SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG DIVISION, PRETORIA

CASE NUMBER: 2267/2015
DATE: 22 APRIL 2016
REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between

DR W S	**Applicant**
and	
PROFESSOR J F N H	**1 nd Respondent**
PROFESSOR R E M	**2nd Respondent**
H P C OF SOUTH AFRICA	**3rd Respondent**

JUDGMENT

UNTERHALTER AJ

INTRODUCTION

1. The Applicant, Dr W B, is a qualified medical practitioner, practising as a cardiologist in D in the Western Cape. In 2007, the Health Professions Council of South Africa ("The Council") brought charges against Dr B, alleging that Dr S had engaged in unprofessional conduct. The conduct in question concerned Dr B participation in chemical and biological warfare research whilst in the employ of the South African Defence Force in the 1980s.

2. In terms of the Health Professions Act 56 of 1974 ("the Act"), The Council is established. On the recommendation of The Council, the Minister of Health is required, in terms of Section 15, to establish a professional board with regard to any health profession. Among the powers given to professional boards is the power to institute an inquiry into any complaint, charge or allegation concerning the professional conduct of any person registered under the Act. (Section 41 (1)) The Act then provides for the procedures to be followed when a professional board undertakes an inquiry and the sanctions that may be applied to a person found guilty of improper or disgraceful conduct. (Sections 42 and 43). The Minister of Health has promulgated regulations concerning the conduct of inquiries into alleged unprofessional conduct. ("The regulations", No R765 published in the Government Gazette of 24 August 2001).

3. The relevant professional board appoints a professional conduct committee to

conduct the inquiry. A professional conduct committee ("the committee") was appointed to inquire into the charges of professional misconduct against Dr B. The committee is constituted by Professor J F N H, a professor of family medicine, practicing at the University of Pretoria and Professor R E M, a professor of obstetrics, practicing at the Nelson R M School of Medicine at The University of K Z N. Professors H and M are cited as the First and Second Respondents in these proceedings.

4. On 18 December 2013, the committee found Dr S guilty of professional misconduct on a number of charges levelled against him. After some delay, the committee proceeded to consider the evidence concerning the penalty that might be imposed upon Dr S. The proceedings resumed in late November 2014, and were continued in January 2015.

5. Upon the resumption of proceedings on 26 November 2014, the pro-forma prosecutor called Mr H as a witness. Mr H came to testify on behalf of a number of civil society organisations. Mr H' s evidence sought to persuade the committee that Dr B should be removed from the Register of Medical Practitioners ("the register"). In the course of his evidence, Mr H submitted petitions that set out the basis upon which a large number of civil society organisations urge that Dr S be struck off. The petitions frame the issue as follows:

> "We *now call upon the HPCSA to strike Dr B off the Medical Register because his actions and his denials of wrongdoing after the hearing demonstrate that he has no remorse and lacks an understanding of right*

and wrong. It is high time that apartheid's agents who thought they could act with impunity, account for their complete disregard of human right in the norms of our South African democracy".

6. The petitions reference a number of organisations that endorse the campaign for Dr B's striking. Important for the purposes of this application is the fact that the (SAMA) and an organisation called (RUDASA) are listed as organisations that have endorsed the campaign.

7. Upon the continuation of proceedings on 19 January 2015, Dr B's counsel raised with the Chairman of the committee, Professor H, that counsel had received information that Professor H was a member of one of the organisations that had signed the petitions. As the relevant passages of the record reflect, Professor H acknowledged that he had been a member of SAMA ever since he commenced practice. Counsel for Dr S referred Professor H to the list of organisations supporting the petitions, and sought confirmation as to whether Professor Hugo or Professor M were members of one or more of the organisations supporting the petitions.

8. Professor H was however advised by Mr J E, the now retired Judge President of this Court, appointed as the legal assessor to the committee, that these interrogatories should not be responded to; and that if an application for recusal was to be brought, it should be moved at a proper time and place. Professor H then directed that the matter should proceed to the hearing of further evidence.

9. What then occurred, in brief, was that Dr S brought an application to the High Court so as to procure the information requested from the members of the committee. By the time the application came before Mr J B, Professors H and M had furnished the required information to Dr S, and an order issued from this Court granting Dr B the right to bring an application for the recusal of Professors H and M.

10. Mr J B found that Dr S was entitled to the information sought and was entitled to an opportunity to bring an application for the recusal of Professors H and M.

11. An application was then made to the committee seeking the recusal of Professors H and M. Professor' s H recusal was sought on the basis that he was automatically disqualified, having an interest in the subject matter of the proceedings. Both members of the committee were, in addition, asked to recuse themselves because they were in fact biased towards Dr S, alternatively Dr S entertained a reasonable apprehension that Professors H and M are or might be biased towards him. The recusal application was heard on 13 March 2015, and after argument, the application was dismissed. Professor H gave a ruling on 13 March 2015 that Dr S had failed to discharge the onus resting on him to "support his claim of recusation." The ruling contains the reasons relied upon by the committee as to why the recusal of its members was not warranted.

12. Dr S now approaches this Court seeking to review and set aside the refusal by Professors Hugo and Mhlanga to recuse themselves. Dr S also seeks an order that Professors H and M are to recuse themselves from the

disciplinary proceedings against him.

13. As the matter is put in the founding affidavit, the grounds advanced before the committee for the recusal of Professors H and M are also the basis upon which the review is brought to this Court. The first ground of review is predicated upon the position of Professor H. Professor H is a member of SAMA and is associated with RUDASA. By reason of the position taken by these two organisations in support of the petition for the removal of Dr S from the register, it is contended that SAMA and RUDASA are parties in the disciplinary proceedings and Professor H thereby became a judge in his own cause. It is also said that the First Respondent's failure to disclose his involvement with these organisations and his failure to disassociate himself from the position of Mr H (supported by SAMA) rendered the position of Professor H untenable. The second basis of the application rests upon a number of decisions taken by the committee that are said by Dr S to give rise to bias on the part of the committee or a reasonable apprehension of bias .

PREMATURITY

14. It was evident to Dr S, as foreshadowed in his founding affidavit, that some justification was required to persuade this Court to entertain a review prior to the completion of the disciplinary proceedings. It is contended on behalf of Dr B that the courts are ordinarily opposed to the hearing of appeals and reviews in a piecemeal fashion, though exceptions in special circumstances are permitted. It is said that this is such a case. It is submitted, further, that neither the Act nor the regulations provide for an internal remedy. But if such remedy exists, then this Court

should exempt Dr S from his obligation to exhaust this internal remedy.

15. As Dr B anticipated in his Founding Affidavit, the Council raises the following preliminary issues. First, Dr S should not be permitted to bring a review to the High Court prior to the completion of the inquiry. A review brought prior to the completion of proceedings and by way of piecemeal litigation is inconvenient and undesirable. Rather, so it was said, the committee should be permitted to complete its work, render a decision and then give Dr B, should he wish to do so, the opportunity to pursue an appeal under the Act. Second, Dr S was required to exhaust the internal remedy of appeal under the Act before approaching the High Court. Third, there are no exceptional circumstances that should permit Dr B to have recourse to the High Court, before exhausting his internal remedy.

16. The preliminary objections of the Council raise issues of prematurity. The objection based upon piecemeal adjudication is predicated upon convenience. Many types of irregularity may occur in proceedings before an administrative body charged with adjudicative functions. The general principle is that an appeal or review should await the final disposition of the matter on the merits because the determination of the merits may render an appeal or review unnecessary or insufficiently material to render the ultimate decision unsound. Even if the decision on the merits leaves a party dissatisfied with the result, it will generally be desirable for an appeal to be heard and determined on all the issues, and within the relevant hierarchy of decision-making.

17. It is common ground between the Council and Dr S that piecemeal

adjudication is generally undesirable, but that there are exceptions to this rule. The parties differ as to whether this is such a case.

18. The preliminary point taken by the Council concerning the duty to exhaust any internal remedy stands on a different footing. This is a matter of statutory preclusion. Section 7 (2) of PAJA provides that no court shall review an administrative action in terms of PAJA unless any internal remedy provided for in any other law has first been exhausted. The scheme of Section 7 (2) is that the Court cannot entertain a review where an internal remedy available to a litigant has not first been exhausted and, in these circumstances, the Court is required to direct the person concerned first to exhaust their internal remedy before instituting proceedings in the courts for judicial review. Thus, an applicant for judicial review has a duty first to exhaust any internal remedy available. A person who fails in this duty comes to court prematurely. Their right to review is not excluded, but necessarily deferred. In terms of Section 7(2)(c) of PAJA, the duty to exhaust any internal remedy is subject to exemption by a court, upon the showing of exceptional circumstances by the person burdened with the duty.

INTERNAL REMEDY

19 I consider first the exhaustion of remedy objection. This raises the following issues. Did Dr S have a duty to exhaust any internal remedy? If so, has he complied with such duty? And if not, whether this court exempts him from complying with his duty upon a showing by Dr S of exceptional circumstances, and upon a consideration of the interests of justice by this Court.

20. Section 10 (2) of the Act requires that the Council shall establish *ad hoc* appeal committees. The *ad hoc* appeal committee consists of a chairperson, with knowledge of the law and at least 10 years' experience, together with not more than two registered persons drawn from the profession of the person that is subject to inquiry, and a member of the council appointed to represent the community. The *ad hoc* appeal committee enjoys the power to vary, confirm or set aside a finding of a professional conduct committee established in terms of Section 15 (5) (f) of the Act or to refer a matter back to such professional conduct committee. (Section 10 (3) of the Act.).

21. Under regulation 8 of the regulations, the accused or pro-forma complainant may appeal against the finding and or penalty of the professional conduct committee to the appeal committee. The appeal committee is defined in regulation 1 to mean a committee established by a professional board under Section 10 (2) of the Act for the purposes of conducting an appeal against the finding of an inquiry conducted by a professional board or committee established for such purpose. An accused is defined under the regulations to mean a person registered under the Act whose conduct is the subject of an inquiry under chapter IV of the Act and the regulations. Chapter IV is the chapter in terms of which persons registered under the Act may be charged and subject to inquiry for unprofessional conduct.

22. In terms of section 20 (1) of the Act any person who is aggrieved by any decision of the Council, a professional board or a disciplinary appeal committee may appeal to the appropriate High Court against such a decision.

23. Section 42 (1) stipulates for the penalties to which a person found guilty of improper

or disgraceful conduct may be liable. Such penalties include suspension from practice and, in a more severe case, removal from the register. Section 42 (1 A) of the Act provides that if an appeal is lodged against a penalty of erasure or suspension from practice, such penalty shall remain effective until the appeal is finalised. The word "erasure" refers to removal from the register.

24. The central question that arises is whether Dr S may appeal the refusal by the committee to uphold his application for the recusal of Professors H and M to an *ad hoc* appeal committee established in terms of section 10 (2) of the Act ?

25. Dr S made a formal application to the committee, supported by an affidavit deposed to by Dr S in which application Dr S sought the recusal of Professors H and M. The grounds relied upon by Dr S for this recusal application are substantially the same as the basis upon which the review is brought to this Court.

26. The powers vesting in an appeal committee constituted in terms of section 10 of the Act, as indicated, reference "a finding of a professional conduct committee". An appeal committee is given the power to vary, confirm or set aside a finding or to refer the matter back to the professional conduct committee. This formulation of powers of an appellate administrative body is to be found in many statutes. The formulation however does not resolve certain perennial questions of statutory interpretation. First, does the appellate body enjoy review powers as well as an appellate jurisdiction? Second, does the appellate body entertain appeals in the wide sense referred to in *Tickly v Johannes NO 1963 2 SA 588 (T) at 590F-591 A,* or is the appeal an ordinary appeal, limited to the evidence and record upon which

the decision was rendered?

27. These matters often occasion considerable difficulty where, as here, the legislature has not expressly stated the scope of appellate jurisdiction. In my view, these interpretational intricacies can be avoided in this case.

28. Even if I assume in favour of Dr S that the appeal committee does not enjoy review powers and no appeal jurisdiction in the wide sense lies to the appeal committee, that does not mean that the appeal committee does not enjoy a jurisdiction to consider an appeal in respect of the committee's decision to dismiss Dr B's recusal application. The recusal application was made by way of formal application. The facts and law relied upon in support of the application served before the committee. (see the Notice of Application and Dr B's supporting affidavit, Annexure 8 to the founding affidavit). The application before the committee is not as fully articulated as the review before this court. But all the essential averments are made in support of the recusal. The appeal committee would also be assisted by the full record of the proceedings before the committee by reference to which most of the grounds upon which reliance is placed may more fully be appreciated.

29. In these circumstances, the appeal committee may consider the merits of the recusal application and the ultimate finding of the committee to refuse the application. If the committee came to an incorrect finding and should have found that Professors H and M could no longer serve on the committee, then in my view the appeal committee enjoys the power to set aside the finding of the committee and correct it. The ruling of the committee dismissing the recussal application is a finding of the committee. An appeal committee is terms of Section

10(3) of the Act is given appellate powers in respect of a finding of a professional conduct committee. The committee's ruling is such a finding.

30. This is not a case in which there are irregularities that do not appear from the record and were not advanced as the basis upon which the recusal of Professors H and M was sought before the committee. On the contrary, the premise of the review before this court is expressly stated to be as follows:

> "*I will now provide the Honourable Court with an exposition of the grounds that was argued on my behalf for the recusa/ of the respondents, which also forms the basis of this application."*

31. The recusal application was argued before the committee, considered by it, and a decision rendered on the merits. The correctness of the committee's finding on the recusal may be considered by the appeal committee. No power of review is required to do so because the question is not whether the committee's finding is lawful but whether it is correct. So too, the appeal committee does not need to decide the recusal application *de nova* in order to decide whether the finding of the committee was correct. No wide appeal is implicated in order to determine the merits of the recusal finding.

32. It follows that in my view Dr B is afforded a meaningful right of appeal under the Act to have the correctness of recusal finding considered once more. The appeal committee includes a person of considerable legal experience, as well as persons drawn from Dr B's profession. There is no reason to think that such an appellate body will not give fair consideration to an appeal brought by Dr S.

33. In the result I find that Dr S does enjoy an internal remedy of appeal under the Act. It follows that he is under a duty to exhaust this remedy in terms of Section 7 of PAJA, unless exempted from doing so. And it is common ground that Dr S has not pursued an internal appeal because he chose rather to approach this court on review. Accordingly, Dr B has not discharged his duty to exhaust his remedy of appeal before initiating review proceedings.

34. The question that then arises is whether he should be exempted from his duty. This requires a showing of exceptional circumstances and a consideration of the interests of justice. And it is to these matters that I now turn.

35. The Constitutional Court in *Koyabe & Others v Minister of Home Affairs & Others 2010 (4) SA 327 (CC)* stressed that the duty to exhaust internal remedies is a valuable requirement of our law but should not be used to shield administrators from judicial scrutiny, nor should the duty be rigidly imposed. Exceptional circumstances should be considered on the facts of each case. The Constitutional Court stressed that consideration must be given to the administrative action in issue and whether the internal remedy would be effective.

EXEMPTION

36. Dr B's founding affidavit sets out a number of weighty considerations that he says constitute exceptional circumstances and should persuade this court to entertain his review in the interests of justice. I have carefully considered these matters. Among the factors relied upon, three overarching considerations are relied upon. First, it is said that the Act and regulations render any decision of the

committee (more particularly any penalty of suspension or erasure) of immediate effect, even if an appeal is noted to the appeal committee. And an appeal from the appeal committee to the High Court is likewise brought into effect, pending the appeal. Second, if a penalty of suspension or erasure was to issue from the committee or the appeal committee and was rendered effective by operation of law, this would cause irreparable harm to Dr B's large practice and the many patients that it serves. Third, Dr S points out that the penalty decision which could have such drastic consequences for him would be taken by persons who, it might be determined, should have recused themselves, and consequently he will suffer the exercise of drastic powers by persons whose decisions are ultimately found to be a nullity.

37. These are matters of substance that require the most careful consideration. In my view, however, the case for exceptional circumstances and the interests of justice faces a formidable hurdle. The legislature has determined a statutory scheme under the Act that provides for two appeals: one to the appeal committee (the internal appeal) and the second to the High Court. But the legislature has also determined what regime is to apply, pending appeal. The regime is for the enforcement of decisions, pending appeal. This may work harshly upon a professional person who may suffer a penalty destructive of his professional life, and yet be vindicated on appeal. Yet that is what the legislature has determined, and no constitutional challenge is brought to this regime. The legislature has determined a balance of interests. Rights of appeal are recognised. But a finding of serious misconduct also triggers the need to protect the public. So too does a penalty imposed pending

appeal work harshly upon the professional who must suffer the punishment. The balance struck is to provide rights of appeal, but to require enforcement, pending the exercise of the right.

38. The harm that may be done to a person under this statutory scheme who wishes to exercise his right of appeal is somewhat mitigated by the provisions of Section 10 (4) and (5) which permit a professional conduct committee or appeal committee to determine when its decisions shall be of force and effect. Section 42 (1A) determines that a penalty shall remain effective until the appeal is finalised but this provision does not determine the date from which the penalty shall take effect. That remains within the discretionary power of the professional conduct committee or appeal committee.

39. These prov1s1ons permit Dr S, should he ultimately suffer a penalty of suspension or erasure, to persuade the committee or, in turn, the appeal committee that the penalty should not commence until his appeals or review have been determined.

40. In these circumstances, I do not consider that there are exceptional circumstances, nor that the interests of justice require exemption. First, the committee has yet to decide upon the penalty. The penalty may turn out to be one that does not occasion the kind of harm that Dr S apprehends should he nevertheless exercise his right to appeal the recusal decision. A reprimand would not occasion him irreparable harm pending an appeal. Second, I have found that Dr S does enjoy an effective internal remedy by way of an appeal in respect of the committee's recusal decision. The Act also permits Dr S to appeal to the High Court from an

adverse decision of an appeal committee, rendering the review before this court redundant. Third, it is clear from the recusal application before the committee and the review before this court that Dr B has many complaints as to the manner in which the committee has conducted the hearing. These complaints and any appeal he may ultimately wish to bring on the merits of the findings of misconduct and penalty should all be heard together. In accordance with the recognised principle, a consideration of all the issues in one appellate hearing would bring order and convenience to the matter. This is an application of the principles explained by our courts in *Take and Save Trading* CC *v Standard Bank of SA Ltd 2004 (4) SA 1 (SCA) at para [4} and SACCAWU v Irvin and Johnson Limited 2000 (3) SA 705 (CC) at paras* [4] and [5], and I see no reason to deviate from these principles in this case.

41. Finally, deferring a review at this stage does not shield Professors H and M from scrutiny. On the contrary, their decision on the recusal application may be considered by an appeal committee, and if Dr B remains dissatisfied, he then enjoys a right of appeal to this Court. That he is subject to the regime of the Act pending an appeal does not disclose an exceptional circumstance. It is not for this Court to reorder the way in which the legislature has struck the balance of interests to which I have made reference. It does not seem to me to be an exceptional circumstance that the regime determined by the legislature may work harshly upon a professional penalised under the Act. Such harm forms part of the scheme of the Act that the legislature has determined. Once I have found, as I have, that the appeal process can provide effective redress to Dr B in respect of his recusal challenge, on its merits, I cannot find that his case is exceptional because

the penalty of suspension or removal, should it be imposed, may come into effect pending any appeal. That is what the legislature has ordained.

42. Accordingly, I find that Dr B's review to this court is premature and may not be entertained until such time as he has exhausted his internal remedy of appeal. Dr S must, if he wishes to challenge the recusal decision, bring his appeal under the Act to an appeal committee.

43. This finding renders it unnecessary for me to decide the second preliminary objection raised by the Council concerning piecemeal adjudication. Indeed, this issue is now one for the committee to determine as to whether it should permit Dr S to appeal the recusal decision to the appeal committee before the proceedings have been completed before the committee and a penalty decision rendered by it.

In the result, I make the following order:

1. The application is dismissed with costs, the costs to include the costs of two counsel.
2. Dr S is directed to exhaust his remedy of appeal before an appeal committee in terms of the Health Professions Act 56 of 1974, should he wish to do so.

Unterhalter AJ

15 April 2016

For Dr W S
J G Cilliers SC

M M W Van Zyl SC

Instructed by Geyser & Coetzee Attorneys

For H P C of South Africa & Others

S Joubert SC

Instructed by Gildenhuys Malatji Attorneys

Heard: 16 February 2016

Judgment: 15 April 2016