IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

Not Reportable
CASE NO. EL967/2023

In the matter between:

NICOLAAS JOHANNES DU PLESSIS **Applicant**

and

LEGAL PRACTICE COUNCIL **Respondent**

JUDGMENT

LAING J

[1] This is an application for the review and setting aside of various decisions taken by a Disciplinary Committee of the respondent in relation to two complaints lodged against the applicant. The applicant also seeks an order interdicting the respondent from continuing with the disciplinary proceedings, pending the outcome of the application, and directing the respondent to refer one of the complaints back to an Investigating Committee.

Applicant's case

[2] The applicant emphasises that he does not challenge the disciplinary proceedings. He attacks, instead, the Disciplinary Committee's decision regarding certain points raised *in limine* on 29 March 2023. The background is set out below.

[3] On 25 February 2019, Mrs AL Friderichs, from the legal practice of Squire Smith & Laurie Inc ('Squires'), lodged a complaint with the respondent about the applicant's conduct. The complaint pertained to the appointment by the applicant's legal practice, NJ du Plessis & Associates ('NJDP'), of Squires as local correspondents for matters requiring a Qonce address; NJDP is based in East London. More specifically, Mrs Friderichs raised concerns about the way NJDP had billed the State Attorney for work allegedly carried out by Squires when this had not been the case and when Squires had not submitted any invoices to NJDP in that regard.

[4] The applicant responded on 9 April 2019. He refuted Mrs Friderichs's allegations and pointed out that the fees for which his practice had billed were permitted in terms of the relevant tariff and the rules of court. Nothing further was heard from the respondent. This prompted the applicant to send an enquiry on 8 August 2019 to Ms Nicole Stemmet at the respondent's offices; on the same date, Ms Estelle Braaf contacted the applicant to say that the matter would receive attention during the following month.

[5] A few days later, on 12 August 2019, Mr Edward Scheun of the Eastern Cape Department of Education ('the Department') also lodged a complaint about the applicant's conduct. In short, the complaint pertained to NJDP's alleged abuse of court process and referred to an affidavit deposed to by Mr Scheun in that regard. The applicant contacted the respondent telephonically upon receipt of the complaint and indicated that he had not been provided with the affidavit in question.

[6] On 16 September 2019, the applicant made a follow-up enquiry about the Squires complaint with Ms Braaf, who responded on 30 September 2019 to say that the respondent's Investigating Committee would deal with the matter on 1 October 2019. The applicant made a further enquiry on the later date but received no response.

[7] Regarding the Department's complaint, the applicant informed Ms Braaf on 17 January 2020 that he had received Mr Scheun's affidavit but not the annexures thereto. He also pointed out that it would be prejudicial for him to address the complaint before

the finalization of the underlying court proceedings. He received no response but reached agreement with the Department on some of the issues being litigated.

[8] Sometime later, on 5 October 2021, the applicant contacted the respondent's Eastern Cape office to point out that the Squires complaint had been outstanding for more than two years; he wished to have the matter finalized. In response, Ms Louise Belcher indicated to the applicant on the same date that the Investigating Committee had dismissed the complaint on 18 January 2021. The applicant immediately requested the respondent for a formal letter to that effect; he made further requests on 11 October 2021 and 3 November 2021, whereupon he was informed that the letter had been requested from the respondent's Western Cape office. The applicant made another enquiry on 1 December 2021 and was told that the respondent would follow up and revert. This never happened.

[9] Time passed and on 1 February 2022 the applicant enquired again; he was simply told that he would receive the letter once it had been obtained. The applicant contacted the respondent a few weeks later, on 28 February 2022, but there were no new developments.

[10] On 13 January 2023, Mr Siphamandla Ntshingila from the respondent's Eastern Cape office contacted the applicant, informing him that the Investigating Committee had considered the matter on 15 June 2022 and referred it to the Disciplinary Committee on 31 January 2023. Caught completely off guard, the applicant responded immediately and protested that the Squires complaint had already been dismissed. He contacted the respondent again, a few days later, but to no avail.

[11] The disciplinary proceedings were convened for 31 January 2023. They were subsequently postponed. The applicant conveyed his unhappiness to the respondent on 17 February 2023 and indicated that he intended to rely on the undue delay, the respondent's failure to reply to his response to the allegations levelled against him, and the dismissal of the complaint (which Ms Belcher had communicated to him) as points *in*

limine at the proceedings scheduled for 27 February 2023. The proceedings were further postponed until 29 March 2023, whereupon the Disciplinary Committee dismissed the applicant's points *in limine*.

[12] The applicant delivered his outstanding response in relation to the Department's complaint on 18 May 2023. This was done in anticipation of the resumption of proceedings on 25 May 2023.

[13] It is the applicant's case that the respondent's conduct has been unfair; it did not follow the correct procedure in relation to his points *in limine* and it has unduly delayed the finalisation of the matter. The Squires complaint, moreover, has already been dismissed.

Respondent's case

[14] The chairperson of the South African Legal Practice Council ('national LPC'), Ms Janine Myburgh, deposed to an answering affidavit, pointing out that the applicant had cited the Eastern Cape Provincial Council ('provincial LPC') as the respondent. It was, however, the national LPC that retained authority to oppose an application of this nature, which it proceeded to do.

[15] Ms Myburgh mentions that both complaints were initially dealt with by the erstwhile Cape Law Society. This was prior to the provincial LPC's having become fully operational. Subsequently, the provincial LPC's Investigating Committee issued reports on 15 June 2022 and 16 August 2022, recommending that disciplinary proceedings be commenced.

[16] A charge sheet was delivered to the applicant on 16 January 2023. The applicant was, for medical reasons, unable to attend the proceedings at the end of the month and the matter was rescheduled for 29 March 2023. Ms Myburgh remarks that the

complaints are of a serious nature and pertain to allegations of dishonest conduct on the applicant's part. They require the national LPC's proper attention.

[17] The point is made that the applicant sought to interdict the continuation of the disciplinary proceedings on 25 and 26 May 2023. The matter proceeded anyway; Mrs Friderichs gave evidence and underwent cross-examination. The proceedings were adjourned until 17 and 18 August 2023 for finalization. Consequently, argues Ms Myburgh, the present review has become moot. She goes on to address the applicant's founding affidavit, pointing out that the applicant never received formal confirmation to the effect that the Squires complaint had been dismissed because, factually, this was not the case.

[18] No prejudice has been caused to the applicant, asserts Ms Myburgh. The documentation that informs the complaints are common cause and 'well preserved'. Any delay that has occurred did not prevent the applicant from defending himself at the disciplinary proceedings. The decision of the Disciplinary Committee in dismissing the points *in limine* did not, moreover, give rise to unfairness or any reviewable irregularity.

Subsequent developments

[19] The applicant, in a supplementary affidavit, records that he received notice to attend the continuation of disciplinary proceedings on 12 April 2024. This was while the present review was still pending.

[20] At the commencement of the proceedings, the applicant raised, again, the issue of undue delay as well as the alleged dismissal of the Squires complaint. He also raised concern that evidence had been introduced in the Department's complaint prior to any charges having been levelled against him and prior to his having pleaded thereto; he pointed out, moreover, that he had since provided his response to the Department's complaint and that the matter should, accordingly, be referred to the Investigating Committee for further consideration. The Disciplinary Committee, avers the applicant,

acknowledged receipt of his response and removed the Department's complaint from the proceedings on the day in question.

[21] The respondent subsequently filed the affidavit of Mr Pieter van Zyl, who has been appointed to prosecute the disciplinary proceedings against the applicant. He explains that the applicant requested a postponement of the proceedings that had been adjourned until 17 and 18 August 2023. This was done. The proceedings were rescheduled for 12 April 2024, on which date the applicant gave evidence and was cross-examined. No further evidence is to be led regarding the Squires complaint; the parties are only required to submit heads of argument, after which the Disciplinary Committee will make its ruling.

[22] Mr van Zyl goes on to state that, in relation to the Department's complaint, there was insufficient time to have dealt with the matter on 12 April 2024. It has not been referred to the Investigating Committee. It remains with the Disciplinary Committee and disciplinary proceedings in that regard will resume in due course, on a date still to be determined.

Issues to be decided

[23] From the papers filed, the court must determine, *inter alia*, whether the applicant has established a basis upon which: (a) the Disciplinary Committee's ruling on the applicant's points *in limine* can be reviewed and set aside; (b) the respondent can be interdicted from continuing with the disciplinary proceedings regarding the Squires complaint, pending the above review; and (c) the respondent can be directed to refer the Department's complaint and the applicant's response to the Investigating Committee before further steps are taken.

[24] The relevant principles are considered below.

Legal framework

[25] The Legal Practice Act 28 of 2014 ('the LPA') provides for the establishment of investigating and disciplinary committees.[1] It requires the national LPC to make rules for dealing with misconduct complaints[2] and sets out the principles upon which a disciplinary hearing must be conducted.[3] The LPA requires a disciplinary committee to decide the guilt or otherwise of a legal practitioner within 30 days after the conclusion of disciplinary proceedings, but does not stipulate a timeframe for the overall investigation and adjudication of a matter.[4] A legal practitioner may appeal against a finding of misconduct or against the sanction imposed, or both.[5] No provision is made, however, for an appeal against the conduct of an investigating or disciplinary committee.[6] The LPA makes it clear, nevertheless, that a practitioner may apply to the High Court for appropriate relief 'in connection with any decision of a disciplinary body.[7]

[26] The rules[8] made in terms of the LPA deal with disciplinary matters under Part X. They broadly reflect the principles contained in the LPA; similarly, they do not provide recourse for a practitioner in relation to the conduct of either the investigating or disciplinary committee.

[27] The Supreme Court of Appeal confirmed, in *Mapholisa NO v Phetoe NO and others*,[9] that the decision-making of a statutory disciplinary body amounts to administrative action. This is subject to review under section 6(1) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), the grounds for review being listed in section 6(2) thereof. The applicant has not referred specifically to any of the PAJA review grounds. He has argued, however, that undue delay in the institution and finalization of disciplinary proceedings against him has rendered them unfair.

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[1] Sections 37(1) and (4).
[2] Section 38(1).
[3] Section 39.
[4] Section 40(1)(a).
[5] Section 41(1)(a).
[6] Interestingly, section 41(1)(b) permits a complainant to lodge an appeal against any conduct or finding of the committees in question.
[7] Section 44(2).
[8] The LPC Rules were published in terms of GN 401 of 20 July 2018, GG No. 41781.
[9] 2023 (3) SA 149 (SCA), at paragraph [14].

[28] The subject of undue delay was considered in *Sanderson v Attorney-General, Eastern Cape*,[10] where the Constitutional Court dealt with the alleged infringement of the appellant's right to a speedy trial. Kriegler J observed that:

> 'The critical question is how we determine whether a particular lapse of time is reasonable. The seminal answer in *Barker v Wingo*[11] is that there is a "balancing test" in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the delay; the reason the government assigns to justify the delay; the accused's assertion of his right to a speedy trial; and prejudice to the accused.'[12]

[29] The context of the above case was the prosecution of criminal proceedings, with reference to the right to a speedy trial in terms of section 25(3)(a) of the Interim Constitution.

[30] In *Bothma v Els and others*,[13] the Constitutional Court dealt with a delay in the appellant's institution of a private prosecution for a series of rapes that allegedly occurred 37 years previously. Sachs J held as follows:

> 'The question before us, then, is not with his [the respondent's] rights under section 35(3)(d) have been violated;[14] clearly they have not been. It is whether in a broader sense his right to a fair trial would be irreparably violated as a consequence of the extreme belatedness of the prosecution. In this respect I

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[10] 1998 (2) SA 38 (CC).
[11] The reference is to a decision of the United States Supreme Court, viz. *Barker v Wingo, Warden* [1972] USSC 144; 407 US 514.
[12] *Sanderson*, at paragraph [25].
[13] 2010 (2) SA 622 (CC).
[14] The reference is to section 35(3)(d) of the Constitution, within the context of the overarching right to a fair trial, that every person has the right to have his or her trial begin and conclude without unreasonable delay.

believe that the High Court correctly decided that the right to a fair trial should not be anchored exclusively in section 35(3)(d). As Kentridge AJ said in *S v Zuma*:[15]

> "The right to a fair trial conferred by [the fair trial provisions of the Interim Constitution] is broader than the list of specific rights set out in [the paragraphs dealing with the rights of the accused]. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force."[16]

In this context, then, the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence.'[17]

[31] The above decisions pertain to the prosecution of criminal proceedings. They have, nevertheless, been referred to within the context of disciplinary proceedings emanating from an employment relationship.

[32] In *Moroenyane v Station Commander of the South African Police Services, Vanderbijlpark*,[18] Snyman AJ considered an urgent application to interdict disciplinary proceedings brought by the applicant's employer, the South African Police Services ('SAPS'). The alleged misconduct occurred in 2014; the disciplinary proceedings were instituted in 2016. Snyman AJ sought guidance from the principles of a stay in criminal proceedings to decide whether undue delay could render the institution or continuation of such disciplinary proceedings as unreasonable and unfair.[19]

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[15] 1995 (2) SA 642 (CC).
[16] At paragraph [16].
[17] *Bothma*, at paragraph [34].
[18] (J1672/2016) [2016] ZALCJHB 330 (26 August 2016).
[19] At paragraph [38].

[33] The learned judge observed as follows:

‘In summary, I do not believe that what may be considered to be a lengthy delay in the institution, and then conclusion, of disciplinary proceedings can per se lead to a conclusion of unreasonableness and unfairness. A disciplinary hearing cannot be directed to be aborted just because there is a long delay. More is needed. What must always be considered, in deciding whether to finish off disciplinary proceedings because of an undue delay, is the following:

> …The delay has to be unreasonable. In this context, firstly, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.
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> …The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.
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> …It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing.
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> …Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case.
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> …The nature of the alleged offence must be taken into account. The offence may be such that there is a particular imperative to have it decided on the merits. This requirement however does not mean that a very serious offence (such as a dishonesty offence) must be dealt with, no

matter what, just because it is so serious. What it means is that the nature of the offence could in itself justify a longer period of further investigation, or a longer period in collating and preparing proper evidence, thus causing a delay that is understandable.

…All the above considerations must be applied, not individually, but holistically.'[20]

[34] The Constitutional Court subsequently endorsed the approach in *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and others*.[21] In that matter, the court considered a situation where the Department, as employer, dismissed the appellant more than five years after the alleged misconduct. Petse AJ stated that the requirement of promptness extended not only to the institution of disciplinary proceedings but also to their expeditious completion.[22] The learned judge went on to refer to *Bothma* and held as follows:

'This [i.e. the decision in *Bothma*] also accords with the general principles how delay impacts the fairness of disciplinary proceedings. The question whether a delay in finalisation of disciplinary proceedings is unacceptable is a matter that can be determined on a case-by-case basis. There can be no hard and fast rules. Whether the delay would impact negatively on the fairness of disciplinary proceedings would this depend on the facts of each case.'[23]

[35] The recent case of *Mapyane v South African Police Services and others*,[24] decided in the Labour Court, reflects the continued application of the above principles to an employment relationship. To that effect, Nkutha-Nkontwana J had regard to the institution of disciplinary proceedings some three-and-half years after SAPS became aware of the misconduct allegations. The learned judge found that the undue delay

[20] At paragraph [42].
[21] 2019 (4) BCLR 506 (CC).
[22] At paragraph [67].
[23] At paragraph [71].
[24] (JR 1948/19) [2023] ZALCJHB 344.

tainted the fairness of the proceedings; the dismissal of the applicant was vitiated by a gross irregularity, as envisaged under section 145(2)(a)(ii) of the Labour Relations Act 66 of 1995.[25]

[36] The distinction between the above cases and the present matter is, of course, that the disciplinary proceedings have been instituted against the applicant as a legal practitioner in terms of the LPA. The present matter does not pertain to an employment relationship.

[37] In *Heidema v Professional Conduct Committee for Optometry and Dispensing Opticians of the Health Professions Council of South Africa and others*,[26] Davis J was prepared to apply the principles of undue delay to the disciplinary proceedings of the respondent, being a professional body established to regulate the optometry profession. The findings are persuasive.

Discussion

[38] There are several arguments to be considered before the main issues can be decided. These are addressed separately below.

Whether the court can intervene, pending finalization of the proceedings

[39] At the outset, it is necessary to recognize the fact that the disciplinary proceedings against the applicant have not been finalized. The applicant has merely challenged the Disciplinary Committee's ruling of 29 March 2023 on the points raised *in limine*.

[25] At paragraphs [28] to [30].
[26] 2022 JDR 3835 (GP).

[40] Counsel for the respondent referred to *Dr Grieve v The Health Professions Council of SA*,[27] where Khumalo J reiterated the general principle that, absent exceptional circumstances or a contravention of the requirements of procedural fairness, a court will not intervene in an administrative process that has yet to be concluded.[28] The reasons for this are not difficult to find. Intervention by the court risks further delay, added expenses, and might be unnecessary where the administrator has yet to decide entirely unrelated issues that could ultimately prove decisive of the matter.

[41] The applicant's case, in the present matter, rests on the delay that has occurred and the prejudice that has resulted. Whether these constitute exceptional circumstances that justify the court's intervention, notwithstanding the fact that the proceedings have not been finalized, must be decided after examining the delay itself and its consequences. This must be done within the context of PAJA.

Undue delay as the basis for a possible ground of review

[42] The application has been brought in terms of the authority granted under section 6(1) of PAJA, in accordance with the procedure contained in rule 53 of the Uniform Rules of Court. As counsel for the respondent contended, however, the applicant has failed to identify the review grounds listed under section 6(2) upon which he relies. In *Heidema*, Davis J observed:

> '…the applicant, having launched review proceedings in terms of Rule 53,[29] is restricted to the principles applicable to a judicial review of an administrative act. These principles are those codified in PAJA.'[30]

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[27] 2019 JDR 0352 (GP).
[28] At paragraph [48]. The court referred to the Canadian decision of *Northern Cross (Yukon) Limited v Canada* (Attorney General / 2017 FC 622, 2017 CarswellNat 2962b). In relation to the intervention of a superior court in Magistrates' Court proceedings that had not yet been terminated, see *Wahlhaus and others v Additional Magistrate, Johannesburg and another* 1959 (3) SA 113 (A), at 119D-120D; and *Goncalves v Addisionele Landdros, Pretoria en 'n ander* 1973 (4) SA 587 (T), at 596h.
[29] Rule 53 of the Uniform Rules of Court.
[30] *Heidema*, n 26, above, at paragraph [26].

[43] The exact principles upon which the applicant relies are not readily apparent. It is certainly not the role of the court to second-guess, from the affidavits and argument presented, what forms the basis of the applicant's challenge. This must be conveyed clearly and unequivocally, not only for the benefit of the court but also for that of the respondent, who has been called to answer the applicant's case.

[44] Nevertheless, it seems that the applicant has sought to assert that the delay and the resulting prejudice, as alleged, have given rise to an irregularity, which possibly forms the basis for a ground of review upon which he can launch an attack against the ruling of the Disciplinary Committee. He has averred that the proceedings have been rendered unreasonable and unfair by the delay but has stopped short of explaining how such an irregularity relates specifically to the grounds listed under section 6(2) of PAJA. At best for the applicant, it could be said that any of the grounds of procedural unfairness,[31] irrationality,[32] or unreasonableness[33] might serve as the basis for the applicant's challenge. The question of delay can possibly be examined through such a lens.

Nature and impact of the delay on the proceedings

[45] At this stage, it is necessary to examine in greater detail the nature of the delay to which the applicant objects. Whether it has rendered the proceedings unreasonable and unfair can be decided within the framework set out in *Moroenyane*, subsequently endorsed in *Stokwe*. Ultimately, the facts of the case must determine whether the delay gave rise to a ground of review upon which the Disciplinary Committee's ruling can be challenged.

[46] Beginning firstly with the Squires complaint, the applicant can hardly be criticized for not having taken adequate steps to attempt to have the matter resolved. There is undisputed evidence in his papers of the correspondence sent to the respondent's

[31] Section 6(2)(c) of PAJA.
[32] Section 6(2)(f)(ii).
[33] Section 6(2)(h).

Western Cape and Eastern Cape offices, enquiring about the status of the matter and requesting that its conclusion be expedited. The respondent, in return, provided vague assurances that the matter was receiving attention, as well as several apologies for the ongoing delay. At some point, an administrator in the Eastern Cape office, Ms Belcher, informed the applicant that the complaint had been dismissed, only to be contradicted more than a year later by another administrator, Mr Ntshingila, who pointed out that the Investigating Committee had already referred it to the Disciplinary Committee for a hearing.

[47] The complaint was lodged on 25 February 2019; the disciplinary proceedings commenced on 31 January 2023. This represents a period of almost four years.[34] The closest that the respondent comes to explaining the delay is an allusion to the managerial shortcomings and inevitable complications caused by the transition of the administration of the legal profession from the Cape Law Society to the provincial LPC, involving two different offices. This is inexcusable. A professional body that has been established to regulate a profession must conduct itself according to the same high standards expected from the practitioners themselves. The delay in question was undue and chiefly attributable to the respondent's inaction.

[48] It remains to be decided, however, whether such undue delay rendered the proceedings unreasonable and unfair and, by implication, whether the ruling of the Disciplinary Committee is reviewable.

[49] The applicant has drawn attention to the prejudice caused by the delay, both to his personal life and to his professional life. This is, to some extent, unavoidable, given the nature of the complaint and the inevitable anxiety that accompanies such proceedings. Importantly, however, there is no indication that the delay has materially prejudiced the applicant in the conduct of the proceedings themselves. He (or his legal

[34] The period after the commencement of the proceedings has not been considered. Ms Myburgh's contention that the applicant sought a postponement of the proceedings until 29 March 2023 has not been refuted; after this, the proceedings seem to have followed a standard course within a reasonable timeframe.

representative) has been able to cross-examine Ms Friderichs and to testify on his own behalf. He has had full access to the record and has never challenged, with much conviction, Ms Myburgh's assertion that 'all the documents relating to the complaint seem to be common cause and well preserved by the parties.'[35] If the delay had indeed been as severe as alleged, then the question arises as to why the applicant permitted the proceedings to advance as far as they have, with only the parties' respective heads of argument being outstanding.

[50] The serious nature of the complaint, too, cannot be overlooked. Where allegations of dishonesty have been made against a legal practitioner, these must be investigated thoroughly; if an investigation reveals *prima facie* evidence thereof, then they must be tested properly at a hearing. A certain measure of delay in this regard ought to be tolerated.

[51] With reference to the principles emphasised in *Sanderson* and later cases, a balancing test must be applied. The four-year delay in the present matter, the efforts made by the applicant to resolve it, and the inexcusable conduct on the part of the respondent must be balanced against the remaining factors. These include the absence of material prejudice caused to the applicant and the serious nature of the complaint itself. Considered holistically, the undue delay cannot be seen to have crossed the threshold for the proceedings to be deemed unreasonable and unfair.

[52] The same balancing test must be applied to the Department's complaint. Although the complaint was lodged on 12 August 2019, the applicant's case appears to be weakened somewhat by his letter to the respondent's Western Cape office, on 17 January 2020, to the effect that 'we believe that to answer this complaint will be prejudicial at this stage and that the matter [i.e. the underlying High Court litigation] should be finalized first.' There was no further communication between the parties until the respondent's notification, on 13 January 2023, of the commencement of

[35] The quotation is derived from the Disciplinary Committee's ruling, per the chairperson, Mr Ayanda Gwabeni, at paragraph 9, 29 March 2023.

proceedings. At least some of the three-year delay can be attributed to the applicant's stance that an answer to the complaint, pending completion of the underlying High Court litigation, would be premature and not in his interests. There is no suggestion from the papers that the applicant took any further steps to deal specifically with the Department's complaint.

[53] Insofar as the applicant never received a copy of the annexures to Mr Scheun's affidavit, this had more to do with the fairness of the proceedings themselves rather than the delay; the applicant subsequently obtained the outstanding documents and provided an answer to the complaint. The demise of a potential witness in the proceedings, Mr Sean Coetzee, might well have compromised the applicant's case.[36] His passing, however, on 26 December 2023, was almost a year after the date upon which the hearing commenced; there is no indication that there was any connection between the prejudice caused by Mr Coetzee's death and the delay from when the complaint was first lodged. It takes the matter no further.

[54] Similarly, when all the factors pertinent to the Department's complaint are considered holistically, any undue delay has not, to use the language of *Bothma*, inevitably and irremediably tainted the overall substantive fairness of the proceedings were they to continue. That threshold has simply not been crossed.

[55] In the absence of a finding that the proceedings have been rendered unreasonable and unfair by the undue delay, there is no need to investigate further whether any of the review grounds of procedural unfairness, irrationality, or unreasonableness as listed under section 6(2) of PAJA, can be invoked. The applicant's challenge to the Disciplinary Committee's ruling is unsuccessful.

Distinction between appeal and review procedures

[36] The Department alleged that the applicants' clients never had their affidavits properly commissioned. Mr Coetzee was the commissioner of oaths involved.

[56] The discussion, at this stage, must move away from the nature and impact of the undue delay on the proceedings to examine whether there is any basis for the applicant's remaining arguments. This invites the question of whether such arguments form the basis for an appeal against the Disciplinary Committee's ruling, rather than a review.

[57] It is important to reiterate the distinction between the two procedures. Counsel for the respondent referred to Hoexter's work, where the learned writer observes:

> 'Like judicial review, administrative appeals allow for the reconsideration of administrative decisions by a higher authority. Unlike judicial review, such appeals are established specifically to challenge the merits of a particular decision. The person or body to whom the appeal is made will step into the shoes of the original decision-maker, as it were, and decide the matter anew.
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> Judicial review, on the other hand, focuses on the way in which the decision was reached, and not on the correctness of the decision itself. At least in theory, review tests the legality and not the merits of the decision. Another major distinction is that judicial review is an external safeguard against maladministration, whereas administrative appeals constitute an internal or "domestic" check.'[37]

[58] A key contention advanced by the applicant is that the respondent previously dismissed the Squires complaint. This was conveyed to the applicant on 5 October 2021 by an administrator of the respondent, Ms Belcher. Consequently, suggests the applicant, the complaint could not have been revived and made the subject of the ensuing proceedings.

[59] The respondent points out that, factually, the complaint was never dismissed; the Investigating Committee never made any decision to that effect. In its ruling, the

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[37] C Hoexter and G Penfold, *Administrative Law in South Africa* (Juta, 3ed, 2021), at 85.

Disciplinary Committee referred to rule 40.5.2 of the LPC Rules,[38] in terms of which the Investigating Committee must inform the LPC, the complainant, and the practitioner concerned (i.e. the applicant in this case) of any decision to dismiss a complaint, as well as the reasons for it. This was never done. The email from Ms Belcher could never have been construed as official communication from the Investigating Committee, as envisaged under rule 40.5.2. The applicant's subsequent insistence on the respondent's provision of a formal letter in confirmation of the above served merely to underscore his acceptance that the email was, on its own, insufficient.

[60] In advancing the above argument for purposes of the present matter, the applicant has not challenged the way in which the Disciplinary Committee reached its decision on 29 March 2023. He has, however, challenged the correctness thereof. The applicant's heads of argument confirm as much when the assertion is made, in their conclusion, that 'on the basis of all the aforesaid… the respondent erred in its finding on the points raised *in limine* and ought to have upheld same.' This is, without a doubt, an appeal mistakenly dressed as a review. The provisions of section 41(1)(a) of the LPA, read with rule 44, provide the appropriate recourse for the applicant.[39]

[61] The argument also attracts the problems associated with section 7(2) of PAJA. The provisions in question prevent a court from reviewing administrative action unless an internal remedy, as provided for in any other law, has first been exhausted.[40] The LPA's appeal procedure is just such a remedy. The court cannot, in the absence of exceptional circumstances and without application having been made, exempt the applicant from his obligation in this regard.[41]

[62] By extension, it also follows that the applicant's challenge to the Disciplinary Committee's ruling, overall, can be rejected simply because it does not amount to a

[38] See n 8, above.
[39] Rule 44 of the LPC Rules sets out the procedure to be followed for an appeal against the conduct or finding of an investigating committee or a disciplinary committee. The provisions thereof can be interpreted to mean, however, that the applicant must await the finalization of the proceedings before lodging it with the appeal tribunal.
[40] Section 7(2)(a).
[41] Section 7(2)(c).

proper review. The applicant has sought the review and setting aside of the ruling, resting his case on undue delay and the resulting prejudice. He has, however, attached such shortcomings to the proceedings rather than the ruling itself; he has not argued that undue delay and the resulting prejudice have affected the way in which the Disciplinary Committee reached its decision or the legality thereof. He has challenged the merits of the ruling. The applicant has effectively brought an appeal; no case has been made for the review and setting aside of the ruling.

Referral of Department's complaint

[63] The remaining issue for determination is whether to refer the Department's complaint and the applicant's answer to the Investigating Committee. The reason advanced for this is that until the Investigating Committee has properly investigated the matter, has satisfied itself on the basis of available *prima facie* evidence that the applicant is guilty of misconduct, and has referred the matter to the Disciplinary Committee, any attempt by the Disciplinary Committee to continue with the hearing would be in contravention of the LPC Rules.[42]

[64] The difficulty with the applicant's contention is that the Department's complaint has already been investigated by the Investigating Committee. It issued its report on 16 August 2022 and referred the matter to the Disciplinary Committee for adjudication, resulting in the charges brought against the applicant on 16 January 2023. There was, as counsel argued, no obligation on the part of the respondent to have invited a response from the applicant prior to the referral of the matter to either the Investigating Committee or the Disciplinary Committee.[43] It did so, nonetheless. The applicant, in turn, elected not to answer the complaint.

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[42] Rule 40.5.1 addresses the procedure to be followed.

[43] Counsel referred to the discretion created under rule 39.3 and rule 40.2 in relation to whether to invite the practitioner in question (i.e. the applicant) to answer the complaint, provide further particulars, or assist in the formulation of recommendations to the LPC.

[65] The role of an investigating committee is to investigate a complaint so that it can determine whether the practitioner in question is, based on the available *prima facie* evidence, guilty of misconduct that warrants disciplinary proceedings.[44] The role of the disciplinary committee is to adjudicate the matter and to decide whether the practitioner is guilty of misconduct.[45]

[66] In the present matter, once the Investigating Committee had referred the Department's complaint to the Disciplinary Committee, it had performed its function. There was and remains no need to refer the matter back to it for further consideration. That the Disciplinary Committee invited the applicant to answer the complaint was, as was pointed out in the ruling made on 29 March 2023, a procedure that fell within the ambit of the discretionary powers available to the chairperson in terms of rule 41.8.10[46] and served to give effect to the principle of *audi alterem partem*. It is not inconceivable that the applicant could have admitted the charges *in toto*; alternatively, he could have placed such information before the Disciplinary Committee as to have persuaded it that he was entirely innocent of the misconduct with which he had been charged. In either event, it would have been within the powers of the Disciplinary Committee to have determined, through its chairperson, the way in which the proceedings would have been conducted further.[47]

[67] To refer the Department's complaint back to the Investigating Committee, at this stage, would serve no purpose at all. It would merely exacerbate the delay that lies at the heart of the applicant's case.

Relief and order

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[44] See rule 40.1 and rule 40.5.
[45] See rule 40.5.1 and 43.1.
[46] The rule provides that a disciplinary committee has the power, where any matter of procedure arises for which no provision is made in the LPC Rules, to determine through its chairperson, at his or her discretion, what procedure should be followed.
[47] See rule 41.8.1.

[68] On the facts of this matter, the applicant has not demonstrated that undue delay in either the Squires complaint or the Department's complaint has rendered the proceedings unreasonable or unfair, such that the ruling of the Disciplinary Committee is reviewable. Such delay, moreover, has not given rise to a set of exceptional circumstances that justify the court's intervention when the proceedings have yet to be concluded. It is also clear that the applicant has misconstrued the recourse available to him, inadvertently framing his application as a review of the decision of the Disciplinary Committee on 29 March 2023, instead of pursuing an appeal procedure once it becomes available to him.[48]

[69] Consequently, there is no basis for reviewing and setting aside the Disciplinary Committee's ruling. There is also no basis for interdicting the proceedings pertaining to the Squires complaint[49] or for referring the Department's complaint back to the Investigating Committee.

[70] Regarding costs, the general rule must be applied; the respondent as the successful party is entitled to recover its expenses. To that effect, however, it is unnecessary to make an award on an attorney-and-client scale, as requested by counsel for the respondent. As the court has already found, the respondent was chiefly responsible for the undue delay in the Squires complaint; it was also not entirely blameless for the delay in the Department's complaint. It would be unfair to impose a punitive costs order on the applicant.

[71] In the circumstances, the following order is made:

(a) the application is dismissed; and

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[48] See n 39, above.

[49] Counsel for the respondent contended that the issue has become moot because the proceedings went ahead on 25 and 26 May 2023. During argument, counsel for the applicant applied, from the bar, for an amendment of the relief sought, such that all further proceedings in relation to the Squires complaint would be interdicted.

(b) the applicant is directed to pay the respondent's costs on a party-and-party basis.

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JGA LAING

JUDGE OF THE HIGH COURT

Appearances

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Date of hearing:	18 April 2024.
Date of delivery of judgment:	20 August 2024.