

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D9060/2018D

In the matter between:

Govindsamy Venkatasami Naidoo

Applicant

and

The KwaZulu-Natal Law Society

First Respondent

Sivi Pather

Second Respondent

Judgment

Lopes J

[1] This is a review application is brought by Govindsamy Venkatasami Naidoo ('Mr Naidoo') against the KwaZulu-Natal Law Society ('the Law Society'). He lodged a complaint against his erstwhile attorney, the second respondent, Mr Sivi Pather. The allegations were considered by the Complaints Committee ('the committee') of the Law Society, and dismissed. Mr Naidoo seeks to review that decision and have the matter returned to the Law Society for reconsideration.

[2] In the original notice of motion which was issued on the 6th August 2018, the principal relief sought by Mr Naidoo was an order compelling the Law Society to provide him with what he described as 'comprehensive reply as in addressing all of the elements and aspects of my evidence and complaint as

tabulated in my submissions'. In the alternative, he sought an order that this Court review the findings of the committee, and compel the Law Society to rehear the complaint afresh by a different committee. He further sought to be allowed to continue making submissions in person, which submissions were initiated with Ms Pearl Mfusi 'the Director of the Law Society' or for further relief to be determined by this Court.

[3] In Mr Naidoo's heads of argument, the relief sought is that his complaint be remitted to the Law Society for reconsideration. In a joint statement of issues delivered by Mr Naidoo and the Law Society, he contends that the issue to be decided is whether the committee's decision to dismiss his complaint against Mr Pather falls to be reviewed and set aside because:

- (a) irrelevant considerations or evidence in the form of the findings of the learned magistrate in the Regional Civil Court in Durban in an application to stay his prosecution were taken into account; and/or
- (b) relevant considerations and/or evidence, in particular two letters written by Mr Pather on the 3rd and 30th March 2009 were ignored or not properly dealt with by the committee.

[4] Mr *G J M Randles*, who appeared for Mr Naidoo, clarified that Mr Naidoo sought only the review of the committee's decision, and in the alternative, that I should make an order striking Mr Pather from the roll of attorneys.

[5] The history of this drawn-out and unfortunate matter may be summarised as follows:

- (a) Between April, 2005 and February, 2006, Mr Naidoo was employed as the Managing Director of Afripath Medical and Research Laboratory (Pty) Ltd ('Afripath').
- (b) In February, 2006 Afripath was placed into provisional liquidation.
- (c) During May, 2006, two creditors of Afripath, the Ithala Development Finance Corporation Limited ('Ithala') and the Industrial Development Corporation of South Africa ('the IDC') commenced investigations into allegedly fraudulent conduct by Mr Naidoo in the operations of Afripath.
- (d) On the 6th June, 2006, Ithala caused a summons to be issued against Mr Naidoo for payment of the sum of R1 495 287.84. The cause of action was an alleged fraud, committed by Mr Naidoo.
- (e) During August 2006 the liquidators of Afripath commenced an enquiry into the affairs of the company, in terms of s 417 of the Companies Act, 1973. Mr Naidoo was required to attend the s 417 investigation, and he did so and was legally represented.
- (f) During April of 2007, Mr Pather, as the erstwhile legal representative of Mr Naidoo, received a summons and subpoena to attend the s 417 Enquiry. He appeared at the enquiry and handed over a number of documents, apparently to Mr Rikhotso, the attorney who represented the IDC. These documents are contained in the papers before me. Mr Pather contends that he handed over no more than copies of the front cover of various 'closed matters' dealt with by him on behalf of Mr Naidoo, together with a copy of the inside of each of those covers containing fees charged by Mr Pather, and payments made to Mr Pather by Mr Naidoo in each matter.

Apparently, some payments were made to Mr Pather directly from Afripath.

- (g) Mr Naidoo and Mr Pather were related by marriage, Mr Naidoo having married Mr Pather's first cousin. During Mr Naidoo's tenure as Managing Director of Afripath, Mr Pather represented him in various matters, apparently concerning both his business and personal life. One of those matters was the conduct of Mr Naidoo as Managing Director of Afripath.
- (h) The relationship between Mr Naidoo and Mr Pather soured, to the extent that in 2006 Mr Pather's mandate to represent Mr Naidoo was terminated. It appears from the voluminous record of the proceedings in this matter that this was because a fee dispute arose between them, with Mr Naidoo refusing to pay Mr Pather's fees. The matter was eventually resolved when Mr Pather decided to write off a portion of the fees in order to maintain peace in the family environment. This was in approximately December of 2006.
- (i) Mr Naidoo maintains that he and Mr Pather parted company because Mr Pather wished to join the attorneys' panel of the IDC, who were intent on proceeding against him. Mr Pather's firm did join the attorneys' panel of the IDC, but only two years' later, and after a protracted and difficult application process. The allegations regarding Mr Pather's alleged motive were never established by Mr Naidoo.
- (j) At this stage, criminal investigations were continuing into the conduct of Mr Naidoo during his tenure at Afripath.
- (k) After parting ways with Mr Pather, Mr Naidoo then instructed Mr Anil Rabinath, a legal practitioner in this division. Mr Pather handed

over to Mr Rabinath all the 'live matters' concerning Mr Naidoo, and which were in his possession at the time his mandate was terminated. In addition to those files, Mr Pather was in possession of a number of 'closed files' – a reference to matters which had been finalised by Mr Pather and which would not, in the normal cause, have been sent to Mr Naidoo's new attorney.

- (l) On the 7th April 2008 Mr Naidoo was criminally charged with fraud, the complainant being Ithala. On the 17th December 2008, he was again criminally charged with fraud, and the IDC was the complainant.
- (m) The Ithala criminal trial was set down for hearing in the early part of March, 2009. At the outset of the criminal trial, Mr Naidoo sought an adjournment on the basis that Mr Pather still had in his possession a number of documents which were important to the conduct of Mr Naidoo's defence.
- (n) Between March of 2009 and March 2014 both criminal trials were repeatedly adjourned. There were two main reasons for this:
 - (i) Mr Naidoo adamantly refused to accept Mr Pather's statement that he had no further documents belonging to Mr Naidoo in his possession, and that he had revealed privileged information in the documents which Mr Pather handed over at the s 417 Enquiry.
 - (ii) A fee dispute had arisen between Mr Naidoo and his then (third) attorney Mr Vengtas, which affected the legal representation of Mr Naidoo.
- (o) It was alleged in the record that Mr Naidoo had also fallen-out with his erstwhile attorney, Mr Rabinath over the non-payment of his

fees, and the same was to happen with Mr Vengtas and his later attorney, Mr van der Merwe.

- (p) On the 13th March 2014, Mr Naidoo brought an application for a permanent stay of proceedings in the Ithala criminal prosecution. On the 3rd July 2014, Mr Naidoo brought another application, this time in the IDC matter. No relief was set out in the notice of motion, which was prefixed to his affidavit. His affidavit contained prayers for the following relief:
- (i) Ordering the prosecution to furnish him forthwith with a list itemizing each and every document of his handed to Mr Rikhotso.
 - (ii) Ordering the prosecution to render assistance for the recovery of his documents from the possession of his erstwhile attorneys Messrs Vengtas and Rabinath.
 - (iii) Ordering the prosecution to preserve each and every document of his, which was handed to Messrs Rikhotso and Vengtas.
 - (iv) Ordering Mr Vengtas to produce his files and documents.
 - (v) Ordering Mr Rikhotso to produce all the files and documents handed to him by Mr Pather.
- (q) Despite the headings to the notice of motion and his affidavit, no relief was sought in either document for a stay of prosecution. In his affidavit Mr Naidoo states that in the event that his documents are lost, he would be 'constrained' to make an application for a permanent stay of the IDC prosecution. Answering affidavits were

delivered by Mr Rikhotso, who denied having ever received from Mr Pather, the documents which Mr Naidoo alleges he did. He annexes to his affidavit a letter sent to him on the 10th July 2007, attached to which were the documents he received from Mr Pather. They are, not surprisingly, the same documents which Mr Pather alleges that he gave to Mr Rikhotso.

- (r) On the 17th October 2014 the learned magistrate ordered that Mr Naidoo's legal representatives could cross-examine Mr Pather. The matter dragged on in a desultory fashion until the 10th April 2017. The learned magistrate, exhibiting the patience of Job, listened to tedious and repeated arguments about the trial prejudice suffered by Mr Naidoo, and various excuses for adjourning the matter from time to time. She eventually ruled that the application for a permanent stay of prosecution be dismissed. During these proceedings, Mr Pather endured cross-examination on various days from the 21st November 2014 to the 24th February 2016, covering 171 pages of the record.
- (s) On the 10th July 2017 Mr Naidoo then lodged a complaint with the Law Society against Mr Pather. Affidavits were exchanged in due course, and during December 2017 Mr Naidoo's complaint was dismissed by the committee.
- (t) Mr Naidoo was, nonetheless, dissatisfied, because no reasons had been given by the committee. He had been merely informed by email that the committee had decided that Mr Pather had not acted unprofessionally. Pursuant to further complainants by Mr Naidoo, the matter was referred to the Executive Committee of the Law Society, which resolved that the committee should draft a

comprehensive report dealing with the dismissal of Mr Naidoo's complaint.

- (u) On the 10th May 2018 a document entitled 'Report from members of the ad hoc complaints committee' ('the report') was delivered by the Law Society members who presided. They were Mr C T James and Mr O D Hart, both highly experienced and long-standing legal practitioners in Pietermaritzburg.
- (v) Mr Naidoo was still not satisfied that the report was 'comprehensive'. Correspondence was exchanged between Mr Naidoo and the Law Society, with the latter eventually suggesting on the 19th December 2017 that should Mr Naidoo still be dissatisfied, he should approach the High Court to review or appeal the decision of the Committee. This, of course, was not an indication that the Law Society agreed with his complaint, as Mr Naidoo, somewhat strangely, later averred. It was rather an indication that the law Society could not and would not take any further steps to continue the complaint. The Law Society clearly felt that it had done its duty.
- (w) On the 10th May 2018 the applicant then instituted this application.

[6] The record in this matter extends to over 900 pages, containing as it does the record of the unfortunate application in the Regional Magistrates' Court, and is replete with duplications of various documents. Ultimately, the relief sought before me by Mr Naidoo is to have his complaint remitted to the Law Society for reconsideration (the alternative relief requested of striking Mr Pather off the roll of attorneys is not within my jurisdictional powers See: Practice Manual of the Kwa-Zulu Natal Division – practice directive 24). Mr *Randles* accepted that in

order for Mr Naidoo to succeed in the review, I must be satisfied that the complaint of Mr Naidoo meets the requirements set out in sub-sec 6(2) of the Promotion of Administrative Justice Act, 2000, (PAJA) which provides;

‘(2) A court or tribunal has the power to judicially review an administrative action if –

(a) The administrator who took it –

- (i) was not authorised to do so by the empowering provision;
- (ii) acted under a delegation of power which was not authorised by the empowering provision;
- (iii) was biased or reasonably suspected of bias;

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

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken –

- (i) for a reason not authorised by the empowering provision;
- (ii) for an ulterior purpose or motive;
- (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
- (iv) because of the unauthorised or unwarranted dictates of another person or body;
- (v) in bad faith; or
- (vi) arbitrarily or capriciously;

(f) the action itself –

- (i) contravenes a law or is not authorised by the empowering provision;
- or

(ii) is not rationally connected to –

- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.'

[7] Mr *Randles* emphasized that Mr Naidoo's case was based only on the provisions of sub-sec 6(2)(e)(iii) of PAJA. A large part of the Mr Naidoo's complaint, as set out in his papers, was that the committee never provided him with what he referred to as a 'comprehensive' reply to his allegations. This is contained in both his affidavit and in some of the annexures thereto. Mr *Randles* recorded that Mr Naidoo no longer relied upon the following:

- (a) That the report of the committee was not comprehensive.
- (b) That there was no merit in the committee claiming that it was *functus officio*.
- (c) That the committee or the Law Society exercised any bias in arriving at its decision.

Mr *Randles* also confirmed that Mr Naidoo accepts that no documents fell into the hands of the prosecuting authorities as a result of any breach of ethics by Mr Pather.

[8] Mr *Randles* submitted that the committee relied too heavily upon the decision of the learned regional magistrate in dismissing the application for a stay of prosecution. He pointed to the discrepancies between the evidence of Mr Pather and the letters which he wrote, particularly those of the 3rd and 30th March,

2009 addressed to Mr Vengtas, and submitted that the learned magistrate should have disbelieved the evidence of Mr Pather.

[9] The two issues for ultimate consideration by the committee were whether Mr Pather breached the principle of attorney and client privilege, and in that regard whether he prejudiced Mr Naidoo by providing the prosecution in the criminal case with Mr Naidoo's documents which were privileged and confidential. The committee sets out in its report why it found that there was no compelling evidence that Mr Pather was guilty of any unprofessional, dishonourable or unworthy conduct and they accordingly dismissed the complaint.

[10] Mr *Randles* submitted that the answers to the issues are to be found in the two letters dated the 3rd March 2009 and 30th March 2009. The high watermark on the attack on Mr Pather was that he conceded in cross-examination that he could not remember all of the events which had occurred, because he was testifying some 10 years' after they had taken place. Mr *Randles* submitted that in those circumstances the letters should be taken at their face value, and in preference to the *viva voce* evidence of Mr Pather.

[11] Those letters are not in the affidavit of Mr Naidoo to lead his complaint. The affidavit very briefly sets out his complaint in nine short paragraphs. Annexed to his affidavit is the entire application for delivery of documents in the IDC prosecution, referred to above, supplemented with the addition of Mr Pather's letter of the 3rd and 30th March 2009. He records in his affidavit that he relies on the advice of his erstwhile counsel in placing the entire record before

the Law Society, allegedly 'So as to avoid prolixity and compromise the context of in which my complaint is made' (in my view, a most unfortunate piece of advice!). He continues;

'I have been advised that the evidence contained in my complaint is compelling and overwhelming and further weighted on account of Mr Sivi Pather lying under oath, threatened (sic) my attorneys; Anil Rabinath, Attorney Carl van der Merwe, threatened (sic) Adv Scheltema SC and me.'

Mr *Randles* did not seek to rely on any of these allegations made by Mr Naidoo, save the issue of privilege.

[12] The two letters were not specifically referred to in the report. That does not mean that they were ignored or not considered by the committee. The decision of the committee makes it clear that on an overall conspectus of the evidence, the members were not satisfied that there was any compelling evidence that Mr Pather was guilty of any unprofessional, dishonourable or unworthy conduct. The members also concluded that there was no credible evidence that privileged documents were disclosed by Mr Pather to the prejudice of Mr Naidoo.

[13] Nor were either of those letters dealt with by the learned magistrate in her judgment dismissing the application for a stay of prosecution. The letter of the 3rd March 2009 is addressed to Mr Vengtas by Mr Pather. It deals with a request by Mr Naidoo that Mr Pather confirm that he is still searching for a document relating to the dismissal of a Mr Pillay from the employment of Afripath. In this regard, Mr Naidoo had requested Mr Pather to contact Mr Rikhotso. Mr Pather confirms having perused all the files in his possession without success. He also confirms having contacted Mr Rikhotso to enquire whether he had the letter, which he did not. Mr Pather then stated that all the documents were given to Mr

Naidoo when Mr Pather's mandate was terminated. In closing he suggests that Mr Naidoo and Mr Vengtas continue to liaise with Mr Rikhotso.

[14] It is significant that the letter of the 3rd March 2009 was sent to Mr Pather on the morning after the beginning of the Ithala trial. Mr Naidoo had sought an adjournment of the hearing on the basis that Mr Pather was in possession of important documents needed for his defence. The request for the document was made the previous day, in an attempt to bolster Mr Naidoo's application to adjourn the trial. Why this was requested from Mr Pather at so late a stage, and over two years after the termination of Mr Pather's mandate, is never dealt with by Mr Naidoo.

[15] The letter of the 30th March 2009 is a reply to a detailed follow-up on the letters of the 2nd and 3rd March 2009. The follow-up letter was addressed by Mr Vengtas to Mr Pather on the 19th March 2009. Various allegations were made on behalf of Mr Naidoo, which are fully dealt with by Mr Pather. It was in this letter to Mr Naidoo that Mr Pather stated:

'... our files were handed to Attorney Bibi Rikhotso. We were subpoenaed to deliver all our files to Court in the interrogation matter and we complied.'

It was this reference to 'files' which led to a great deal of cross-examination, with Mr Pather explaining exactly what he had meant by using those words – ie. that it was no more than the documents annexed to a letter sent by him to Mr Rikhotso on the 10th July 2007. Those documents were the front covers of files, and the inside pages of the covers reflecting charges to, and payments by, Mr Naidoo of fees due to Mr Pather. They contained no privileged information.

[16] Mr *Chetty*, who appeared for the Law Society, submitted that first step which has to be taken, is for this Court to find that the committee ignored relevant material, as alleged. Only then can the Court assess the allegedly privileged documents which Mr Naidoo alleges were disclosed by Mr Pather, but were never identified by him. Accordingly, the committee could not have failed to take into account relevant matters – they were never revealed. Mr *Chetty* pointed to the fact that the letter of the 2nd March 2009 requesting documents from Mr Pather, was sent on the morning of the beginning of the trial. No particular document is sought, but rather ‘the file pertaining to the above matter’ (the criminal trial), and no particular document is identified – the letter relating to the dismissal of Mr Pillay – was only revealed in a phone call from Mr Pather to Mr Naidoo.

[17] Mr *Chetty* submitted that there is no evidence in the record of proceedings or anywhere else, which demonstrates that Mr Pather handed over documents which were privileged and accordingly prejudicial to Mr Naidoo in the conduct of his criminal proceedings. That is the nub of the complaint to the Law Society and that is what the committee dismissed.

[18] Mr *Chetty* further submitted that it is important to note that nowhere in Mr Naidoo’s evidence and the extensive arguments by his counsel in the Regional Court, has he identified any documents other than those which were annexed to the letters referred to above as being prejudicial to his criminal case and which were neither delivered to the prosecution, nor to the IDC representatives at the s 417 Enquiry.

[19] Mr *Chetty* alluded to the onus borne by Mr Naidoo in the stay of prosecution application to demonstrate that he would not get a fair trial because the documents which has been disclosed were prejudicial to him. He was unable, even to identity those documents generally, let alone in detail. This was despite repeated requests from the learned magistrate that he do so. Mr *Chetty* pointed out that it is only in instances where the committee makes a finding of a *prima facie* case of unprofessional conduct, that an enquiry will ensue. The committee declined to make such a finding in this matter.

[20] With regard to costs, Mr *Chetty* referred to the matter of *Law Society of the Northern Provinces v Dube* [2012] 4 All SA 251 (SCA), para 33, where Mhlantla JA stated:

‘The final issue is costs. The general rule in matters of this kind, is that the respondent has to pay the costs of the law society on an attorney and client scale. This is so because the appellant is not an ordinary litigant as it performs a public duty. It is obliged to approach the court when a complaint, in particular one involving an act of dishonesty, is lodged against an attorney. The appellant in this matter did not act on its own frolic. It was accordingly entitled to an appropriate costs order. There was no reason for the court below to depart from the general rule. In the result, the court below erred and should have ordered the respondent to pay the costs of the application on a punitive scale. The appellant is also entitled to its costs on appeal notwithstanding the fact that the order of the court below has not been set aside and replaced with an order striking the name of the respondent off the roll.’

[21] Mr *Broster*, who appeared for Mr Pather *pro bono*, submitted that Mr Rikhotso only requested a limited number of documents, as contained in the summons in terms of s 417 of the Companies Act, 1973. He submitted that legal privilege was not envisaged here, and Mr Pather acted correctly and properly in obtaining legal advice prior to delivering any documents to the enquiry. In this

regard he referred to *A Company and others v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) paras 22-36. I am in respectful agreement with the views of the learned judge in that case.

[22] Mr *Broster* referred to the dicta in *Bogoshi v Van Vuuren NO and others; Bogoshi and another v Director, Office for Serious Economic Offences, and others* 1996 (1) SA 785 (A) at 793G-I, that privilege is not set in stone, and there are limitations, one of which is that it is for the client to raise the privilege. I did not understand Mr *Broster* to be suggesting that Mr Pather had no duty to protect his client – on the contrary, that Mr Pather had such a duty, and did so, even to the extent of obtaining legal advice in advance. The point is that the privilege was always available to Mr Naidoo, and he could have raised it at any time.

[23] Mr *Broster* also submitted that Mr Naidoo was obliged to have deposed to a further affidavit setting out the contentions he sought to have advanced in this review. It is not open to a litigant to raise matters for the first time in heads of argument, when they have not been canvassed in the pleadings – in this review, those are the affidavits.

See: *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others* 2008 (2) SA 184 (SCA) at 200C-D. In *Molusi and others v Voges NO and others* 2016 (3) SA 370 (CC) Nkabinde J stated:

‘[27] It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in *Sunker*:

“If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on.”

[28] The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (*mero motu*), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert* the Supreme Court of Appeal held:

“A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”

[29] The section 9(2) notice makes no mention of the reliance on ownership or common law reasonable notice. These grounds were impermissibly raised for the first time in argument before the Land Claims Court. This much was noted by that Court and the Supreme Court of Appeal. I do not agree that the respondents were “perfectly entitled to rely . . . on such common law grounds as availed [them] in support of the pleaded claim for eviction as a single cause of action”. Section 9(1) is manifest that “notwithstanding the provisions of any other law, an occupier may be evicted *only* in terms of an order of court under this Act.” The phrase “any other law” includes the common law.’

(footnotes omitted).

[24] In this regard, Mr *Broster* also relied upon the dicta of O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC), para 27:

'Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action.'

and *Minister of Cooperative Governance and Traditional Affairs v De Beer and another* (538/2020) [2021] ZASCA 95 (1 July 2021), where the court stated:

'[87] Likewise, in *Fischer v Ramahlele*, it was stated:

'Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded." There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no

supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

This last point is of great importance because it calls for judicial restraint.'

(footnotes omitted).

[25] Mr *Broster* submitted that nowhere in his affidavits had Mr Naidoo set out for debate, the issues raised in the heads of argument prepared by Mr *Randles*. In addition, Mr Naidoo had not set out which documents had been wrongfully disclosed by Mr Pather, and how they could have impacted on his criminal trial.

[26] Mr *Broster* recorded that Mr Pather did seek any order for costs against Mr Naidoo in this review. He sought only to have the review dismissed.

[27] I agree with the submissions of both Mr *Chetty* and Mr *Broster*. In my view, Mr Naidoo has not begun to establish that Mr Pather had disclosed privileged documents to either the representatives of the IDC or the National Prosecuting Authority. The purpose of raising these matters in an application for a permanent stay of prosecution was solely to avoid Mr Naidoo having to endure a criminal trial. An inordinate amount of time, money and effort has been fruitlessly wasted on this pursuit. If Mr Naidoo is unable to identify even the category of disclosed documents (let alone identify particular documents) which were actually possessed by Mr Pather, and in respect of which Mr Pather failed to assert Mr Naidoo's privilege, he cannot begin to demonstrate any kind of unprofessional conduct on the part of Mr Pather. In so far as it may be suggested

that the letter of dismissal of Mr Pillay may have been a contributing factor to disclosure of a privileged document, it was never established that Mr Pather had the document to give to the representatives of the IDC.

[28] Mr Naidoo's suggestion that the committee failed to take into account the letters of the 3rd and 30th March 2009, lacks any substance given the report of the committee. It was neither necessary nor desirable that the committee had to troll through every document in its report. Nor was it ever established that Mr Pather had possession of the allegedly privileged documents to be able to disclose them.

[29] The decision of the committee does not, in my view, fall foul of any of the provisions of sub-sec 6(2) of PAJA. I am in agreement with Mr *Chetty* with regard to the question of the scale of costs applicable to the costs to be paid by Mr Naidoo. Given the general attitude of Mr Naidoo throughout the process followed by him to have Mr Pather struck off the roll of attorneys, I would, notwithstanding the position of the Law Society, have made a punitive order of costs against Mr Naidoo anyway. His actions were clearly not motivated by a desire to see that the proper administration of justice was followed. He used a combination of evasiveness in addressing the hearing of his criminal trial, coupled with a vindictiveness towards Mr Pather in order to attempt to achieve his aims.

[30] In the circumstances I make the following order:

- (a) The application for the review of the decision of the Complaints Committee of the Law Society is refused.
- (b) The applicant is directed to pay the costs of the first respondent on the scale as between attorney and client.