

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2024-061977

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
15 October 2025	
DATE	SIGNATURE

In the matter between:

TRYPHINAH DIPHOKO

Applicant

and

**THE APPEAL BOARD FOR THE SOUTH AFRICAN
COUNCIL OF PLANNERS**

First Respondent

**DEPUTY CHAIRPERSON OF THE APPEAL BOARD
FOR THE SOUTH AFRICAN COUNCIL OF
PLANNERS**

Second Respondent

SOUTH AFRICAN COUNCIL FOR PLANNERS

Third Respondent

M E DUVENHAGE

Fourth Respondent

W G DAVEL

Fifth Respondent

D A LINDEQUE

Sixth Respondent

B J VAN DERSCHYFF

Seventh Respondent

RIAN BEUKES

Eighth Respondent

JUDGMENT

ILES AJ:

INTRODUCTION

1. The applicant seeks leave to appeal to a full bench of this court against the whole of my judgment and order of 22 August 2025 in terms of which I dismissed the applicant's review against a decision of an appeal board constituted in terms of section 27 of the Planning Profession Act 36 of 2002. I do not repeat the facts, the disputes between the parties or my reasoning, as these appear from my judgment.
2. This application is opposed by the first to fourth respondents.
3. Leave to appeal was sought on four grounds:
 - 3.1. First, it was contended that I erred in concluding that the review was required to have been brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'),

rather than in terms of the common law, as it was.

3.2. Second, it was contended that I erred by accepting that the appeal board's failure to indicate a costs scale was a deliberate omission by the appeal board.

3.3. Third, I am said to have erred in finding that the applicant was found guilty of five separate contraventions of section 18(3) of the Planning Profession Act.

3.4. Fourth, it was submitted that I erred in my interpretation and understanding of the appeal board's order.

4. On the basis of these four grounds, it was submitted on behalf of the applicant that she bore reasonable prospects of success on appeal.

THE AMBIT OF THE LEAVE TO APPEAL APPLICATION

5. The oral and written argument advanced on behalf of the applicant in certain respects strayed wide of the application for leave to appeal. For example, in written heads of argument served in the late afternoon the day before the application was to be heard, reliance was placed on section 17(1)(a)(ii) of the Superior Courts Act, notwithstanding that this basis for seeking leave to appeal was not disclosed in the application. It was also contended that I erred in so far as my costs order was concerned. In oral argument it was submitted that I had erred in finding that certain contentions advanced on behalf of the applicant constituted grounds of appeal, as opposed to grounds of

review.

6. Ms Nel, for the first to fourth respondents, objected to the reliance by the applicant on any ground of appeal not contained within the application for leave to appeal. It was argued, with reference to *M.S.H. v J.S.H* (8470/2021) [2023] ZAWCHC 345 (14 September 2023), that this was impermissible and that the applicant was limited to those grounds articulated by her in the application for leave to appeal.
7. *M.S.H v J.S.H*, apart from being only persuasive authority in this division, does not state in unequivocal terms that a party is bound to the grounds set out in the application for leave to appeal. *M.S.H v J.S.H* makes reference to *Phiri v Phiri and Others* [2016] ZAGPPHC 341, a decision of this division. In that decision Mavundla J held in paragraph 9 that Rule 49(1)(b) is peremptory and the applicant must set out the grounds upon which he or she seeks leave to appeal. He reached that conclusion on the basis of the language of the rule itself, and the earlier decision of *Songono v Minister of Law and Order* 1996 (4) SA 384 (ECD) at 385I – 386A. *Songono* is a decision which has been applied in numerous decisions in this division. Mavundla J went on to hold, in paragraph 10 of his judgment, that it was thus impermissible to advance grounds of appeal not set out in the notice of application for leave to appeal.
8. I consider myself bound by *Phiri* and thus decide this application on the basis of the four grounds set out above. In doing so, I must

consider whether the appeal grounds advanced hold a reasonable prospect of success, by which is meant I must make a dispassionate decision, based on the law and the facts, as to whether a court of appeal could reasonably arrive at a conclusion which is different to the conclusion I reached.¹ Other decisions relied on by the applicant, being *National Education, Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC), *Toyota SA Motors (Pty) Ltd v CCMA and Others* 2016 (3) BCLR 374 (CC), *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others* 2020 (6) BCLR 725 (CC) and *Afriforum & Another v University of the Free State* 2018 (2) SA 185 (CC) are less helpful concerning, as they do, the test for leave to appeal in the Constitutional Court, not this court.

9. As appears from the grounds on which leave to appeal is sought, I dismissed the applicant's application on two broad grounds: First, I took the view that the application ought to have been brought in terms of PAJA, rather than the common law. Second, I was not persuaded that the review grounds were meritorious. The applicant thus needs to persuade me of a reasonable prospect of success on both of these aspects, as a failure on appeal on either one would be fatal to the success of the appeal.

THE FINDING THAT A COMMON LAW REVIEW WAS IMPERMISSIBLE

¹ *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) at para 10

10. The first ground was, broadly stated, that I erred in holding that the review ought to have been brought in terms of PAJA. The application for leave to appeal amplified this error in three respects. First, it was contended that it was erroneous to find that the appeal board fell within the ambit of PAJA given that it was exercising quasi-judicial functions. In my judgment I cited *Mapholisa NO v Phetoe NO and Others* 2023 (3) SA 149 (SCA) at paragraph 14, where the Supreme Court of Appeal held, in the context of a professional conduct committee of the Health Professions Council of South Africa established in terms of the Health Professions Act 56 of 1974, that '*generally speaking, the decision-making of a statutory disciplinary body ... would constitute administrative action as defined in s 1 of the PAJA*'. Reference was also made in my judgment to *South African Veterinary Council and Another v Veterinary Defence Association* 2003 (4) SA 546 (SCA) where the Supreme Court of Appeal held, at paragraph 34, that a disciplinary decision taken by a statutory council regarding the conduct of a vet, constituted administrative action.
11. No arguments were advanced as to why these two decisions were distinguishable from the present matter, and I was not referred to any contrary or differing authority.
12. The second amplification was to the effect that I disregarded the discretionary powers exercised by the third respondent, being indicative of exceptional circumstances which precludes it from a

review in terms of PAJA. This contention seems to me to be erroneous in several respects. First, that an administrative body has or exercises discretionary powers does not mean that the decision being impugned is not administrative action. Second, I am not aware of any authority, either in PAJA itself or elsewhere that provides that a decision is not administrative action where exceptional circumstances are present. Nor am I aware of any authority that says that something which falls within the definition of administrative action may be reviewed under the common law, rather than PAJA, in exceptional circumstances (if that is what was meant). I was not referred to any such authority nor was this contention advanced in oral argument. Third, no exceptional circumstances were identified.

13. The third amplification was that my understanding of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), on which I relied in reaching my decision, was incorrect in that *Bato Star* did not preclude reliance on the common law, as opposed to PAJA, when bringing a review application. I am not persuaded that my reading of *Bato Star* as set out in my judgment was incorrect. But even if it was, I am not persuaded that there is a reasonable prospect of an appeal court finding either that the third respondent's decision was not administrative action within the meaning of PAJA or that the applicant was entitled to bypass PAJA in bringing her review.

14. I am fortified in this conclusion by the recent decision of *Kwinana v*

Chairperson of Disciplinary Inquiry Instituted by the South African Institute of Chartered Accountants and Another [2025] ZAGPJHC 735 in which Du Plessis J, in a thoroughly reasoned judgment, concluded that a disciplinary decision taken by the South African Institute of Chartered Accountants constituted administrative action and that once a decision meets the definition of administrative action, an applicant must rely on PAJA and there is no residual right to rely on the common law. With respect, I agree with that decision and it is and was binding on me when I decided this matter.

15. That leaves the applicant's contention that I was not permitted to dismiss the application on this ground given that the respondents had not taken any objection to the review having been brought under the common law.

16. I was referred by the applicant to *Fisher and Another v Ramahele and Others* 2014 (4) SA 614 (SCA) and *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) as authorities for the proposition that the PAJA point was not one which I was entitled to have raised *mero motu* and that I was constrained to decide the matter as a common law review as the respondents had not objected to this.

17. *Fisher* held, in relevant part (in paragraphs 13 – 15) as follows:

'[13] 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. ... 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.

[14] 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.'

18. I do not interpret *Fisher* as meaning that I should have ignored the basis on which the review was brought and have decided the matter on an incorrect legal basis, simply because the respondents did not raise the point. *Fisher* is concerned with the introduction by the court of new disputes not advanced by the parties, as opposed to the raising of questions of law, something which it recognises may be done *mero motu*. The applicant did not, either when I raised the matter at the hearing of the application or in the leave to appeal, suggest that she

had suffered any prejudice by virtue of my having raised this question.

19. I can do no better than to quote the words of Justice Ngcobo, as he then was, in *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) at paragraph 67:

'67. These principles [pertaining to a review court being bound by the pleadings] are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. ...'

20. I am thus not persuaded that I erred in finding that the review ought to have been brought as a PAJA review, and am of the view that the applicant does not hold reasonable prospects of success on appeal of overturning this finding.

21. Given what I have stated in paragraph 9 above, this conclusion ought to be dispositive of this application. I nevertheless proceed to consider the remaining grounds on which leave to appeal is sought.

THE MERITS OF THE REVIEW

22. Grounds 2, 3 and 4 can conveniently be dealt with together. Ground 2 argues that I was mistaken in finding that the failure by the appeal board to indicate a costs scale was deliberate. Ground 3 contended

that I erred in finding that the applicant was guilty of five contraventions of section 18(3)(b) of the Act as the facts indicated that she was only found guilty of one contravention. The fourth ground on which leave is sought is that I misinterpreted the appeal board's order: I did not pay sufficient regard to the use of the words '*in toto*'. The context was that there had been an appeal against both the costs order and the merits. As the general rule is that costs follow the result, and as the applicant succeeded on appeal, she ought to have been awarded the costs and the fact that she was not, and that nothing was said in the award in this regard, is indicative of irrational decision making.

23. I was alive to the context, namely that the applicant had noted an appeal against both merits and costs. This appears from paragraph 25 of the judgment. It is rather that, against that context, my interpretation of what the appeal board did differs from the construction which the applicant contended for.
24. I placed importance on the fact that, had the appeal board intended to uphold the appeal on costs, it would have expressly stated that the costs decision of 5 June 2019 was set aside. It did not. It only made reference to the merits decision of 28 July 2018.
25. In so far as the '*in toto*' phrase was concerned, it received specific attention as appears from paragraph 26. I did, erroneously, hold that the tribunal had found the applicant guilty of five separate contraventions of section 18(3) of the Act but, that I was wrong in this

regard, does not alter my interpretation. I found in paragraph 26 of the judgment that the use of the phrase '*in toto*' was a reference to all of the guilty findings being reversed or all of the grounds of appeal (and there were numerous independent grounds) being upheld, or both of those things. Thus even though I was wrong to find that there was more than one guilty finding, the use of the '*in toto*' phrase remains explained by the fact that the appeal board intended to indicate that all of the grounds of appeal against the one guilty finding were being upheld.

26. I also found in paragraph 27 that my interpretation was consistent with the manner in which the appeal board dealt with costs. It appreciated that the general rule was that costs should follow the result, and proceeded to explain why it was departing from this rule. It is not correct to say that the appeal board said nothing about costs. As explained in paragraph 28 of my judgment it held that taking into account the nature of the proceedings and that the appeal did not make a finding on the facts of the complaint and that the irregularities were committed by the tribunal and not the third respondent (whom the appeal board considered to be separate entities), no costs were awarded in favour of the applicant. For those reasons I found that the failure to award costs was deliberate, and I am not persuaded that another court will reach a different conclusion.

27. The applicant contended that by holding in paragraph 45 of my

judgment that the applicant's interpretation of the order was not an unreasonable one, I recognised that another court might find differently to me in so far as the interpretation is concerned. This argument makes too much of paragraph 45 of my judgment. By saying that the applicant's interpretation was not unreasonable, I meant no more than that I could see how she had arrived at the interpretation of the order she contended for and, for this (and the other reasons mentioned in my judgment) chose not to order her to pay costs. That is not the same thing as saying that there is a reasonable prospect that another court would find for her interpretation.

CONCLUSION

28. For the aforesaid reasons, I grant the following order:

28.1. The application for leave to appeal is dismissed.

28.2. The applicant is to pay the costs of this application, with costs to be on scale B.



K D ILES
Acting Judge of the High Court, Johannesburg

Appearances:

On behalf of the applicant:
Instructed by:

G Shakoane SC
Phaleng Podile Attorneys

On behalf of the 1st – 4th respondents:
Instructed by:

A Nell
Raymond Francois Hauptfleisch
Attorneys Inc

Date of hearing:

14 October 2025

Date of judgment:

15 October 2025