IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

27/3/2019.

DATE SIGNATURE

Case Number: 29967/2015

In the matter between:

DR WOUTER BASSON	Applicant
and	
PROFESSOR J.F.M. HUGO	First Respondent
PROFESSOR R.E. MHLANGA	Second Respondent
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	Third Respondent

JUDGMENT

POTTERILL J

[1] Dr. W. Basson ("Basson") was charged with six charges of unprofessional conduct. The charges emanate from events that occurred during the 1980s. The first and second respondents, Professor Hugo and Professor Mhlanga ("the Committee"), were members of the Tribunal Committee that presided over the disciplinary hearing instituted by the Health Professions Council of South Africa, the third respondent ("HPCSA"). Retired Judge Eloff was also a member of this Committee, but has in the meanwhile passed away. From the outset it must be understood that Judge Eloff had the purpose on this Committee to regulate the legal aspects that cropped up during the hearing.

[2] Basson was acquitted on two charges and subsections of a third charge, but was on 18 December 2013 found guilty on the remaining charges.

[3] During the sanction proceedings Basson applied that the Committee members recuse themselves. On 13 March 2015 the application for recusal was refused.

[4] Basson is applying to this Court to review and set aside the Committee's refusal to recuse themselves from the disciplinary proceedings. The Committee abides by the Court's decision.

[5] This very review application served before Unterhalter AJ, as he then was, wherein he dismissed Basson's review application and directed Basson to exhaust internal remedies as mandated by section 7(2) of the Promotion of Administration of Justice Act 3 of 2000 ("PAJA"). This order at the Supreme Court of Appeal was set aside and *"the case was (is) remitted to the Gauteng Division of the High Court, Pretoria, to decide the review application."*

The common cause facts that led to the application for recusal

[6] On 26 November 2014 the Pro Forma Prosecutor called Mr. Haywood ("Haywood") as a witness. Haywood is from a non-profit organisation: section 21. He was the means by which two petitions were handed up to the Committee. The first petition was from individual health practitioners and the second petition was prepared by the People's Health Movement. The purpose of the two petitions to agitate for Basson's name to be struck off from the medical roll. In the second petition the South African Medical Association ("SAMA") and the Rural Doctors Association of South Africa ("RUDASA") were *inter alia* organisations that supported this petition. Although Basson's counsel objected to Haywood's evidence on the basis of it *inter alia* constituting hearsay evidence the Committee overruled the objection and allowed the

evidence, but with to decide the probative value thereof on a later stage. Haywood could not testify as to the method followed within the listed organisations supporting the petition before the decision was reached to sign the petition and become part of the campaign. He could testify what method was utilised in SAMA. SAMA had 17 400 members and is the representative body of the medical professions. Haywood said *"he was not aware of anybody in SAMA who came forward and said we object to our participation or to signing onto this petition."*[1] SAMA cannot take resolutions without consulting its members. SAMA had a representative leadership which is mandated to take decisions on the members' behalf. A member can however choose to contest a decision.[2] Haywood did not advocate for the first petition, but was part of the advocacy for petition 2. Petition 1 was an on-line petition; he was certain that some people refused to sign this petition.

[7] On 19 January 2015 the matter was to proceed with the Pro Forma Prosecuter calling Prof. Mark Blockman, an expert witness. Although the parties had agreed that Basson and the prosecutor would only each call one expert for sanctioning purposes, this would be the second witness for the prosecution. This was so because Professor Benator, the chosen expert for the prosecution, under cross-examination made material concessions favouring Basson. On record, the prosecutor submitted that effectively the expert of Basson (Dr. Knobel) will just have to agree with the evidence

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[1] p193 of this record
[2] p193 of the papers

of Benator and the matter could be finalised. The prosecutor thus to *"save"* the situation wanted to call a further witness, he accordingly requested a postponement in order to call another expert. Despite objection to the postponement for the reasons proffered, the view of the Committee was that the motivation for the postponement was questionable but due to practical considerations a postponement to 22-25 September 2008 was granted.

[8] Only on January 2015 did the calling of Prof. Blockman eventually come to fruition. However, Basson had in the meantime obtained information that one of the Committee, Hugo, may be a member of SAMA, one of the organisations that signed the petition for the removal of Basson from the medical roll. Basson set out in his affidavit in this review application that if one of the members was a member of SAMA he had a real concern that the Committee was biased against him. Basson could only ascertain that a Hugo was a member of SAMA but did not know if it was the Committee member.

[9] Counsel for Basson on the morning of 19 January 2015 raised a preliminary point that in fact Hugo was a member of SAMA that signed the petition agitating for Basson's removal from the roll. Counsel on behalf of Basson requested Hugo if he was in fact a member of one of the organisations agitating for the removal of Dr.

Basson according to the petition handed in by Mr. Haywood. Hugo's answer was that he would have to look at the list again, but he does know off-hand that he is a member of SAMA. Hugo then, on the advice of Judge Eloff, only took note of the request, would not provide the information and proceeded with the hearing. Counsel for Basson then requested the following:

> *"MR CILLIERS: Mr Chairman, unfortunately we are not satisfied with that arrangement. It appears from what you have already said, that you are indeed a member of at least one of the organisations who put evidence before you, that you are a member of agitating for the removal of Dr Basson, and clearly we wanted to confirm this because it is very difficult to obtain information of this nature, but in the light of the fact that you have already confirmed that you are at least a member of one of these organisations, we would again request you to go through the list and maybe ask the honourable member to do the same, and then to provide us with that information. After obtaining the information, then we will consider our position, whether we want to and if so, to bring a formal application for recusal.*
>
> *JUDGE ELOFF: I think this interrogation is not correct and you have taken note of it, and proceed with the evidence.*
>
> *CHAIRPERSON: Let us proceed with the witness. ...*

JUDGE ELOFF: You have made no ruling at all on this question, you merely noted that the point as being taken, and that is sufficient.

MR CILLIERS: I am asking you then formally to stand the matter down for a couple of minutes that I can number one, approach you in private, alternatively to obtain an instruction from my client what we should do with this situation, and if necessary I am approaching the High Court on an urgent basis this morning for a proper order."

[10] A postponement was thus denied. Counsel for Basson then left the hearing to approach the High Court to obtain an urgent interdict to receive the information and to interdict the enquiry from proceeding. In their absence Professor Blockman testified. A request by Basson's attorney to reserve the right of Basson to cross-examine Prof. Blockman at a later stage was denied with *"no they had the opportunity"*[3]

[11] On 19 January 2015 Baqwa J granted an interim interdict interdicting the Committee to proceed with a disciplinary enquiry pending the finalisation of the urgent application. However, Prof. Blockman had already testified.

[3] p230 of this record

[12] Basson then served the urgent application on the Committee and the HPCSA. The Committee and the prosecutor opposed the application and all three were represented by the attorneys Gildenhuys Malatji Incorporated.

[13] On 23 January 2015 Bam J heard the urgent application of Basson. The Judge found that:

> *"In view of the contents of the petition and the first respondent's relation to SAMA I am satisfied that both first and second respondents were obliged to furnish a proper explanation of their possible involvement and/or knowledge of the petition. Their refusal to do so was not justified and irregular. The applicant, therefore had sufficient grounds meriting the application and indeed justified to approach this court on an urgent basis."*[4]

[14] Bam J ordered:

[4] Paragraph 10 of judgment

"The applicant is granted the right to institute the application for the recusal for the first and second respondents, if he is inclined to do so, within 10 days of the order."

The three respondents were ordered to pay the costs.

[15] On 12 March 2015 the application for recusal of the committee was argued.

[16] On 13 March 2015 the application for recusal of the Committee was refused.

Point *in limine*: *Medias res* principle

[17] Basson's review of the refusal of recusal was dismissed in this court and Basson was directed to exhaust his internal remedy as required by section 7(2) of PAJA. On appeal to the Supreme Court of Appeal the court found that the Appellate Committee lacked the power to grant the relief asked for and the internal remedy was ineffective. The SCA accordingly found that there were exceptional circumstances exempting Basson from exhausting the internal remedy.

[18] On behalf of the HPCSA it was submitted that the SCA did not decide on the appropriateness of this court entertaining this review at this stage of the proceedings i.e. after a finding on misconduct but before sanction. It was argued that the general approach is that the court should only be approached with review applications after the finalisation of the process before a tribunal. Reliance for this submission was placed on ***Hlophe v Judicial Service Commission and Others*** **2007 (4) All SA 67 (GSJ)** paras 34-35:

> *"It is apparent that from the cases cited above [referring to para 4 of the Take and Save Judgment cited above], these issues such as bias raised by the applicant amount to in medias res. They may still be raised at the hearing in due course. The JSC's rulings on these issues are unknown. If known they cannot be subjects of review until a final pronouncement is made by the JSC. In the result I agree with the submissions of respondents' counsel that it is undesirable for the court to intervene at this stage."*

[19] It was submitted that the rule against piecemeal approach applies with particular force in respect of disciplinary hearings: *"While the common law remedy is not confined to cases where proceedings have been finalised, it is only in rare instances that the*

Supreme Court will exercise that power to restrain illegalities during the hearing of the matter."[5]

[20] This is one of those rare instances where the SCA expressly found that the proceedings need to be interrupted as the issue of bias is one of elementary justice.[6] *"In addition the appellant is entitled to fairness at every stage of the disciplinary proceedings ... If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?"*[7] In the judgment of Swain JA he found that the immediate judicial consideration of the appellant's claim for review would be justified.[8]

[21] I therefore am of the view that this preliminary point need no further address. In any event, paragraph 3 of the order of the SCA reads as follows:

> *"The case is remitted to the Gauteng Division of the High Court, Pretoria, to decide the review application."* (my underlining)

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[5] *Brock v A Medical and Dental Council* 1961 (1) SA 319 (C) at 324B-E; *Nell v Raad van Eiendomsagente* 1986 (4) SA 605 (T) at 610B-D

[6] *Basson v Hugo and Others* 2018 (3) SA 46 (SCA) paragraph 18

[7] *Basson supra* par 20

[8] Paragraph 56

And I shall do so.

Grounds of review

Applicable legal principles pertaining to recusal

[22] The cornerstone of any fair and just legal system is the impartial adjudication of disputes. This principle obviously also applies to quasi-judicial and administrative proceedings.

[23] The correct approach for a recusal application is whether objectively Basson had established whether *"a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel."*[9]

A man may not be a Judge in his own case

[9] *President of the RSA v SA Rugby Football Union* 1999 (4) SA 147 (CC) par 45

[24] The first submission on behalf of Basson was based on the principle of *nemo debit esse index in causa propria sua*: a man may not be a Judge in his own cause. Much reliance was placed on the English decision of *In re Pinochet* [1999] 1 All ER 577 at p.586:

> *"In my judgment, this case falls within the first category of case, vis where the Judge is disqualified because he is a judge in his own cause, in such a case, once it is shown that the Judge himself is a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure."*

[25] The argument thus was that the Committee is automatically disqualified to preside as Hugo is biased based on his membership of SAMA.

[26] In ***Bernert v Absa Bank* 2011 (3) SA 92 (CC)** para 53 the court found after reference to English and Australian law that: *"the approach of our law to the problem must be informed by our test for apprehended bias."*

[27] I am thus not satisfied that there must be an automatic discharge of the Committee and that their refusal to recuse themselves just because Hugo was a member of SAMA was reviewable.

Was the Committee correct in dismissing Basson's claim that there was a reasonable apprehension of bias?

[28] I must from the outset stress that I am aware that the Committee was guided by Judge Eloff with regard to legal matters, but that cannot negate any apprehension of bias.

[29] Hugo was a member of SAMA, but not involved in the management of SAMA. SAMA endorsed petition 2 in terms of its governance structures. Haywood testified that to his knowledge no member of SAMA disassociated himself or herself with the petition.

[30] I am in agreement with Bam J that: *"In view of the contents of the petition and the first respondent's relation to SAMA I am satisfied that both first and second respondents were obliged to furnish a proper explanation of their possible involvement and/or knowledge of the petition."* By refusing, objectively a reasonable informed person would wonder why is there such refusal; is there something to hide that will confirm bias. In the ***Bernert*** matter ***supra*** par 56 the court found as follows:

"However, even in those situations where there is no realistic possibility that the outcome of a case would affect the judicial officer's interest or shareholding, it is nevertheless desirable that the judicial officer should disclose the nature, extent and value of his or her interest to the parties. Disclosure should be made no matter how small the interest should be. Litigants should not be left with the impression that the judicial officer is hiding his or her interest in the case from them. This is likely to be the case where there was no prior disclosure, and the parties subsequently discover that the judicial officer had an interest. This may raise questions about the impartiality of the judicial officer, in circumstances where this would not have been the case if there had been prior disclosure. And this may well undermine public confidence in the judiciary."

[31] The refusal to recuse on the basis that Hugo firmly believed that he need not disclose his membership because Basson could not reasonably conclude bias is a ground for reviewing and setting aside this order. This deliberate action of non-disclosure and revealing no disassociation with the petition leads to a reasonable apprehension of bias, simply because it is not far-fetched or untenable to accept that Hugo was deliberately refusing to disclose his involvement with SAMA because he supported the viewpoint expressed in the petition.

[32] Even after it became clear that Basson required an explanation of Hugo's participation with the petition, Hugo never once disassociated himself with petition 2. The Committee also did not disclose that they both had an association with RUDASA.

[33] This fact on its own allows for the reviewing and setting aside of the refusal to recuse.

Refusal of postponement

[34] The refusal to postpone the matter from one day to the next for Basson's counsel to approach the High Court to halt any further proceedings until Hugo was provided with the required information, which as we know was granted, is astounding. But, even if for argument's sake one accepts this refusal of a postponement on its own does not objectively show bias. The result does. To proceed with the evidence of Prof Blockman in the absence of Basson and his counsel is procedurally irregular and substantively unfair. The Chairman expressed himself as thus: *"The ruling is that the opportunity for cross-examination has been ample and that cross-examination did not happen and that is not be done in future."* [10] The unfairness is so patent that counsel for HPCSA placed on record before me that he gives an undertaking on record that as the prosecutor he would not object to the recalling and cross-examination of Prof.

[10] This record p198

Blockman as that will be the only fair thing to do. This correct concession confirms the irregularity and unfairness of the process illustrating a total disregard for the rights of Basson constituting a reasonable apprehension of bias of a reasonable person. I am satisfied that on these facts the refusal to recuse must be reviewed and set aside.

Further review grounds

[35] Although further grounds were raised on the papers, the only other ground argued was the appointment of the same firm of attorneys who appointed the Pro Forma Prosecutor who then also acted on behalf of the Committee members in the High Court proceedings; i.e. acting on behalf of the Committee members and at the same time the prosecution.

[36] Although having considered all the grounds I find it unnecessary to make findings on the other grounds simply because the first two grounds emphatically constitute a resounding yes to whether a reasonable, objective and informed person would on these correct facts reasonably apprehend that the Committee had not brought an impartial mind to bear on the adjudication of the case.

[37] I will just remark *obiter* that the appointment of the same attorney is just another one of the comedy of errors unfortunately constituting facts for reasonable bias. I say so because this matter is serious for the HPCSA as well as Basson, has extended over an unsavoury length of time and now has not come to fruition.

[38] I accordingly make the following order:

38.1 That the first and second respondents' refusal to recuse themselves from the disciplinary proceedings against the applicant is hereby reviewed and set aside;

38.2 The first and second respondents are ordered to recuse themselves from the disciplinary proceedings against the applicant;

38.3 The third respondent is ordered to pay the costs of this application.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 29967/2015

HEARD ON: 21 February 2019

FOR THE APPLICANT: ADV. J.G. CILLIERS SC

ADV. M.M.W. VAN ZYL SC

INSTRUCTED BY: Geyser & Coetzee Attorneys

FOR THE 3rd RESPONDENT: ADV. S. JOUBERT SC

ADV. L. KUTUMELA

INSTRUCTED BY: Malatji Kanyane Inc.

DATE OF JUDGMENT: 27 March 2019