IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.

DATE **SIGNATURE**

CASE NO.: 34380/2021

Date of hearing: 8 February 2023

Date of Judgment: 30 March 2023

In the matter between:

DR M ASLAM Applicant

and

THE PRESIDENT: HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA 1st Respondent

THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA 2nd Respondent

THE CHAIR FOR THE TIME BEING, MEDICAL AND DENTAL PROFESSIONS BOARD OF THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA 3rd Respondent

THE CHAIR FOR THE TIME BEING, SECOND MEDICAL COMMITTEE OF PRELIMINARY ENQUIRY OF THE MEDICAL

AND DENTAL PROFESSIONS BOARD OF THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA 4th Respondent

THE CHAIRPERSON OF THE PROFESSIONAL CONDUCT COMMITTEE OF THE MEDICAL AND DENTAL PROFESSIONS BOARD OF THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA 5th Respondent

THE REGISTRAR: HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA 6th Respondent

MR PVH MOAKA N.O. 7th Respondent

JUDGMENT

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1. This case, save for its unfortunate tale of institutional inefficiency, demonstrates the traumatic and adverse prejudicial impact which the ineptitude of the officials employed or appointed by the second respondent and its disciplinary bodies and/or structures has on the well-being of a professional medical practitioner, accused of “unproven” misconduct.

2. A complaint issued against the applicant in March 2008 resulted in a decision to hold disciplinary proceedings, referred to in the papers as a professional conduct inquiry, in October 2011 (some two years later). As at the time of the launching of this application, some 13 years after the complaint, it being evident that much of the evidence in support of the complaint and in defense of the applicant would have been lost, the proceedings had not properly commenced. Yet the respondents, notwithstanding the glaring inequity that would result, remained steadfast in prosecuting the applicant by means of its disciplinary process in the year 2021 again, some 7 years after it had been postponed.

3. That was the last straw. The applicant launched the present application effectively seeking a permanent stay of the pending proceedings. I shall revert to the relief sought.

4. The first respondent is the president of the Health Professions Council of South Africa (herein the "***HPCSA***"). The second respondent is the HPSCA, and the applicant is member of the HPSCA. The HPSCA is established in terms of section 2 of the Health Professions Act 56 of 1974 (herein ***"the Act"***). One of its objects is to uphold and maintain professional and ethical standards within the health profession. It must also ensure that complaints are investigated by the appropriate structures, and disciplinary action is taken where required to protect the interests of the public.

5. The third respondent is the chairperson of the Medical and Dental Professions Board of the HPCSA. The fourth respondent is the chairperson of the Second Medical Committee of Preliminary Inquiry of the Medical and Dental Professions Board of the HPCSA.

6. The fifth respondent is the chairperson of the Professional Conduct Committee of the Medical and Dental Professions Board of the HPCSA. It was appointed on 21 February 2014 to chair the professional conduct inquiry into the charge of unprofessional conduct against the applicant. The sixth respondent is the registrar of the HPCSA. The seventh respondent is the pro forma complainant. All the respondents actively oppose the application of the applicant, and all of them play a pivotal role in the prosecution of the complaint against the applicant.

7. The Medical and Dental Professions Board is a board established in terms of section 15 of the Act. The objects of this board include the maintenance and enhancement of the dignity of the health profession as well as the integrity of medical practitioners. A decision made by the board, falling within its ambit, is not subject to ratification by the HPCSA.

8. Section 41 of the Act provides that a professional board shall have the power to institute an inquiry in allegations of unprofessional conduct, and on finding a person guilty of the said conduct impose penalties as prescribed in section 42(1). The latter section stipulates that should a medical practitioner after an inquiry held by a professional conduct committee be found guilty of improper or disgraceful conduct, such person shall be liable to one or more of the following penalties:

8.1. a caution or a reprimand or a reprimand and a caution.

8.2. suspension for a specified period from practicing or performing acts generally pertaining to the practitioner's profession.

8.3. removal of his/her name from the register.

8.4. a prescribed fine.

8.5. a compulsory period of professional service as may be determined by the professional board.

8.6. the payment of costs of the proceedings or a restitution or both.

9. For purposes of my judgment, this is an important facet, because any of the above possible penalties remain looming for as long as the inquiry or disciplinary hearings have not been finalized. That this may weigh heavy on a professional medical practitioner requires no explanation.

10. A person whose conduct is the subject of an inquiry, in terms of the Act, shall be afforded the opportunity of answering the charge and of being heard in his/her defense. The professional board conducting the inquiry may summon witnesses and require the production of any book, record, document, or thing and hear the testimony of witnesses under oath. The non-appearance of a witness summoned constitutes an offence.

11. Section 15(5)(fA) of the Act envisages that regulations relating to professional boards must provide for the establishment of professional conduct committees consisting of so many persons as may be prescribed, which shall consist of at least three board members or members of the relevant profession and at least two public representatives, one of whom shall be the chairperson of the committee.

12. In terms of section 61(1) of the Act the Minister published *inter alia* the 2001 and 2009 professional conduct regulations. The latter replacing the former, but the former remained applicable to the inquiry into the conduct of the applicant. In terms of the 2001 regulations:

12.1. "*committee of preliminary inquiry*" means a committee established by a professional board.

12.2. "*proforma complainant*" means a person appointed by the professional board to represent the complainant and to present the complaint to a professional conduct committee. As such, the proforma complainant is an appointee of the professional board.

12.3. "*professional conduct committee*" means a committee established by a professional board.

13. In terms of regulations 3(2), (3) and (4) of the professional conduct regulations applicable, the committee of preliminary inquiry is mandated to conduct a sifting process and to thereafter decide, following due consideration of the information at its disposal, whether there are grounds for an inquiry, or not, and/or whether an inquiry must be held into the conduct of the accused in which event the committee of preliminary inquiry must direct the registrar of the HPCSA to arrange the holding of such an inquiry. Further, in terms of the relevant regulations, the proforma complainant is obliged to formulate a charge sheet and the registrar is then obliged to issue a notice addressed to the accused stating where and when an inquiry will be held which has to include the charge sheet.

14. The accused is then entitled to request and receive further particulars to the charge sheet and the proforma complainant and the accused are obliged to convene a pre-inquiry discussion with the view of expediting and facilitating the smooth running of the professional conduct inquiry.

15. Important is the fact that, in terms of the professional conduct regulations:

15.1. the accused is obliged to formally plead to the charge sheet or, failing such a plea, a plea of not guilty will be entered.

15.2. evidence is to be led by the proforma complainant under oath in support of its case and the accused is entitled to cross-examine the witnesses, and the professional conduct committee, through the chairperson, is also permitted to examine the witnesses; the accused is then again permitted to cross-examine the witnesses arising from the examination by the chairperson and other members whereafter the proforma complainant may re-examine his/her witnesses.

15.3. the accused may apply for a discharge after the proforma complainant has closed his/her case. If not discharged, the accused can lead evidence in support of his/her case and the same procedure as outlined in subparagraph 15.2 shall be followed.

15.4. the professional conduct committee, upon conclusion of the case, deliberates in camera and thereafter announces its finding and, in the event of a guilty finding, receives address and evidence concerning a suitable penalty to be imposed and thereafter deliberate in camera upon the penalty to be imposed and impose it.

16. It follows that this process is akin to a criminal hearing and the applicant, for all intents and purposes, is and presently remains an accused person. This brings me to the applicant and the incident that led to the complaint.

17. As indicated, the applicant is a medical practitioner and specialist orthopedic surgeon who practices as such in Gqeberha in the Eastern Cape Province. The applicant has, since 21 January 1999, been registered as a specialist orthopedic surgeon, with the second respondent.

18. The applicant brings an application for judicial review. In the alternative the applicant seeks interdictory relief. At the hearing of the application prayers 2, 3 and 4 of the notice of motion had been abandoned by the applicant. As such, the only relief that remains is this, and I quote:

> "*1. The disciplinary proceedings pending against the applicant in terms of Chapter IV of the Health Professions Act 1974 (Act 56 of 1974) (as amended) in relation to the complaint by Mr. AF Olivier and being dealt with under reference number MP0376272/336/2008 be and are hereby permanently set aside.*"
>
> and
>
> "*5. The Medical and Dental Professions Board of the Health Professions Council of South Africa be and is hereby interdicted and restrained from taking all or any further disciplinary measures against the applicant in terms of Chapter IV of the Health Professions Act, 1974 (Act 56 of 1974)*

(as amended) in relation to the complaint of AF Olivier being dealt with under reference No MP0376272/336/2008, and all existing disciplinary proceedings in relation thereto are terminated."

"*6. The applicant's costs are to be paid:*

6.1. by the third, fourth and seventh respondents jointly and severally, the one paying the other to be absolved, and

6.2. by any other opposing respondent, jointly and severally, the one paying the other to be absolved, with the respondents in paragraph 6.1 supra."

19. Supplementary heads were filed by the applicant prior to the hearing motivating a punitive costs order to be granted against the respondents.

20. Most of the facts, and the chronology of events, in this case seem to be common cause. In paragraph 43 of their answer, the respondents admit the factual history, but elected to elaborate upon the history. That elaborating for most parts constituted a mere repetition of what the applicant had already set out.

21. The applicant was charged with unprofessional conduct. According to the charge, the applicant is alleged to have failed or neglected to properly assess and manage a patient, being a Mrs. A Olivier, on 24 August 2007. It is alleged that the applicant failed to diagnose a severe injury to the patient's thoraco-lumber spine, by failing

to obtain an adequate history from her and by failing to adequately examine her thoraco-lumber junction both clinically and radiologically.

22. The applicant denies that he is guilty of unprofessional conduct, as charged, and confirms that he has always had the intention of defending the charge had he been given the reasonable opportunity to do so. That opportunity or right to defend himself, as the history will demonstrate, was not afforded to the applicant.

23. The patient was treated by the applicant on 24 August 2007. The applicant rendered orthopedic and medical services to the patient. As already mentioned, she is identified as a Mrs. A Olivier (herein "*the patient*"). She was referred to the applicant by a casualty doctor at the Cuyler Netcare Private Hospital. The referring doctor did obtain a history from the patient and would have had examined her clinically, did refer her for X-rays, and had to diagnose her condition. This all happened on the same day on which the applicant also treated the patient. The applicant who says that he has treated thousands of patients since cannot recall who the casualty doctor was.

24. The patient's medical history presented to the casualty doctor, his or her findings following a clinical examination of the patient, and the reason for referring the patient for selective X-rays, are, without doubt, material to the defense of the applicant in respect of the charge of unprofessional conduct. This fact is not contested by the respondents, although the respondents seem to claim that the non-existence of evidence operates also to the prejudice of the pro forma complainant, who bears an evidentiary onus. I shall revert to the absurdity of that claim.

25. When the patient was discharged from the hospital, she would have been given all the original views of her radiological investigations whilst she was a patient. The applicant has, despite requests therefore, no been given the original views, and it is unknown whether they still exist. The respondents, notwithstanding undertakings to provide the views, have failed to do so, which leaves the inference that they have become lost. The original views are also material to the applicant's defense in respect of the charge levied against him.

26. The patient was discharged from the Cuyler Hospital and from the applicant's care on 29 August 2007. Some 13 days later, the applicant was contacted telephonically by the late Dr GHJ Coetzee, who was a specialist neurosurgeon practicing in Cape Town. The latter had allegedly been consulted by the patient. Further X-rays as well as a CT scan had been performed on the patient. The late Dr Coetzee diagnosed the patient with an unstable fracture of the T12 thoracic vertebra and had performed surgery on the patient in the form of an instrumented fusion of the T12 vertebra.

27. The late Dr Coetzee wrote a report on 3 November 2008 setting out his diagnosis and assessment of the patient. It confirms that the patient sustained no neurological deficits; that the instrumented fusion was successful and uncomplicated, and that the patient was successfully mobilized and rehabilitated.

28. The applicant *inter alia* denied the charge of unprofessional conduct, premised thereon that there was at the time of him treating the patient no clinical or radiological evidence available to him suggesting or evidencing an injury to the

patient's thoraco-lumber spine. In addition, the applicant explains that, if there was such an injury to the patient's spine, it was not reasonably diagnosable in the absence of radiological evidence such as X-rays. The existence of X-rays is therefore central to the defense of the applicant.

29. As between the applicant and the respondents there exists a dispute of fact concerning the history provided to him by the patient and the history which the patient alleges had been given to him. The examination of the disputed history which was presented to the applicant is therefore pivotal to the charge of unprofessional conduct. As a result, the history received by the casualty officer and the documents and records of the Cuyler Hospital of 24 August 2007 are crucial to the determination of that dispute. That such evidence is of utmost importance was also confirmed by the respondents' expert witness.

30. The original views of the X-rays and CT scan performed on the patient on the instruction of the late Dr. Coetzee also constitute material evidence in the disciplinary proceedings. The applicant is not in possession of the evidence. The different proforma complainants intended to present the evidence and testimony of the late Dr. Coetzee. In my view, his evidence is naturally material to the complaint of unprofessional conduct. Coetzee passed away on 25 July 2015, being some 4 years after it was decided to hold the disciplinary inquiry. Save for the fact that he is not a witness anymore, the other material evidence seems to be concededly non-existent. The respondents' response in this regard is somewhat astonishing. I quote from their answer:

"203. I have already dealt with the absence of merit in the applicant's allegation that the sad demise of Dr Coetzee has a bearing on his defence. It is stated that Dr Coetzee's records may have been destroyed to the applicant's disadvantage. But this would equally apply to the pro-forma complainant's case. The pro-forma complainant would not have access to any material to the exclusion of the applicant and the applicant's attorney. The pro-forma complainant bears the onus to prove the charge against the applicant."

31. This constitutes a concession by the respondent that, notwithstanding the onus that they bear, and the absence of the material evidence, which seems to have concededly gone astray, they wish to persist with the hearing. The attitude lacks compassion and demonstrates a deep misappreciation of the most fundamental principles of justice. I shall revert to this aspect.

32. It is the applicant's case therefore, which ought to be largely common cause, and which case I accept in my judgment, that at a minimum the following evidence is material to the applicant's defense on the charge of unprofessional conduct:

32.1. the quality of the images of the X-rays, and consequently,

32.2. that the anatomical structures imaged by the first X-rays are required to determine whether the applicant should have insisted on new X-rays to be conducted.

32.3. the evidence of Dr Coetzee, who has passed away, and

32.4. in addition, the original views of the second X-rays ordered by Dr Coetzee and his clinical notes as well as the operation report in respect of the surgery which he performed on the patient.

33. The existence, or non-existence, of material evidence is particularly relevant to this case, since it can be accepted that the inexplicable delays in the adjudication of the disciplinary proceedings, constitutes the predominant contributing factor to the loss of such evidence. In this regard the failure to timeously collect the evidence, as will be dealt with in my judgment, was occasioned by slothfulness within the structures of the respondents.

34. The dilatory conduct of the respondents permeates this case. It is thus important to set out the chronology of events in respect of the professional conduct proceedings.

34.1. as already indicated, on 24 August 2007 the applicant treated the patient.

34.2. on 20 March 2008 the patient's husband issued the complaint to the second respondent.

34.3. on 2 April 2008 the applicant was notified of the complaint issued to the second respondent, the HPCSA.

34.4. on 15 July 2008 the applicant submits his letter of explanation to the registrar of the HPCSA in response to the complaint. On 22 August 2022

the applicant was notified in writing that the investigations have not yet been concluded since the registrar was allegedly awaiting the hospital records and the report of Dr. Coetzee.

34.5. on 30 September 2010 the complaint was considered by the first meeting of the Second Medical Committee of Preliminary Inquiry of the HPCSA ('the preliminary committee"). It decided to defer the complaint until a next meeting. It failed to consider the 26-month delay between the response provided by the applicant and 30 September 2010.

34.6. on 13 and 14 September 2011 a resolution was passed by the preliminary committee that a professional conduct inquiry be held into the conduct of the applicant. Again, no explanation is provided for the further delay of another year (cumulatively already 3 years) from the applicant's response, and four years since the incident.

34.7. by means of an email of 12 December 2011 the applicant was informed that the professional conduct inquiry would be held on 5 and 6 March 2012. The appointed pro forma complainant was Thabang Baloyi. By agreement between the parties those dates were moved to 22 and 23 March 2023. Due to the unavailability of witnesses, the inquiry was postponed at the request of Baloyi.

34.8. in May 2012 it was agreed that the inquiry would be enrolled for 17 and 18 July 2012. No notice of set down was provided by Baloyi in respect of the

agreed dates. A notice of set down is a pre-requisite in terms of the applicable regulations.

34.9. Baloyi unilaterally amended the dates to 22 and 23 August 2012. New dates were proposed by the applicant, but that written proposal was ignored.

34.10. almost a year later, on 4 July 2013 Baloyi unilaterally enrolled the professional conduct enquiry for 29 and 30 August 2013. On 15 July and 1 August 2013 Baloyi in writing informed that the applicant would be available for the hearing unilaterally enrolled.

34.11. on 1 August 2013 Baloyi again unilaterally postponed the professional conduct inquiry which was enrolled for 29 and 30 August 2013. He undertook to provide alternative dates and respond to previous unanswered letters dealing with outstanding required particulars and documents for the hearing.

34.12. on 5 September 2015 the proforma complainant again unilaterally enrolled the professional conduct inquiry to be conducted on 30 September 2013 and 1 October 2013. To this the applicant objected as it constituted inadequate notice, and the applicant's attorney was unavailable. Several further dates were proposed to Baloyi.

34.13. on 9 September 2013 Baloyi enrolled the professional inquiry for 12 and 13 November 2013 and the applicant confirmed his availability.

34.14. on 12 November 2013 was the first sitting of the professional conduct inquiry, however, it was before an incorrectly constituted professional conduct committee, and the inquiry was postponed to 5 and 7 March 2014.

34.15. a pre-inquiry hearing was held between the applicant's attorney and Baloyi. The attorney informed Baloyi that he intended to raise an *in limine* point of unreasonable delay at the hearing and to seek a stay. Baloyi undertook to provide a report by an expert, Professor Walters, a factual report by Dr Coetzee and to provide "any radiology images" to be used in the inquiry. He confirmed that Dr Coetzee would be his witness. The promised information was not provided within the time agreed upon.

34.16. on 27 February 2014 Baloyi provided the applicant with a so-called bundle of documents which only contained an expert report by Professor Walters and other less relevant documents. No original radiology documents were provided, and the report of Dr Coetzee was also not incorporated.

34.17. on 28 February 2014 the applicant's attorney wrote and enquired in respect of the outstanding documents and recorded the intention to oppose any attempt to postpone the inquiry.

34.18. the conduct inquiry eventually commenced on 5 March 2014. The applicant's attorney argued in *limine* the delay in prosecution point. After having heard the point in *limine*, but prior to a ruling, Baloyi made an

application for postponement. The committee granted the postponement and determined that the matter would be finally adjourned to a next date which should be within 14 days from the hearing.

34.19. in response to the ruling, Baloyi stated that it would be best if the case be postponement *side die* but he promised that within 14 working days he would have arranged a date with the applicant. It follows that the basis upon which the postponement was issued was that a new date must be arranged within 14 days of 5 March 2014.

34.20. on 17 March 2014 the applicant proposed that the inquiry be enrolled for three consecutive days and provided a variety of dates.

34.21. Baloyi responded on 19 March 2014 setting the inquiry down for 5 and 6 August 2014 which were not dates that the applicant's attorney had proposed and went against the notion of an expedited hearing.

34.22. on 24 July 2014 the applicant was informed that the inquiry would not proceed on 5 and 6 August 2014 as the committee had not been timeously informed of and reserved for the inquiry.

34.23. Baloyi's appointed as proforma complainant had been terminated and he was replaced by Advocate Esther Pillay-Naidoo.

34.24. on 4 August 2014 the applicant's attorney wrote to Pillay-Naidoo requesting that, due to the delays in prosecuting the inquiry, the matter be

referred back to the preliminary committee for reconsideration and that further delays would be unfair, unreasonable and unjust to the applicant. On the same day further dates were proposed in November 2014 should there not be a referral back to the preliminary committee.

34.25. Pillay-Naidoo, in response, suggested dates in February and March 2015. She did not deal with the request that the matter be referred to the preliminary committee.

34.26. on 8 October 2014 the applicant's attorney recorded in two letters an intention to raise the issue of delay again and enquired about progress in respect of the referral back to the preliminary committee. These letters went unanswered.

34.27. on 24 October 2014 the applicant proposed that the matter be proceeded with on 2 days during the period 2 to 13 February 2015. The letter remained unanswered. On 19 November 2014 a further enquiry was made about the previous letter. That letter went unanswered.

34.28. again, on 10 December 2014, an enquiry was made about the proposed dates in February 2015, but no response was received.

34.29. the applicant's attorney wrote to Pillay-Naidoo on 13 January 2015, mentioning that it was no longer possible to set the matter down for hearing in February 2015. That letter went unanswered. In the meantime,

the attorney's secretary also attempted to make telephonic contact with Pillay-Naidoo on 14 January 2015 but was unsuccessful.

34.30. Pillay-Naidoo finally wrote, on 29 January 2015. She undertook to provide new dates by the next week.

34.31. further enquiries were made on 20 February 2015, 22 April 2015 and 15 June 2015. The applicant was ignored.

34.32. on 14 August 2015 the applicant's attorney wrote to Pillay-Naidoo informing her of Coetzee's death and enquired whether the respondents intended, in the circumstances, to proceed with the matter. A reminder was sent on 12 October 2015 and 20 November 2015, but Pillay-Naidoo failed to respond.

34.33. on 22 February 2016 the applicant's attorney's secretary managed to contact Pillay-Naidoo. During that conversation Pillay-Naidoo informed the attorney's secretary that the case had been referred back to the preliminary committee for consideration. This was recorded in a letter, which letter also remained unanswered.

34.34. on 14 June 2016 the applicant was informed that Advocate Mapholisa had replaced Pillay-Naidoo as proforma complainant. On 23 August 2016 a letter was addressed to Advocate Mapholisa enquiring whether the preliminary committee was reconsidering the matter. The letter went unanswered.

34.35. the applicant's legal team wrote to Advocate Mapholisa on 18 November 2016, 7 March 2017, 2 May 2017, 6 September 2017, 4 December 2017, 19 March 2018, 21 June 2018, 1 October 2018, and 7 January 2019. All these letters were unanswered. The letters recorded the prejudice and recorded the failure to answer. Since none of the letters were answered, although it could be seen by means of read receipts that they were read, the applicant's attorney stopped writing.

35. Given the applicable legal principles, which will be considered hereinafter, the inordinate delays are inexcusable. The applicant was proactive and sought to get the disciplinary hearing finalized within a reasonable time. The respondents, on the other hand, deliberately, alternatively due to sheer incompetence, ignored the plight of the applicant. Already at the first commencement of the hearing before the professional conduct committee, the delay caused, and the concomitant absence of relevant and material evidence, ought to have warranted a stay in prosecution. More disconcerting is the fact that the committee itself had made an order that new dates be obtained as a matter of expediency. This was ignored and no reasonable explanation exists for such ineptitude.

36. This brings me to the next phase in this tale of tardiness:

36.1. the applicant's attorney, whilst speaking telephonically to the seventh respondent, Mr Moaka, about another unrelated matter, the latter mentioned in passing that he had been appointed as the new proforma complainant in the applicant's matter. He did not regard it important to tell

the applicant's attorney that he was also a member of the professional conduct committee that had convened on 5 March 2014, which is something that the applicant and the applicant's attorney realised somewhat later.

36.2. during the telephone call of 20 November 2020 with the seventh respondent, the latter told the applicant's attorney that he wanted the inquiry to be enrolled for hearing to which the attorney for the applicant responded that:

36.2.1. although he would facilitate the identifying of dates, he would do so subject to taking instructions on how to deal with the issues of delay.

36.2.2. he would strenuously object to the inquiry reconvening after all the intervening years, in view of the irretrievable loss of evidence; and

36.2.3. conveyed that the matter had been returned to the preliminary committee for reconsideration following the death of Dr Coetzee.

36.3. the seventh respondent stated that he was unaware that the matter had been referred to the preliminary committee and would make enquiries on the subject. He then agreed to provisional dates for 7 and 8 April 2021 on which dates both parties were available.

36.4. the telephone call was confirmed in a letter dated 22 February 2021 which letter again went unanswered. On 1 March 2021 a follow-up was written.

36.5. on 11 March 2021 Moake responded stating that the complaint had never been referred to the preliminary committee and that he saw no reason to refer the complaint to the preliminary committee and would not do so. He confirmed that he was intent on setting the inquiry down for 7 and 8 April 2021.

36.6. on 31 March 2021 a notice was issued stating that the disciplinary inquiry had been set down again for hearing on 7 and 8 April 2021. Both the notice and attached charge sheet seem to be irregular, but that issue is not relevant for purposes of this application.

36.7. this was followed up by a demand, sent by the applicant's attorney to the respondents, that due to the inordinate delay the inquiry should be stayed. This evoked a response which was nothing but an attempt to avoid culpability on the side of the respondents and conveyed an unequivocal intention to persist with the professional conduct inquiry at all costs.

37. That attitude led to the launching of this application.

38. The applicant tells the court that all the above had a very traumatic adverse prejudicial impact on him. The pending professional conduct proceedings are the first and only professional conduct proceedings that the applicant (then[1] in his 21

[1] *The year 2021.*

years as registered orthopedic surgeon) faced. He conveys that he, in his day-to-day interaction with his patients, makes every effort to treat them to the best of his ability, competently, compassionately, empathetically, respectfully and in a dignified manner.

39. He was devastated when he first learnt about the complaint in April 2008. He expresses that he was profoundly disappointed by the fact that the patient was apparently not satisfied with his care. He was saddened by the fact that he would need to explain his professional conduct to his professional regulatory body and that it was an event which he had hoped to avoid during the whole of his career. It played heavily on his mind and his emotional well-being.

40. When he, in October 2011, heard about the fact that a professional conduct inquiry would be held into his conduct, he became even more distraught. He learned about the possible penalties envisaged in section 42(1) of the Act in the event of a conviction. It was most distressing, and he has lived with this sword hanging over him for many years.

41. Over the years, he has requested numerous potential dates and every time a date was agreed, he would become increasingly anxious having to face the inquiry. He would properly consult and prepare and usually, at the last minute, find out that the inquiry would not proceed. He explains that this brought him untold despair. He thought at many times about the inquiry which thinking would usually happen over weekends, at night or while on holiday, being at times when he was not that busy. It weighed heavily on him and his family and has deleteriously affected his phycological and emotional well-being.

42. He also tells that he has been incredibly frustrated and distressed by the dismissive way in which he has been handled by the respondents. He experienced the treatment as being undignified, unfair and high-handed. In addition, he conveys that the perpetual, unreasonable, unexplained, and unjustifiable delays in dealing with his professional conduct inquiry have not and do not install confidence in him that the Medical and Dental Professional Board, or any of its functionaries are intent or capable of upholding and maintaining the professional standards of the profession and/or protecting the rights of the public. The postponed professional conduct inquiry of March 2014 was reported in a local newspaper, which added to his distress and reputational embarrassment. This list is not exhaustive, and the applicant raises numerous other complaints.

43. I interject this judgment to point out what the respondents' response in the answering affidavit was to these sincere issues raised by the applicant. This is contained in paragraphs 212 and further of the answering affidavit. I quote:

"*212 The applicant complains about the effect of the delay on his health and well-being. This is regrettable and sad, but I have explained above that the solution to any delay that may be found, should not deprive the Complainant of Justice. It is not unreasonable to imagine that the well-being of the Complainant may equally be adversely affected by the non-conclusion of the Inquiry.*

213 Further, the applicant is 'frustrated and distressed by the dismissive way' in which he feels this matter or Inquiry was handled by the Board and its

functionaries, he ultimately charges that he has no confidence that he will receive a fair hearing.

214 *I reiterate, with respect, that the charge of lack of fair hearing is far-fetched and simply aimed at stroking controversy. I have dealt with this above and explained that the independence and impartiality of the Conduct Committee has not been brought into doubt. The persons the applicant reportedly dealt with in his interaction with the HPCSA do not sit to determine the Complaint at the Inquiry, but the Conduct Committee. There is nothing tangible to sustain this wild accusation.*

215 *Regarding the newspaper report of the matter in 2014, the HPCSA has no control or influence over that. But obviously the applicant does not appear to complain of bad press or defamation.*

216 *The applicant incessantly refers to the length of the period that had elapsed but at the same time very meticulously record what has happened in those years. This suggests that the matter was not just left a limbo but had remained active all these years. It was always clear that he will be subjected to a disciplinary process.*

217 *It is also untrue that beyond March 2014 up to March 2021 'there was simply no attempt' to deal with the Inquiry. On the applicant's own version there were events towards the holding of the Inquiry. The applicant was not helpless in influencing the pace of matters towards finalization of the Inquiry. The options available to the applicant includes an approach to the*

Honourable Court, which could have been done years ago. The applicant waited all these years in an attempt to bolster his case for interdictory relief to avoid facing the Conduct Committee at the Inquiry. The Honourable Court ought not to countenance this type of conduct and abuse of its process.

218 I have dealt with the unfortunate issue of the staff turnover or the change of hands in the office of the pro forma complainant. This applied to everyone interacting with the HPSCA and was not selectively applied or meted out to the applicant. There was no sending of the case from 'pillar to post'."

and

"*221 As I have already stated, any loss of evidence would apply to both sides, (i.e. the applicant's and the proforma complainant). This cannot be used to halt the Inquiry or to quash the charge. The Conduct Committee will listen to the evidence adduced and decide the outcome. The playing field will be the same for all the players so to metaphorically speak, with respect. Above all, the pro forma complainant bears the onus to proof the charge against the applicant.*"

44. In this high-handed fashion the respondents elected to react. Instead of showing genuine compassion with the plight of the applicant, whose distress was caused largely by the respondents' ineptitude, the response is disrespectful and unbecoming of a body that represents professional medical practitioners and

wishes to uphold the public interest. Cognizance should be given to the fact that the answering affidavit was deposed to by the acting registrar and chief executive officer of the HPSCA, being an important public function, who should have known better.

45. That brings me to the legal position. As indicated the facts are mostly common cause. The respondents seek to tell this Court that the relief sought by the applicant is somehow incompetent. Shortly prior to hearing of this application, the respondents filed supplementary heads of argument, which they said contained the main arguments they would rely upon I court. Yet, the new heads incorporated the first set of heads of arguments, which I was also asked to consider and take in account.

46. The first heads raised initial points, one of them being that a tender was made that the matter could now eventually be referred back to the preliminary committee. This tender the applicant refused, but I cannot see how the preliminary committee, a statutory created body, that has strict and limited legislated powers, could ever reconsider its own decision to have referred the complaint for an inquiry. It has no powers to do so, and the tender therefore lacks legal competency. This shall be elaborated upon hereunder.

47. The further points raised are that:

47.1. the applicant seeks relief akin to a permanent stay of criminal prosecution, and has, so it is argued not complied with the trite requirements for such

relief. This contention was, a bit astonishingly so, premised on the argument that it was the applicant itself that "contributed" to the delays.

47.2. that the applicant has not made out a case for interdictory relief, which the respondents equate to relief to nullify the decision to prosecute, namely that the applicant failed to demonstrate the trite requirements for an interdict; and

47.3. that the applicant has failed to exhaust its internal remedies as envisaged in section 7(2) of PAJA, and failed to demonstrate exceptional circumstances to be excused from exhausting internal remedies first; and

47.4. the review, insofar as it is premised upon PAJA, is not brought within a reasonable time or within 180 days from the offending decision; and

47.5. insofar as the relief sought is premised upon a legality review, it is also unreasonably delayed.

47.6. In the respondents' supplementary heads, the argument was limited to the points in and above.

48. I intend to deal with the defenses raised. Prior to this, I mention the following. Section 33(1) of the Constitution provides that everyone has the right to administrative action that is "*procedurally fair*". In this respect our courts have held that this is not a promise of a just outcome but that the process, as one sees in

this case, must not be so tainted with irregularities, that it will inevitably result in an unfair outcome.

49. In *C Hoexter & G Penfold Administrative Law in South Africa Third Edition (2021)* at page 501 it is said that:

"*In the context of s 33 the 'procedural' qualification remains significant, since the administrative-law notion of fairness is not substantive in nature – or at least, not yet. As the Constitutional Court indicated in Bel Porto School Governing Body v Premier, Western Cape 2022 (3) SA 265 (CC), under our Constitution 'procedural fairness' does not promise fairness or equitability in a substantive sense. It does not promise a just outcome. But even in a purely procedural sense, fairness or 'natural justice' (its more ancient name) remains a crucially important component of administrative law. Listening fairly to both sides has aptly been described as 'a duty lying upon everyone who decides anything'.*

As with reasonableness (discussed in Chapter 6), procedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all-important: the content of fairness is not static but must be tailored to the particular circumstances of each case. There is no room now for the all-or-nothing approach to fairness that characterized our pre-democratic law, an approach that tendered to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant. In this regard the relevant parts of PAJA are generally a positive contribution to our law. The principle of legality, too, may in limited instances demand procedural fairness, but so far it has done so only as a matter of rationality. In other words, as the

Constitutional Court has indicated, this is a form of 'procedural rationality' rather than 'procedural fairness' as such."

50. There was some debate before me in court whether the present application classified as a PAJA review or it is best suited as a legality review. The reliance on legality reviews has gained popularity in recent judgments of our courts. In this respect I refer to the case of *Pharmaceuticals Manufacturers Association of SA: In re Ex parte President of Republic of South Africa 2000 (2) SA 674 (CC)* at para. 85:

"*It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.*"

51. In the case of *Democratic Alliance v President of Republic of South Africa 2013 (1) SA 248 (CC)* the court held that not only the decision itself but also the process must be rational. This is confirmed in paragraphs 33 up to 37 of that judgment.

52. If it is accepted that the outcome of the inquiry, which is the subject of this decision, is reliant upon the procedures as envisaged in the regulations which allows for the production of all material and relevant evidence, whether it supports the applicant's case or not, it follows, in my view, that the outcome will be tainted

by irregularity if the evidence is lost due to the dilatory procedural conduct of the respondents. The decision, in these circumstances, to recommence with the inquiry some seven years, after it had been postponed, is irrational. The present application therefore neatly falls within the concept of a legality review.

53. To the extent that the process adopted by the respondents constitutes administrative action as defined in s 1 of PAJA, s 3(1) of PAJA requires that the administrative action must be procedurally fair. Section 3(1)(b)(ii) requires that to give effect to the right to procedurally fair administrative action an administrator must give a person a reasonable opportunity to make representations.

54. In the recent case of *Dyantyi v Rhodes University and Others 2023 (1) SA 32 (SCA)* the Supreme Court of Appeal held in paragraph 21:

"*... At common law the opportunity of an individual to present evidence that supports his or her case and to controvert the evidence against him or her 'is the essence of a fair hearing and the courts have always insisted upon it'. See Lawrence Baxter Administrative Law 1 ed (1984) (3rd impression 1991) at 553. Today this forms part of the reasonable opportunity to make representations under s 3(2)(b)(1)(ii) of PAJA. In Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another 2002 (3) SA 265 (CC) para 104 Chaskalson P said that 'what procedural fairness requires depends on the particular circumstances of each case'. And in Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening) 2001 (3) SA 1151 (CC) para 102 he said:*

'Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors including the nature of the decision, the 'rights' affected by it, the circumstances in which it is made, and the consequences resulting from it.'"

55. The applicant brought the review both in terms of the provisions of PAJA as well as premised on a legality review. The applicant also applies for an interdict for a permanent stay of the proceedings against the applicant. Should a review be inappropriate, and in my view, it is not, an interdict is surely appropriate in this case. I shall deal with this aspect as well.

56. I proceed to deal with the defenses raised. I disagree that there exists an internal remedy that had to be exhausted first.

57. Relying on the case of *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others (2014) (3) BCLR 265 (CC)* the respondents argue that a person applying for a review of an administrative act must exhaust his/her internal remedies failing which he/she is precluded from reviewing the administrative action. It is contended for the respondents that the applicant in fact concedes that there is some internal process he should have followed, because in the transcript of the professional conduct inquiry which was held on 4 March 2014 the applicant's attorney had the following to say:

"*I say that the matter should be remitted to the Committee of Preliminary Inquiry with a recommendation that the inquiry be discontinued due to the unreasonable delay in finalising the matter.*"

58. And then further in the transcript:

"*If the committee were not to follow that recommendation, well then it will be open to Dr Aslam to approach a High Court with an application for a permanent stay of proceedings against him. And that would probably be the course that we would take but, that would be running ahead of ourselves of course, because I believe first we should exhaust the internal remedies and the matter should be remitted back to the Preliminary Committee for them to make a finding. They have an inherent authority to discontinue disciplinary proceedings.*"

59. Relying solely on this say-so of the applicant's attorney, the respondents argued that, on the applicant's own version, there is an internal remedy that the applicant should have exhausted. The respondents, however, save for the presentation of the applicant's attorney made to the committee, did not refer me to any legal right for such a referral to the preliminary committee. In my view, the applicant's attorney erred, maybe inadvertently so, when he made the submissions to the professional conduct committee.

60. The preliminary committee has no powers bestowed upon them by legislation or the regulations to make a finding that an inquiry be discontinued due to unreasonable delay. It, in my view, is *functus officio* once it has made its initial recommendation to hold the inquiry. It has no self-review powers. The committee has only certain "preliminary" functions. I am also not bound by incorrect legal submissions that may have been presented at the disciplinary hearing.

61. In paragraph of my judgment hereinabove, I already pointed out that in terms of regulations 3(2), (3) and (4) of the professional conduct regulations applicable, the committee of preliminary inquiry is mandated to conduct a sifting process and to thereafter decide, following due consideration of the information at its disposal, whether there are grounds for an inquiry, or not, and/or whether an inquiry must be held into the conduct of one of the members, in which event the committee of preliminary inquiry must direct the registrar of the HPCSA to arrange the holding of such an inquiry. That is where its mandate stops.

62. The preliminary committee has no power to review its own decision to direct the registrar to arrange the holding of the inquiry and/or to alter its decision to hold an inquiry. As such, it is in my view incorrect to say that a referral back would constitute an internal remedy available to the applicant. In addition, any internal remedy envisages or requires at a minimum a remedy that an applicant can procedurally follow “as of right”. The applicant has no power or legal right, as one usually has with, for example, an internal appeal, to insist that the preliminary committee reconsiders its earlier decision. It would therefore not constitute a remedy available to the applicant.

63. The lateness of the review defense. Accepting that the present review constitutes a legality review, it was argued that even in a legality review a delay in bringing the judicial review requires to be explained. This argument is premised on the case of *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC)* where it was held that where there is no explanation for the delay, the delay will be necessarily unreasonable. In the case of *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 200 (4) SA 331 (CC)* the Constitutional

Court also decided that courts have the power in a legality review to refuse an application where there is an undue delay in initiating the proceedings.

64. The respondents correctly argue that, insofar as it is a PAJA review, it must be brought without unreasonable delay and within 180 days.

65. During argument I enquired with counsel for the respondents how this court should go about to find the moment in history from where one is to count the days to get to the point of reasonableness or unreasonableness. I asked this indicating to counsel for the respondents that I could not discern from the papers which decision or administrative action would be relevant for purposes of the calculation of the so-called 180 days or the reasonable or unreasonable delay in bringing the review. In my view it is the cumulative effect of all the conduct that I have dealt with in this judgment that infringes upon the procedural right to fairness and a fair hearing.

66. In any event, the event that led to this application was the decision of the seventh respondent to, in the year 2021, recommence the prosecution of the applicant after a 7-year postponement. This decision was made in the face of the conceded fact that material evidence has gone astray. The decision was further taken against the objective fact of the fact that the professional conduct committee had for seven years neglected to pronounce upon the application made by the applicant to permanently stay the proceedings. In my view it should have been evident to the pro forma complainant that the delay in procedure and its consequent loss of evidence has tainted the process to such an extent that the continuation of the proceedings would be irregular and unfair.

67. The respondents, however, contended that the moment that I should consider as being relevant is May 2014 when the case was postponed without a pronouncement having been made on the request for a permanent stay. This, in my view, is incorrect. Since that day the applicant's attorney (and this is conceded) has made numerous attempts to get to a point to have the inquiry recommence with the view to get a decision on his request for a permanent stay, alternatively to get some finality. This did not occur. After the applicant an/or his attorney's enquiries fell on deaf ears, it was early in the year 2019 that the applicant and his attorney gave up, accepting that there would probably not be a prosecution any further. It is the decision to recommence the prosecution therefore that spurred them into action.

68. The respondents, in their supplementary heads of argument, explained that any of the following time periods were relevant in respect of my decision on whether the delay was reasonable or unreasonable:

68.1. 14 September 2011 when the preliminary committee resolved that an inquiry be held into the conduct of the applicant.

68.2. 3 October 2011 when the applicant was informed of the decision.

68.3. 20 February 2014 at a pre-inquiry meeting where the applicant raised the point of undue delay.

68.4. on 5 March 2014 where the professional conduct committee sat for the first time and the applicant raised the point of undue delay.

69. The initial decision to hold an inquiry has no bearing on the question before me, because the initial decision is not being objected against. Instead, the applicant did everything in his power to fast-track the inquiry and have it finalized. He co-operated. He has no battle with the initial decision to prosecute. It is true that the delay was in 2014 already evident, and that they delay was then already unjust, but at that hearing the applicant in fact argued unreasonable delay. The problem is that he did not receive the courtesy of a decision on the point raised in *limine*.

70. Since then, however, Dr Coetzee passed away and it became more and more evident that material evidence had become lost. The decision to recommence proceedings in the circumstances, read against the backdrop of the other dilatory conduct of the respondents, constitutes the point from where the days must be counted. The application was launched within a short period after that decision was taken and there is no unreasonable delay.

71. In my view the applicant has made out a proper case for its review. In any event, I further hold the view that a case for a final interdict, as requested, has also been properly made.

72. Insofar as it relates to interdictory relief, I make the following remarks. Save for the right to administrative action that is lawful, reasonable, and procedurally fair, as envisaged in s 33 of the Constitution, s 35(3) bestows upon every accused person the right to a fair trial which includes *inter alia* the right to have his/her trial begin

and conclude without unreasonable delay and to adduce and challenge evidence. These are constitutional rights and surely constitute the notion of a "*clear right*", being a prerequisite for an interdict. I have alluded to the fact, earlier in my judgment, that the position of the applicant is to be equated to an accused person in a criminal trial. At a minimum, the applicant is "*accused*" of improper or unprofessional conduct and must defend himself against that charge.

73. In that respect, it is therefore prudent to consider the authorities that deal with a stay of prosecution. In the case of *Bothma v Els and Others 2010 (2) SA 622 (CC)* the Constitutional Court considered four elements, although it warned that they do not constitute a definite checklist (*vide* para. 37). It considered the length of the delay, the reason the government (in this case, the prosecuting body) proffer to justify the delay, the accused assertion of a right to a speedy trial and prejudice to the accused.

74. In the case of *Zanner v Director of Public Prosecutions, Johannesburg, 2006 (2) SACR 45 (SCA)* the Supreme Court of Appeal had the following to say about the nature of the defense:

"*The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime… It is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe... Clearly, in a case involving a serious offence such as (murder), the societal*

demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay."

75. In this case, the applicant stands accused of unprofessional conduct in allegedly having misdiagnosed a patient who, on the objective facts on the papers, was fully rehabilitated within a very short time after the alleged diagnoses made by the applicant. Although one should steer away from describing such professional misconduct as being negligible, comparing it with reprehensible conduct such as murder or the humiliating, degrading and brutal invasion of dignity as one would find in cases of rape, it surely is an offence that is to be regarded as *de minimis* in comparison.

76. The contention of the respondents that the prejudice that the complainant may suffer must be weighed against the prejudice of the applicant is untenable in this case. As indicated, the complainant, and this issue has not been challenged, has fully rehabilitated after being treated by Dr. Coetzee and no evidence exists of any prejudice that the patient continues to suffer.

77. If that is compared with the prejudice that I have outlined that the applicant suffers, and has conveyed to this court, it is bleak in comparison. It is also an uncontested fact that, save for this pending complaint, the applicant has an impeccable professional record, and has treated thousands of patients through all these years without another complaint. The applicant provides the citizens of this country therefore with a needed service. A proper functioning society demands that professional doctors, who contribute positively to the well-being of its people, should not be subjected to the stresses, with the concomitant negative impact on

his own health, of an inquiry looming for an unacceptable extensive period. It surely is in the public interest that this court steps in and stops the prosecution of the applicant.[2]

78. Insofar as it relates to the trial prejudice, it is common cause that Dr. Coetzee passed away at a point in time where the professional conducts proceedings should have been completed already several years earlier. It is an uncontested fact that much of the evidence, whether it favors the applicant or not, is not to be found. It is simply impossible in those circumstances to conduct a fair trial. The proposition that this prejudice is also suffered by the proforma complainant and/or the complainant is of no moment. If the respondents had acted prudently and with due diligence, the disciplinary inquiry would have been finalized shortly after the event complained about; and no evidence would have gone astray.

79. If one considers, against this backdrop, the length of the delay as well as the reasons proffered by the respondents for the delay, it follows that the delay is inexcusable. It is, as I have already pointed out hereinabove, due to the sheer incompetence within the structures and offices of the respondents. It has caused tremendous prejudice towards the applicant; it has caused years of hardship towards the applicant and is, in my view, not only inexcusable but also ill-explained. That harm exists and is continuing is self-evident in this case.

80. Insofar as one must consider whether an alternative remedy is available to the applicant, in my view, there is no adequate alternative relief available to the applicant, save to have approached this court. The applicant's plight has been

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[2] *see also the unreported judgment of Moodley v Health Professions Council of South Africa and Another, case number 73859/2009, North Gauteng High Court, Pretoria, where a similar approach had been adopted.*

ignored by the respondents and their officials. The applicant, having brought an application for the stay of the execution, did not even get the courtesy of a ruling on that application. Notwithstanding it being patently clear that the inquiry cannot proceed due to a lack of evidence, the seventh respondent insisted on a recommencing with the inquiry. This has brought the applicant to this court. The applicant had no other choice but to seek the assistance from this court to get protection from the continuing unconstitutional conduct (the infringement of ss 33 and 35 of the Constitution).

81. As such, I intend to, although it may be somewhat superfluous, issue the interdict as sought.

82. The last aspect in this judgment is the issue of costs. The applicant filed supplementary submissions seeking costs as against the respondents, jointly and severally, on an attorney and client scale. In the submissions in support of such a costs order made, the applicant points out that, in conducting the current litigation, the respondents have:

82.1. unjustifiably and recklessly charged the applicant with abusing court process, engineering the application to avoid the professional conduct proceedings, of being himself dilatory and of making averments that are "*far-fetched*" and simply aimed at stoking controversy.

82.2. contemptuously failed to comply with the provisions of Uniform Rule 53 and failed to explain non-compliance with the rule.

82.3. filed an unnecessary prolix answering affidavit which mainly duplicated the common cause facts made by the applicant, which failed to disclose a substantive defence to the applicant's relief, and which was replete of irrelevant potentially misleading averments.

82.4. unjustifiably adopted a high-handed, if not conceited, attitude towards the applicant's request for the relief.

83. Some other grounds were also raised, but I am mainly in agreement with the above quoted submissions made.

84. I also agree that if one considers the respondents' conduct that gave rise to the application, the respondents have unapologetically and materially failed to execute the statutory obligations with which they are clothed in terms of the Health Professions Act and have failed to exercise their public power in an accountable, responsive, open, rational, and lawful manner.

85. I agree that the respondents' conduct in this case, both pre-litigation and during the litigation, is conduct that is unacceptable of a body that should instill confidence in the medical profession. The facts of this case are lamentable and demonstrate a lack of accountability. At a minimum, one would have expected the respondents, being faced with the application as presented by the applicant, to concede the relief and agree to a permanent stay of prosecution. The subsequent accusations levelled at the applicant, already being traumatized by the dilatory conduct of the respondents, is unbecoming.

86. In the premises, I agree that a costs order against the respondents, jointly and severally, on the scale as between attorney and client, is justified in this case.

87. I issue the following order:

87.1. the disciplinary proceedings pending against the applicant in terms of Chapter IV of the Health Professions Act, No. 56 of 1974, in relation to the complaint by Mr AF Olivier and being dealt with under reference number MP0376272/33/2008 is hereby permanently set aside.

87.2. the Medical and Dental Professions Board of the Health Professions Council of South Africa is herewith interdicted and restraint from taking any further disciplinary measures against the applicant in terms of Chapter IV of the Health Professions Act, No. 56 of 1974, in relation to the complaint by Mr AF Olivier and being dealt with under reference number MP0376272/336/2008, and all existing disciplinary proceedings in relation thereto are herewith forthwith terminated.

87.3. the first, second, third, fourth, fifth, sixth and seventh respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

D VAN DEN BOGERT
Acing Judge
High Court of South Africa

Gauteng Division, Pretoria

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