THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Case No **237/03**

Reportable

In the matter between:

THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA Appellant

and

DEWALD DE BRUIN Respondent

Coram**:** Streicher, Cameron, Navsa, Brand et Van Heerden JJA

Heard: 14 September 2004

Delivered: 29 September 2004

Summary: Medical practitioner struck off register for disgraceful conduct – application for review and appeal in terms of section 20 of Health Professions Act 56 of 1974 both successful before High Court – appeal by Health Professions Council against penalty of three months' suspension from practice by High Court succeeding – SCA substituting suspension for two years.

J U D G M E N T

V AN H EERDEN JA

Introduction

[1] The respondent, Dr Dewald de Bruin ('De Bruin'), is a medical practitioner who was found guilty of disgraceful conduct by a disciplinary committee of the appellant's predecessor in title, the Interim National Medical and Dental Council of South Africa.[1] (For the sake of convenience, both the appellant and its predecessor in title will be referred to in this judgment as 'the Council'.) In terms of the then applicable regulations,[2] the disciplinary committee ('the Committee') recommended to the Council that, as the penalty for his disgraceful conduct, De Bruin's name should be removed from the register of medical and dental practitioners. The Council subsequently confirmed both the finding of the Committee and the penalty recommended by it.

[2] De Bruin did not contest the Council's finding that he was guilty of disgraceful conduct. As regards the penalty imposed on him,

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[1] The appellant, the Health Professions Council of South Africa, was established in terms of s 3 of the Medical, Dental and Supplementary Health Service Professions Amendment Act 89 of 1997 to replace the Interim National Medical and Dental Council of South Africa with effect from 30 April 1999 (see s 2, read together with s 63A, of the Health Professions Act 56 of 1974, formerly known as the Medical, Dental and Supplementary Health Service Professions Act). The Interim Council had in turn replaced its predecessor, the South African Medical and Dental Council, with effect from 12 April 1995: see ss 3 and 12 of the Medical, Dental and Supplementary Health Service Professions Amendment Act 18 of 1995.

[2] Regulations 10 and 15 of the *Regulations relating to the conduct of enquiries held in terms of section 41 of the Act,* published under Government Notice R2303 in *Government Gazette* 12759 of 28 September 1990. These regulations were subsequently repealed in their entirety and replaced by the *Regulations relating to the conduct of inquiries into alleged unprofessional conduct under the Health Professions Act, 1974,* published under Government Notice R765 in *Government Gazette* 22584 of 24 August 2001.

however, he instituted review proceedings in the Pretoria High Court, simultaneously appealing to that court in terms of s 20 of the Health Professions Act 56 of 1974 ('the Act').[3] Both the review application and the appeal were upheld with costs by the court below. Swart J ordered that the decision of the Council to remove De Bruin's name from the register of medical and dental practitioners be set aside and that the penalty imposed on De Bruin by the Council be substituted with a penalty of suspension from practice for three months. With the leave of this court, the Council now appeals against that order.

Background

[3] The disgraceful conduct with which De Bruin was charged had its origin in his relationship with the complainant, Ms Lioni Kühn. The Committee ultimately accepted the complainant's version of events and

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[3] Section 20 was inserted into the Act by s 18 of Act 89 of 1997, with effect from 23 January 1998. Sections 20 and 42(6) of the Act in its original form also provided for a right of appeal to the High Court against the finding or penalty imposed on (*inter alia*) a medical practitioner by the South African Medical and Dental Council. These sections were, however, repealed by ss 4 and 8 of the Mental, Dental and Supplementary Health Service Professions Amendment Act 33 of 1976 with effect from 7 April 1976. Thus, during the period 7 April 1976 to 22 January 1998, it was not possible for an aggrieved person to appeal to the High Court against a decision of the appellant's predecessor, although he or she could approach the High Court by way of review: see *Thuketana v Health Professions Council of South Africa* 2003 (2) SA 628 (T) para 16 at 633J-634D. As was pointed out in the *Thuketana* case, the amendments made to the Act by Act 89 of 1997 brought about significant changes in the disciplinary structures relating to the health professions. Disciplinary inquiries are now conducted by a professional conduct committee established by the relevant professional board. An appeal against the finding of such a committee lies to an *ad hoc* disciplinary appeal committee established by the Council, each such committee having as chairperson 'a retired judge or retired senior magistrate, or an attorney or advocate with at least 10 years' experience' (see ss 10(2) – (5) of the Act, as substituted by s 8 of Act 89 of 1997). In terms of the new s 20 of the Act, 'any person who is aggrieved by any decision of the council, a professional board or a disciplinary appeal committee, may appeal to the appropriate High Court against such decision.'

rejected De Bruin's version insofar as it conflicted with that of the complainant. In approximately May 1993, the complainant and De Bruin became involved in a romantic relationship. At that time, De Bruin was a clinical assistant at the Department of Urology at the University of Pretoria, qualifying to become a specialist urologist, while the complainant was a 21 year old honours student in accountancy at the same University. By the beginning of July 1993, the couple had already started to discuss marriage and subsequently planned to become engaged to each other in December 1993. It would appear that De Bruin undertook the responsibility for contraceptive precautions and that, at his instance, the couple resorted to the so-called 'rhythm method'. Despite these precautions, the complainant became pregnant in late July/early August 1993. De Bruin made it clear to her that he did not want a child at that stage and that she should not inform her parents of the pregnancy.

[4] Even before the pregnancy was medically confirmed, De Bruin indicated that he would perform an abortion on the complainant. When hormone medication did not have the desired result, De Bruin decided to attempt to perform the abortion by means of physical intervention. The complainant was apprehensive, but was assured by De Bruin that the procedure was quick, simple and safe. She trusted him because of his

medical qualifications. De Bruin performed this first attempt at a physical abortion in his apartment, administering liquor to the complainant to sedate her and using surgical instruments which he had apparently borrowed from the hospital at which he worked. This first attempt was not only very painful for the complainant, but was unsuccessful.

[5] Thereafter, over a period of approximately four months, De Bruin made numerous further attempts, all of them unsuccessful, to perform an abortion on the complainant by way of physical intervention. Most of these attempts took place in De Bruin's apartment, with the use of medication such as sleeping pills, morphine, Valium and pethidene, sometimes combined with alcohol, to sedate the complainant (albeit inadequately). By this time De Bruin had acquired his own surgical instruments, such as a speculum, curette and surgical scissors. However, according to the complainant, he also made use of knitting needles on at least one occasion. The complainant was subjected to severe pain and trauma during the course of these procedures, which also caused her to bleed intermittently from the uterus. What made matters worse was that, after many of these attempts, De Bruin expected the complainant to drive herself home, in her own car, from his apartment to her parents' home

nearby (where she resided at the time). Moreover, on at least one occasion, De Bruin indulged in sexual intercourse with the complainant after an attempt to procure an abortion, whilst she was still in a sedated state. Despite the fear, pain and trauma, the complainant continued to allow herself to be subjected to this treatment, firstly, because she feared that the fetus might have been irreparably damaged and secondly, because she loved and trusted the complainant and firmly believed that he would ultimately marry her.

[6] De Bruin suspended his attempts to induce an abortion through physical intervention while the complainant was taking her final examinations in early November. However, during this period, and using a false name, he prescribed various forms of medication for her, also aimed at procuring an abortion. This medication, taken by the complainant in accordance with his instructions, failed to produce the desired result. On or about 6 November, following yet another bout of physical intervention by De Bruin, the complainant apparently suffered a substantial loss of amniotic fluid.

[7] De Bruin's physical attempts to cause the complainant to abort the fetus culminated on the evening of 23 November 1993, when the

complainant started to experience contractions. Late that night, when the contractions became very severe, De Bruin inserted instruments into her uterus and 'broke up' the fetus, removing several pieces which he then disposed of. The complainant was still suffering contractions when De Bruin drove her to her parents' home and left her there shortly after midnight. The contractions became more and more intense and painful but, although she telephoned De Bruin several times to ask him to come and fetch her, he refused to do so. Finally, the complainant had to remove a large part of the fetus manually and to dispose of it herself. She appears to have lost a considerable amount of blood and to have sustained deep shock. For some time thereafter, she was very feverish, developed severe bronchitis and suffered pain in her muscles and joints.

[8] In the month following the abortion, De Bruin began to treat the complainant in an aloof manner, being impatient with her and failing to give her emotional support. Eventually, on 27 December, the complainant could no longer endure the emotional strain alone and informed her mother (Dr Annelie Kühn – not a medical doctor) of what had happened. Her mother, who also gave evidence during the course of the disciplinary inquiry, immediately confronted De Bruin, who acknowledged that he had performed an abortion on the complainant.

Although De Bruin did not consider it necessary for the complainant to receive further gynaecological attention, Dr Kühn arranged for her to be examined by a gynaecologist, Dr Herholdt. Shortly thereafter she was admitted to hospital for an evacuation of the uterus. She spent only three and half hours in hospital and, according to Dr Herholdt (who also testified at the disciplinary inquiry), no permanent pathology was noted either at this time or during the course of a clinical examination and laparoscopy performed during June 1994.

[9] The emotional and physical strain inflicted on the complainant during the second half of 1993 caused her to suffer from severe depression. In early 1994 she was treated by both a psychologist and a psychiatrist and, on the latter's recommendation, she was admitted to a clinic for sleep therapy in approximately February 1994. Her emotional state was exacerbated by her discovery that De Bruin had commenced a relationship with another woman. Although she terminated her relationship with De Bruin in January 1994, she found it impossible to distance herself emotionally from him and continued to suffer severe depression. During this period Dr Kühn made a number of attempts to persuade De Bruin to provide the complainant with emotional support so that she could regain her self-confidence and resume her studies.

[10] It would seem that both the complainant and her mother felt that De Bruin should make some financial contribution towards the costs incurred by the Kühn family, not only in respect of the treatment given to the complainant, but also because she had failed her final examinations in November 1993 and had to repay her bursary for that year. Both of them testified that, despite these efforts to persuade De Bruin to 'resume his responsibilities' and to act with integrity, he remained apathetic towards the complainant and did not support her emotionally or financially. During this time, the complainant's mother also made contact with De Bruin's parents and with the academic head of his department, Professor Du Plessis, apparently informing them what De Bruin had done to her daughter. Eventually, in July 1994, acting upon the advice of her minister of religion**,** the complainant laid a formal charge against De Bruin with the Council.

The disciplinary inquiry

[11] Although a committee of preliminary inquiry of the Council decided on 12 December 1994 that De Bruin should be subjected to a disciplinary inquiry, the inquiry only commenced on 20 August 1996.

The charges against him, contained in a 'charge sheet' dated 24 January 1996, were formulated as follows:[4]

'1. De Bruin carried out an abortion on his patient [the complainant] or attempted to carry out an abortion on her; and/or

2. coerced or persuaded or encouraged the patient to undergo an abortion or to consent to an abortion; and/or

3. carried out an abortion on the patient or attempted to carry out an abortion:

3.1 in a manner which was negligent, incompetent or not in accordance with the generally accepted norms and standards of medical practice in that he utilised:

3.1.1 instruments; and/or

3.1.2 medication which were not suited for that purpose; and/or

3.2 on or at premises other than a hospital or clinic where the necessary medical equipment and/or support was available and/or under unsterile conditions; and/or

[4] The charge sheet was written in Afrikaans. What follows is a translation, with editorial amendments where necessary.

3.3 without the patient having been properly sedated prior to the commencement of the procedure; and/or

3.4 while he did not possess sufficient knowledge, experience or training; and/or

4. injured and/or destroyed the patient's fetus; and/or

5. gave or administered medication to the patient, which medication was contra-indicated, harmful or not in the best interests of the patient and/or her unborn child; and/or

6. prescribed or obtained medication under a false name for the patient; and/or

7. administered veterinary remedies to the patient and/or utilised veterinary equipment on or in respect of the patient; and/or

8. had sexual intercourse with the patient while she was anaesthetized and after he had attempted to perform an abortion on her; and/or

9. forced, recommended to or encouraged the patient to do strenuous exercises notwithstanding the fact that he knew that she was pregnant; and/or

10. failed to have the patient admitted to a hospital when hospitalisation was indicated; and/or

11. failed to refer the patient to a gynaecologist for evaluation and/or treatment; and/or

12. dissuaded the patient from consulting a gynaecologist at the time when she was in need of the services of a gynaecologist; and/or

13. performed one or more procedures on the patient in respect of which he possessed insufficient training, knowledge and/or experience; and/or

14. failed to provide the patient with support after he had performed an abortion on her or attempted to perform an abortion.'

[12] In accordance with the then applicable regulations, the disciplinary committee consisted of three members of the medical profession, who were assisted by a legal assessor. De Bruin pleaded not guilty to the charges against him and the *pro forma* complainant was put to the proof of all the allegations contained in the charge sheet. This resulted in a protracted hearing taking place over five days during a period stretching from August 1996 to February 1998. The version of events presented by De Bruin during the hearing was that the complainant had started to abort spontaneously in approximately October 1993 and that he had, first by medication and thereafter by physical intervention, attempted to complete the process by evacuating her uterus. On 25 February 1998, De

Bruin was found guilty of disgraceful conduct as charged, except for the charges contained in paragraphs 4, 7, 9 and 12 of the charge sheet.[5] The verbatim finding of the Committee reads as follows:

'VOORSITTER: Dr De Bruin, die Komitee het alle getuienis met versigtigheid oorweeg. Die Komitee aanvaar mej Kühn se getuienis met 'n groot bewustheid daarvan dat sy tot 'n groot mate 'n enkel getuie is. Boonop moet haar getuienis met omsigtigheid benader word omdat die klagte analoog is aan 'n klagte in 'n seksuele tipe aanklag. Verder was die klaagster emosioneel betrokke by die respondent. Mej Lioni Kühn, wat die Komitee as 'n goeie getuie beïndruk het, se weergawe word deur die volgende objektiewe feite gesteun:

a) Haar laaste menstruele stonde was ongeveer 20 Julie of ongeveer 15 Julie. Teen 22 tot 23 November 1993 sou sy dan ongeveer agtien weke swanger gewees het indien die swangerskap intakt was. Dr A Kühn het getuig dat op hierdie stadium Lioni 'n magie getoon het. Dr De Bruin het getuig dat alhoewel hy nie die uterusgrootte presies kon onthou nie, was dit onder die naeltjie. Hy getuig verder dat hy die hele kuret kon indruk en sleg die handvatsel buite gebly het – dit was hier by 22/23 November. Derhalwe is die mees waarskynlike afleiding dat dit 'n aangaande intakte swangerskap op hierdie stadium was.

b) Die medikasie wat volgens Bewysstukke en volgens getuienis toegedien was op die volgende datums, was as volg: Op die 8ste Oktober was dit DF 118, op die 16de Oktober Amoxil en Flagyl, op die 2de November Ergotrate maliaat, op die 3de November Prostin E2, op die 4de November Prostin E2 en op die 7de November weer Ergotrate maliaat. Hierdie feite noop die Komitee om te interpreteer dat dit pogings was om 'n aborsie te pleeg. Die alternatiewe scenario, met ander woorde, om dit te gebruik het as dit 'n

[5] See the preceding paragraph.

onvolledige abortus sou wees en dus slegs ‘n evakuasie wou veroorsaak, sou moeilik verenigbaar gewees het met sulke sterk analgetika, antibakteriële middels, Ergotrate en Prostoglandine.

c) Die teenwoordigheid aldan nie van ‘n intakte fetus sou waarskynlik dr De Bruin se optrede of weerhouding van optrede verklaar het. Sy onverantwoordelike hantering van mej Lioni Kühn kan net dui op die teenwoordigheid van ‘n intakte swangerskap wat ten alle koste beëindig moes word, andersins sou hy ‘n onvolledige abortus met redelike gemak en veiligheid kon verwys vir verdere hantering na ‘n ander medikus. Om byvoorbeeld ‘n onvolledige miskraam na ‘n naasliggende dorp te verwys en daar ‘n geneesheer te vind wat dit kon evakueer, sou baie maklik gewees het.

d) Die transkripsie van die gesprek [a telephone conversation between De Bruin and the complainant during June 1994 which was partially recorded on tape by the complainant without De Bruin’s knowledge] is met mej Lioni Kühn se weergawe versoenbaar, maar moeilik met dr De Bruin s’n. Dr De Bruin was ‘n ontwykende getuie en daar was talle weersprekings in sy getuienis. Daar was onwaarskynlikhede in sy getuienis. Die Komitee vind dit uiters moeilik om sy weergawe op grond van bovermelde feite (a) tot (d) op ‘n oorwig van waarskynlikhede te kan aanvaar.

Die totale oënskynlike ongevoeligheid en onprofessionaliteit van sy hantering dui op, bo en behalwe ‘n gebrek aan sorgsaamheid, ook ‘n onverantwoordelikheid en onbekwaamheid.’

[13] On 28 April 1998, after hearing argument on the appropriate penalty, the Committee recommended that De Bruin’s name be removed from the register of medical and dental practitioners. In the light of the decisions subsequently made by the Council in respect of De Bruin, and

the reasons given by the Council for such decisions, it is (as with the Committee's finding) useful to set out in full the Committee's reasons for the penalty recommended by it:

'VOORSITTER: By die oorweging van die straf het die Komitee in ag geneem dat ons reeds bevind het dat die totale oënskynlike ongevoeligheid en onprofessionaliteit van dr De Bruin se hantering van die saak dui op, bo en behalwe 'n gebrek aan sorgsaamheid, ook 'n onverantwoordelikheid en onbekwaamheid. Voorts het die Komitee die erns van die oortreding, die belange van dr De Bruin en sy persoonlikhede asook die belange van die gemeenskap in ag geneem. Hierdie faktore is op 'n objektiewe wyse beoordeel sonder om emosionele faktore of moontlike vooroordele vir of teen vrugafdrywing in die algemeen in ag te neem.

Die Komitee neem, onder meer, die volgende versagtende faktore in ag en dit was deur u advokaat betoog. (a) Die voorval het nie ontstaan uit 'n geneesheer/pasiënt verhouding nie. Daar was 'n verhouding tussen dr De Bruin en mej Kühn en die geneesheer/pasiënt verhouding het eers op 'n latere stadium ontstaan. (b) Dr De Bruin was onderhewig aan wat genoem kan word "the tyranny of litigation", deurdat die saak eers jare na die voorval afgehandel is. Dr De Bruin het dan ook getuig dat hy elke dag aan die saak gedink het en dat die onsekerheid waarskynlik moeilik verwerkbaar was.

Verswarende faktore wat in ag geneem word, is die volgende: Eerstens, dr De Bruin het bykans die ergste gedoen wat hy moontlik kon doen om die probleem van mej Kühn se swangerskap waarvan hy die pa was, op te los. Hy het haar lewe wesenlik in gevaar gestel en hy het dit meedoënloos, berekend en by herhaling gedoen. Dr De Bruin het deurlopend geen berou getoon nie. Dit is jammer dat hy nie die Komitee in sy vertroue geneem het nie. Derdens, hy het voorts sy bevoorregte posisie as geneesheer ingespan om hom in staat te stel

om te doen wat hy gedoen het en wat daarop gemik was om sy probleem op te los.

Dr De Bruin, die Komitee het besluit om 'n verslag van hierdie ondersoek aan die Raad voor te lê by sy volgende vergadering met die aanbeveling dat u naam uit die Register van Geneeshere en Tandartse geskrap word.'

[14] As indicated above, in terms of the then applicable regulations, the finding and recommendation of the Committee were referred to the Council for consideration at its next meeting, held on 13 October 1998. In the interim, in September 1998, written representations regarding the recommended penalty were made on De Bruin's behalf to the Council. By means of these representations, De Bruin sought to persuade the Council to amend the penalty to one other than the removal of his name from the register. The written representations also contained a request that the Council allow De Bruin's legal representatives to address full oral argument to it in respect of an appropriate penalty. The written representations submitted to the Council referred to and were accompanied by an impressive number of references in support of De Bruin, most of which emanated from members of the medical profession who had worked closely with De Bruin. These references (all written after the disciplinary inquiry) attested, frequently in glowing terms, to De Bruin's professional integrity, his competence as a urologist, his dedication to his patients, his high ethical standards, his humanity and

the excellent service being rendered by him to the community in which he was practicing as a urologist.

[15] As it was entitled to do in terms of the regulations, the Council refused to allow De Bruin's legal representatives to make oral representations to it. On 13 October 1998, the Council confirmed the recommendations of the Committee as to both the finding of disgraceful conduct and the penalty of removal of De Bruin's name from the register of medical and dental practitioners.

[16] The Council's decision was followed by a flurry of correspondence between De Bruin's legal representatives and the appellant's registrar, in which the former requested reasons for the Council's decision to confirm the recommendations of its Committee and for its decision to refuse De Bruin's legal representatives the opportunity of submitting oral representations to it. In the interim, the Council agreed to suspend execution of the penalty imposed on De Bruin, pending a review application. After several (apparently entirely misguided) undertakings given on behalf of the appellant to furnish such reasons, De Bruin's legal representatives were ultimately informed by Professor LH Becker, the Chairman of the Medical and Dental Professional Board and a member

of the Council since 1978, by letter dated 29 June 2000, that 'the verbatim record of the disciplinary proceedings was placed before the Council at its meeting on 13 October 1998. The full Council concurred with the reasons as put forth by the Disciplinary Committee as to both the finding and the penalty, and henceforth ratified the recommendations.

[17] Further correspondence followed, but it was not until 23 January 2001 that Professor Becker indicated that no further reasons would be forthcoming from the Council. It was shortly after receipt of this letter that De Bruin instituted review proceedings and simultaneously launched an appeal in terms s 20 of the Act.

The appeal and review proceedings

[18] The court below identified what it regarded as 'common ground' ('gemeenskaplike gronde') for its decision to uphold both the review application and the appeal. In essence, Swart J concluded that the Council had failed to furnish proper reasons for its decision to confirm the recommendation of the Committee regarding the penalty to be imposed on De Bruin and that this defect had not been remedied by the answering affidavits deposed to on behalf of the Council by its

registrar and Professor Becker. In his affidavit, Professor Becker described the procedure followed by the Council in confirming the recommendation of the Committee and indicated that the decision to remove De Bruin's name from the register was unanimously taken by the 31 members of the Council (consisting in total of 53 members) who were present at the relevant meeting. Professor Becker also emphasized the nature and extent of the disgraceful conduct of which De Bruin had been found guilty, pointing out that -

'Die Applikant word gemeet aan die norme wat vir sy professie geld. Dit wil sê daar word geoordeel tot welke mate hy afgewyk het van die standaard van profesionele optrede wat van hom verwag word. Dit beteken nie dat hierdie die enigste faktor is wat in ag geneem word nie, maar alle relevante faktore insluitende sy persoonlike omstandighede, versagtende faktore en die vertoë van sy regsverteenwoordigers word ook in ag geneem. By die beoordeling van hierdie geval was die Interim Raad egter eenparig van mening dat die enigste gepaste straf 'n skrapping was.'

[19] The court *a quo* considered the answering affidavits to be problematic in various respects, in particular in that they failed pertinently to deal with the numerous references submitted to the Council on behalf of De Bruin. In this regard, Swart J remarked as follows:

'Wat die getuigskrifte betref, help dit nie om te sê dat die redes van die komitee aanvaar is nie want die getuigskrifte was nie voor die komitee gewees nie.

Weens die belang van die getuigskrifte ... wat dwingende feite en argumente beliggaam waarom die applikant se naam juis nie verwyder moet word nie, sou mens verwag dat indien dit behoorlik in ag geneem is as synde reëlreg in stryd met die aanbeveling van die dissiplinêre komitee, die respondent eweneens juis sou verduidelik dat hierdie dokumente behoorlik oorweeg is, dat dit verwerp is en hoekom dit verwerp is, terwyl dit oënskynlik nie verwerp moes gewees het nie. Die enigste afleiding wat regtens gemaak kan word is dat die getuigskrifte glad nie of nie behoorlik oorweeg is nie en dat die blote aanvaarding van die redes en voorstel van die komitee ongeregverdig was en tot 'n growwe onbillike straf gelei het. ... Die opgelegde straf moet dus tersyde gestel word en iets moet in die plek daarvan kom.'

[20] In substituting the penalty imposed on De Bruin by the Council with a period of 3 months' suspension from practice, the court below relied heavily on the abovementioned references. In addition, mention was made of the fact that the complainant had apparently suffered no lasting physical or psychological harm; that the actions in question had arisen from a crisis in a personal relationship to which the complainant was a consenting party; and that, although certainly constituting an abuse of his position as a doctor, De Bruin's conduct did not necessarily have a bearing on his professional competence in his chosen sphere of specialization. De Bruin was a first offender and during the lengthy period that had elapsed between his transgressions and the consideration thereof by the Council, he had qualified and registered as a specialist

urologist and had subsequently been practising as such with no untoward incidents.

[21] Counsel for De Bruin was asked by this court whether he was persisting in the grounds of review that succeeded in the court below. He responded that he was primarily challenging the Council's verdict on the basis of an appeal in terms of s 20 of the Act.

[22] In my view, the alleged grounds of review upheld by Swart J are not sustainable. I do not agree that the Council failed to furnish adequate reasons for the decision reached by it. The Committee had given full reasons for its recommendation to the Council that De Bruin's name be removed from the register – there is nothing to suggest that the Council did not properly consider, and was not justified in endorsing, the Committee's reasons when deciding to confirm the recommended penalty. As regards the alleged failure by the Council to consider, properly or at all, the written references submitted to it in support of De Bruin, it should be noted that, in his founding affidavit in the review application, De Bruin did not specifically rely on the fact that the references were not taken into account by the Council. The inference drawn by Swart J that the references were not considered, or were not

properly considered, is in direct contradiction with what was said by Professor Becker in his answering affidavit. Becker pointed out that, some time before the Council Meeting on 13 October 1998, every member of the Council had been furnished with the written representations (including the references) submitted on behalf of De Bruin. Moreover, every member of the Council had received a full record of the proceedings before the disciplinary committee by no later than the end of June 1998. In accordance with the established procedure, the written representations, including the references, would have been specifically drawn to the attention of Council members before the discussion of De Bruin's case. It simply cannot be said that De Bruin established, on the papers before the court *a quo*, that the Council had not properly applied its mind to all the relevant documents in deciding to accept the Committee's recommendation of an appropriate penalty. To my mind, the review proceedings should not have succeeded.

[23] The same cannot, however, be said about the appeal proceedings before Swart J. The appeal to the High Court created by s 20 of the Act has (in my view correctly) been described as 'an appeal in the ordinary sense', ie 'a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which

the only determination is whether that decision was right or wrong' (see *Thuketana v Health Professions Council of South Africa,*[6] referring to *De La Rouviere v SA Medical and Dental Council*[7] and *Rosenberg v South African Pharmacy Board).*[8] The court hearing such an appeal must, of course, give due weight to the fact that the Council is the statutory *custos morum* of the medical profession and that, being mainly composed of members of the profession who know and appreciate the standards demanded of it, it has considerable advantages over a court in the consideration and evaluation of the standards sought to be maintained (see, for example, *Veriava & others v President, SA Medical and Dental Council & others;*[9] *Phathela v Chairman, Disciplinary Committee, South African Medical and Dental Council & another;*[10] *Nel v Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad;*[11] *Thuketana v Health Professions Council of South Africa*[12]). However, while a court of appeal will obviously be reluctant to interfere with the decisions of a body such as the Council, it should not hesitate to do so when interference is warranted by the principles governing appeals. A failure to intervene in such circumstances would render nugatory the

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[6] 2003 (2) SA 628 (T) at 634J-635I.
[7] 1977 (1) SA 85 (N) at 93H-94B.
[8] 1981 (1) SA 22 (A) at 33D-E.
[9] 1985 (2) SA 293 (T) at 307A-H.
[10] 1995 (3) SA 179 (T) at 182G-E.
[11] 1996 (4) SA 1120 (T) at 1129B-E.
[12] *Supra* at 640B-F.

right of appeal reintroduced into the Act in 1998, after a period of nearly 22 years during which no such right existed.[13]

[24] The approach to be followed by a court of appeal in considering questions of sentence was summarised by Marais JA in *S v Malgas*[14] as follows:

> 'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate Court is not at large in the sense in which it is at large in former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it

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[13] See footnote 3 above.
[14] 2001 (1) SACR 469 (SCA) para 12 at 478d-h.

attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'

[25] In addressing the appeal in terms of s 20 of the Act, counsel for the Council submitted that the penalty imposed was both fair and appropriate, while the penalty substituted by Swart J was shockingly inappropriate in that it was far too lenient. Counsel for De Bruin, on the other hand, submitted that the decision to remove De Bruin's name from the register was so grossly unreasonable that interference was warranted and that the penalty imposed by the court below could not be faulted.

[26] It was common cause that the removal of a medical practitioner's name from the register is an extremely severe penalty – indeed, the most severe penalty for which the Act makes provision. As was pointed out by the court below, through the imposition of this penalty 'is daar 'n konklusiewe einde gemaak aan sy [De Bruin's] loopbaan as uroloog sedert 1995 onderhewig aan die spekulasie van die lot van 'n aansoek om hertoelating.' The question to be answered is, therefore, whether the disgraceful conduct of which De Bruin was found guilty truly merited this severe penalty. Was the nature of De Bruin's transgressions such that he must be regarded as not being a fit and proper person to practice his profession, to 'put him beyond the pale' as a medical practitioner?

[27] It cannot be gainsaid that De Bruin's actions and omissions have to be viewed in an extremely serious light. As pointed out by counsel for the appellant, the facts underlying the charges of which he was ultimately found guilty revealed dishonesty, selfishness, an intrinsic lack of judgment and a callous disregard for the physical and emotional well-being of the complainant. There was a significant age difference between the parties and it is clear that the complainant trusted De Bruin, not only because she loved him deeply, but also because of his position as a doctor. Although she was afraid to subject herself to physical intervention by De Bruin in order to precipitate an abortion, she initially did so because of his assurances that the procedure was safe, simple and quick:

> 'Ek was eintlik 'n bietjie bang gewees en ek was baie verward en verskrik en toe het ek vir hom gevra of dit nie gevaarlik en onwettig is nie. Toe het hy vir my gesê, nee, dit is nie gevaarlik nie, hy sal net een keer vinnig ingaan en die baarmoeder skraap en dan sal ek menustrueer en dan sal dit verby wees. Ek het hom geglo, ek het nooit gedink dit sal meer as een keer gebeur nie.'

[28] An aspect that must count against De Bruin is that, over and above the age difference between him and the complainant, there would also appear to have been a significant power imbalance in their relationship, which he abused.

[29] After the first unsuccessful attempt at a physical abortion, the complainant believed that she had no option but to continue to subject herself to De Bruin's interventions. Not only was she afraid that the fetus had suffered irreparable damage, but she did not want to lose De Bruin's love. As she explained under cross-examination:

'Ek dink ek was blind vir Dr De Bruin se bedoelings. Ek meen, ek het geen rede gehad om hom in twyfel te trek oor wat hy alles vir my belowe het en wat hy alles vir my gesê het nie en ek het hom, ek dink, op daardie stadium was ek te bang om na my ouers toe te gaan, of hy het my ontmoedig om dit te doen. Dit was klaar moeilik genoeg om dit self te wil doen en hy het my belowe ons gaan trou en ek dink ek was net blind. Ek het hom geglo en ek het geglo as ek maak soos hy sê en ... ek was net bang om hom te verloor want ek was lief vir hom. Ek het geglo as ek maak soos hy wil hê, dan sal hy met my trou en dit was net blind gewees. Dit was regtig dom gewees.'

[30] The complainant continued to love De Bruin even after she had finally aborted the fetus, under extremely traumatic circumstances, in late November 1993. Her emotional collapse and severe depression thereafter was largely due to the fact that De Bruin was not prepared to fulfil his promise to marry her, nor was he prepared to support her emotionally during this most difficult period. In her own words –

'Ek dink dit was vir my baie erg gewees en wat vir my nog erger was is die feit dat ek myself laat oortuig het om 'n kind dood te maak omdat ek so lief was vir

hom. Ek dink dit was die grootste ding vir my waarmee ek geworstel het, om hom te behou, en aan die einde van die dag het hy uitgeloop en my net daar gelos en dit was vir my die ergste.'

[31] It would appear that it was only after laying a formal charge with the Council that the complainant was finally able to break her emotional ties with De Bruin and get on with her life. Thereafter, she retook and passed her final examinations for her honours degree. At the time of the disciplinary inquiry, she had already acquired her professional qualification as an auditor and had commenced with Masters studies, whilst working as an auditor's clerk. It would appear that she had managed to put the emotional trauma of her relationship with De Bruin behind her and she was engaged to be married. As indicated, she had fortunately suffered no permanent physical damage as a result of the treatment which she had received at the hands of De Bruin.

[32] A crucial aspect of this case is the fact that De Bruin's actions and omissions had their origin in a serious crisis arising in the course of a personal relationship. It appears from his evidence that he reciprocated the complainant's love and that he was genuine in his desire to marry her. However, because of (*inter alia*) family pressures, her pregnancy appears to have thrown him completely off balance. He made a gross

error of judgment in his decision to attempt to abort the fetus. Once the first attempt had proved unsuccessful, he appears to have convinced himself that there was no other option but to continue with further attempts. The problem escalated and, as the emotional strain increased, it apparently became more and more difficult for either De Bruin or the complainant to extricate themselves from the path upon which they were set. Matters were exacerbated by the conservative family backgrounds of both parties and by the fact that, at that stage, abortion was legally permitted only under strictly controlled circumstances.

[33] Dr De Bruin's conduct was indeed reprehensible. However, this conduct did not take place in the context of a usual doctor/patient relationship. That, during the period in question, De Bruin was acting totally out of character, both from a professional and a personal point of view, is evident from the content of a telephone conversation between himself and the complainant in June 1994 which, unbeknown to him, the complainant was recording on tape. He answered the reproaches levelled at him by the complainant in the following way:

'Lioni, dis maklik om nou 'n klomp verwyte rond te gooi. Toe ek dit gedoen het, het ek gedink ons doen die dinge reg. Dis maklik om vir my en vir jou om nou, nou verwyte te hê. Ek verwyt myself ook, ek sê vir myself, hoekom nie dit nie, hoekom nie dat nie, hoekom het ek ooit saam met jou geslaap?

Hoekom al die jare reguit pad geloop, en dan skielik val ek net in ‘n donker gat in? Dis vrae wat deur my kop ook maar maal waarvoor ek nie antwoorde het nie Lioni.’

[34] He referred in this conversation to the fact that he too had suffered and continued to suffer emotional trauma and that he continued to reproach himself for what he had done. He made no attempt to ascribe any blame to the complainant, simply stating that -

‘ek dink, ‘n groot fout wat ons gemaak het, ons het, ons het daai ding op daai stadium alleen gehanteer, en ons moes dit nie gedoen het nie. Ons moes kalmte in ons hart gekry eers... ons moes, ons moes gegaan het en kalm, net eers kalmeer het, en iemand in ons vertroue geneem het en, en leiding gevra het...’.

[35] It is true that, during the disciplinary inquiry, De Bruin persistently attempted to exculpate himself and to justify his actions. He stuck to the version that his actions had been aimed at completing the process of an abortion which had commenced spontaneously. As the Committee found, this version was clearly not true. Nevertheless, even on his own version, he admitted freely that he had made serious errors of judgment and that he was deeply ashamed of what he had done. A few extracts from his evidence under cross-examination serve to illustrate this:

'Ek het verkeerdelik geglo ons kan dit [the crisis caused by the complainant's pregnancy] hanteer op 'n wetenskaplike manier sonder om skade te doen aan haar, sonder om ekstreme risikos te neem .... Dit was foutief van my. Ek moes glad nie betrokke gewees het by haar hantering nie. My objektiwiteit is daarmee heen gewees. Ek moes haar van die begin af gestuur het vir 'n ander praktisyn, en my heeltemal gedistansieer het. Foutiewelik het ek dit nie gedoen nie.'

'Wat se probleme het u uit 'n regs etiese oogpunt? --- Ek moes hierdie vrou nooit hanteer het nie. Ek moes haar van die begin af na 'n ander praktisyn gestuur het omdat ek betrokke by haar was. Ek het nie die regte apparaat gehad om enige krisis te kon hanteer by die huis nie. Ek erken dit aan u en ek wil vir u sê dit was 'n fout van my. Ek moes haar vroeër vir 'n ander praktisyn gestuur het en ek moes my gedistansieer het omdat ek emosioneel by haar betrokke was. So, dit is alreeds in werklikheid 'n groot fout van my gewees.

Alreeds, en verder? Kom ons stel dit so aan u. As u weer in so 'n situasie beland en u besluit om die pasiënt inderdaad self te hanteer, in watter opsigte sal u anders optree as wat u met Lioni opgetree het? --- Ek sal dit totaal anders hanteer, mnr die Voorsitter.'

'Kom ons sê dit is nou nie iemand by wie u emosioneel betrokke is nie. Dit is nou u pasiënt en u hanteer die situasie. Wat sal u anders doen? ---Ek sou hierdie pasiënt, nommer een, nie hanteer het nie. Dit is buite my vakgebied. Ek sal haar verwys na die huisarts en vra om die pasiënt se behandeling oor te neem en indien sy enigsins dit nodig ag, haar vir 'n ginekoloog verwys.'

'Nou veronderstel dat dit was 'n onvolledige miskraam, 'n uterus van agtien weke grootte, wat 'n mens in die woonstel evakueer, dink u nie dit is 'n ongelooflike risiko waaraan die pasiënt blootgestel was nie? --- Mnr die Voorsitter, dit was 'n uiters onbillike daad van my, dit was 'n hoë risiko daad van my.'

Sou u sê dat behandeling van hierdie aard, dit wat ons tot dusver beskryf het, naamlik agtien weke of 'n groot uterus dan, met 'n evakuasie onder lokaal van die aard, sou u sê dat dit 'n besondere risiko is? --- Mnr die Voorsitter, die risiko daaraan is van so 'n aard dat ek vandag net in skaamte daaroor kan dink.

Het dit die pasiënt se lewe in gevaar gestel? --- Vir seker.'

[36] Another important aspect is the fact that, while the events forming the basis of the charges against him took place in the second half of 1993, the disciplinary inquiry terminated only in April 1998 and the penalty recommended was confirmed by the Council only in October 1998. It is evident that much of the delay in completing the disciplinary inquiry was due to circumstances beyond De Bruin's control, being caused by technical difficulties experienced by the Council. De Bruin had planned to take his final examinations as a specialist urologist in mid-1994, but was unable to do so because of the strain and trauma experienced by him, not least due to the unrelenting pressure exerted upon him by the Kühn family (in particular, Dr Kühn) to resume his relationship with Lioni. Even on Dr Kühn's version, this pressure was considerable. Even the head of his academic department, Professor du Plessis, had been drawn into the matter. De Bruin ultimately obtained the degree MMed (Urology) in mid-1995 and was registered as a specialist urologist in the same year. Since then, he has been practising

as a specialist urologist on the East Rand. By the time the penalty imposed on him was confirmed by the Council, he (like the complainant) had managed to put his professional and personal life back together again and had married.

[37] The references submitted to the Council throw considerable light on De Bruin's proven fitness, suitability and competence as a urologist in the intervening years. One of these references was written by Professor du Plessis, Dean of the Faculty of Medicine at the University of Pretoria, with whom Dr Kühn had discussed the whole matter. The reference written by Professor Hugo, Head of the Department of Anaesthesiology at the University of Pretoria, is also illuminating. It is clear that Professor Hugo was fully aware of the charges of which De Bruin had been found guilty. Notwithstanding this, Professor Hugo, who had worked with De Bruin during 1989 to 1995, was prepared to speak in glowing terms of De Bruin's professional integrity, his dedication, his exceptional competence, his decency, his dignity and the high quality service which he was rendering in the community in which he practices. To use Professor Hugo's own words:

'Tans lewer hy diens van hoogstaande gehalte in die gemeenskap waar hy praktiseer – waar daar werklik 'n behoefte aan 'n spesialis uroloog is. Hy wy

sy hele lewe, tyd en aandag aan sy pasiënte vir wie hy alles feil het. Bowendien vorm hy nie deel van die stroom van goed gekwalifiseerde geneeshere wat nie kan wag om na die buiteland te verhuis nie. Suid-Afrika bly steeds sy eerste prioriteit en ons het sulke profesionele persone nodig ...

In die lig van beskuldigings waarvan hy skuldig asook op sekere onskuldig bevind is sowel as die foltering wat hy alreeds sedert die begin van die geding moes ondergaan is die straf wat deur die dissiplinêre komitee voorgestel word buitensporig, onaanvaarbaar en nie menswaardig nie.'

[38] Taking all these circumstances properly into consideration, I am of the view that the penalty confirmed by the Council in October 1998 was indeed startlingly inappropriate. While De Bruin clearly deserved severe censure, a decision removing his name from the register was, to my mind, so excessive as to warrant interference. This being so, the Council's discretion must be 'regarded (fictionally, some might cynically say) as having been unreasonably exercised'.[15] It follows that the court below cannot be faulted in its decision to interfere with the penalty appealed against**.**

[39] The inquiry does not, however, end there. Counsel for the appellant was, to my mind, clearly correct that the penalty substituted by the court below was, in its turn, shockingly inappropriate. It was far too

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[15] See *S v Sadler* 2000 (1) SACR 331 (SCA) para 8 at 334j-335a.

lenient. While a penalty of suspension from practice for any period of time is not a light penalty, there *is* a striking disparity between a period of suspension of at least two years, which I would regard as appropriate, and the period imposed by the court below. In saying this, I have borne in mind the fact that De Bruin has undoubtedly already suffered in various ways. As indicated above, the lengthy delay between the date upon which the Council confirmed the penalty recommended by the Committee and the launch of the proceedings in the court below was caused, in the main, by what might be called 'administrative bungling' on the part of representatives of the appellant. This would obviously have exacerbated the mental strain which De Bruin must have endured pending the hearing of this appeal.[16] De Bruin has served the period of three months' suspension from practice imposed upon him by Swart J. This period already served must be accommodated by including an appropriate caveat in the order to be made. Furthermore, De Bruin must in all fairness be given sufficient time to arrange his affairs before having to serve a further period of suspension.

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[16] See in this regard *S v Roberts* 2000 (2) SACR 522 (SCA) para 22 at 529c-d and *S v Sadler* (*supra)* para 18 at 337b-d.

[40] In view of what I have said, the appeal to this court must succeed and the order of the court below be set aside. Although I have concluded that the review application should have been dismissed by Swart J, I do not think that this makes any difference to the costs order made by the learned judge. The review and appeal proceedings were heard simultaneously and both necessitated consideration of the entire record of the disciplinary proceedings before the Committee and the Council. The issues were inextricably interlinked. Swart J was correct in upholding De Bruin's appeal in terms of s 20 of the Act and, in my view, the costs of all the proceedings before the High Court should be borne by the Council. Counsel for the appellant did not contend otherwise.

Order

1. The appeal succeeds with costs.

2. The order of the Pretoria High Court is set aside. In its place there is substituted:

    '(a) The appeal in terms of section 20 of the Health Professions Act 56 of 1974 succeeds.

    (b) The respondent's decision dated 13 October 1998 removing the appellant's name from the register of

medical and dental practitioners is set aside and is replaced with an order that the appellant be suspended from practising or performing acts specifically pertaining to his profession for a period of two (2) years.

(c) The application for review is dismissed.

(d) The costs of all the proceedings before this court shall be borne by the respondent.'

3. The period of suspension referred to in para 2(b) above shall commence not later than two (2) months from the date of this order. It is recorded that the respondent has already served three (3) months of this period of suspension.

BJ VAN HEERDEN

JUDGE OF APPEAL

CONCUR:

STREICHER JA

CAMERON JA

NAVSA JA

BRAND JA