SUPREME COURT OF APPEAL SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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***Basson v Hugo & others* (968/16) [2017] ZASCA 01 (17 January 2018)**

Today, the Supreme Court of Appeal (SCA) upheld an appeal brought by the appellant, Dr Wouter Basson, against a judgment of the Gauteng Division, Pretoria (court a quo)(Unterhalter AJ). The issue at the nub of the appeal concerned the question as to whether the appellant was obliged to exhaust an internal remedy as contemplated in s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), before launching an application to review and set aside a decision taken on 13 March 2015 by the third respondent, the Health Professions Council of South Africa (the Council), in terms of which an application for the recusal of the second and third respondents on the ground of bias, was refused.

The dispute between the parties which gave rise to the appeal emanates from the following factual background. The appellant is a qualified medical practitioner, specialising in cardiology. In 2007 the Council launched a disciplinary inquiry against the appellant alleging that he had engaged in unprofessional conduct. The conduct in question related to the appellant's participation in chemical and biological warfare research during his employment with the South African Defence Force in the 1980s. As a result, the committee was appointed to inquire into the charges of professional misconduct against the appellant.

The inquiry proceeded against the appellant and in December 2013, he was found guilty of unprofessional conduct on four of the charges brought against him. In aggravation of the sanction, Mr Martin Heywood was called as a witness to testify on behalf of various civil society organisations. Mr Heywood's testimony aimed at convincing the committee that the appellant should be struck off the Register of Medical Practitioners (the register) through petitions that were signed by a number of civil society organisations. During the course of the proceedings, it transpired that Professors

Hugo and Mhlanga were members of the South African Medical Association (SAMA), which organisation is listed as part of the organisations that supported the petition. Unhappy about their membership and perceived bias, the appellant brought an application for their recusal to the committee on the grounds that he would not have a fair inquiry. The application was refused. The appellant then approached the court a quo with an application to review the decision to refuse the recusal application.

In the court a quo, the review application was dismissed and the appellant was directed to exhaust his internal remedy of appeal before an ad hoc appeal committee in terms of the Health Professions Act 56 of 1974 (the Act), 'should he wish to do so'. The court a quo concluded that the review application was premature as the appellant had a duty to exhaust any internal remedy before approaching the court with a review application. It found that the appellant had not complied with such duty and he failed to show exceptional circumstances in terms of s 7(2)*(c)* of PAJA, and also upon a consideration of the interests of justice, justifying the court to exempt him from complying with exhausting any internal remedy.

The court a quo further held that an appeal committee is empowered to consider the merits of the recusal application and the finding of the Committee to refuse it, in the light of the following circumstances. The recusal application was made by way of a formal application; the facts and law relied upon in support of the application were before the Committee; and the appeal committee would be assisted by a full record of proceedings of the Committee. If the Committee came to an incorrect finding and should have found that Professors Hugo and Mhlanga should have recused themselves, the court reasoned, the appeal committee, in terms of s 10(3) of the Act, has the power to set aside and correct the Committee's finding.

On appeal, the SCA held that the court a quo's finding that an appeal committee is empowered to consider the merits of the recusal application presupposes that the impugned decision is merely voidable, which is somehow rendered valid as a result of a subsequent decision by the Committee on sanction, or by an appeal committee. However, the SCA stated, the consequence of a failure to recuse renders the proceedings a nullity. Therefore, if a presiding officer should have recused himself, proceedings conducted after dismissal of an application for recusal must be regarded as never having taken place at all. An appeal under s 10(3) of the Act cannot cure the lack of jurisdiction, for one cannot appeal against a nullity. And the logical implication of the nullity of the proceedings at the first stage is that any appellate proceedings must suffer the same fate, ie they should also be treated as void.

Furthermore, the SCA considered that the appellant claimed a remedy beyond the powers of an appeal committee: it does not exercise original jurisdiction and cannot hear the matter de novo, with or without new evidence or information. Its powers are limited to varying, confirming or setting aside a finding by the Committee, or remitting a matter to the Committee. An appeal committee does not have the power to set aside the proceedings before the Committee. This is underscored by reg 8(1) of the Regulations relating to the conduct of inquiries into alleged unprofessional conduct, which confines an appeal to a finding or penalty of the Committee; and reg 8(5) which provides that an appeal 'shall only be heard on the papers referred to in sub regulation (4)', ie the transcript of the proceedings at the inquiry, and an appellant's papers comprising the grounds of appeal and heads of

argument. The internal remedy in s 10(3) of the Act is an appeal in the narrow sense and thus inadequate.

For these reasons alone, the SCA concluded that the court a quo should have found that there were exceptional circumstances as contemplated in s 7(2)*(c)* of PAJA, which required the immediate intervention of the court rather than resort to the internal remedy under s 10(3) of the Act. The internal remedy is ineffective and inadequate: it does not offer a prospect of success and cannot redress the appellant's complaint.

As a result, the appeal was upheld and the matter remitted to the Gauteng Division of the High Court, Pretoria, to decide the review application.

---**ends---**