate reference to the relevant sections of PAJA that are relied upon. The papers should also draw the necessary link between the material facts and the identified grounds of review."
[Emphasis supplied.]

33. The founding and supplementary affidavits do not draw any sensible link between the material facts and the grounds of review relied upon by the applicant. The replying affidavit raised further grounds of review, not pleaded in the founding or supplementary affidavits. These grounds, belatedly raised, cannot be taken into account in the determination of the application.
34. The failure properly to plead the grounds of review and the facts relied upon also means that the applicant has failed to displace the presumption of validity in relation to the impugned decisions (see *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2014 6 SA 222 (SCA) at para [27]).
35. I have nevertheless anxiously considered the merits of the application as part of my consideration of the issue of delay, but have come to the conclusion that no case is made out under PAJA. It is clear from the papers that the applicant has sought to review this decision with reference to almost all the grounds of review available under PAJA,

including:

- 35.1. *“The administrative action taken was so unreasonable, that no reasonable person could have so exercised their power or so performed their function with appropriate integrity, and thereafter arrive at the same finding.*
- 35.2. *The administrative action was taken for a reason not authorised by the empowering provision because an ulterior motive existed for the finding.*
- 35.3. *The administrative action excluded relevant considerations and included irrelevant considerations for the determination of the findings.*
- 35.4. *The administrative action was taken in bad faith.*
- 35.5. *The administrative action was patently biased.*
- 35.6. *The administrative action was procedurally unfair.*
- 35.7. *The administrative action was unconstitutional and unlawful.*
- 35.8. *The administrative action was premised upon systemic corruption.”*

36. The Court and the respondent were confronted with a mass of material (including the same documents being attached to affidavit after affidavit repeatedly) from which to attempt to discern what the applicant’s case is, save for an expression of his frustration with the system and contempt for those associated with it.

37. Apart from the founding papers and supplementary affidavit, the applicant delivered an *“Amended / replacement supplementary affidavit”* in January 2021, repeating some of the complaints against the respondent’s conduct and decision, and detailing events following the appointment of the Legal Ombudsman in December 2020. He also repeated the chain of events from 2014 leading up to the respondent’s decision and thereafter. The affidavit is replete with paragraph upon paragraph of conclusions of corruption and collusion in between which constitutional argument is weaved.

38. In April 2021 the applicant applied to the Chief Registrar for the appointment of judges from outside of Cape Town, but that application does not seem to have been proceeded with.
39. A Rule 16A notice and further supplementary affidavit were delivered during February 2022. The Rule 16A notice detailed relief proposed to be sought against and in relation to the Legal Ombudsman and was aimed at procuring the President of the Republic of South Africa and the Minister for Justice and Constitutional Development to join the proceedings as *amici curiae*. Nothing came of this.
40. The further supplementary affidavit accompanying the Rule 16A notice again set out the history of the applicant's complaints, and deal with his attempts at obtaining legal assistance. As mentioned below, the applicant never approached the respondent or the Cape Bar Council for *pro bono* assistance, even though being ordered to do so.
41. The applicant commences his heads of argument with the statement that *"[t]his case has dragged on for nearly eight years because the Law Society and thereafter the Legal Practice Council, including the SABFS [the South African Board for Sheriffs] has attempted to cover up acts of gross malfeasance that were perpetrated by their members, such acts which included inter alia, fraud, collusion, theft of trust funds, forging court documents, perjury, intimidation, including aiding and abetting in the theft of a company ..."*
42. The argument continues in this fashion, with heavy reliance on the provisions of the Constitution amidst allegations of ineffectiveness of the office of the Legal Ombud and the applicant's inability to get redress because of the corrupt nature of and criminal conspiracies perpetrated by the legal profession and various institutions of justice, including the courts and even judges.
43. What the applicant sees as "this case" are, in fact, a series of events and resultant instances of litigation since November 2014, when all the trouble started with an attachment order under section 32 of the Magistrates' Courts Act 32 Of 1944 having been granted against the applicant as a result of the alleged non-payment of rental for his

business premises. It was the lifting of that order by way of an agreement between the parties that sparked the applicant's subsequent complaints against his attorney. He denies having given instructions for the conclusion of a settlement, as he wanted to attack the attachment order in court. He sets out the train of events in detail – I do not intend repeating everything that followed.

44. For the purposes of this application, the applicant eventually lodged various complaints against the attorneys mentioned in the notice of motion with the respondent, and it is the outcome of the complaint against Mr Elliot that is the focus of this application. The applicant's complaints are not limited to the instances that occurred prior to the institution of the application. In his heads of argument, for example, he accuses Mr Elliot of "further acts of criminality" committed during April 2022, in respect of which complaints have been made. The respondent has not yet taken a decision in relation to such complaints.
45. I have considered the respondent's decision in relation to Mr Elliot. I cannot find that the respondent has not duly considered the information available to it in a fair and unbiased manner, and that it has not properly exercised its mind in reaching its conclusion upon such information.
46. It is clear, unfortunately, that the applicant has been and will be dissatisfied with any finding made against what he perceives as the truth and as justice. Left with little recourse after all of the years, he appears in this application to be "litigating" his allegations against whomever he can reach in the hope that it would give him a further bite at the cherry. The applicant argues that *"it is statistically impossible for the outcomes of related matter to have gone for 6 years consistently against me if justice was applied lawfully, fairly, reasonably and independently. This statistic becomes more improbable when viewing the racial demographics and the roles of the key players ie. attorneys, judges, magistrates, the law society, Sheriffs Board, Legal Practice Council, the Western Cape Public Protector and the Director of Legal Services for the Western Cape, both the latter being approached – the entire list being white."* He proceeds to name every person on his list.
47. Fundamentally, the applicant's problems with the decision boils down to a difference of opinion about the conduct and motives of the attorney who had assisted him, to his

dissatisfaction, at the outset. He essentially complains that the respondent is wrong in its assessment of the situation given the “*irrefutable evidence*” in his possession. He is also frustrated with the law, and the way that the legal system operates (this is clear from the continued accusations of bias and maladministration against the magistrates and judges presiding over the civil litigation that had ensued over the years in relation to the matter).

48. The applicant in fact seeks an appeal, not a review. He relies upon events and documents which he interprets in a certain manner so as to reach a conclusion, and he seeks to persuade everyone that his interpretations and conclusions are correct. In the words of Hoexter (*Administrative Law in South Africa* ((2ed) Juta) at 108), appeal and review are both ways of reconsidering a decision. While the reason for seeking the one or the other usually the same – dissatisfaction with the result – appeal and review perform different functions. Appeal is appropriate where it is thought that the decision-maker came to a wrong conclusion on the facts of the law. It is concerned with the merits of the case, meaning that on appeal the second decision-maker is entitled to declare the first decision right or wrong.
49. Review, on the other hand, is not concerned with the merits of the decision but with the matter in which it was reached. The focus is on process, and on the way in which the decision-maker came to the challenged conclusion. One can, of course, not entirely avoid scrutiny of the merits on review (Hoexter at 110 to 111 points out that the distinction is often regarded as artificial) but the distinction should at least be observed at the point of judicial intervention – where a Court should not, in a review, impose its own idea of what the right decision should be on the parties. The applicant in the present matter squarely seeks an order that the respondent’s decision was wrong. This is the language of appeal, not review.
50. Lastly, the *Gijima* principle (referred to earlier) has no application in the present case. The irregularities complained of by the applicant cannot be construed as “clear and indisputable” unlawfulness in the context of the information placed on record.
51. In all of these circumstances I am of the view that the applicant has not established that condonation of his delay in the institution of the proceedings would be in the interests of justice.

52. It is not necessary for me to decide the respondent's further point *in limine*, which is whether Mr Elliot, who was the subject to the decision that the applicant seeks to review, should have been joined to the application.

Conclusion

53. As much as I sympathise with the applicant who is pursuing a quest for what he perceives as justice, I cannot, on these papers, find in his favour in relation to the relief sought.

Costs

54. The applicant was unrepresented. He had clearly put much effort into compiling the papers and was serious about his cause, whatever the merit thereof. He conducted himself respectfully and with dignity in court. One does not lightly depart from the general rule that costs follow the result, but I did deliberate whether each party should pay his or its own costs, amongst other reasons because the applicant appeared in person and the respondent would probably not be able to extract any funds from the applicant in any event.

55. I decided against it in the end, considering that the applicant should bear responsibility for the launch of these unsuccessful proceedings. This is so for three reasons.

56. First, and as indicated earlier, the affidavits upon which the applicant relied were unstructured and filled with material that was argumentative and irrelevant for the purposes of the review relief claimed. He did not clearly indicate what his cause of action was, and did not clearly identify those facts upon which he relied in support of the relief claimed. The replying affidavit, moreover, was replete with new information, much of which had clearly been available to the applicant at the time when the founding affidavit was drafted. The applicant sought to introduce wide-ranging new relief based upon such information:

“60. In the premise I seek the following relief:

60.1 That the Honourable Court make an order in terms of section 8(1)(c) of the Promotion of Administrative Justice Act, setting aside the findings of Mr Elliot, Mr Pienaar, Mr Viljoen and Ms Robertson.

60.2 That the Honourable Court make a finding that the complaints stem from a common cause, directing that in terms of section 7(2)(a) and 7(2)(b), that internal remedies be exhausted in terms of the LPA.

60.3 That the Honourable Court make an order in terms of section 8(2)(b) of PAJA, when read in conjunction with section 6(g) of PAJA declaring my right to have all the aforementioned matters related to this case reviewed before an Ombudsman in terms of section 48 of the LPA.

60.4 That the Honourable Court make an order in terms of section 48(1)(a) and section 48(1)(b) of the LPA, instructing that the Ombud resolve all issues in this matter, prior to further litigation in the High Court.

60.5 Directing that the Honourable Court instruct that the entire case file be placed before the Ombudsman.

60.6 That the Court make an order, directing the Ombud or that the Minister in terms of section 50(2) of the LPA appoint an Acting Ombud in order that the related matters of this case can be resolved.

60.7 That the Honourable Court make a finding of fact and law about the conduct of the LPC and its predecessor the Cape Law Society, providing also particular detail about the effects of their conduct in subsequent related litigation matters that compromised the ability of judges to rule in matters brought before the JCC on 11 June 2020."

57. The respondent naturally objected to this, and I did not venture into a determination of this relief. The Ombudsman, against whom wide-ranging relief is sought in reply and about whose office various allegations are made, had in any event not been joined as a party to this application.

58. I have referred to the manner in which the papers had been drafted, which made it difficult for the respondent and the Court to ascertain the precise relief sought. It was prejudicial to the respondent to have to attempt to divine, from the mass of information on record, what case it had to meet: see *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78I. In that case the Court deprecated the disorderly presentation of facts in lengthy affidavits containing much argumentative matter. As a result the Court was “*given no clear context of facts which are common cause, and no clear guidance as to the dispute of facts which must be evaluated against the background of such a context*” (at 83A–C). The same applies in the present matter. The applicant himself conceded in his replying affidavit that his founding papers might have been poorly drafted, and that some of the allegations therein were scandalous. He argued that the state of the papers should be excused because he was a layperson.

59. Secondly, and in relation to the layperson argument, the applicant had on previous occasions been advised or ordered to obtain *pro bono* assistance, *inter alia* in this Court by the Honourable Justice Samela and the Honourable Judge President Hlophe, and by the Constitutional Court in July 2022, when the applicant made application for direct access to that Court.

60. The last instance was on 22 July 2021 when this Court (the Honourable Justice Fortuin presiding) postponed this application *sine die* and ordered the applicant to apply to the respondent for the appointment of a *pro bono* attorney. The applicant avers that he had made application for assistance to bodies such as the law clinics of the Universities of Cape Town, Stellenbosch, the Western Cape and Wits, as well as the Legal Aid Board, the Human Rights Commission, the Helen Suzman Foundation, Lawyers for Human Rights, Afriforum and “*numerous other organisations*” including the American Bar Association. He does not say what the applications contained.

61. The applicant however never did make application to the respondent for such assistance - the respondent has no record of any such application. This is despite the fact that the respondent had provided the applicant with the contact details of both its and the Cape Bar Council’s *pro bono* departments. The applicant claimed that he would not be assisted because no attorney would act against a colleague. I do not accept this explanation. There are many attorneys – not necessarily in the Western Cape - who would have been

able to assist. Had the applicant applied for assistance, an attorney could have been appointed. He failed to apply, and was thus the author of his own predicament.

62. Thirdly, in his many affidavits and the annexures thereto, as well as in the heads of argument, the applicant made unsubstantiated and, frankly, scandalous comments about and accusations against no fewer than 22 persons, including attorneys who formerly represented him, the Sheriff of the Court, officials employed by the respondent, the Chief Magistrate of Goodwood, the Cluster Head for Magistrates in Wynberg, the Head of the Public Protector in Cape Town, the Director of Legal Services of the Department of Justice in the Western Cape, and against three permanent judges of this Court, all of whom had made rulings against the applicant in various proceedings over the years. These allegations contained material such as:

62.1. *"... staggering amounts of corruption amongst the attorneys which included colluding with the opposing attorneys to compromise my legal matter, stealing funds in trust, forging court documents for gain, drafting a fraudulent writ .. and using that writ to obtain funds from my trust account, also lying in pleas to court in order to have a matter secretly set down so that a default order .. could be contrived thought fraud".*

62.2. *"... these officials [of the respondent] having caused this culture of corruption to flourish..."*.

62.3. *"The Western Caspe LPC officials along with their members had committed numerous egregious, unprofessional and criminal acts which all serve an illegal common purpose...."*

62.4. *"Fostering and promoting a corrupt relationship with the sheriff of the court by instructing him to operate maliciously and without a court order, to unlawfully attach my goods ..."*

62.5. *"Conspiring with the sheriff and fellow attorneys to steal a company ..."*

62.6. *"Theft / selling goods illegally ... conspirational and criminal actions ... unethical"*

conduct ... sabotage ... stealing funds in trust ... lying, intimidation and harassment ...extortion..."

62.7. *"That the officials aggressively promoted delinquency and unethical conduct..."*

62.8. In relation to complaints lodged by the applicant against identified judges of this Court (who displayed "*an unhealthy bias*" towards the applicant) and regarding the members of the Judicial Conduct Committee who exonerated the judges: "*... it became patently clear that they had absolutely no idea about critical aspects of the case, rendering their decisions arbitrary and capricious*".

62.9. *"The orders of Judges Sher, Gamble and ... Wille ... are mere consequences of a criminal conspiracy to deny me justice ..."*

62.10. There are too many examples to mention, and they are repeated in reams of paper.

63. The allegations made in relation to these persons are argumentative and are expressions of the applicant's vehemently-held opinion. They are unsupported by objective facts and do not contribute in any way to the proper determination of the relief sought in the application.

64. In all of these circumstances, justice dictates that the applicant bear the costs of this application. What should the scale of such costs be? The respondent argued that the scandalous accusations made by the applicant without restraint in this application warrant a punitive costs order. I agree.

65. The established position regarding an award of attorney and client costs is set out in *Nel v Waterberg Landbouwers Ko-operative Vereeniging* 1946 AD 597 at 607:

"The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the

successful party will not be out of pocket in respect of the expense caused to him by the litigation."

66. In *MEC for Public Works, Roads and Transport, Free State v Esterhuizen and others* 2007 1 SA 201 (SCA) at para [9] the Supreme Court of Appeal found that an award of attorney and client costs was warranted in a case which unsubstantiated allegations against the trial judge had been made. The Court held that "*it is unacceptable that allegations of impropriety can be made against a judge in so cavalier a fashion...As a mark of opprobrium, I think a punitive costs order should be imposed on the scale as between attorney and client.*"

67. The Constitutional Court in *Mkhatshwa and others v Mkhatshwa and others* 2021 (5) SA 447 (CC) at para [26] made a similar punitive costs order as a mark of its displeasure with the accusations levelled by the applicants against various judicial officers:

"It will not do for litigants to resort to unscrupulous tactics to succeed in this Court, especially when such tactics involve unjustifiable attempts at bringing shame and disrepute upon Judicial Officers. This is because the Judiciary, unlike other branches of government, must rely solely on the trust and support of the public in order to fulfil its functions. Consequently, any conduct that undermines and erodes the authority and integrity of the Judiciary must be prevented. Litigants who resort to the kind of tactics displayed in this matter must beware that they are unlikely to enjoy this Court's sympathies or be shown mercy in relation to costs. The only reasonable conclusion in the circumstances is that a punitive costs order is apposite."

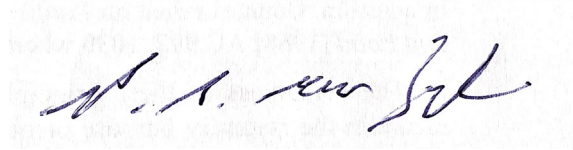
68. On the basis of this precedent, and having considered the tenor of the documents filed of record, I regard a punitive costs order as appropriate in the present matter.

Order

69. The following order is granted:

69.1. **The application is refused.**

- 69.2. **The applicant is to bear the costs of the application on the scale as between attorney and client.**

A handwritten signature in dark ink, appearing to read 'P. S. van Zyl', is written over a light blue grid background.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

The applicant in person

For the respondent: Mr S. Koen, instructed by Bisset Boehmke McBlain