
SOUTH AFRICA / JUDGMENT

Stern and Another v Health Professions Council of SA and Others (57540/2015) [2017] ZAGPPHC 284 (2 June 2017) [2017] ZAGPPHC 284

COURT

North Gauteng High Court, Pretoria

BEFORE

Legodi

CASE / FILE NUMBER

57540/2015

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA DIVISION,)

CASE NO: 57540/2015

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED.

2/6/2017

DR D M STERN FIRST APPLICANT

DR J.H.D.J. BRUMMER SECOND APPLICANT

Versus

THE HEALTH PROFESSIONS COUNCIL OF SA FIRST RESPONDENT

MEDICAL AND DENTAL PROFESSIONS BOARD SECOND RESPONDENT

THE REGISTRAR OF THE HPCSA THIRD RESPONDENT

PRO-FORMA COMPLAINANT FOURTH RESPONDENT

JUDGMENT

LEGODI. J

- [1] The admission on 5 December 2006 at Greencress Hospital, Eastern Cape of a 20 year old boy, an excellent healthy and developing top athlete, Marnus Botha (hereinafter referred to as Marnus) and his discharge from the hospital aforesaid on 15 December 2006, resulted in a complaint lodged by his parents on 24 February 2007 and 7 March 2007 with the first respondent, Health Professional Council of South Africa (the Council) for unprofessional conduct against the three doctors, namely Dr Smith, Dr OM Stern (first applicant) and Dr HDJ Brummer (second applicant), for unprofessional conduct or negligence in the treatment of Marnus.
- [2] The complaint was submitted by the Registrar (the third respondent) in terms of Regulation 4 (1) (a) and (b) to Drs Stern and Brummer for their comment. On 26 March 2009 the Second Medical Committee of Preliminary Inquiry (hereinafter referred to as preliminary inquiry committee) established in terms of the provisions of the Health Professions Act No.56 of 1974 resolved that "the explanation of Drs Stern, Brummer and Smith be accepted and no action be taken, as there was no undue delay in diagnosing the patient."
- [3] Subsequent to the resolution aforesaid, the Registrar received further correspondence regarding the complaint, including a report dated 14 August 2009 by Dr Leon Wagner, and another report from Prof A L van Gelder a physician/cardiologist and various pathology reports, including that of Dr Frieda Pienaar (Specialist physician). These reports and further information were submitted on behalf of the parents of Marnus who were aggrieved by the decision of the preliminary inquiry committee referred to in paragraph [2] above.
- [4] As a result of the further information and reports, preliminary inquiry committee reconvened to consider the further information and the reports. On 25 February 2010 it came to the conclusion that "the explanations of Dr Brummer and Smith be accepted and no further action be taken". However, with regard to Dr Stern it concluded that "an inquiry into the conduct of Dr Stern be held and that the acting Registrar be directed to arrange accordingly".
- [5] The parents of Marnus again aggrieved by the finding that there was still no prima facie evidence against Drs Smith and Brummer, caused Prof A L van Gelder to compile another report dated 15 December 2010 which was then submitted to the Council. On 28 June 2011 the preliminary inquiry committee based on the further report by Prof Gelder concluded that there was prima facie evidence of unprofessional conduct and that conduct inquiry be conducted against Dr Brummer. As a result of the resolutions of 25 February 2010 and 28 June 2011, a pro-forma complainant (evidence leader) was appointed by the Registrar to represent the parents of Marnus and to present evidence regarding the complaint to the professional conduct committee so established to conduct an inquiry and to hear evidence of unprofessional conduct against doctors Brummer and Stern.

[6] The professional conduct inquiry was scheduled to take place on 29 and 30 September 2014 in Port Elizabeth when on behalf of Drs Stern and Brummer, an application was brought in the following terms:

6.1 "that, upon resolving that the explanations of applicants be accepted, the Committee had become functus officio and that, as such, any later purported resolutions of the Committee (to the effect that a professional conduct inquiry be held into the conduct of applicants was invalid;

6.2 that the Committee had acted irregularly by reconsidering the complaints;

6.3 that the professional conduct committee should strike the inquiry off its roll;

6.4 that, it had, in any event, been irregular for the Committee to consider the complaints again and/or by entertaining further information placed before it, whilst applicants had no knowledge thereof, and

6.5 that in view of the inordinate delay in the matter, the Committee should, in any event, order a permanent stay of the proceedings. "

[7] On 23 January 2015 the professional conduct committee decided that it did not have the power or authority to strike the matter off its roll and that it would in fact be compelled to proceed with an inquiry against Dr Stern unless and until the resolution of the preliminary inquiry committee was set aside by an order of court.

[8] It is this decision of 23 January 2015 which prompted the present proceedings to which a challenge to the decisions of 25 February 2010 and 28 June 2011 referred to in paragraphs (4) and (5) of this judgment, is added. Other issues upon which the review

proceedings are based, are peripheral to the two decisions aforesaid. In other words, the peripheral issues are dependent on the

conclusions of 25 February 2010 and 28 June 2011 reached by the preliminary inquiry committee.

[9] Two preliminary issues have been raised on behalf of the respondents in these proceedings. Firstly, that the application should be dismissed for lack of non-joinder of the professional conduct committee. This point was not pursued during oral argument in my view correctly so seen in the light of the nature of delegated authority given to the committees. Secondly, that the applicants have unduly delayed in bringing the present review proceedings.

Decision of 23 January 2015

[10] In paragraph [1] of the notice of motion the two doctors want the decision of the professional conduct committee made on 23 January 2015, in terms of which it refused to strike the professional conduct inquiry from its roll to be set aside. In paragraph 60.3 of the founding affidavit the criticism against the decision is stated as follows:

"In the light of its aforesaid rulings, the aforesaid Committee declined to make any order in terms of the applicants' request for a permanent stay of the proceedings against them."

[11] On 23 May 2017 and during the hearing in these proceedings, I raised the question with counsel for the applicants whether an attempt to set aside the decision of the 23 January 2015 by the professional conduct committee was not premature seen in the light of Regulation 11 which was applicable at the time. The regulation reads as follows :

"11. 1 The respondent or the pro-forma complainant may appeal to the appeal committee against the finding or penalty of the professional conduct committee or both such finding and such penalty."

[12] To the question by the court, counsel for the applicants took the view that internal appeal in the regulation aforesaid did not apply to the applicants seen in the context of regulation 9 in particular sub-regulations (20) and (21), which read as follows:

"(20) At the conclusion of the hearing, the professional conduct committee must deliberate in camera and then inform the parties of its findings within such period as may be determined by the committee.

(21) The findings of the professional conduct committee may include a finding of poor performance on the part of the respondent, in which case the committee must require the pro forma complainant and the respondent or his or her legal representative to address the committee on the appropriateness of the full or referral of the matter to a performance assessment committee to inquire into the performance of the respondent and make a determination on the appropriate management thereof."

[13] His contention was that there is no internal remedy as contemplated in regulation 11 applicable to the two doctors as such appeal applies only where a registered person in terms of the Act has been found guilty of unprofessional conduct, in which case, you can internally appeal against a finding of guilty or penalty, so was the contention. I cannot agree. In terms of regulation 4 (15), the pro-forma complainant may reply to any matter of law raised by the respondent or his or her legal representation in his or her address and may with leave of the professional conduct committee, reply to any matter raised by the legal representative in his or her address.

[14] It is on the legal finding that the professional conduct committee refused to strike the matter off the roll. The contention that this did not amount to a finding by the professional conduct committee as envisaged in regulation 11, in my view, has no substance. The application to have the unprofessional conduct proceedings struck off the roll against Dr Stern was meant to bury the complaint lodged with the Council once and for all and as indicated in paragraph 60.3 of the founding affidavit and quoted in paragraph 9 of this judgment, it was meant to bring the inquiry against the two doctors to a permanent halt.

[15] No court or tribunal shall review an administration action in terms of PAJA unless any

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internal remedy provided for in any other law has first been exhausted[1]. Regulation 11 quoted in paragraph 10 above is such 'any other law'. A court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of PAJA[2]. A court or tribunal may, in exceptional circumstances and on application of the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems in the interest of justice.[3] The applicant were obliged to exhaust internal remedy as provided for in regulation 11 referred to above before they could cause the present application to be instituted regarding the decision of 23 January 2015 by the professional conduct committee. The application is therefore destined to be struck off the roll insofar as it relates to the decision aforesaid. This then brings me to the other decisions and the point in limine raised on behalf of the respondents in these proceedings.

Delay in reviewing the decisions of 25 February 2010 and 28 June 2011

[16] In terms of these decisions, the preliminary inquiry committee reinstated the preliminary inquiry against the Drs Stern and Brummer respectively. Having considered further information supplied to it after it had earlier on 26 March 2009 found that there was no case to proceed or refer the complaint to professional conduct committee, it then recommended or resolved that the two doctors have a case to answer and should be charged for unprofessional conduct. Such decisions concerning Dr Stern (first applicant) was taken on 25 February 2010) and the one concerning Dr Brummer (second Applicant) was taken on 28 June 2011.

[17] The point of undue delay is raised in the answering affidavit as follows:

"9. Second, the applicants have failed to bring the application for the review and setting aside of the decision of 25 February 2010

within a reasonable time. To the extent that the applicants contend that this decision constitutes administrative action, the application should have been brought within a period of 180 days from 9 March 2010 in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). To the extent that they might contend that it does not constitute administrative action under PAJA, and that the review application is based on the principle of legality, the application should also have been brought within a reasonable time.

10. The applicants have delayed unreasonably in bringing the review application and have failed to apply for condonation. In those

circumstances, the review application is not properly before the Court and should be dismissed with costs on this basis alone. 11

[18] To these objections, the applicants (Drs Stern and Brummer) seem to contend the following: That based on the provisions of regulations 8, the period within which the application for review should have been instituted or initiated, must be reckoned from the decision of 23 January 2015 when the professional conduct committee refused to strike off the

unprofessional conduct proceedings from the roll. Second, that if it was to be found that the review proceedings should have been instituted within 180 days from the decisions of 25 February 2010 and 28 June 2011 respectively, they were entitled in terms of the common law to bring the review proceedings within reasonable time and not necessarily within the 180 days as contemplated in PAJA.

- [19] The other point in limine raised by the Council, Board and Pro-forma complainant is that failure to file a substantive application for condonation or extension of time within which to launch the present proceedings regarding the decisions of 25 February 2010 and 28 June 2011 respectively, was fatal to the applicants' application.

Reliance on regulation 8 and failure to apply for extension

- [20] Without specifically referring to regulation 8, in their written heads of argument, the applicants argue as follows:

"8.1 In so far as it is submitted that applicants delayed in bringing the present application, this is argument is rejected and denied.

8.2 It is trite law that, in the normal course of events, any prospective applicant (for judicial or common law review) in the position of first and second applicants is firstly obliged to exhaust all domestic or internal remedies before approaching the court for relief

8.3 This being the case, it was incumbent upon applicants to raise their aforesaid objections and bring an appropriate application for the required relief to the Professional Conduct Committee as preliminary issues when the relevant inquiry was set down and scheduled to be held.

8.4 This was, indeed, done by applicants."

- [21] The relevant part of regulation 8 for the submission made on behalf of the applicants reads as follows:

"8.

- (1) In order to determine the issue in dispute, the pro forma complainant must arrange a pre-inquiry conference, which must be attended by both parties or their legal representatives, if any, on any date at least seven days before the date of the inquiry at a mutually convenient time and venue, at which conference-
- (a) The respondent or his or her legal representative must indicate the exceptions, objections (including an objection to the jurisdiction of a professional conduct committee to inquire into the matter) or points in limine he or she intends to raise;"

- [22] Right at the outset, the applicants moved from the premise that the preliminary inquiry committee was functus officio. That is, it cannot review its decision of 26 March 2009 by reopening the preliminary inquiry. Inasmuch as counsel for the applicants wished to see regulation 8 as internal remedy akin to an appeal envisaged in regulation 11 referred to in paragraph [11] of this judgment, it was mistaken as regulation 8 could never have been

intended to confer authority on the professional conduct committee to deal with challenges to the decision of preliminary inquiry committee. Such a review or appeal authority is not conferred either by the provision of the Act or regulations. It is only under regulation 11 that the process of internal remedy is envisaged, but only against the decision of professional conduct committee because such decisions are final in nature. In the context of the decisions under attack, "preliminary inquiry" speaks for itself. "Preliminary" according to Cambridge English Dictionary means something 'coming before a more important action or event especially introducing or preparing for it'. In other words, preceding or done in preparation for something fuller or more important. The meaning clearly suggests something not final and therefore no reliance can be placed on regulation 8.

[23] Between the period 25 February 2010 and 28 June 2011 respectively until up to 22 July 2015 when the present review proceedings were initiated, is way out of the 180 days envisaged under PAJA. Despite clear intimation by the Council and the Board in the correspondence,

answering affidavit and the written heads of argument, the applicants were steadfast that they were not obliged to institute the present proceedings to review the decisions of 25 February 2010 and 28 June 2011 until up to 23 January 2015 when the professional conduct committee refused to strike the professional conduct proceedings against both the applicants or first applicant off the roll. Furthermore, they contend that it was not necessary to bring substantive application for condonation or extension of the 180 days for the reason already mentioned above. I therefore find that their failure to launch the application for condonation\extension, is fatal to their case and the application is therefore destined to be struck off the roll regarding the decisions of 25 February 2010 and 28 June 2011.

Common law review

[24] In their notice of motion the applicants state: 'in the alternative to the aforesaid application and simultaneously therewith, applicants intend to make application to -- this court by way of common law review- for the review and setting aside of the decisions and proceedings .!'

[25] The question of the relationship between the common law grounds of review and the constitution was considered by the Constitutional

Court in a number of cases. A unanimous constitutional court held that under our new constitutional order the control of public power is always a constitutional matter. There are not two systems of law regulating administrative action- the common law and the constitution- but only one system of law grounded in the Constitution.[4] The courts' power to review administrative action no longer flows directly from the common law. but from PAJA and the Constitution

itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself but in the principles of our constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by case basis as the court interpret and apply the provisions of PAJA and the Constitution.[5]

[26] PAJA is the national legislation that was passed to give effect to the right contained in section 33. It was clearly intended to be, and in substance is, an identification of these rights. It was required to cover the field and purports to do so.[6] A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of National legislation.[7]

[27] Professor Hoexter sums up the relationship between PAJA Constitution and the common law as follows:

"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 section 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 inevitable displace the common law. The common law may be used to inform the meaning of the constitutional rights and the Act, but it cannot be regarded as an alternative to the Act".[8]

[28] It is very clear from the authorities and case law cited in the preceding paragraphs what the applicants can do and not do. They cannot rely on the common law as an alternative process of review. In any case, one should also have regard to how the grounds of review are articulated. For example, in paragraph 6 of the founding affidavit the applicants conclude as follows:

"64. In addition, it is submitted that all and any conduct, action, proceedings and procedures of any of the respondents, the Committee, as well as any officials or employees of the Council and the Board subsequent to the Committee's resolution in March 2009, in connection with further professional conduct inquiry steps against applicants were irregular, ultra vires and invalid and/or voidable."

[29] The grounds of review aforesaid in my view, do not justify deviation from the provisions of PAJA dealing with the review of administrative actions by relying on the common law grounds of review. The applicants made a choice not to resort to condonation or extension of time as contemplated in section 9. The period of -180 days referred to in section 7 may be extended for a fixed period by agreement between the parties or failing such agreement between the parties, by a court or tribunal on application by the person or administrator concerned.[9]

[30] The applicants resorted to an attitude not opened to anything, save for their contention on *functus officio* and alleged 'internal remedy' in terms of regulation 8. This is a risk they took by not asking the respondents to agree to extension of time or by the court as envisaged in section 9.

Functus officio

[31] I deal with this issue in case I was to be wrong regarding the preliminary issues alluded to in the preceding paragraphs. The

highlights of the applicants' case both before the professional conduct committee and in these proceedings is that the preliminary

inquiry committee insofar as it relates to its decisions of 25 February 2010 and 28 June 2011, is *functus officio*. The principle

that under *functus officio*, once a final determination of issues has been made, absent exception, an arbitrator or a decision maker is powerless to vacate, modify, supplement, correct, change, explain, reconsider, reopen, revise, re-examine or withdraw a final determination, has to be seen in context. The context is the applicable legislative frame work and the facts of the present case. The real question being whether the decision of 26 March 2009 in terms of which the preliminary inquiry committee found that Drs Stern and Brummer have no case to answer amounted to a final decision and thus excluding any reconsideration of any further information even if such further information or evidence is relevant in that it establishes a *prima facie* evidence of unprofessional conduct. Put differently, the question is whether acceptance of the explanation or response by the two doctors to the complaint lodged against them precluded the preliminary inquiry committee from reopening or reconsidering its prior decision based on the new information or evidence. Earlier in paragraph [22] of this judgment I referred to the meaning of "preliminary" and same should find application to the topic under discussion herein.

[32] The principle of the *functus officio* applies only to final decisions.[10] It usually applies where rights or benefits have been granted- and thus when it would be unfair to deprive a person of an entitlement

that has already vested.[11] Thirdly, an administrative decision maker may vary or revoke even such a decision if the empowering legislative authorizes him or her to do so, although such a decision would be subject to procedural fairness having been observed and any other conditions.

[12] Ideal hereunder from paragraph 42 with the aspects relevant to the procedural fairness.

[33] I must immediately say there are no vested rights on the facts of the present case. Such rights in my view would have vested in the following circumstances: If the reconsideration of the preliminary inquiry and the decision thereof was based on the same information as on 26 March 2009 when the preliminary inquiry committee resolved not to institute disciplinary inquiry against the two due to lack of *prima facie* evidence. In those circumstances, the principle of *functus officio* would have found application. Secondly, if the two doctors were tried and found not guilty in the disciplinary inquiry, in which case

their rights not to be tried twice would have vested. But this is not what the fact of the present case speak to. They were never tried when the decision was taken on 26 March 2009 and therefore the decision aforesaid conferred no rights of any kind on the two doctors. The conclusion should also be seen in the context of the legislative framework I discuss hereunder.

Legislative framework

[34] The Council may from time to time establish such committees as it may deem necessary, each consisting of so many persons, appointed by the Council as it may determine but, including appeal committees referred to in subsection (2) of section 10 of the Act, at least one member of the council, who shall be the chairperson of such committee. Section 10 deals with establishments of various committees. Such committees include disciplinary committees as the Council may deem necessary. The powers of committees are delegated by the Council without the Council divesting itself of any such powers.[13] In addition, the Council shall from time to time establish an ad hoc disciplinary appeal Committees , each consisting of, as Chairperson,

a retired Judge or retired Magistrate, or any attorney or advocate with at least 10 years' experience , not more than two registered

persons drawn from the profession of the registered person in respect of whose conduct a disciplinary committee of a profession board had held an inquiry, and a member of the council appointed to represent the community which member shall not be a registered person.[14]

[35] Preliminary enquiry Committee and Professional conduct Committee are some of such Committees established in terms of section 10 read with the regulations alluded to earlier in this judgment. However the operations of these Committees that is, the preliminary inquiry Committee and the professional conduct committee are overseen through the Registrar by the Board established in terms of section 15 of the Act. Such operations are regulated in terms of sections 41 and 42 read with regulations 4 and 6 which were applicable at the time of the dispute in the present proceedings.

[36] For the purpose of these proceedings I will only refer to the provisions of the Act and regulations insofar as they might be

relevant to give context why I come to the conclusion that the functus officio point relating to the decisions of 25 February 2010 and 28 June 2011 has no substance. A professional board shall have the power to institute an enquiry into a complaint, charge or allegation of unprofessional conduct against any person registered under this Act ...[15] These powers have been delegated or assigned to both preliminary inquiry committee and professional conduct committee to be executed

in a manner as contemplated in regulations 4 and 6 respectively.

[38] The Registrar may with the approval of the chairperson of a professional Board appoint an officer of the professional board as an investigation officer for the purposes of this section.

[16] The preliminary inquiry committee should be seen as standing committee assigned to perform these functions as contemplated in section 41A (1). The investigation of complaints are conducted in accordance with regulation 4 and the registrar plays the role of facilitating information to both the preliminary inquiry, the complainant and the person against whom a complaint is lodged. For example, the registrar may after receiving a complaint, call for further information or an affidavit confirming the allegations by the complainant,[17] and must, subject to paragraph (a) after receiving a complaint, register the complaint and notify the respondent (in this case, the doctor against whom a complaint is lodged) of the complaint, together with copies of any further information or affidavits referred

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to in paragraph (a) to him or her[18] requesting a written response from him or her within 40 working days from the date of receipt of the notification by the respondent.[19] On receipt by the registrar of further information and written response referred to in sub regulation (1) (a) and (b) of regulation

4, he or she must submit the complaint, such further information and the written response to the preliminary committee of enquiry ...[20]

[39] An investigating officer, (in the present proceedings the preliminary inquiry committee) , which carries out an investigation under section 41A, shall compile a report of the investigation, and the report so compiled shall be submitted to the registrar.[21] If such a report reveals prima facie evidence which in the opinion of the chairperson of the professional board makes it desirable that an inquiry - be instituted, the registrar shall serve a copy thereof on the registered person concerned (in the instant case, Drs Stern and Brummer).[22] On the other hand, if such report does not reveal prima facie evidence of unprofessional conduct contemplated in this Act, the registrar shall serve a copy thereof on the registered person concerned.[23]

[40] It appears from these provisions that the investigating officer or preliminary inquiry committee, which has investigates a complaint, all what it did to do upon conclusion of the investigation, is to compile a report. And, in the report it must indicate whether there is a prima facie evidence or not. Its main function is collection of information or evidence and thereafter compile a report on whether or not there is a prima facie evidence. This does not attract the application of functus officio principle except insofar as the preliminary inquiry committee resorts to the utilization of the provisions of regulation 4 in a situation where the respondent {that is, the person against whom a complaint is lodged}, fails to respond to a complaint within the stipulated period and or where a sanction is imposed on the ground of contempt of council or on the ground that the transgression is less serious that a fine can be fixed without a full blown disciplinary inquiry.[24]

[41] It is not like the two doctors were tried and found guilty or not guilty in a disciplinary inquiry. All what the preliminary inquiry committee did was to determine whether or not there was prima facie evidence for unprofessional conduct and on 26 March 2009 they found that there was none. This did not constitute a verdict capable of finality; neither did this preclude the preliminary inquiry committee to reconsider its decision based on fresh evidence. It would be a mockery of justice to refuse to hold preliminary inquiry in the face of prima facie evidence which had never been tested. The functus officio point is therefore destined to fail.

Alleged failure to afford the two doctors the opportunity to be heard

[42] In his written heads of argument, counsel for the two doctors makes the point as follows:

"6.7 In the circumstances, applicant were also not given opportunity to make any submissions and or to provide any response or further

explanations in respect of any of the aforesaid additional material so placed before the aforesaid committee."

[43] There is no merit to the submission seen in the light of the following: The responsibility to inform registered person against

whom a complaint has been lodged is that of the registrar as contemplated in regulations 4(1) (a) and (b) (i). Furthermore, the

registrar may in terms of subparagraph (2) (c) of regulation 4 refer the complaint directly to the preliminary committee of inquiry or the chairperson of such committee for instructions on the information required to complete a full investigation of the matter. The registrar was therefore entitled to go straight to the preliminary inquiry committee with the new information. In the instant matter, the preliminary inquiry committee was entitled to receive from the registrar further information and reports after their decision of 26 March 2009 without the registrar having to revert to the two doctors. That did not amount to flouting the right to fair hearing seen in the context of the following provisions of the regulations:

43.1 Once a prima facie evidence of unprofessional conduct is found to exist, the preliminary inquiry committee so informs and directs the registrar to arrange for the holding of the inquiry, of importance, the registrar should accordingly inform the person who lodged the complaint and the person against whom the complaint was lodged.[25] The two doctors in these proceedings were at the early stage almost immediately after the decisions of 25 February 2010 and 28 June 2011 informed of the impending disciplinary inquiry. This was in line with the provisions of regulation 4(8) in terms of which the registrar is required to issue a notice addressed to the person against whom a complaint is lodged stating the date and terms when and the place where the inquiry will be held and enclosing the charge sheet as formulated by the pro-forma complainant.[26] The notice and charge sheet referred to in subregulation of regulation 5, (1) must be served - at least 60 days prior to the date

of the inquiry and a copy of the notice and charge sheet must be served or posted to the respondent's legal representative, if

appointed at the time of service or posting to the respondent.[27] This is all to give a respondent fair hearing and sufficient time to prepare for his or her defence. It is not the applicants' case that this did not happen.

43.2 Furthermore, a respondent is entitled in terms of regulation 7 to request for further particulars,[28] which had actually happened in this case. In order to determine the issues in dispute, the pro-forma complainant must arrange a pre-inquiry conference, which must be attended to by both parties or their legal representatives, if any, on any date at least seven days before the date of the inquiry at a mutually convenient time and venue,[29] at which pre-inquiry conference, parties play open cards with each other for example, copies of all documents, reports, notes, X-rays or any other exhibits which a party intends to use at the inquiry must be furnished to the other party.[30]

[44] All of the above is to ensure that the right to fair inquiry or hearing, is protected. In the present case, the two doctors were informed of the decisions of 25 February 2010 and 28 June 2011 in time. All the processes contemplated in regulations 4, 5 and 8 alluded to in the preceding paragraphs were adhered to long before 30 September 2014 being the date on which the matter was argued. By that time, the two doctors had sufficient time and all relevant information they needed for the disciplinary inquiry. It was never their case that they did not take the advantage of all these pre-hearing procedures.

[45] Consequently an order is hereby made as follows:

45.1 The application is hereby struck off from the roll for reasons articulated in this judgment.

45.2 The applicants to pay the costs of the application.

MF LEGODI

JUDGE OF THE HIGH COURT

Counsel for Applicants: ADVOCATE VAN DER SPUY

Instructed by: GILDENHUYS MALATJI INC

Counsel for the respondents: ADVOCATE MAENETJE SC

Instructed by: MACROBBERT INCORPORATED

[1] Section 7(2) (a) of PAJA (Act 3 of 2000)

[2] See subsection (2) (b) of section 7 of PAJA.

[3] See sub section (2) (c) of section 7 of PAJA.

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- [4] Pharmaceutical Manufactures Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Another 2000(2) SA 674 (CC; see also Bato Star Fishing Pty Ltd v Minister of Enviromental Affairs and Tourism and Others [2004] ZACC 15; 2004 (4) SA 490 (CC at para 22
- [5] See further Bato Star supra at para 22
- [6] Minister of Health and Another v New Clicks South Africa Pty Ltd and Other 2006 (2) SA 31 1 (CC) at para 95
- [7] See New Clicks supra at para 96.
- [8] "Administrative action", a paper delivered by Professor C Hoexter for a comperative administrative jus tice workshop held at Cape Town from 20-22 March 2005
- [9] Subsection (1) (b) of section 9 of PAJA.
- [10] President of Republic of South Africa v South Africa Rugby Football Union & 2 others 2000 (1) SA 1 CC at para [44]; see also Retrial Motor Industry Organisation and Another v Minister of Water affairs and Another 2013 3 All SA 435 (SCA) at Para 25
- [11] Retail Motors Organisation and Another v Minister of Water and Environmental Affairs and another GNP 12 November 2012 (case 51148\12) unreported.
- [12] La Rose -Innes Judicial Review of Administrative Law in South Africa (1963) at 99; See further para 25 Retail Motors Industrial supra.
- [13] Section 10 (I) (a) and (b) of the Act.
- [14] Subsection 2 of section 10 of the Act
- [15] Section 41(1) of the Act.
- [16] Section 41A (1) of the Act.
- [17] Regulation 4(1) (a) GG No. 31859 6 February 2009
- [18] Regulation 4 (1) (b)
- [19] Regulation 4 (1) (b) (i)
- [20] Sub-regulation (2) of regulation 4
- [21] Subsection (8) (a) of section 41A
- [22] Subsection (8) (b) (ii) of section 4 1A
- [23] Subsection (8)(a) (iii) of section 41A
- [24] See subsections (8) and (9) of section 42 of the Act; see also regulation 4(8)
- [25] Regulation 4(8)

[26] Regulation 5 (1)

[27] Regulation 5(2)

[28] Regulation 7 (1)

[29] Regulation 8(1)

[30] Regulation s 8(1) (c)

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/stern-and-another-v-health-unknown-topic-agpphc-2017>

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