



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

**Reportable
Case no: 163/2021**

In the matter between:

MESHACK MAPHOLISA N O

APPLICANT

and

ADV K I A PHETOE N O

FIRST RESPONDENT

PROF S M DAWJEE N O

SECOND RESPONDENT

DR J BASSON N O

THIRD RESPONDENT

DR M N MABASA N O

FOURTH RESPONDENT

MS CHOKOE N O

FIFTH RESPONDENT

MS D P MTHIMUNYE-HLUYO N O

SIXTH RESPONDENT

DR P MILLER

SEVENTH RESPONDENT

THE HEALTH PROFESSIONS COUNCIL

OF SOUTH AFRICA

EIGHTH RESPONDENT

MALINDA MILLER

NINTH RESPONDENT

VIOLET GAOLEBALE SENNA

TENTH RESPONDENT

Neutral citation: *Mapholisa N O v Phetoe N O and Others* (163/2021) [2022]
ZASCA 168 (30 November 2022)

Coram: PLASKET and MABINDLA-BOQWANA JJA and WINDELL, CHETTY
and MALI AJJA

Heard: 1 November 2022

Delivered: 30 November 2022

Summary: Administrative law – review of decision of one organ of state by another – whether review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or principle of legality – exhaustion of internal remedies – applicability of s 7(2) of PAJA or under principle of legality.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius J, sitting as court of first instance) :

- 1 Leave to appeal is granted with costs, including the costs of two counsel.
- 2 The appeal is upheld with costs, including the costs of two counsel.
- 3 The order of the high court is set aside and replaced with the following order:
 - ‘1 The decision by the Professional Conduct Committee of the Medical and Dental Professions Board, as contemplated in the Health Professions Act 56 of 1974, constituted of the first to sixth respondents and taken on 3 July 2017 (the decision) is reviewed and set aside.
 - 2 The decision is substituted with the following:
“The point in limine is dismissed.”
 - 3 The seventh respondent is directed to pay the applicant’s costs.’

JUDGMENT

Mali AJA (Plasket and Mabindla-Boqwana JJA and Windell and Chetty AJJA concurring):

Introduction

[1] This is an application for leave to appeal brought by the applicant, Mr Meshack Mapholisa in his official capacity (Mr Mapholisa). The application is against an order of the Gauteng Division of the High Court, Pretoria (the high court) dismissing an application to review a decision of the Professional Conduct Committee (the PCC) of the Health Professions Council of South Africa (the HPCSA). After the high court refused leave to appeal, Mr Mapholisa petitioned this Court. It referred his application for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013, and directed that the parties be prepared to argue the merits of the appeal if called upon to do so.

Factual background

[2] Mr Mapholisa was appointed as a *pro forma* complainant by the Registrar of the HPCSA, in terms of the Health Professions Act 56 of 1974 (the Act), read with the Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the Act (the regulations).¹ As Mr Mapholisa brought the application for review, he litigated as an organ of state. So too is the body that took the decision under challenge.

[3] The first to sixth respondents are members of the PCC, a committee established in terms of s 15(fA) of the Act, read with regulation 6 of the regulations. They are cited in their official capacities. The seventh respondent, Dr Percy Miller (Dr Miller) is a registered medical doctor under the Act and practising as such in the private sector. He was the respondent in a complaint of unprofessional conduct referred to the PCC. The eighth respondent is the HPCSA, a statutory body established in terms of s 2 of the Act. The ninth respondent is Ms Malinda Miller (Ms Miller). She lodged the complaint against Dr Miller. The tenth respondent is Ms Violet Gaolebale Senna (Ms Senna), who is now deceased. She was Dr Miller's patient and the complaint laid against Dr Miller was in respect of his treatment of Ms Senna. Before dealing with the two points that arise in this application, it is necessary to consider the disciplinary system created by the Act and the Regulations.

The disciplinary system and the complaint

[4] The Act provides for the establishment of professional boards for the respective medical professions and the Medical and Dental Professions Board is one of those (the Board). The procedure for dealing with complaints against health professionals is set out in the regulations. Regulation 2 deals with the lodging of a complaint, requiring that the complaint must be in writing and be addressed either to the registrar of the HPCSA, the HPCSA itself or a professional board of the HPCSA. In terms of reg 4,

¹ Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct GN R102, GG 31859, 6 February 2009.

the registrar is the official, who deals with the complaint initially, irrespective of whom it was addressed to, and may, for instance, call for more information.

[5] The complaint is then referred to a preliminary committee. Its task is to scrutinise complaints and decide on the substance of same. In the process, the committee may dismiss frivolous complaints. It would proceed with complaints that appear to have merit. At this stage, the respondent is asked to state their case. The preliminary committee may dismiss a complaint if it is satisfied with the explanation given by the respondent. If, however, it is satisfied that there are grounds to proceed, it must refer the complaint to an inquiry.²

[6] In terms of reg 6, the chairperson of the appropriate professional board, on the request of the registrar, must appoint a PCC to enquire into the matter. The PCC hears the evidence and decides on the guilt or innocence of the respondent. In terms of reg 11(1), 'the respondent or the *pro forma* complainant may appeal to the appeal committee against the findings or penalty of the professional conduct committee or both such finding and such penalty'.

[7] In terms of reg 11(9), the appeal committee considers the appeal 'on the papers'. Having considered representations and argument by the parties, it then must determine the appeal. In terms of reg 11(11), the decision of the appeal committee 'will be of force and effect from the date determined by the committee and may be set aside by a High Court if approached in terms of section 20 of the Act'. Section 20 provides a right to appeal to the High Court against all decisions that may be made by the HPCSA or its structures.

[8] On 8 July 2013, Ms Miller lodged a complaint with the HPCSA arising from doctor-patient interactions between Dr Miller and Ms Senna. Ms Miller made allegations of misconduct against Dr Miller. Based on these allegations, the Board appointed a Committee of Preliminary Inquiry (the prelim committee) to investigate the complaint and make a determination thereon. The prelim committee convened on 12

² Regulation 4(8) of the regulations.

December 2013 and resolved that Dr Miller was guilty of misconduct and that a penalty of a fine of R10 000 be imposed.

[9] In his capacity as a *pro forma* complainant, Mr Mapholisa prepared charges against Dr Miller, which were served on Dr Miller on 11 February 2014. Dr Miller was given an option to accept or reject the admission of guilt fine determined by the prelim committee. Dr Miller rejected payment of this fine, after which a Professional Conduct Inquiry ensued.

[10] At the inquiry a point *in limine* was raised on Dr Miller's behalf. It was argued that Ms Miller, who laid the complaint, had no *locus standi* because she was not Dr Miller's patient and was not in a position to provide evidence as to what transpired between Dr Miller and Ms Senna. On 3 July 2017, the PCC upheld the point *in limine*. The PCC furnished the following reasons for its decision:

' . . . the regulations are not clear on the issue of locus standi. The committee is now of the view that it must fall back on the rules of evidence and procedure, as clarified by the case of De La Rouviere v South African Medical and Dental Council.

The committee therefore have decided that the complainant in this case [Ms Miller] has no locus standi and therefore the point in limine is upheld.'

[11] Mr Mapholisa approached the high court for the review and setting aside of the decision of the PCC. Dr Miller raised a point *in limine* namely that Mr Mapholisa had failed to exhaust the internal remedy of an appeal provided for in terms of the regulations, as he was obliged to do in terms of s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). The high court dismissed the application on the basis of the point *in limine*. The high court also dealt with *locus standi* issue that had been upheld by the PCC, concluding that the PCC had not acted irregularly.

[12] The high court's reasons for its finding that Ms Miller did not have standing were the following:

'There is also another issue. The seventh respondent attended to his patient, the tenth respondent on 14 May 2012. The ninth respondent (not the patient of the seventh respondent) laid a complaint with the council on 8 July 2014. The patient himself laid no complaint. The

ninth respondent had no factual information upon which the Committee could rely. Applicant informed the Committee that he would not call the patient as a witness. There would therefore have been no admissible evidence before the Committee. Applicant in his reply to a request for Further Particulars stated that the complainant had cited from “a humanitarian perspective”. It is of course true that “any person” can lay a complaint in terms of the Regulations. The Regulations however makes detailed provisions for a “sifting” process, by way of “preliminary inquiry” for instance. The Regulations, with whom a [complaint] must be lodged, must also categorise it according to their significance and seriousness. It is therefore clear in my view that not every complainant has a right to be heard by a Committee totally irrespective of his or her knowledge of any alleged misconduct by a medical professional. Some admissible knowledge or intent would at least have to be present if the particular patient does not give evidence. The decision of the Committee was therefore correct.’

The issues

[13] The principal issue that arises in this application is whether the high court was correct that the internal remedy of an appeal ought to have been exhausted in terms of s 7(2) of the PAJA, given that the review was brought by one organ of state against another. If the answer is ‘yes’, the application will be unsuccessful. If the answer is ‘no’, the merits of the matter may have to be decided, ie, whether the PCC’s decision to uphold the point *in limine* should be reviewed and set aside.

The review of administrative action

[14] Generally speaking, the decision-making of a statutory disciplinary body, such as the PCC, would constitute administrative action as defined in s 1 of the PAJA. It provides that administrative action means ‘any decision taken, or any failure to take a decision, by . . . an organ of state’ when ‘exercising a public power or performing a public function in terms of any legislation’ but does not include such species of public power as executive, legislative and judicial powers. Section 6(1) of the PAJA provides that administrative action is subject to review and s 6(2) sets out the grounds for review.

[15] Section 7(2) places a procedural hurdle in the way of a person wishing to review an administrative action. It provides:

‘(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), 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 this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.’

[16] If s 7(2) applies, this would non-suit Mr Mapholisa because it is common cause that he has not exhausted the internal remedy of the appeal created by reg 11 and neither has he applied to be exempted from the obligation. Assuming for present purposes that the appeal procedure applies to a finding such as the one made by the PCC in this case, the result would be, if the PAJA applies, that the high court was precluded from reviewing the PCC’s decision, and thus correctly dismissed the application.

[17] If, however, the PAJA does not apply, the position will be different. In order to determine whether or not the PAJA applies, it is necessary to consider the Constitutional Court’s decision in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (Gijima)*.³ The court found that the PAJA did not apply when an organ of state reviewed its own decision, and that the pathway to review in these circumstances is the principle of legality that is sourced in s 1(c) of the Constitution, the founding value of the rule of law. The reason for this conclusion was that s 33(1) of the Constitution, to which the PAJA gives effect, ‘ . . . creates rights enjoyed only by private persons’ and that ‘ . . . the bearer of obligations under the section is the State’.⁴ The court had earlier stressed that it was not considering ‘a scenario where an organ of state that is in a position akin to that of a private person (natural or juristic) may be seeking to review the decision of another organ of state’.⁵ It thus left open the question

³ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (Gijima)* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC).

⁴ *Ibid* para 29.

⁵ *Ibid* para 2.

that we are required to answer in this case, namely whether PAJA applies to one organ of state reviewing another organ of state.

[18] It was argued on Dr Miller's behalf that *Gijima* is only applicable to self reviews and that it does not apply to this matter because it concerns an organ of state reviewing the decision of another organ of state. I disagree. Despite the fact that in *Gijima* an organ of state sought to review and set aside its own decision, the Constitutional Court quite clearly reasoned that the rights under s 33 of the Constitution are enjoyed by private persons and not organs of state. This reasoning applies, it seems to me, whether an organ of state is reviewing its own decision, as in *Gijima*, or reviewing the decision of another organ of state, as in this case.

[19] I am fortified in my conclusion by the view expressed by this Court in *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* when it remarked:

'Although the scenario seemed to have been left open by the Constitutional Court in *Gijima*, it seems doubtful that the SIU would be regarded as being *in a position akin to that of a private person*. The Constitutional Court in *Gijima* went on to say "it seems inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights. This must, indeed, be an indication that only private persons enjoy rights under section 33", and by extension under PAJA.⁶

[20] There is an exception to the *Gijima* rule. It is that if an organ of state applies to review an administrative action when acting in the public interest, rather than in its own interest, it steps into the shoes of private persons, and then may use the PAJA.⁷ But the exception does not apply in this case. Mr Mapholisa makes no claim to act in the public interest and clearly stated in the founding affidavit that he brought the review

⁶ *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* [2021] ZASCA 90; [2021] 3 All SA 791 (SCA); 2022 (5) SA 416 (SCA) para 25.

⁷ See *Hunter v Financial Sector Conduct Authority and Others* [2018] ZACC 31; 2018 (6) SA 348 (CC); 2018 (12) BCLR 1481 (CC) para 49 and *Compicare Wellness Medical Scheme v Registrar of Medical Schemes and Others* [2020] ZASCA 91; 2021 (1) SA 15 (SCA) para 21.

application 'in my capacity as *pro forma* complainant', duly appointed as such by the registrar of the HPCSA.

[21] As the pathway to review in this case is the principle of legality under the common law, and not the PAJA, regulates the procedure. And the common law has no rule similar to s 7(2) of the PAJA. In fact, the common law approach to the exhaustion of internal remedies is to the exact opposite effect – that there is no duty to exhaust internal remedies, unless a statute places an obligation on a person to do so.⁸ As Jafta J said in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd*,⁹ where internal remedies are created, the common law rule is to the effect that 'the choice was that of the aggrieved party either to pursue those remedies before going to a court of law or to proceed straight to seek the review of the offending decision in court'. The mere fact that an internal remedy has been created does not give rise to an inference that there is a duty to use it.¹⁰

[22] There is no indication in either the Act or the Regulations that parties to disciplinary proceedings must first exhaust internal remedies before they may apply to review administrative decisions taken against them. The result, is that, in this case, there was no obligation placed on Mr Mapholisa by the legislation to exhaust the internal remedy, and his failure to have done so did not stand in the way of the high court reviewing the decision of PCC. The high court erred in its conclusion to the contrary.

⁸ See L G Baxter *Administrative Law* (1984) at 720-723; Plasket 'The Exhaustion of Internal Remedies and section 7 (2) of the Promotion of Administrative Justice Act 3 of 2000' (2002) 119 *SALJ* 50 at 50-51; see also Hoexter and Penfold *Administrative Law in South Africa* 3 ed (2021) at 745-746.

⁹ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd and Others* [2013] ZACC 48; 2014 (3) BCLR 265 (CC); 2014 (5) SA 138 CC para 115.

¹⁰ See *Bindura Town Management Board v Desai & Co* 1953 (1) SA 358 (A) at 362H-363H and *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502G-503D.

The merits of the review

[23] As far as the merits are concerned, I think the issue is clear. It is so that the person who lodged the complaint against Dr Miller was not his patient. But the definition of the term 'complainant' in reg 1 of the regulations is wide enough to include her. It defines that term to mean 'any natural or juristic person, group or professional body, including a professional association or society, a teaching or training institution, or any health care or related facility, that lodges a complaint against a registered person about alleged unprofessional conduct'.

[24] The PCC found that Ms Miller did not have *locus standi* to lay a complaint. In terms of s 3(k) of the Act, one of the objects and functions of the the PCC is to exercise its powers and discharge its responsibilities in the best interest of the public and in accordance with national health policy determined by the Minister. The definition of complainant in reg 1 must be interpreted in this context. A wide group of persons and bodies are identified as potential complainants so as to protect the public effectively from professional misconduct by health professionals, and thus further the public interest.

[25] The PCC seems to have been confused between two distinct concepts – who may lodge a complaint, on the one hand, and how a complaint may be proved on the other. Its reasoning appears to have been that because the complainant was not the victim of Dr Miller's alleged unprofessional conduct, and thus could not give admissible evidence to prove it, she had no standing to lodge a complaint. In this the PCC made an error of law that was material, with the result that the decision to stop the disciplinary process was invalid.

Conclusion

[26] In my view, Mr Mapholisa has established reasonable prospects of success, with the result that his application for leave to appeal must succeed. He has also established that the high court erred in dismissing his application because he had not exhausted the internal remedy of an appeal, and that the PCC's decision was tainted by irregularity. He must therefore succeed in his appeal.

[27] In the result I make the following order:

1 Leave to appeal is granted with costs, including the costs of two counsel.

2 The appeal is upheld with costs, including the costs of two counsel.

3 The order of the high court is set aside and replaced with the following order:

‘1 The decision by the Professional Conduct Committee of the Medical and Dental Professions Board, as contemplated in the Health Professions Act 56 of 1974, constituted of the first to sixth respondents and taken on 3 July 2017 (the decision) is reviewed and set aside.

2 The decision is substituted with the following:

“The point in limine is dismissed.”

3 The seventh respondent is directed to pay the applicant’s costs.’

N P MALI
ACTING JUDGE OF APPEAL

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