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

CASE NO: **2516/2022**

In the matter between:

DR RESHAM MOONIRAJ ATWARU	Applicant
and	
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	First Respondent
MEDICAL AND DENTAL PROFESSIONAL BOARD	Second Respondent
THIRD PRELIMINARY COMMITTEE OF INQUIRY OF THE MEDICAL AND DENTAL PROFESSIONAL BOARD	Third Respondent

Heard: 1 November 2023

Delivered:

JUDGMENT

LESLIE AJ:

Introduction and background

1. The applicant is a specialist orthopaedic surgeon in private practice. As such, he is registered with the Health Professions Council of South Africa – the first respondent.

2. On 7 December 2017, the applicant performed surgery in the form of a fourth toe metatarsophalangeal joint arthrodesis on Ms Debra Hetherington. In December 2019, Ms Hetherington laid a complaint of unprofessional conduct against the applicant.

3. The complaint was forwarded to the applicant, who provided his written response to it on 27 January 2020.

4. The complaint and the applicant's response served before the third respondent ("the Committee").[1]

5. The Committee convened a consultation meeting with the applicant on 30 July 2021, whereafter it decided to deal with the complaint in the manner contemplated by regulation 4(9) of the Regulations.[2] Regulation 4(9) provides as follows:

> *"If a preliminary committee of inquiry decides, after due consideration of the complaint, any further information which may have been obtained in terms of subregulation (1)(a) and the respondent's explanation of the subject matter of the complaint, that the respondent acted unprofessionally, but the conduct in question is found to constitute only a minor transgression, it must determine, as a suitable penalty to be imposed, one or more of the penalties provided for in section 42(1)(a) and (d) of the Act and direct the registrar to formulate the charges in writing and communicate the charges and its decision to*

[1] The Third Preliminary Committee of Inquiry of the Medical and Dental Professional Board.
[2] Regulations relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the Act (GN R102 in GG 31859 of 6 February 2009, as amended) ("the Regulations").

the respondent, stipulating that the penalty must be accepted or rejected within 14 days from the date of receipt of the communication: Provided that if the penalty –

(a) is accepted by the respondent, proof of compliance with such penalty must accompany the notice of acceptance to the registrar, and that penalty must be regarded as a penalty imposed by the preliminary committee of inquiry, whereupon the matter will be regarded as finalised; or

(b) is rejected by the respondent or no response is received by the due date, the registrar must arrange for an inquiry into the professional conduct of the respondent, and the charges so formulated and the penalty so rejected or not responded to may no longer be applied to the matter."

6. In correspondence dated 12 August 2021, the applicant was advised that the Committee had considered the matter and resolved:

6.1. To find him guilty of unprofessional conduct in terms of regulation 4(9); and

6.2. To impose a fine totalling R140 000 on him (R20 000 for exposing a patient to danger or harm, R50 000 for incompetence and R70 000 for negligence).

7. In a further notice dated 3 February 2022, the applicant was informed that acceptance of the penalty and the payment of the fine would not constitute a conviction and would not be reflected against his name as a previous conviction. He was also informed that if the penalty was rejected or no response was received within 14 days, it would no longer be applied to the matter and the registrar would arrange for an inquiry into the complaint.

8. On 11 February 2022, the applicant instituted the present application to review and set aside the Committee's decision to find him guilty of unprofessional conduct (albeit a minor transgression) and to impose the fines on him ("the impugned decision").

9. The application is brought, in the first instance, on the basis that the impugned decision constitutes administrative action within the meaning of section 1 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Alternatively, the applicant relies on the principle of legality, on the basis that the Committee's functions involve the exercise of public power.

10. The respondents dispute that the impugned decision constitutes administrative action. It is therefore necessary to address this question first.

Does the impugned decision constitute administrative action?

11. As summarised by Hoexter,[3] there are seven elements to the definition of "administrative action" in PAJA, namely:

    11.1. a decision;
    11.2. by an organ of state (or a natural or juristic person);
    11.3. exercising a public power or performing a public function;
    11.4. in terms of any legislation (or in terms of an empowering provision);
    11.5. that adversely affects rights;
    11.6. that has a direct, external legal effect;
    11.7. and that does not fall under any of the listed exclusions.

12. In the present matter, it is clear that, in making the impugned decision, the Committee was exercising a public power or performing a public function in terms of legislation.[4] This was not placed in dispute by the respondents.

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[3] C Hoexter and G Penfold *"Administrative Law in South Africa"* (Juta 3ed) p 248; PAJA section 1 ("administrative action").

[4] Sections 41 and 42(1) of the Health Professions Act 56 of 1974 ("the Act"), read with the Regulations. The second respondent ("the Board") established the Committee pursuant to section

13. It is equally clear that none of the exclusions listed in section sub-sections (aa) to (ii) of section 1 of PAJA apply.

14. However, the respondents submit that the impugned decision does not comply with the definition of administrative action in that:[5]

14.1. it does not adversely affect the applicant's rights, and

14.2. it has no direct, external, legal effect.

15. These points are interrelated. In support of both points, the respondents assert that the nature of the impugned decision is preliminary and not final. The respondents contend that the Committee's decision is not final because it was open to the applicant to reject the proposed penalty. In that event, the complaint would be referred to a professional conduct inquiry and the Committee's (preliminary) determination and proposed penalty would fall away.

16. The Constitutional Court held in *Viking Pony* that:[6]

15(5)(f) of the Act and delegated its powers to the Committee for the purposes of undertaking a preliminary inquiry and imposing a suitable penalty.

[5] In addition, in the respondents' heads of argument it was asserted, without meaningful substantiation, that the impugned decision was not of an administrative nature. This does not withstand scrutiny. In *Grey's Marine* (infra at para 24), this element was described as follows: *"Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."* The Committee is tasked with performing functions in relation to inquiries into alleged unprofessional conduct of persons registered under the Act. As described in *Aslam v President: Health Professions Council of South Africa* [2023] ZAGPPHC 1321; 3480/2021 (3 April 2023) at para 46, a preliminary committee of inquiry is a statutorily created body with *"strict and limited legislated powers"*. There can be no question that, when a preliminary committee of inquiry carries out its statutory powers, it is performing functions that are quintessentially administrative in nature. (See also *Mapholisa NO v Phetoe NO* 2023 (3) SA 149 (SCA) para 14.)

[6] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) para 37.

"Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case."

17. It is also apposite to have regard to the following dictum from *Grey's Marine*:[7]

"While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals." (emphasis added)

18. There is ample authority to the effect that, in cases of multi-staged decision-making, even decisions of a preliminary nature may qualify as administrative action which is susceptible to review under PAJA. This is so particularly, but not exclusively, in cases where the preliminary step is a prerequisite to further steps in the decision-making process.[8] This flows from the recognition that preliminary decisions may have self-standing, serious consequences for individuals. In such cases, affected parties do not have to

[7] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 23.

[8] See for example, *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism* 2005 (3) SA 156 (C) paras 17 and 35; *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA) para 17; *Glencore Operations South Africa Proprietary Limited Coal Division v Minister of Mineral Resources* (JR91/2014) [2016] ZALCJHB 49 (3 February 2016) paras 48-70; *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* 2008 (2) SA 570 (T) para 25.

wait until every stage of a decision-making process has been completed before instituting a review application. It has been held that even non-binding recommendations made by an investigating committee might, in a proper case, attract an obligation to adhere to a fair procedure.[9]

19. In the present matter, the powers exercised by the Committee go beyond merely making recommendations regarding the holding of a further inquiry. Under regulation 5(9), the Committee is required to make positive determinations, based on the material before it:

19.1. as to whether the respondent[10] acted unprofessionally;

19.2. if so, whether the unprofessional conduct constitutes only a minor transgression; and

19.3. if so, the Committee must determine a suitable penalty to be imposed on the respondent (which is subject to his or her acceptance or rejection).

20. If the respondent accepts the penalty "imposed" by the Committee in this fashion, that is the end of the matter. It amounts to a final decision. As such, the decision of the Committee – at the very least – has the *capacity* to directly and immediately affect the respondent's rights. There is something incongruous in the suggestion that, only if the respondent does not accept the Committee's proposed penalty, its decision lacks the necessary element of directness or finality.

21. What is more, the provisions of regulation 5(9) are mandatory. Once the Committee determines that the respondent has committed a minor transgression (as defined), it *must* determine a suitable penalty to be imposed. This obligation on the part of the Committee gives rise to a corresponding right on the part of the respondent – to be offered the chance

[9] *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) para 15.
[10] The registered person is referred to as the respondent in the Regulations.

to finalise the matter by paying a suitable penalty. In this sense, the Committee's determination directly affects the respondent's rights under regulation 5(9).[11]

22. For these reasons, in my view, the functions and powers exercised by a preliminary committee of inquiry in terms of regulation 5(9) constitute administrative action. As such, the impugned decision is in principle susceptible to review on the grounds set out in section 6 of PAJA.

23. In any event, there is no doubt that the powers of a preliminary committee of inquiry entail the exercise of public power, which is subject to legality review.[12]

Review grounds

Duplication of findings and penalties

24. Section 42(1) of the Act stipulates that any registered person who, after an adverse determination made by a preliminary committee of inquiry on minor transgressions, shall be liable to one or more listed penalties, including a prescribed fine.

25. The applicable regulations[13] provide that:

> *"A committee of enquiry[14] may impose a fine equal to or falling within the range of minimum and maximum fines stipulated for each category of unprofessional conduct indicated below, against a registered person*

[11] There are myriad reasons why a registered person might wish to accept a suitable penalty and avoid a full conduct inquiry. These include an unwillingness to go through the inconvenience and expense of a hearing, as well as the risk of an adverse finding potentially attracting more stringent penalties and the risk of an endorsement against his or her name in the register kept by the Registrar.
[12] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85; and see Hoexter (supra) on the rapid expansion of the application of legality review at pp 160-161.
[13] Regulations relating to Fines Which May be Imposed by a Committee of Enquiry Against Practitioners Found Guilty of Improper or Disgraceful Conduct under the Act (GN R632 in GG 33385 of 23 July 2010), reg 2.
[14] Which includes a preliminary committee of enquiry (reg 1).

or a person who is legally required to be registered and has been found guilty of unprofessional conduct after an inquiry held by such committee of enquiry under Chapter IV of the Act."

26. There follows a table setting out various categories of improper or disgraceful conduct, together with the prescribed minimum and maximum fines for each category. Of relevance here are the following categories:

26.1. Category 6 – exposing patients to danger or harm, for which a fine of between R5000 and R20000 may be imposed;

26.2. Category 10 – incompetence, for which a fine of between R10000 and R50000 may be imposed; and

26.3. Category 11 – negligence, for which a fine of between R20000 and R70000 may be imposed.

27. Despite categorising the applicant's conduct as a "minor transgression", the Committee applied the maximum fines for each of these three categories, totalling R140000.

28. The manner in which the Committee's findings were arrived at is evident from the transcript of its deliberations which immediately followed the consultation meeting with the applicant on 30 July 2021. The Committee members initially determined that a fine of R70000 should be imposed, made up of R50000 for incompetence and R20000 for exposing the patient to danger or harm. The latter fine pertained to the timing of the operation, which, in the Committee's view, was undertaken too hastily in the context of the patient's overall medical condition.

29. Thereafter, following a question from a Committee member as to whether the applicant was also negligent, the chairperson responded as follows:

"Yeah, I'm neither here nor there, I think that you are right, I mean what's the difference between incompetence and negligence here. I am quite happy to add negligence to the whole situation.

…

So, we will add the negligence to that as well and then that will become R140000."

30. It is clear that the finding of negligence, and the additional R70000 fine, was based on the same facts and considerations that underpinned the incompetence finding.[15] It amounted to a duplication of findings and fines, which is not permitted under the Act or regulations. As such, the impugned decision was both unlawful and unfair. It falls to be set aside on these grounds alone.

Procedural fairness

31. Procedural fairness is a flexible concept. The requirements of a fair procedure in any particular case are context-dependent.[16] Generally, a person affected by administrative action is entitled to be given *inter alia*:[17]

31.1. Adequate notice of the nature and purpose of the proposed administrative action; and

31.2. A reasonable opportunity to make representations.

32. In argument, the respondents' counsel pointed out that there is no express requirement in the Act to afford a healthcare practitioner any form of prior hearing before a preliminary committee of inquiry makes a determination in

[15] In the formulation of charges dated 3 February 2022, drafted by an official of the first respondent, an attempt was made to allocate different facts to the charges of incompetence and negligence. However, this does not accord with the findings and determination of the Committee dated 30 July 2021, as summarised above.

[16] PAJA s 3(2)(a); *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) para 104.

[17] PAJA s 3(2)(b)(i) and (ii). These requirements apply unless the administrator can justify departure from them on reasonable and justifiable grounds.

terms of section 42(1). However, this does not mean that the procedural fairness requirements of PAJA may simply be ignored.

33. All administrative decisions must comply with PAJA, even if PAJA is not mentioned in the empowering statute. PAJA is the legislation envisaged in s 33(3) of the Constitution that gives effect to the right to reasonable, lawful and procedurally fair administrative action. PAJA determines the standard of procedural fairness for all administrative action.

34. The Constitutional Court has held that it does not matter that a statute does not expressly state that a decision must be procedurally fair, or must comply with PAJA:

> *"All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA."*[18]

35. The consequence is that all administrative decisions must be consistent with PAJA "*unless, upon a proper construction, the provisions of the statute [ ] in question are inconsistent with PAJA.*"[19]

36. Or, as the Court put it in *Eisenberg and Associates*:[20]

> *"In each case it is a question of construction whether a statute making provision for administrative action requires special procedures to be followed before the action is taken. In addition, <u>whether or not such provisions are made, the administrative action must ordinarily be carried out consistently with PAJA</u>."*

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[18] *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC) at para 101. See also *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) at para 61.
[19] Ibid.
[20] *Minister of Home Affairs v Eisenberg & Associates In re: Eisenberg & Associates v Minister of Home Affairs and Others* [2003] ZACC 10; 2003 (8) BCLR 838 (CC); 2003 (5) SA 281 (CC) at para 59 (emphasis added).

37. The upshot is that unless PAJA is excluded, it applies. In the present case, there are no grounds for concluding that the Legislature intended to exclude PAJA's procedural fairness requirements from the Act, read with the Regulations.

38. In my view, the process followed by the Committee prior to making the impugned decision fell short of the requirements of a fair procedure. In this regard:

38.1. The patient's written complaint pertained to the surgery performed by the applicant. In particular, it was alleged that the implant placed in her toe was *"incorrectly inserted and should never have been placed there."* This was the complaint which the applicant was called upon to answer. It formed the subject matter of his written response.

38.2. However, at the consultation hearing on 30 July 2021, the applicant was questioned on additional issues which went beyond the surgery itself, namely, the timing of the operation and the use of general as opposed to regional anaesthetic. The Committee made adverse findings against the applicant, at least on the issue of the timing of the operation, which it considered to have been too hasty. One of the Committee members went so far as to express the view that the applicant *"rushed into the surgery in such haste, he wants to make some money as far as I could see out of what he thought was a quick and easy operation."* This resulted in the R20000 fine for exposing the patient to danger – the maximum for this category of unprofessional conduct.

38.3. The applicant had no notice of these additional issues which were raised *mero motu* by the Committee members on 30 July 2021. This was unfair to the applicant. If the Committee intended to make adverse findings against the applicant on points that were not foreshadowed in the written complaint, it was incumbent on it to notify the applicant in

advance of these additional issues so that he could meaningfully exercise his right to make representations in his defence.

38.4. In addition, one of the Committee members (the only orthopaedic expert on the Committee) indicated to the Committee in its deliberations that his views were borne out by a report from an independent foot surgeon. The content of this report was never put to the applicant and he had no opportunity to rebut it.

39. In conclusion, the procedure followed by the Committee was unfair to the applicant in more than one material respect. The impugned decision falls to be reviewed and set aside on this ground too.

40. In light of the above findings, it is not necessary to consider the remaining grounds of review relied on by the applicant. I propose to remit the complaint against the applicant to a differently constituted preliminary committee of inquiry for its determination.

41. Lastly, the respondents brought an application to strike out paragraph 108 of the applicant's replying affidavit, on the grounds that it contained scandalous, vexatious and irrelevant material (as well as introducing new matter in reply). In the offending paragraph, the applicant insinuated that the remark made in the Committee's deliberations (to the effect that the applicant merely wanted to make some money from the surgery) had racist overtones – the applicant being of Indian descent. This is not supported by any of the evidence on record. It has nothing to do with the issues at hand. At the very least, it has no place in a replying affidavit. The application to strike out accordingly falls to be upheld.

Order

In the premises, I make the following order:

1. The third respondent's decision, taken on or about 30 July 2021, to find the applicant guilty of unprofessional conduct and its determination of a suitable penalty to be imposed in the amount of R140000, is reviewed and set aside;

2. The complaint lodged against the applicant by Ms D C Hetherington is remitted to the first and second respondents for reconsideration by a differently constituted preliminary committee of inquiry;

3. The costs of this application shall be paid by the first and second respondents, jointly and severally, the one paying the other to be absolved;

4. The respondents' application to strike out paragraph 108 of the applicant's replying affidavit is upheld, with costs.

G.A. LESLIE
Acting Judge of the High Court

Appearances:

For the applicant:	W Van Niekerk Instructed by Bowman Gilfillan Inc
For the respondents:	A Bhoopchand SC Instructed by Nair and Associates