IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 2923/2024

In the matter between:

LUCINDA LOURENS **APPLICANT**

and

SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS **FIRST RESPONDENT**

THE BOSS GROUP (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Lourens v South African Institute of Chartered Accountants* (2923/2024) [2026] ZAFSHC 104 (19 March 2026)

Coram: VAN ZYL J *et* DAFFUE J

Heard: 12 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h30 on 19 March 2026.

Summary: Administrative Law – review – procedural fairness – right to be informed of the charge with sufficient particularity – professional body (SAICA) finding member guilty on grounds distinct from the original notification – breach of ss 3(2)*(b)*(i) and 6(2)*(c)* of the Promotion of Access to Justice Act 3 of 2000.

ORDER

1 The decision of the Judicial Conduct Committee of the first respondent, dated 14 November, in terms whereof the applicant was found guilty of contravention of the first respondent`s By-Laws and Code of Professional Conduct and sanctioned accordingly, is reviewed and set aside, and substituted with the following order:

'1.1 The applicant did not make herself guilty of contravening any of the By-Laws or Code of Professional Conduct of the first respondent.'

2 The first respondent is ordered to pay the costs of the application, counsel`s fees to be paid on Scale B.

JUDGMENT

Van Zyl J

[1] This is a Rule 53 review application in which the applicant is seeking the following relief in terms of the amended notice of motion:

'1. That the following decisions of the first respondent's Professional Conduct Committee be reviewed and set aside:

1.1 The decision to find the applicant guilty of a punishable conduct for failing to administer the Second Respondent's payroll system;

1.2 The decision to find the applicant guilty of paragraphs 5.1.6 of the 2021 and 2022 SAICA By-Laws (as amended) and Section 110.1 A1 read with subsection 113: Professional Competence and Due Care of the SAICA 2021 and 2022 Code of Professional Conduct;

1.3 The decision to impose the following sanctions: (a) a reprimand; (b) a fine of R25 000; and (c) publication of the Applicant's disciplinary matter on the SAICA website, member communications and/or ASA magazine.

2. That such respondent opposing the application be ordered to pay the costs.'

Background

[2] The applicant is a qualified accountant and became an Associate General Accountant member of the first respondent, the South African Institute of Chartered

Accountants ('SAICA') during 2016. During 2019 she qualified as a General Tax Practitioner (SA) and became a member of the South African Institute of Taxation.

[3] At all times relevant to this application the applicant has been practicing as an accountant and general tax practitioner under Boss@Tax (Pty) Ltd in Bloemfontein.

[4] On or about 12 April 2021, the second respondent, represented by its chief executive officer, Mr JT van Jaarsveld ('Mr Van Jaarsveld'), appointed the applicant to provide the second respondent with accounting and tax consulting services.

[5] On 10 November 2022 Mr Van Jaarsveld notified the applicant via email of the termination of her mandate effective 30 November 2022. The applicant accepted this termination of her mandate and informed Mr Van Jaarsveld accordingly in an email of even date.

[6] Due to subsequent events which occurred between Mr Van Jaarsveld and his wife, on the one hand, and the applicant, on the other hand (the detail of which I do not deem necessary to deal with in this judgment), the applicant felt that the trust relationship between herself as accountant and the second respondent (as well as Mr and Ms Van Jaarsveld) had broken down irretrievably. In the circumstances she considered it impossible to deliver any further accounting and tax services to the second respondent (and to Mr and Ms Van Jaarsveld) and advised them accordingly in an email dated 15 November 2022.

[7] Since I will henceforth be referring to affidavits filed in the review application, as well as affidavits filed in respect of the complaint, I will differentiate between the respective affidavits by indicating in brackets whether it is with reference to the review application or with reference to the complaint.

[8] On 11 May 2023 SAICA notified the applicant that the second respondent had filed a complaint against her. A copy of SAICA's written notification is annexed to the applicant's founding affidavit (review) as annexure 'FA5'. Attached to the said notification is the written complaint in the form of an affidavit deposed to by Mr Van Jaarsveld. The complaint is attached to the applicant's founding affidavit (review) as annexure 'FA6'. In the said complaint it was alleged that the applicant had committed

'*punishable conduct*' under SAICA's By-Laws in several respects. These involved what has been termed the '*payroll issue*', which is the subject of this review. In SAICA's written notification the applicant was called upon to respond to the complaint with a detailed written explanation within 21 calendar days. The applicant duly filed an answering affidavit (complaint) in response to the written complaint in which she contested the complaint. This answering affidavit (complaint) is attached to the founding affidavit (review) as annexure 'FA7'.

[9] Mr Van Jaarsveld deposed to a replying affidavit (complaint), which is attached to the founding affidavit (review) as annexure 'FA8'. The applicant filed a rejoinder affidavit (complaint) attached to the founding affidavit (review) as annexure 'FA9'.

[10] On 10 November 2023 the applicant was informed of the Secretariat's recommendations as set out in a Case Summary provided to her. The Case Summary is attached to the founding affidavit (review) as annexure 'FA10'.

[11] On 13 November 2023 the applicant was notified of a disciplinary hearing to be conducted on 14 November 2023 under the auspices of SAICA's Professional Conduct Committee ('the PCC').

[12] On 29 November 2023 the applicant was informed of the outcome of the PCC hearing. The PCC found the applicant guilty of punishable conduct for failing to administer the second respondent's payroll system. The outcome ('the impugned decisions') is recorded as follows in the outcome letter, annexure 'FA12' to the founding affidavit (review):

'4.1 You are found guilty of contravening Paragraphs 5.1.6 of the 2021 and 2022 SAICA By-laws (as amended), and section 110.1 A1 read with subsection 113: Professional Competence and Due Care of the SAICA 2021 and 2022 Code of Professional Conduct, and is sanctioned as follows:

4.1.1 A reprimand;

4.1.2 A fine of R25 000.00 (twenty-five-thousand rand) wholly suspended for a period of 3 (three) years on condition that you do not commit and/or be found guilty of the same or similar conduct from the date hereof;

4.1.3 The matter will be published on the SAICA website, member communications and/or ASA magazine together with your name and a brief description of the offence and penalty imposed; and

4.1.4 Further a Fit and Proper Enquiry is not necessary herein.'

The basis of the application

[13] The applicant brought the application in terms of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA'). In the alternative, should it be found that the impugned decisions and the legal consequences thereof do not constitute administrative action as defined by PAJA, it was contended in the founding affidavit (review) that the impugned decisions are subject to a legality review on the grounds that they were made in the exercise of a public power.

[14] However, from the arguments advanced on behalf of the respective parties, it became evident that they are *ad idem* that PAJA is indeed applicable, in my view, correctly so. In this regard the following is stated in *Kwinana v Chairperson of Disciplinary Enquiry instituted by the South African Institute of Chartered Accountants and Another* (2093/091726) [2025] ZAGPJHC 735 (12 March 2025) para 66:

'[66] Based on the reasoning above, I agree with SAICA that when the disciplinary tribunal made its decision, it did so as a private entity exercising a public power, namely regulating the accounting profession. It does not matter that other institutions have similar powers; what matters is that the power it exercises complies with the second definition of "administrative action", as set out above.'

[15] In the founding affidavit (review) of the applicant she contends that the impugned decisions are flawed to the extent that they fall to be set aside under PAJA on one or more of the following grounds:

'72.1 The PCC, in coming to the conclusion that it did, ignored the established test to resolve two conflicting versions. It is accordingly submitted that the impugned decisions were materially influenced by an error of law (section 6(2)(d) of PAJA); and/or

72.2 The PCC also took into account irrelevant considerations or failed to consider relevant considerations (section 6(2)(e)(iii) of PAJA); and/or

72.3 The impugned decisions are not rationally connected to the information before the PCC alternatively the reasons given for it (section 6(2)(f)(ii)(cc) and (dd) of PAJA).'

[16] In her supplementary founding affidavit which was filed in the review after the record of SAICA`s decision was filed, the applicant persisted with her

abovementioned grounds of review and she also expanded and amplified the grounds upon which she contends that the impugned decisions are flawed.

[17] SAICA is opposing the application. The second respondent is not opposing the application.

The evidence

The complaint

[18] In paragraph 7 of the complaint Mr Van Jaarsveld alleged that the applicant handled the management and control of the second respondent's payroll system in an unprofessional and inadequate way.

[19] In paragraph 13.3 of the complaint Mr Van Jaarsveld alleged that the applicant was responsible for the management and control of the second respondent`s payroll system, which is reflective of the number of staff employed by the second respondent, as well as the number of wages and/or salaries paid to the said staff.

[20] In paragraph 13.4 of the complaint Mr Van Jaarsveld alleged that the applicant further controlled the Business Solutions payroll system at First National Bank (FNB). In this regard Mr Van Jaarsveld claimed that the applicant only attended to loading 8 of the second respondent's employees on the payroll system, whilst the second respondent employed 28 employees who were supposed to have been added to the payroll system. As a result of this, the second respondent experienced extreme difficulties to ensure that employees get a monthly payslip and the applicant was the only person able to furnish them with a payslip. Mr Van Jaarsveld attached confirmatory affidavits of two employees of the second respondent who confirmed the alleged difficulties they experienced to get a monthly payslip.

Answering affidavit to the complaint

[21] In her answering affidavit filed in response to the complaint, at paragraph 6.8 thereof, the applicant responded in detail to paragraphs 13.3 and 13.4 of the complaint. I will, however, quote her response later in the judgment.

[22] After the applicant`s termination of her services at the second respondent, a dispute arose between the applicant and the second respondent regarding the

release of documentation and records in possession of the applicant against full payment of her outstanding account for services rendered to the second respondent. This led to correspondence which was exchanged between the attorneys of the applicant and those of the second respondent. The correspondence was exchanged about four months before the second respondent laid the complaint against the applicant. One such letter is annexure 'B' to annexure 'LL29' attached to the answering affidavit to the complaint, which is a letter from the applicant's attorney addressed to the second respondent's attorney, dated 23 November 2022. This letter (annexure "B") refers to a letter of the applicant, dated 23 November 2022, attached thereto. In this last-mentioned letter the applicant stated the following:

'2. The monthly payroll was compiled by the client on a "Google Sheets" spreadsheet where it automatically calculated the deductions and reflected the nett pay. It also reflects the details of each employee. This spreadsheet is in the possession of the client, and we only had access thereto in order to process the payslips on a monthly basis.

3. We will send you the payslips that was processed for the period 01 March 2022 – 31 October 2022 via e-mail.'

[23] Another such letter is annexure 'LL27' to the answering affidavit to the complaint, which is also a letter from the applicant's attorneys addressed to the second respondent's attorney, dated 9 December 2022. In this letter the applicant's attorneys stated the following regarding the payroll:

'Our client maintains that the salaries of The Boss Group were done and processed on a monthly basis by your client on an Excel spreadsheet, which is in your client's possession. Your client only allowed our client access for purposes to process the data to "*payslips*". Your client can therefore give its new accountants access to the salary schedule in order to enable them to generate the payslips in the future.

Our client has already provided the new accountants with all Payslips relating to the period 1 March 2022 to 31 October 2022.

According to our client, there is no reason why your client cannot calculate or pay the salaries with the information already in their possession.'

Replying affidavit to the complaint

[24] In its replying affidavit to the complaint, the second respondent responded as follows to paragraph 6.8.1 of the applicant's answering affidavit to the complaint:

'14. The contents hereof is denied, and I stand by my initial statement. Annexed hereto as annexure RP11 and RP12 is confirmation that Mrs. Lourens dealt directly with the payroll and managed same.'

[25] I will return to the contents of annexures 'RP11' and 'RP12'.

Rejoinder affidavit to the complaint

[26] In the rejoinder affidavit which the applicant filed in response to the replying affidavit filed in the complaint, she responded as follows to paragraph 14 of the replying affidavit:

'6.7.1 The contents hereof are noted and reference is again made to my answering affidavit dated 25 May 2023.

6.7.2 The information provided in "RP11" I clearly state in the messages that I captured the payroll information received by the complainant to a payslip format.

6.7.3 The information provided in "RP12" indicates that I calculate the salaries received. This was to ensure that the final salary spreadsheet received from the complainant which listed each employee's basic salary, hours worked, deductions and nett payable to each employee, matched the information generated to payslips.'

The minutes and transcript of the PCC hearing

[27] SAICA delivered the record of its decision in terms of rule 53(1)(b) on 17 July 2024. It comprises a total of 1535 pages. The applicant subsequently filed an amended notice of motion and a supplementary founding affidavit in the review application. Attached to it are the minutes and transcript of the PCC hearing, marked annexures 'SA1' and 'SA2' respectively. SAICA subsequently filed an answering affidavit in the review application and thereupon the applicant filed a replying affidavit.

[28] A panel consisting of a practicing advocate as chairperson and two accountants, presided over the hearing. Mr M Mathavha, Project Manager: Legal and Discipline, an admitted attorney, represented the Secretariat of SAICA and effectively acted as prosecutor 'the prosecutor'. The hearing was conducted virtually. Other than the applicant, no other witnesses testified at the hearing. In addition to the four affidavits which Mr Van Jaarsveld, on behalf of the second respondent, and the applicant deposed to, and the annexures thereto, the Case Summary prepared by the Secretariat, served before the PCC. The totality of the documents which served before the PCC were marked 'Bundle B' and referred to as such during the hearing.

[29] The Case Summary included the 'Analysis by the Secretariat' and the 'Recommendation by Secretariat'. Attached to the said document was a document

titled 'Draft Order A'. From a reading of the minutes and the transcript, it is evident that the whole of the aforesaid document already served before the PCC even prior to the applicant's appearance at the virtual hearing. Already during this phase of the meeting, the Secretariat of SAICA submitted as follows at paragraph 6.2.8.13 of the minutes, which constitutes paragraph 8.13 of the Case Summary:

'The Secretariat is of the opinion that the information contained in Annexure **RP12** is rather contradictory to the Respondent's version that she only dealt with the generation of payslips and the complainant dealt with the payment of salaries on his own. The Respondent has listed payment of salaries as one of the unpaid services she rendered to the complainant. To this end, the Secretariat is of the opinion that the Respondent has failed to take the PCC into her confidence that she was not responsible for payroll and the consequences attached to that responsibility. The complainant has maintained that as a result of the Respondent's failure to administer payroll efficiently, some of the employees suffered as they could not receive their payslips. The Secretariat is of the opinion that the Respondent is guilty of failing to administer payroll system for her then client and has contravened the SAICA Code of Professional Conduct Section 110.1 A1 read with subsection 113: Professional Competence and Due Care.'

[30] The Secretariat subsequently recommended that the applicant should be sanctioned as set out at paragraph 6.2.9.4 of the minutes, which constitutes paragraph 9.4 of the Case Summary:

'6.2.9.4.1 A reprimand;

6.2.9.4.2 Fine of R25 000.00 (twenty-five thousand Rand) wholly suspended for a period of 3 (three) years on condition that the Respondent does not commit and/or be found guilty of the same or similar conduct from the date hereof;

6.2.9.4.3 The matter will be published on the SAICA website, member communications and/or ASA magazine together with the name of the Respondent and a brief description of the offence and penalty imposed;

6.2.9.4.4 A Fit and Proper Enquiry is not necessary herein.'

[31] The eventual outcome of the PCC hearing therefore corresponded with the recommendations by the Secretariat.

[32] I will deal with the further relevant detail of the minutes and the transcript as and when applicable later in the judgment.

The charge

[33] In order to give effect to procedurally fair administration, s 3(2)(b)(i) of PAJA requires adequate notice of the nature and purpose of proposed administrative action. Although the meaning of 'adequate' notice is not defined, it implies sufficient information to enable a person to exercise his or her rights. At common law the subject of disciplinary proceedings is entitled 'to have the charge clearly formulated with sufficient particularity in such a manner as will leave him/her under no misapprehension as to the specific act or conduct to be investigated'. See C Hoexter *et* G Penfold, *Administrative Law in South Africa*, 3 ed (2023), at 509.

[34] As stated earlier in the judgment, in terms of paragraph 7 of the complaint against the applicant in relation to the payroll issue, the complaint is that the applicant handled the management and control of the second respondent's payroll system in an unprofessional and inadequate way.

[35] As also earlier indicated in the judgment, the averment that the applicant was responsible for the management and control of the second respondent's payroll system, is repeated in paragraph 13.3 of the complaint. In addition, it is alleged in paragraph 13.4 of the complaint that the applicant further controlled the second respondent's Business Solutions Payroll System at FNB and only attended to loading 8 of the second respondent's employees on the payroll system, whilst 28 employees were supposed to have been added. Because of this, so Mr Van Jaarsveld averred, the second respondent '*experienced extreme difficulties to ensure that employees get a monthly payslip after continuously requesting same*' and that the applicant was the only person able to furnish them with a payslip.

[36] The written notice of the disciplinary complaint which SAICA gave the applicant described the relevant complaint against her as having '*failed to load all the employees on the payroll system*'.

[37] The applicant's case throughout was that the management and control of the second respondent's payroll were not her responsibility. According to her Mr Van Jaarsveld himself dealt with the payroll on an Excel spreadsheet which he sent to her solely for the purpose of generating payslips for the employees.

[38] In respect of the issue of the eight employees, the applicant explained in the PCC hearing that IR Services used to be appointed by the second respondent as an outsourced HR service, who, *inter alia,* compiled payslips for the second respondent. During the course of 2021 the second respondent decided to end their services and to do the payroll itself, which would be more cost effective for the second respondent. The payroll system was then done on SAGE, but that was also too expensive for the second respondent. The applicant then continued and gave the following explanation in the JCC hearing, as reflected at p. 303 of the application papers:

'. . . And then I said to him, ok, well if you want a free system to do it, you have to, we can consider doing on the FNB platform. I will introduce it to them, to do payslips on there for them and then they can have a look at it.

So, just to give you guys an indication of what the FNB platform is that was used, it was linked to their online banking profile. So, it`s not a profile where they did not have access to or anything like that. <u>But, unfortunately, after I myself processed the payslips on the platform, I said to them that unfortunately the platform itself does not have all the requirements they need in terms of a payslip and it was decided that they would stop with that.</u>

<u>So, that`s the reason for only loading eight employees onto the FNB payroll,</u> and then after that I recalculated the <u>payslips</u> on my own payroll platform, <u>which was only used to generate the payslips.</u> In calculating that, I recaptured all the payslips that was done from March up until the date where we decided that we should use a new system, which was my payroll system, just to generate the payslips. And nothing else was done on that specific platform that was mine.' (My emphasis)

[39] During the PCC hearing, a line of questioning different to what the applicant was actually charged with, occurred, as reflected at p.320 – 322 of the application papers:

[Dr Shuro] 'Were you getting a summary of payees or you were running the payroll. I just want to get the crux of this matter.'

[Applicant] 'I was getting a summary compiled by the Complainant, of the payroll.'

[Dr Shuro] 'So you had no responsibility of inputting employees?'

[Applicant] 'No.'

[Dr Shuro] 'So, the eight employees, where do they come from? What was your role with the eight employees?'

. . .

[Applicant] 'So, in order for me to provide a payslip for the Complainant, I had to recapture his already, the information that he already compiled, onto a system in order for them to get a payslip. So, I re-compiled the data that he already had compiled, onto a payslip. And the eight employees that is referred to in the case summary was when I started, when they ended their services with IR Services, obviously we had to compile payslips for the employees, which he employed already asked me to do.

So, I had to capture their details, that was already in his possession, on a system in order to compile a payslip.'

[Dr Shuro] 'I just want to understand something here. When you talk of professionalism, so if ever there was a mistake on a payslip you basically ignore it? Because you are saying it was compiled.'

[Applicant] 'What do you mean a mistake on the payslip?'

[Dr Shuro] 'You are saying you are basically there to capture, that is what you have said'

[Applicant] 'Yes. So, what I did on my side, is when there was a mistake made on the payroll, that was compiled by the Complainant, if there was a mistake it was his mistake, not mine. I basically just tied up his Excel spreadsheet to a payslip.'

[Dr Shuro] 'So, and I am just coming back to that, so at the end of the day, providing a service as you are as the accountant, would you say, or the client sees he is reliant on you to say if we have done something wrong you will correct us?'

[Applicant] 'Yes.'

[Dr Shuro] 'Was that the expectation on that?'

[Applicant] 'Yes, that is true ja'

[Dr Shuro] 'So, we can go back again to the issue of ... because to me the client put a trust to your profession.

[Applicant] 'Yes'

[Dr Shuro] 'To say I have engaged an accountant, who is a member of SAICA, therefore whatever I do there is a difference between a matric student who compiles the information on a payslip and an accountant who puts information on a payslip. Can I say the two are different?'

[Complainant] 'Yes'

[Dr Shuro] 'And what is expected of you is different from what you are explaining. Because of your profession and qualifications, more is expected by the client.'

[Applicant] 'With respect, that is only, he only requested me to compile payslips, which I did. And recalculated from his Excel spreadsheet that had formulas inserted by himself. I did check to make sure that the UIF and the Pay As You Earn was correctly calculated and tied up to the payslips, but he calculated it on Excel spreadsheet and it was already formulated. So, I did not, at the end of the day the payroll was not my responsibility. I did not manage the payroll as such, at all. I did not, employee, employees, I did not sit down and do their employee contracts with them or decide what their basic salary should be, or their overtime, or if they could take leave or not, or the times that they would work. I would only compile payslips for them. I was not in control of the payroll as such.'

[Dr Shuro] 'Ok. Can we say, this is my last point. Can we say that the client took comfort, based on your qualification, to say you can look at the payroll?'
[Applicant] 'You could, ja.'
[Dr Shuro] 'OK, that's fine. That's all from me.'

[40] In my view there was no specific identification of a mistake which the applicant allegedly made. The questions as to how the applicant will deal or dealt with mistakes were merely hypothetical.

[41] Towards the end of the hearing, the following conclusions were made by two members of the panel, namely Dr Shuro and Mr Padayachy, as reflected at p. 324 – 325 of the application papers:
[Chairperson] 'Ok. My colleagues, do you have anything or we can move on?'
[Dr Shuro] 'Nothing. I think she's cleared the issues which I had. I think she is running away from responsibility, if I can ... it's just like somebody signing off a document, I am supposed to sign, but I am not supposed to look at what I am signing.'
[Mr Padayachy] 'Mmm. I get the same view, Chair. That she is not taking responsibility. I mean if you just signing off a document without checking it, you are not doing your job that you were hired for.' (My emphasis)

[42] The PCC consequently decided the matter on a distinctly different premise than what the applicant was charged with, namely that she did not check for payroll-related mistakes, that she ought to have corrected any payroll-related mistakes, that she failed to do so and that this constituted misconduct and consequently punishable conduct. Dr Shuro engaged the applicant on her duty to have identified and rectified mistakes, whilst this was not the issue presented for determination within the context of the payroll complaint.

[43] This marked shift in ground and migration of the charge violated the procedural fairness of the proceedings. A breach of procedural fairness has the following consequences as discussed in *Administrative Law in South Africa, supra,* at 533:
'At common law a breach of procedural fairness would ordinarily lead to invalidity of the administrative decision concerned. As Baxter indicates, the principles of fairness "are considered to be so important that they are enforced by the courts as a *matter of policy*, irrespective of the merits of the particular case in question", so that the merits cannot justify a breach of fairness. . .

As far as the PAJA is concerned, invalidity would again seem to be the natural and logical result of non-compliance with the rules of fairness. After all, procedural unfairness is listed as a ground of review in s 6(2)(c) of the PAJA and setting aside remains the default remedy of our administrative law.'

[44] Based on the aforesaid grounds, the impugned decisions stand to be set aside.

Further grounds of review

[45] In addition to my aforesaid finding, I deem it apposite to also deal with the remaining grounds of the applicant's review.

The process followed in reaching the impugned decisions

[46] I have detailed the complaint and charge against the applicant earlier in the judgment.

[47] In her answering affidavit to the complaint, the applicant responded as follows to paragraphs 13.3 and 13.4 of the complaint:

'6.8.1 The contents hereof are noted and it is denied that I was responsible for the management and control of the company's payroll as the complainant himself dealt with the payroll on an excel spreadsheet which he would send to me solely for purposes of generating payslips for the employees.

6.8.2 I confirm that we considered using the FNB payroll system, however after loading the first eight employees I realized that this system would not be functional. As a result, I proceeded to utilize my own payroll system, solely for generating the payslips for the employees of the complainant, after the payroll was sent to me by the complainant, up and until the termination of my services by the complainant, the last of which was for the end of October 2022.

6.8.3 I furthermore confirm that the last batch of payslips I generated was only for 18 (EIGHTEEN) employees, which was the total amount of employees then employed by the complainant and/or the only employees of which I received any information from the complainant, and deny that there were 28 (TWENTY-EIGHT) employees employed by the complainant at that time, or that I received information or instructions to generate the payslips for 28 (TWENTY-EIGHT) employees, as alleged by the complainant. The complainant is put to the proof hereof.

6.8.4 My understanding of my responsibilities regarding the payslips were that I would provide employees with their payslips, only upon request from the employees to do so. This was, therefore, not something which happened regularly and most certainly did not have any impact on the payments made for salaries or wages, as the complainant himself managed the payroll system.

6.8.5 I deny that I ever failed to provide payslips timeously and note that the complainant does not make any reference to which payslips he is referring to herein, nor does the complainant attach any proof of these requests which were made and allegedly not complied with. Should these payslips be for the end of November 2022, I submit that at that stage I had already ended my services with the complainant for reasons advanced above and of which due notice was given to the complainant in my letter of 15 November 2022 ("LL13").

. . .

6.8.11 I therefore submit that the complainant was at all times able to make payment of salaries and wages to his employees as he was solely responsible for managing the payroll whereas I was only responsible for generating payslips.

6.8.12 In addition hereto, and as is evident from the above, I released any and all documentation and records in my possession to the complainant and/or his new accountants which would have enabled them to generate the payslips for November 2022 and to attend to any and all accounting matters after my departure.'

[48] In the second respondent's replying affidavit (complaint) he merely denied the aforesaid allegations by the applicant and referred to annexures 'RP11' and 'RP12' to the said replying affidavit as '*confirmation that Mrs Lourens dealt directly with the payroll and managed same*'.

Annexures 'R1', 'RP11' and RP '14' to the second respondent's replying affidavit (complaint)

[49] The aforesaid annexures consist of copies of extracts from WhatsApp messages exchanged between the applicant and Mr Van Jaarsveld:

(a) At p. 194 of the application papers (p. B678 of the bundle which served before the JCC hearing) is annexure 'R1' to the second respondent's replying affidavit (complaint), in which message the applicant wrote the following to Mr Van Jaarsveld:

'Goeie more. Hoop dit gaan goed. Sal jy asb onthou om jul payroll vir my te stuur? Dankie.'

(b) At p. 199 of the application papers (p. B765 of the bundle which served before the JCC hearing), is part of annexure 'RP11' to the second respondent's replying affidavit (complaint), which message was sent from the applicant to Mr Van Jaarsveld, and which, on face value thereof, appears to be a payslip dated 27 May 2022, with two messages from the applicant appearing underneath it:

'Hier is hoe die payslip lyk op FNB. Dit is nou nie so smart soos SAGE nie, maar ek dink nie dit maak regtig saak nie.'

'Ek kort asseblief ID van Siyanda Jasezwend SA 124 op on May 2022 Payroll. As jy dit vir my aanstuur dan kan ek net sy Payslip ook uitmaak.'

(c) At p. 200 of the application papers (p. B766 of the bundle which served before the JCC), is a further part of annexure 'RP11' to the second respondent's replying affidavit (complaint). There are four WhatsApp messages from the applicant to Mr Van Jaarsveld. The first message again appears to be a payslip, with a small logo of the second respondent appearing thereon. The following message from the applicant then reads:

'Ek is besig om al die salarisse te capture. Hier is solank 'n voorbeeld van hoe dit lyk. Kyk asseblief deur en laat weet wat jy wil verander. Het jy nie bietjie groter Logo nie?'

A payslip is then again reflected, but this time with a bigger logo of the second respondent appearing on it. The following message from the applicant then reads:

'Het Logo so bietjie groter gemaak.'

(d) At p. 305 of the application papers, the applicant gave the following explanations in the JCC hearing regarding additional WhatsApp messages exchanged between herself and Mr Van Jaarsveld, attached as annexure 'RP14' to the replying affidavit (complaint) of the second respondent:

[Applicant] 'Okay, so, on Annexure B790 *[annexure 'RP14' at p. 209 of the application papers]*, the conversation led where I asked him is there anything that he would still want to change on this Excel spreadsheet before I proceed to do the payslips. And then he answered that he is still busy doing some changes on the payroll Excel spreadsheet before I can go ahead and also process the payslips for him.

. . .

And if you go to the first page, B792 *[annexure 'RP14' at p. 208 of the application papers]*, I explained to him on the fourth column of the conversation, I want to do their payslips on the Friday, so he needs to update the spreadsheet for me, in order for me to do the salaries. And that is how the conversation flowed, to order me to do it. And he only got to update the payroll Excel spreadsheet later that evening.

So, that is what I want to point out. Is that I was never in control of the payroll and in paying employees. It never relied on me to do that. He was in control of the payroll and employees, especially appointment of employees and also when employees resigned. I was only requested to do the payslips which I have done.'

[50] After the applicant referred to and explained the context of the abovementioned WhatsApp messages, the Chairperson again referred to the WhatsApp messages in general and questioned the applicant as follows thereon at p. 315 – 316 of the application papers:

[Chairperson] 'OK. So, what was his role? This is in relation to payroll. Correct me if this has nothing to do with that but as I was reading it, I felt there was .... that is dialogue between you and the Complainant about payroll.'
[Applicant] 'Yes.'
[Chairperson] 'Which is a main complaint. So what was your role and what was his role?'
[Applicant] 'Ok. So, if I understand you correctly, the rule was that he would send me the Excel spreadsheet, already compiled with the final figures for the salaries, in order for me to do the payslips. So that Excel spreadsheet that he had to compile would contain a list of employees, the hours that they worked for that month, any deductions and then also the nett pay that they would be paid at the end of the month.
So, he had to send me that Excel spreadsheet that he compiled, in order for me to do the payslips. That was my role. Without that I could not compile the payslips. So he had to send it to me within a time frame in order for me to capture all the details and to make sure that it ties up to his Excel spreadsheet, the payslips.'

Annexure 'RP12' to the second respondent's replying affidavit (complaint)

[51] Annexure 'RP12' to the second respondent's replying affidavit (complaint), at p. 205 – 206 of the application papers, is an email, dated 5 October 2022, from the applicant to ActionCOACH in response to a request from ActionCOACH to provide it with a detailed description of all services provided to the second respondent in exchange for the monthly fee which the applicant charges the second respondent. In the said annexure 'RP12' the applicant listed, *inter alia*, the following two services which are included in her monthly fee:

'2.m. Calculation of monthly salaries on monthly basis.

n. Generate Payslips to employees on monthly basis.'

She also listed the following service which she renders to the second respondent for which she did not invoice the second respondent and does not intend to invoice it for the service:

'3.B. Payments of salaries on a monthly basis on FNB on behalf of client.'

[52] The applicant gave the following explanations in the JCC hearing regarding annexure 'RP12' at p. 303 – 304 and p. 305 - 306 of the application papers:

[Applicant] 'Furthermore, regarding the payslips, I want you guys to move to RP12 of the bundle documents, which is B771. I want to clarify also this document, it is a list of services that I compiled for the complainant upon request of his Action Coach on 5 October 2022, a month before they ended my services.

And, clearly, in this document, it states all the services that I rendered. Also services that I rendered but did not invoice them for. And I think the confusion, what I did not mention in my affidavit, is under point 3b, I mentioned the payment of salaries on a monthly basis on FNB on behalf of the client. So, I never paid it as a rule, they sometimes were busy and they requested me to do the payments on their behalf. But it was not a monthly occasion at all, it was just when they requested me to do so.' (My emphasis)

. . .

[Applicant] 'So, I also want to mention that as I understand from the summary from the Secretariat, the Secretariat made a comment to say that because, that I did not mention, and this is what I am basically saying now, I understand the Secretariat's opinion because I did not mention that I also made payments to the employees on behalf of the complainant, that I failed to convince them that I was [not] in charge of the payroll. I simply did not mention the payments that I made as requested by the Complainant sometimes, because I did not think it was relevant because I also did not invoice them for these services, if and when I did them.'

Issue regarding the eight employees

[53] I have already recorded the applicant`s explanation regarding this issue, as contained both in her answering affidavit (complaint) and during the PCC hearing.

Balance of probabilities

[54] By-Law 16.1 of Appendix 4 to SAICA`s By-Laws, the Disciplinary Code and Procedures, provides that in all disciplinary matters where the PCC is to determine whether a member has conducted punishable conduct, the civil standard of proof on a balance of probabilities shall apply. This entails that SAICA, who bore the burden of proof, was required to prove that the second respondent`s version on the payroll issue is more probable than that of the applicant.

[55] From the totality of the evidence dealt with above, it is evident that the version of the second respondent and that of the applicant constitute two mutually destructive versions.

[56] Mr Van Aswegen, on behalf of the applicant, relied on *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Cie SA and Others* (427/01) [2002] ZASCA 98; 2003 (1) SA 11 (SCA) (6 September 2002) para 5, wherein it was authoritatively laid down that to come to a conclusion on two irreconcilable versions,

a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. He contended that the record of the proceedings is notably silent on any reasoning that on the contentious issues, one version was more probable than the other. There is no indication that the PCC made a credibility finding against the applicant, nor that it identified inherent probabilities favouring the second respondent's version. He submitted that the PCC`s failure to properly apply the balance of probabilities test, constituted a material error of law and therefore a ground for review under PAJA.

[57] Mr Mitchell, on behalf of SAICA, submitted that the aforesaid ground of review is a 'non-starter' because the established test in the *Stellenbosch Farmers'*-judgment applies only to courts, not administrative decision-makers such as the PCC. He submitted that there is no obligation on administrative decision-makers to assess evidence like a court. Mr Mitchell relied on *Botha NO v Governing Body for the Eljada Institute* (20530/2014) [2016] ZASCA 36 (24 March 2016) para 41, where the following was stated:

'The high court correctly referred with approval to the observation by Professor Cora Hoexter in her *Administrative Law In South Africa*, that the courts are wary of "over-judicialising" administrative processes. In *Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others* this court referred to "the potential tyranny of artful forensic footwork".'

[58] It is to be accepted that an administrative decision-maker such as the PCC is not expected to assess evidence with the same rigour as a court of law. However, since SAICA`s own By-Laws require the threshold of a balance of probabilities, the PCC was obligated to determine the probabilities, especially in the circumstances where it was confronted with two conflicting versions. In the *Kwinana*-judgment, *supra,* the following applicable passage is contained at paragraph 90:

'From *Turner v Jockey Club of South Africa* and other authorities, it is clear that natural justice does not impose rigid, court-like procedures on domestic tribunals. <u>Still, it does require minimum standards of fairness and rational decision-making.</u> The scope of natural justice depends on the nature of the tribunal, the complexity of the issues and the severity of the consequences for the affected individual.' (My emphasis)

[59] The PCC gave no reasons for the impugned decisions and there is no record of deliberations by the panel members during which the probabilities were evaluated or decided.

[60] Mr Mitchell submitted that the review is an appeal dressed up as a review, in that the applicant, according to the second respondent, is disputing the factual correctness of the impugned decisions, which is not reviewable. In this regard he referred to *Mgijima v The Premier of the Eastern Cape Province* (949/2018) [2020] ZASCA 139 (30 October 2020) at para 29:

'The principal basis of the appellant's review is that the recommendation of the Commission and the decision of the Premier based on that recommendation, were factually wrong. In general terms, review is concerned with whether a decision was regular or irregular, not with whether it was 'right' or 'wrong'. That is the province of appeals – and no provision is made in the legislation in this case for an appeal. In other words, whether the decision is a correct decision is not open for determination on review. The appellant's counsel properly conceded that his attack on the decision was based on it being wrong. He conceded too that in a review, a party may not revisit the correctness of the factual findings of the administrative decision-maker.

[61] Although I agree with the aforesaid enunciated principle, I do not agree that the applicant is relying on an error of fact. The review is clearly directed at an error in the process of arriving at the impugned decisions.

[62] The PCC's conclusion that the applicant was guilty of misconduct, without an articulated or other indication that the probabilities had been considered, is in my view indicative thereof that it did not apply the correct standard of proof.

[63] The failure to have applied the balance of probabilities test is a material error of law and a valid ground for review under PAJA.

[64] The said failure therefore constitutes a further ground why the impugned decisions stand to be set aside.

Rationality

[65] In terms of s 6(2)(f)(ii)(cc) of PAJA administrative action is reviewable if the action is not rationally connected to the information before the administrator.

[66] In this regard Mr Van Aswegen referred to *Trinity Broadcasting (Ciskei) v Independent Communications Authority of SA* (56/2003) [2003] ZASCA 119; [2003] 4 All SA 589 (SCA); 2004 (3) SA 346 (SCA) (21 November 2003) in which judgment the Supreme Court of Appeal confirmed that for a finding to be rational, there must be '*a rational objective basis justifying the connection made by the administrative decision maker between the material made available and the conclusion arrived at*'. He submitted that there is no rational link between what served before the JCC and the outcome.

[67] From the earlier contents of the judgment it is evident what material and evidence served before the JCC for their determination of the outcome of the hearing.

[68] It has throughout been SAICA's case that the applicant was responsible for the management and control of the second respondent's payroll system. The applicant, in her founding affidavit (application) stated that the notion of payroll management encompasses more than just paying employee salaries – she listed eight key components thereof. She therefore stated that the mere fact that she made payments of salaries from time to time and generated payslips, does not equate to payroll management. Considering the composition of the panel, with, *inter alia*, two chartered accountants, one can accept that this information was to their knowledge.

[69] Not only did the applicant in her affidavits which served before the JCC in detail explained that she was mainly responsible for generating payslips, but she also gave detailed explanations in this regard during her evidence before the JCC. Her version in this regard was supported and confirmed by the contemporaneous WhatsApp messages, Annexures 'R1', 'RP11' and RP '14' to the second respondent's replying affidavit (complaint), which I already dealt with earlier in the judgment. She also explained the contents of annexure 'RP12' in context. In addition, as mentioned earlier in the judgment, her version was also contained in two letters addressed by her attorneys to the attorneys of the second respondent, months before the complaint was even levelled against her.

[70] In fact, from the record of the JCC hearing it is clear the prosecutor himself (on behalf of the Secretariat) accepted, based on the totality of what served before the

JCC, that the applicant was not responsible for the management and control of the payroll system in totality; that her roll did not encompass the full responsibilities for the payroll system (although the prosecutor persisted with his view that the applicant made herself guilty of misconduct). This is evident from the following extract from the transcription of the hearing, as reflected at p.323 – 324 of the application papers:

[Prosecutor] '. . .That, to the Secretariat, made it clear that at that point, before even now, made it clear that she was responsible or she was managing payroll to a certain degree. And those payment of those employees could be included in that management of the payroll.

...

Based on the information that was placed before the Secretariat, we did believe, also with her concession that she was paying salaries, she was in some degree responsible for managing it.'

[Chairperson] 'Ok. And then now? Do you still hold the same view?'

[Prosecutor] 'Chairperson, from the Secretariat's point of view, considering what has just been submitted to it now, the Secretariat still holds a view that she did not efficiently manage the duties or the role that she was playing in the payroll. Perhaps now, not to say the full payroll duties, as she has explained how the two between her and the Complainant how their duties were somehow intertwined, with the Complainant compiling certain information and her having to take that information and action it further to complete the payroll system.

. . .' (My emphasis)

[71] The above shift in ground on behalf of the Secretariat did not escape the Chairperson's notice as is evident from the following extract from the transcription which is reflected at p. 324 of the application papers:

[Chairperson] 'Ok. So, you have ... Ok. This is very untidy, it is not a clean, and by that I mean that it is not clear cut. So, from, let's say assuming she was right that there were parts in this whole payroll management duty, there were roles that was played by the Complainant and the role that was played by herself.

You are saying you are satisfied that on her role she is guilty of misconduct. Is that what you are saying?'

[Prosecutor] 'Yes, that is what the Secretariat is putting forward.'

[72] The complaint was predicated on the allegation that the applicant was responsible for managing and administering the second respondent's payroll system in totality. The fundamental question was therefore whether the applicant was indeed tasked by the second respondent to administer and manage its payroll system. There is no indication that the JCC took the above concessions on behalf of the Secretariat

into consideration, even though it is crucial material in support of the applicant`s case that she did not manage and control the payroll system.

[73] Despite the aforesaid concessions on behalf of the Secretariat, the prosecutor also failed to revisit the Secretariat's recommendation that was made without the benefit of the additional facts and evidence presented at the hearing.

[74] The applicant`s version stands uncontradicted, both regarding her restricted role in the payroll system and in respect of the reason for having uploaded only eight employees. The contemporaneous WhatsApp messages also support the applicant`s version.

[75] I am consequently of the view that there is no rational connection between the impugned decisions made and the information before the JCC. The decision to find the applicant guilty and impose the Secretariat`s recommendation was not rationally connected to the totality of the material that served before the JCC.

[76] The absence of rationality constitutes yet a further ground why the impugned decisions stand to be set aside.

Remitting or substituting

[77] Mr Mitchell submitted that should the review succeed and the impugned decisions set aside, the matter is to be remitted back to SAICA for further consideration.

[78] As a general rule, the court will not substitute its own decision for that of the relevant administrator; instead it will remit the matter to the administrator together with an instruction to decide the matter again, or other appropriate directions.

[79] The aforesaid position is reflected in s 8(1)(c) of PAJA, which determines as follows regarding remedies in proceedings for judicial review:

'(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders-

. . .

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;'

[80] PAJA does not contain any guidelines as to what sort of cases might be exceptional and therefore the courts continue to be guided by the principles established by common law. *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) at 75H -77C deals with three common law principles, one of which is that the court will be prepared to substitute the decision where the end result is a foregone conclusion and it would be a waste of time to remit the decision to the original decision-maker. See also *University of the Western Cape and Others v Member of the Executive Committee for Health and Social Services and others* 1998 (3) SA 124 at 131D.

[81] The aforesaid principle was applied in *Hangklip Environmental Action Group v Minister for Agriculture, Environmental Affairs and Development Planning, Western Cape and Others* (7139/03) [2007] ZAWCHC 41; 2007 (6) SA 65 (C) (15 June 2007) at 84H – 85 A:

'In the present case it is transparently clear to me that there was only one decision which the first respondent could properly have made on the material available, viz. the applicant's appeal against the third respondent's decision should have been upheld, and the latter decision should have been set aside. It has not been suggested that there is any further information or evidence which is not already before the Court which could possibly lead to a different result. Mountains of paper have already been generated by this dispute. There can be no good reason to burden the first respondent with it again. Four-and-a-half years have passed since he made his decision. Further delays and uncertainty should be avoided, if possible. In my view no useful purpose would be served by remitting the matter to the first respondent so that he could reconsider his decision: there is, in my view, as I have said, only one decision which he could properly make in the circumstances. The Court is in as good a position as he is to make it.'

[82] A further principle which is, in my view, also applicable in the present matter, is the one which was present in *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A) where it was found that the offending action, a disciplinary decision, was 'purely judicial' in type, and therefore one which the court was fully qualified to deal with.

[83] In the present matter all the information and evidence is already before Court. Further, the offending act and how it is to be considered, is pretty much judicial. The expertise of the two chartered accountants who formed part of the panel, has served its purpose. Through the questions posed to the applicant during the JCC hearing, it has become evident what professionalism is expected of an accountant in the position of the applicant. In my view no useful purpose would be served by remitting the matter to the JCC to reconsider its decision.

[84] When the totality of the material that served before the JCC is considered in accordance with the applicable legal principles and in conjunction with the charge, it is a foregone conclusion that the applicant did not make herself guilty of contravening any of the By-Laws of SAICA or its Code of Professional Conduct.

[85] The matter is consequently not to be remitted to the JCC.

Costs

[86] The applicant sought in the amended notice of motion that such respondent who opposes the application, be ordered to pay the costs of the application. There is no reason why costs should not follow the outcome of the application. The parties were *ad idem* that counsel's fees are to be paid on Scale B.

Order

1 The decision of the Judicial Conduct Committee of the first respondent, dated 14 November, in terms whereof the applicant was found guilty of contravention of the first respondent's By-Laws and Code of Professional Conduct and sanctioned accordingly, is reviewed and set aside, and substituted with the following order:

'1.1 The applicant did not make herself guilty of contravening any of the By-Laws or Code of Professional Conduct of the first respondent.'

2 The first respondent is ordered to pay the costs of the application, counsel`s fees to be paid on Scale B.

[redacted]

C VAN ZYL

JUDGE OF THE HIGH COURT

I concur:

[redacted]

JP DAFFUE

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	WA van Aswegen
Instructed by:	McIntyre & Van der Post Attorneys, Bloemfontein
For the First Respondent:	J Mitchell
Instructed by:	Symington & De Kok Attorneys, Bloemfontein