Republic of South Africa

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

Case No. 5845/2022

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 24 May 2022
Date of judgment: 30 May 2022

In the matter between:

CHRISINA FRANSINA JOHANNA ELS	Applicant

and

THE HEALTH PROFESSIONALS COUNCIL OF SA	First Respondent
REGISTRAR, HEALTH PROFESSIONALS COUNCIL OF SA	Second Respondent
THE PROFESSIONAL CONDUCT COMMITTEE	Third Respondent
PULE VICEROY HILARY MAOKA	Fourth Respondent

JUDGMENT

BINNS-WARD J

[1] In mid-2013, the applicant was appointed as a facilitator by the Cape Town Children's Court in a dispute about care and contact between the parents of a young

boy. According to the applicant, she recommended to the court that it would be in the best interests of the child if he and the father took part in a reunification process to restore their father-son relationship. The Family Advocate reportedly endorsed the recommendation, and the court made an order in accordance with it in December 2013. The applicant avers that the reunification process went off successfully, and the matter was finalised when the Children's Court made an order by agreement, in February 2015, that the child would remain in the primary care of his father, with rights of reasonable contact reserved to the mother.

[2] The matter currently before this court is an application, brought as a matter of urgency, for an interim interdict postponing an inquiry into the applicant's professional conduct in the matter before the Children's Court pending the outcome of an application by her to the High Court for a permanent stay of the inquiry. The inquiry had its genesis in the complaints lodged in December 2013 by two persons, who were not involved in the case before the Children's Court, about the applicant's professional conduct in that matter. The applicant alleges that the complainants were friends of the child's mother.

[3] The detail of the complaints is not apparent on the papers before this court but, after an assessment of them by a preliminary committee, it was determined, in terms of regulation 4(9) of the regulations made for the 'Conduct of Inquiries into Alleged Unprofessional Conduct under the [Health Professions] Act',[1] that the applicant had acted unprofessionally. The evidence suggests that the finding was one of 'incompetence'. As her conduct was adjudged to be 'only a minor transgression',[2] she was invited to pay an admission of guilt fine.

[4] The fines that may be imposed by a committee of inquiry into alleged professional misconduct are determined by regulations made by the Minister of Health in terms of section 61(1)*(j)* read with section 42(1)*(d)* of the Health Professions Act 56 of 1974. The range of fines permitted by the regulations applies irrespective of whether

[1] GN R102 published in GG 31859 of 6 February 2009.

[2] The expression comes from reg. 4(9).

they are imposed by a preliminary committee as admission of guilt penalties, or by a professional conduct committee after it has found a member of the profession guilty of professional misconduct in a contested hearing.

[5] In a puzzling and unmotivated contradiction of its determination that the applicant was guilty of 'only a minor transgression', the preliminary committee imposed a penalty of R50 000 per complaint. That was the maximum fine permitted in terms of regulation 2 of the 'Regulations relating to Fines Which May be Imposed by a Committee of Enquiry Against Practitioners Found Guilty of Improper or Disgraceful Conduct under the [Health Professions] Act'.[3] It was the most severe punishment that could be imposed, short of the suspension or cancellation of her registration as a counselling psychologist.

[6] The applicant rejected the preliminary committee's findings, which were communicated to her in January and February 2016, and declined the invitation to pay the fine. It followed, in terms of regulation 5 of the Conduct of Inquiry regulations, that the registrar of the Health Professions Council was then required to convene a hearing for the trial of the complaints.

[7] A hearing date was duly set for 3 and 4 October 2016. The matter was, however, delisted at short notice during September 2016 without any reason being provided. A request by the applicant's then attorney for the reasons for the delisting was not responded to.

[8] The decision to proceed against the applicant in respect of the complaints made against her appears to have been founded on an opinion obtained by the board of the applicant's professional body from a certain Professor Human-Vogel of the University of Pretoria. A copy of Professor Vogel's report had been provided to the applicant ahead of the hearing scheduled to take place in October 2016. A footnote on the first page of the opinion indicated that a schedule of the 'published research articles related to the Family Bridges Programme' that Professor Vogel had consulted for the purposes of

[3] GN R632 published in GG 33385 of 23 July 2010

preparing her report was attached as Appendix A to the report. The schedule was omitted from the copy of the report provided to the applicant's then attorney. The attorney requested a copy of the missing annexure from the registrar on 30 September 2016. The missing document was not provided.

[9] Nothing further appears to have been done to advance the matter between October 2016 and the second half of 2019. It was probably because of the intervening dormancy that nothing was done by the applicant's then legal representative to press the request for the missing annexure.

[10] All that the papers disclose in respect of the delay is that the case was allocated to a legal advisor in the Legal Services Unit of the Health Professions Council in June 2019. He was cited as the fourth respondent in the current application and was the deponent to the answering affidavit delivered on behalf of the first, second and fourth respondents. The allocation constituted the fourth respondent as the pro-forma complainant in the conduct inquiry. What, if anything, was done between October 2016 and June 2019 has not been explained. There is, however, nothing in the evidence to suggest that the applicant raised any complaint during the extended interval about the effect of the delay in finalising the proceedings on her professional reputation or her health, being matters, as I shall describe presently, that she raises in the current application.

[11] The fourth respondent set the inquiry down for hearing in April 2020. It could not proceed then, however, because of the Covid-19 related lockdown. An alternative series of dates in October 2020 was proposed by the applicant's then attorney, but, by agreement, the hearing was then further postponed, initially until August 2021, and thereafter to 26-28 October 2021, when the hearing finally commenced.

[12] The hearing was preceded by a pre-hearing conference, as prescribed by regulation 8 of the Conduct of Inquiry regulations. That was held virtually on 20 September 2021. A copy of the minutes of the conference, apparently prepared by the applicant's then attorney, was annexed to the respondents' answering affidavit. The

minutes reflect that the applicant's attorney gave notice of his intention to raise a number of points *in limine* at the hearing commencing on 26 October. One of them concerned the alleged failure of the pro forma complainant to provide the applicant with certain of the further particulars requested in terms of regulation 7 of the Conduct Inquiry regulations.

[13] The failure to provide the applicant with a copy of Appendix A to Professor Vogel's report is not identifiably one of the complaints raised by the applicant's legal representatives in this regard. The complaint in the pre-hearing conference minutes is referenced to various paragraphs of the applicant's request for further particulars, which was not available to me. Judged by the paragraph numbers cited, the request must have been a very comprehensive one. But without insight into its content, I am unable to ascertain whether any part of it related to the missing appendix to Professor Vogel's opinion.

[14] It is not evident from the papers precisely what occurred during the hearing in October 2021, but there is a suggestion that much time was taken up with argument on the preliminary points taken by the applicant. The hearing was adjourned on 28 October 2021 to be continued in the period 17-21 January 2022. It was during the session in January that Professor Vogel was called by the pro-forma complainant to testify in support of the opinion by her that had underpinned the charges preferred against the applicant. That the opinion had been used as the foundation for the charges is apparent from the fact that charge sheet is worded closely in accordance with paragraphs 1-3 of part E (s.v. 'Summary') of Professor Vogel's report. In other words, the charges were formulated directly in line with Professor Vogel's recommendation.

[15] The charges that the applicant faces before the professional conduct committee are the following:

> That she acted in a manner not in accordance with the norms and standards of [the] psychologists' profession by:

> (a) Operating outside [her] mandate as a court appointed facilitator by personally investigating and coming to a finding of trauma related to severe parental alienation instead of appointing an independent psychologist to conduct a complete psychological evaluation; and/or
>
> (b) assuming a psychologist/client relationship with the H family simultaneously in [her] role as quote appointed facilitator and these conflicting roles impeded [her] neutrality, objectivity and effectiveness in making decisions in the best interest of their minor child; and/or
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> (c) not acting in the best interest of the minor of the (sic) Mr GH and Mrs JH by recommending that the H family participate in a transfer of care and reunification programme to be presented by [her]self rather than an independent, qualified and appropriately experienced psychologist.

[16] The unavailability of Appendix A to Professor Vogel's report became an issue during the course of her evidence, presumably when she was taken under cross-examination. The pro forma complainant was unable to provide the applicant's representative with a copy and Professor Vogel reportedly testified that she was unable to produce the list of sources or identify them. The uncontroverted evidence of the applicant is that Professor Vogel explained that she could not remember the published resources to which she had regard for the purpose of her opinion, that she no longer had access to the hard copy documents on which she had relied and that she could no longer access the information because she was unable to remember the password that she needed to do so.

[17] The applicant testified that her case was seriously prejudiced by the inability of the pro forma complainant or Professor Vogel to provide the lost information. She averred that the prejudice arose from the inordinate delay in bringing the inquiry to a hearing. Her evidence on the point went as follows in paragraph 7.8 of the supporting affidavit:

> 'When an expert delivers a report such as the expert report, the opinions, findings and conclusions expressed therein are invariably based upon academic

and/or clinical literature, research and studies. The expert has testified that this was indeed the case in relation to the expert report and that she did rely on such "sources". The import of the expert's testimony (that she cannot identify and provide a list of the sources), however, is that:

1. I am left completely "in the dark" as to the academic, clinical and/or research sources upon which she allegedly relied for her findings and conclusions; and

2. I am materially prejudiced in the conduct of my defence to the complaints: in challenging the expert report, my principal lines of attack (including, without limitation, in cross-examination of the expert) would be to consider the sources with a view to demonstrating inter alia that:

2.1 the sources themselves are unreliable for a host of possible reasons (e.g. the conclusions they reach are not borne out by the data/research/reasons advanced for them);

2.2 the opinions and conclusions reached by the expert are contrary, or not borne out by reference, to the sources ostensibly put forward as substantiation for them;

2.3 the sources relied on by the expert have been discredited, disproved or departed from on some or other bases; and/or

2.4 the sources do not represent accepted or current professional knowledge and/or opinion on the relevant subjects.

This is not a closed list of lines of attack that I might and would adopt to challenge the expert report and the expert's testimony; but to do so, in fairness to me, I simply *must* know the sources relied on by the expert for the expert report and her testimony in that regard.'

[18] The hearing was further postponed by agreement. I infer that Professor Vogel was still under examination at the adjournment. The periods of 9-13 May and 23-27 May were scheduled for the continuation.

[19] During the period intervening between January and May, the applicant requested her attorneys to consider her legal position in the context of the prejudice she considered was caused by Professor Vogel's inability to identify the published research material upon which her opinion evidence was, at least to some extent, based. Pursuant to the advice provided, she gave notice, on 5 May 2022, of her intention to apply at the resumption of the hearing for the permanent stay of the inquiry proceedings.

[20] The application for a permanent stay of the proceedings was opposed on various grounds, including a contention by the pro forma complainant that the professional conduct committee was not empowered to entertain it. Argument and deliberation on the application took up the entire week between 9 and 13 May. On 13 May 2022, the committee handed down a ruling that it did not have the authority to entertain the application for a stay. The hearing was thereupon adjourned to be resumed at the end of May, as previously agreed. During the interval, the applicant instituted the current application urgently seeking an interim stay of the proceedings pending the determination of an application for a permanent stay.

[21] The requirements for interim relief of the nature sought by the applicant in this case are well established. She has to establish prima facie, even if open to some doubt, that she has a right that will be threatened or defeated if the remedy is not granted; that without relief she will suffer irremediable prejudice; that she has no alternative effective remedy; and that the balance of convenience weighs in favour of the grant of the remedy she seeks. The court has regard to all of those elements together in exercising its discretion whether to grant the application. The weight that the court will accord to each of them in arriving at its decision depends on the peculiar facts of the given case. Thus, the balance of convenience tends to be treated as a lesser consideration when there is compelling evidence in support of the existence and infringement of the alleged right in issue and *vice versa*.

[22] That a person in the applicant's situation may be entitled to permanent stay in the inquiry proceedings by reason of the prejudicial consequences of the first respondent's delay in prosecuting them is established; see *Moodley v Health Professions Council of*

South Africa and Another [2010] ZAGPPHC 242 (9 December 2010[4]) [2011] 3 All SA 88 (GNP). In *Moodley*, the court (Makgoba J) reviewed and set aside the decision of a committee of inquiry to refuse an application for a permanent stay that had been made on the basis of the forensic prejudice occasioned to the applicant in consequence of the loss of important evidence as a result of the delay in prosecuting the complaint. The court made a substitutive order permanently staying the inquiry in respect of the only count to which the accused psychologist had pleaded not guilty.

[23] Whether the right to claim a permanent stay that the decision in *Moodley* shows notionally exists actually obtains in a given case depends on the facts. In assessing the right upon which the applicant relies for interim relief in the current case, the appropriate measure is her apparent prospects of success in the proceedings she intends to institute to obtain an order granting her a permanent stay of the inquiry. The manner in which that assessment is to be undertaken for present purposes was eloquently described by Holmes J in *Olympic Passenger Service (Pty) Ltd v Ramlagen* 1957 (2) SA 382 (D) at 383D-F:

> '... Where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak. The expression '*prima facie* established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the

[4] The date of the judgment is incorrectly given as 13 December 2010 in the report of the judgment at 2011 JDR 0010 (GNP).

> stronger the prospects of success, the less need for such balance to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

[24] Counsel on both sides argued the applicant's prospects of successfully obtaining a permanent stay of the inquiry with reference to the salient authorities in respect of applications by accused persons in criminal proceedings for a permanent stay of prosecution; e.g *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18 (2 December 1997); 1997 (12) BCLR 1675; 1998 (2) SA 38 (CC), *Bothma v Els and Others* [2009] ZACC 27 (8 October 2009); 2010 (2) SA 622 (CC) ; 2010 (1) SACR 184 (CC); 2010 (1) BCLR 1 (CC) and *Zanner v Director of Public Prosecutions, Johannesburg* [2006] ZASCA 56; 2006 (2) SACR 45 (SCA); [2006] 2 All SA 588 (SCA).

[25] Those cases were premised on alleged breaches of the applicant's constitutional right to have their trial begin and conclude without unreasonable delay. The right concerned pertains to criminal proceedings, but the relevant principles identified in that body of jurisprudence can usefully be applied in the context of disciplinary proceedings, especially where the proceedings constitute administrative action and therefore engage everyone's constitutional right to administrative action that is reasonable and procedurally fair. That much is illustrated by the comparative references made to both of the forementioned Constitutional Court judgments judgments in *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* [2019] ZACC 3 (7 February 2019); 2019 (4) BCLR 506 (CC); [2019] 6 BLLR 524 (CC),[5] a matter concerned with delay in the finalising of a disciplinary process under the Employment of Educators Act 76 of 1998.

[26] It was emphasised in all the judgments mentioned in the previous two paragraphs that delay, or the passage of time, while central to the enquiry, is not a decisive factor by itself. 'Time is the triggering mechanism that initiates the enquiry, and

[5] In para 70-72.

also functions as an independent factor in the enquiry'.[6] The context and effects of the delay are determinative whether the passage of time entailed in it has occasioned unacceptably unfair consequences for the person accused in the criminal or disciplinary proceedings.

[27] In *Stokwe*, the Constitutional Court appeared to endorse the following factors listed in *Moroenyane v Station Commander of the South African Police Services, Vanderbijlpark* [2016] JOL 36595 (LC) at para 42 as the ones relevant to determining whether a delay should have vitiating consequences (although, as I shall illustrate in paratheses, with reference to *Sanderson* and *Bothma*, they were perhaps too baldly stated):

> 1. The length of the delay. It being understood that the longer the delay, the more likely it is that it would be unreasonable. (In *Sanderson*, this was described as 'a fair although tentative generalisation'.[7])
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> 2. The explanation provided for the delay. If the delay is not excusable in the light of the explanation given for it, would normally support a conclusion that it was unreasonable.
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> 3. The steps taken by the accused person in the course of the process to assert his or her right to a speedy process. If the person stood by and did nothing, that is factor to be taken into account. (In *Sanderson*, Kriegler J expressed the view that '(a)n accused should not have to demonstrate a genuine desire to go to trial in order to benefit from the right [to a speedy trial], provided that he can establish any of the three kinds of prejudice protected by the right'.[8] The learned judge went on to say, however, that it might be more

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[6] *Bothma* supra, at para 39. The expression 'triggering mechanism' comes from the North American jurisprudence in point referred to in *Sanderson* supra, in the footnotes to para 28.

[7] In para 30.

[8] The three kinds of prejudice identified in *Sanderson* are prejudice to liberty, security of the person and trial-related interests. Liberty is not an issue in the context of the current case, but the other kinds of

difficult for an accused person who had repeatedly consented to postponements to establish that he had suffered prejudice.[9] He also stated suggested that 'if an accused has been the primary agent of delay, he should not be able to rely on it in vindicating his rights under section 25(3)(a) [of the Interim Constitution].'[10])

4. The materially prejudicial consequences of the delay for the person who has been charged. (Both *Sanderson* and *Bothma* emphasise that the prejudice to the person charged has to be assessed contextually. Societal demands that favour a formal resolution of the charges must also be weighed in the balance. In the result, the question is whether the burdens that the accused person is called to bear if the process is permitted to continue are unreasonable having regard to all the other considerations to be taken into account.)

5. The nature of the alleged offence or misconduct.

It is accepted that the forementioned considerations must be taken into account 'not individually, but holistically'.

[27] The central pillar of the applicant's case for a permanent stay is the forensic prejudice that she asserts she will suffer if the inquiry is permitted to run its course. In its assessment of this issue any court that becomes seized of her intended application for final relief will be bound to have deferential regard to the observation by Sachs J in *Bothma* that '(i)rreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context

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prejudice have been raised. The concept of 'security of the person' pertains to the anxiety, concern and stigma of exposure to the proceedings.

[9] In para 32.

[10] In para 33.

must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained.'[11]

[28] Sachs J referred in this regard[12] to the Canadian Supreme Court's judgment in *R v Carosella* [1997] 1 S.C.R. 80. His illustrative reference, which carried an endorsement of the minority opinion of L'Heureux-Dubé J (whose reasons were concurred in by La Forest, Gonthier and McLachlin JJ), bears quoting in full:

> [In] *R v Carosella* [1997] 1 S.C.R. 80, ... proceedings were brought against a teacher who had allegedly committed gross acts of indecency with the complainant when she had been in grades seven and eight, some twenty-seven years before. Notes taken by the Sexual Assault Crisis Centre during an interview with the complainant were shredded by the organisation as a general policy to prevent the Centre from being subpoenaed to produce such documents in criminal trials. This behaviour narrowly divided the Canadian Supreme Court. Stating that the shredding of the documents was the factor that distinguished the case, the majority upheld the stay of prosecution ordered by the judge. Evaluating the shredding in a different way, L'Heureux-Dubé J for the minority observed at para 59:
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> > "The criminal justice system, being very much a human enterprise, possesses both the strengths and frailties of humanity. Lacking a flawless method for uncovering the truth, or a crystal ball which can magically recreate events, the court attempts to determine an accused's guilt or innocence based on the evidence before it. This search for justice does not operate perfectly, and in every trial there is likely to be some evidence bearing upon the case which does not appear before the trier of fact. Still, society expects courts of law to ascertain that person's guilt or

[11] At para 67.

[12] Ibid, in fn. 76.

> innocence by way of a trial, and, subject to the uncertainties inherent in any human enterprise, to render a verdict that is true and just. It is a crucial role which should not be abdicated except in the most extreme cases."

And at para 72:

> "While the production of every relevant piece of evidence might be an ideal goal from the accused's point of view, it is inaccurate to elevate this objective to a right, the non-performance of which leads instantaneously to an unfair trial."

Later in para 72 she quoted the following passage from a judgment by McLachlin J:

> "[T]he Canadian Charter of Rights and Freedoms guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair . . . What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice."

[29] Sachs J also referred[13] to the judgment of this court in *Naidoo and Others v Director of Public Prosecutions* [2003] 4 All SA 380 (C), where Erasmus J (Desai J concurring) held that the proper forum to adjudge the prejudicial effect of the loss of a witness or the effect of the lapse of time on the reliability of the recall of events by witnesses, something which he considered inherently affected both sides of a case, could only be properly measured by the trial court hearing all the evidence. *Dicta* to the same effect were uttered in *S v Naidoo* [2011] ZAWCHC 448 (6 December 2011); 2012 (2) SACR 126 (WCC) in para 32.

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[13] In para 71.

[30] These views have even louder resonance when the matter involved concerns an inquiry into alleged professional misconduct by a professional conduct committee constituted by the relevant professional body and comprised predominantly of members of that profession. Such a committee, with its own degree of specialised knowledge of the ethical questions in issue, would generally be best placed to determine the effect of Professor Vogel's inability to identify her sources on the integrity of the proceedings and any findings arrived at in them.[14] If, however, the committee were to misdirect itself, an internal appeal remedy is available in terms of the Conduct of Inquiry regulations. In addition, a statutory appeal to the High Court is available in terms of s 20 of the Health Professions Act to any person who is aggrieved by any decision of the Council, a professional board or a disciplinary appeal committee. If appropriate, an application could also be made for judicial review in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000.

[31] In the current matter it is evident that the pro forma complainant has given notice of his intention to call a second expert witness. It is not apparent on the papers exactly what the import of the second witness's evidence will be, but I think one may reasonably infer that the pro forma complainant has assessed that it will be in support of the charges. The applicant has also given notice of her intention to lead an expert witness in support of her defence to the charges. It is reasonable to infer that the applicant's intention in calling the expert is to rebut or contradict the opinion evidence adduced by the pro forma complainant in support of them. There is nothing in the evidence in the current application to suggest that the applicant's expert witness was fundamentally hampered by the absence of the information in the appendix to Professor Vogel's report from being able to express an expert opinion in defence of the applicant's conduct. The inherent probability is that, if there is any published research material on the Family Bridges Programme to controvert or call into question the cogency of Professor Vogel's opinion, the applicant's expert witness will rely on it and will alert the applicant's legal representative also to do so in his or her cross-examination of Professor Vogel. (The parties were required, in terms of regulation 8(1)(f) of the Inquiry Conduct regulations, to

[14] Cf. *Rosenberg v South African Pharmacy Board* 1981 (1) SA 22 (A) at 34A-C.

exchange summaries of the opinions of any expert witnesses they intended to call at inquiry.)

[32] It is evident from the nature of the charges that their substance turns on the ethical rules of the psychologists' profession. The committee of inquiry constituted to try the matter is required by the applicable regulations to consist of at least five persons, two of whom must be registered in the profession in which the person whose conduct is being investigated is registered and at least one of whom must be registered in the same discipline, and one must be appointed from the membership of the relevant professional board established in terms of the Health Professions Act. The committee should therefore on the face of it be well qualified to determine the ethical questions raised in the case. The fact that Professor Vogel is unable to identify or make available the published research on which her opinion is - at least in part - based, can only redound against the pro forma complainant in the committee's assessment of her evidence. Whether it will do so significantly is a matter for the professional conduct committee to determine in the context of the holistic assessment it will have to undertake of all the evidence adduced at the inquiry. It is not apparent on the evidence before me that the absence of the appendix and the information it contains will disable the committee from competently and fairly adjudicating the charges of professional misconduct.

[33] The evidence given by the applicant in the current application has not persuaded me that she is likely to be able to persuade a court seized of her application for a permanent stay that the disappearance of appendix A to Professor Vogel's report has caused, or will occasion, her irremediable prejudice. It is obvious, for example, that the loss of the appendix has far less potentially prejudicial consequences for the applicant's situation in the inquiry than the shredding of the documents had for the accused in the Canadian case mentioned earlier that was referred to by Sachs J in *Bothma*, or the death of the vital witness to a centrally relevant factual question did for the respondent in the professional conduct inquiry in *Moodley*.

[34] In *Sanderson*, Kriegler J described an application to stay a prosecution as seeking relief that is 'radical, both philosophically and socio-politically'.[15] He said that it would 'seldom be warranted in the absence of significant prejudice to the accused'. The cases show that applications for a permanent stay of prosecution are rarely successful. That demonstrates that the bar is set high. Most of the cases concerned criminal prosecutions, but, as discussed above, the approach in respect of the staying of disciplinary proceedings is analogous.

[35] In *Moodley*, the judgment heavily relied upon by the applicant's counsel, a stay was granted because the court accepted that the death of the person, a former client, with whom the psychologist in that case was charged with having had an inappropriately intimate relationship had deprived her of a witness that was vital to conduct of her defence, and who would have been available had it not been for the Council's delay in bringing the inquiry to a hearing. In para 50 of its judgment, the court in *Moodley* concluded: 'The evidence overwhelmingly demonstrates that the applicant would suffer irreparable trial-related prejudice due to the delay and that she would therefore not receive a fair trial.' It also weighed significantly with the court in that case that the applicant had pleaded guilty to two of the three charges she faced, and that therefore there was no question that she was seeking by means of her application for a permanent stay of the inquiry in respect only of the third charge to avoid the inquiry by opportunistic reliance on the Council's delay. The case is therefore starkly distinguishable on its facts from the current matter.

[36] Like the court did in *Sanderson*, I accept that the delay in the current case has been unreasonable. As mentioned, the respondents have offered no explanation of the nearly three-year interval of inactivity between 2016 and 2019. On the face of it that delay is therefore inexcusable. But mere delay is not enough. The forementioned interval appears to have been acquiesced in by the applicant. She did not raise an objection to the matter proceeding when the fourth respondent set it down again in

[15] In para 38.

2019. The further postponements that happened after that date were either by agreement or because of the Covid pandemic.

[37] In addition to the primary issue of trial related prejudice in respect of Professor Vogel's evidence, the applicant relied on several other grounds to contend that there were 'exceptional circumstances' that merited the delay being regarded as of sufficiently significant effect to merit a permanent stay of the professional conduct proceedings. In this regard she referred to –

1. the reputational damage that she has suffered over the past nine years, and which she continues to suffer, while the complaints 'hang over her head like the proverbial sword of Damocles';

2. the substantial legal costs that she has been forced to incur, and continues to incur;

3. that she has been diagnosed with a stress-related illness brought on by the protracted and 'enormously stressful process'; and

4. questions surrounding the pro forma complainant's legal standing in the professional conduct inquiry.

[38] I do not consider it at all likely that any court seized of an application for a permanent stay of the disciplinary proceedings in this matter would find those grounds, singly or cumulatively, as sufficient to constitute exceptional circumstances that would justify granting the remedy.

[39] The applicant has not particularised the reputational damage of which she speaks, but assuming her unsubstantiated evidence in this regard to be well-founded, a permanent stay of the professional conduct proceedings will not address the problem. It will leave the question whether she was in fact guilty of professional misconduct, as alleged, unresolved; cf. *Sanderson* at para 42, where Kriegler J remarked of a similar

contention by the appellant in that matter: '... of course, a stay will not remedy the main prejudice of which he complains – it will not clear his name'.

[40] I have no reason to doubt, having regard to the number of days already taken up by the inquiry (many of them apparently on procedural or technical points rather than the substantive import of the charges), that the applicant has incurred substantial legal expenses. It is obvious, however, that even were she to be granted the interim relief she seeks, she would continue to do so. She would incur expenses in relation to her intended review application and, in the event of that being unsuccessful, yet further expenses when the inquiry resumes. I am not persuaded that the applicant has shown that this is an aspect of the matter that supports the granting of interim relief. I am of the view, moreover, that it would be unlikely to affect the determination of the application she wants to be bring for a permanent stay.

[41] There is also no reason to doubt that the ongoing and drawn-out process has placed the applicant under stress, even considerable stress. Without in any way meaning to diminish the effect that the process has had on the applicant's security of person, it nonetheless has to be said that the stressful effects of pending criminal or disciplinary proceedings are something that will that will present in almost every case. The applicant alleges that in her case the amount of stress to which she has been subject has given rise to a stress-related illness. She has, however, led no substantiating evidence in support of that contention, or of its relationship to the established delay. A stress-related illness would in any event not, without more, justify a permanent stay of proceedings. There would at the very least need to be evidence regarding the treatment-related prognosis of the illness and of its effect on the applicant's ability to conduct her case in the professional conduct proceedings.

[42] The applicant's counsel, advisedly, did not in her oral submissions press any argument on the issue of the pro forma complainant's standing.

[43] All of this leads me to conclude that the applicant's prospects of success in an application for a permanent stay cannot, on the basis of the evidence that she has

adduced in these proceedings, be rated as good; on the contrary. I would not rate them as nil, but nevertheless so slight as to be as inappreciable. Put differently, I have not been persuaded on the evidence that the applicant has proved that she has a well-grounded apprehension of irreparable harm, or that there are no adequate ordinary remedies more appropriately available to her to address any possible misdirections by the professional conduct committee should it make any adverse determinations concerning her alleged misconduct.

[44] In the light of those conclusions, the role of the balance of convenience in the exercise of my discretion is a diminished one. Suffice it to say that I consider that the further delay that would be involved in a temporary stay of proceedings pending the final determination of the application that the applicant currently intends to bring for a permanent stay would, having regard to my assessment of its prospects, probably redound to the common prejudice of both parties in the professional conduct proceedings. It is in the interests of the both the applicant and her professional body that the conduct inquiry should proceed efficiently and expeditiously to a conclusion on the merits of the complaints.

[45] Before concluding, I should mention briefly that the respondents, advisedly, abandoned the contention in the answering affidavit that this court lacked jurisdiction to entertain this application. Furthermore, their contention that it should not be entertained a matter of urgency was rejected. Although there was something to be said for the argument that the application could have been brought earlier than it was, it was nonetheless apparent that the applicant could not obtain effective relief were the application heard in the ordinary course.

[46] In the result, the application is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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