REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number:112/2002
Reportable

In the matter between:

SOUTH AFRICAN VETERINARY COUNCIL First Appellant
RJ NAGEL NO Second Appellant
and

VETERINARY DEFENCE ASSOCIATION Respondent

CORAM: MARAIS, SCHUTZ, FARLAM, MTHIYANE JJA, et HEHER AJA

HEARD: 28 FEBRUARY 2003

DELIVERED: 27 MARCH 2003

SUMMARY: SA Veterinary Council – *locus standi* of Veterinary Defence Association to review disciplinary action against member – disciplinary inquiry – correct approach where respondent does not testify – when failure to cross-examine significant.

JUDGMENT

FARLAM JA

[1] This is an appeal against a judgment and order granted by Roux J, sitting in the Transvaal Provincial Division of the High Court, in terms of which a finding made by a tribunal appointed by the first appellant, the South African Veterinary Council, in terms of section 12(1) of the Veterinary and Para-Veterinary Professions Act 19 of 1982, as amended ('the Act'), to the effect that Dr SB Krawitz, a member of the respondent, the Veterinary Defence Association, was guilty of unprofessional, improper or disgraceful conduct, was set aside with costs.

[2] The first appellant is a statutory body established by section 2 of the Act.

[3] The second appellant is Raynier Johannes Nagel, who was the chairman of the tribunal which found Dr Krawitz guilty.

[4] The respondent is the Veterinary Defence Company Ltd, a public company registered in terms of the Companies Act 61 of 1973, which, according to the founding affidavit deposed to by its chairman, 'trades' as 'the Veterinary Defence Association'.

[5] The respondent brought an application in the court *a quo* for an order setting aside the finding against Dr Krawitz, who is one of its members. It alleged that it had *locus standi* in terms of section 38(e), alternatively section 38(c) of the Constitution. The basis on which it sought relief was its

contention that, despite the absence of a *prima facie* case against Dr Krawitz, he had been found to be guilty because he had failed to testify at the inquiry.

[6] The application was opposed by the appellants on two grounds: *first,* that the respondent lacked *locus standi* to bring the application because it had no direct and substantial legal interest in the proceedings, which should have been brought by Dr Krawitz himself, and because section 38(c) and (e) of the Constitution did not apply; and *secondly,* that no reviewable irregularity had taken place.z

[7] In the charge which Dr Krawitz was called upon to answer it was alleged that he, being a veterinarian registered in terms of the Act, had acted unprofessionally, improperly or disgracefully in that he had admitted as a patient a dog, which was the property of a Mr Potgieter and a Ms Kruger, but failed to render the necessary timeous veterinary assistance to it. In the alternative it was alleged that he failed to refer the dog elsewhere when he should have done so.

[8] At the inquiry the *pro forma* prosecutor called the owners of the dog as witnesses, whereafter the tribunal of its own motion called Dr Krawitz's receptionist.

[9] The first witness, Mr Potgieter, told the inquiry that the dog, which had apparently been struck by a motorcar while roaming on a highway and had been away from its home without food or drink for three days, was taken to a veterinarian, not Dr Krawitz, who gave the dog an injection and said that it had to be watched and if it had not come right within a week or two it was to be brought back.

[10] About six days later, when the witness noticed that the dog's breathing had become laboured and it started getting sick, he took the dog to Dr Krawitz's clinic between 10.30 and 10.45 am. There his receptionist said that Dr Krawitz 'was in theatre and would attend to [the dog] thereafter'. Mr Potgieter left the dog in the clinic. Later he telephoned in order to ascertain when it would receive treatment. As the clinic was closed at that stage, he left a message on the answering service, on which a message had been recorded to the effect that the service was frequently checked for messages. While he could not remember exactly what message he had left, the effect was that the veterinarian or his receptionist was to get back to him urgently as he needed to retrieve his dog if it was not going to receive attention for some time. He stated that he also went back to the clinic and found it closed. He telephoned the clinic at about 3.05 pm and was told that the doctor was still unavailable. When he said that he wished to collect his dog so that it

could get the medical attention it needed the receptionist said that there was no chance of his getting the animal but that Dr Krawitz would telephone him. He also stated that Dr Krawitz sent Ms Kruger and himself an invoice in which he claimed fees for x-rays and cremation and R32.21 for treatment.

[11] Ms Kruger testified that at about 4 pm on the day in question she received a telephone call from Dr Krawitz, who told her that the dog had died. He also stated that he had done a post-mortem and that he had taken x-rays which showed that the dog had had a hernia. He asked Mr Potgieter and Ms Kruger to come to his rooms that evening to view the x-rays. They did so but after waiting for some time (according to Mr Potgieter about 45 minutes) they left.

[12] After the *pro forma* complainant had closed her case Dr Krawitz's attorney closed the case for the defence and asked for his acquittal. He stated that his application was based on the fact that there was in his view no evidence before the tribunal upon which Dr Krawitz could be found guilty.

[13] The tribunal then ruled that before it gave its verdict it wished to call Dr Krawitz's receptionist, as it put it, 'to clarify the time issue when the dog was taken up into the possession of the clinic and the availability of Dr Krawitz thereafter after this dog was admitted to the clinic'.

[14] Ms Chilton, Dr Krawitz's receptionist, thereafter testified. She said that Mr Potgieter and the dog came to the surgery 'probably between 11.00 and 11.30' and that she told Mr Potgieter that Dr Krawitz was in theatre doing surgery but that he would see the dog 'between surgery and afterwards'. She said that she expressly gave Mr Potgieter the opportunity to try another vet and mentioned that as far as she knew all the veterinarians were in surgery at that time. She stated that when she left, between 12.15 and 12.30 pm, Dr Krawitz was still busy and that he had been operating on the same dog throughout. She had asked one of the men working at the clinic to take the dog to their hospital and had told Dr Krawitz, while he was operating, that there was a dog which needed to be seen. In regard to the telephone answering service, she said that it is switched on at 12 noon and switched off again at 3.00 pm: it tells a person who calls to telephone Dr Krawitz on his cell phone. When asked by a member of the tribunal whether, when she told Dr Krawitz in theatre about the dog, she indicated to him that its condition was serious, she replied that she merely said that there was a patient, without commenting on its condition. When cross-examined by the *pro forma* complainant she elaborated on what she had said to Mr Potgieter when he brought the dog to the clinic: Dr Krawitz would look at the dog when he had a chance. She also said that Mr Potgieter did not give her an

indication that this was an emergency but wanted a second opinion on the dog's condition from Dr Krawitz.

[15] At the conclusion of Ms Chilton's evidence the second appellant gave Dr Krawitz's attorney an opportunity to reopen his case but he did not wish to do so. He then repeated his earlier submission that Dr Krawitz should be acquitted because there was no basis in the evidence that had been led upon which the tribunal could find that the allegations against Dr Krawitz had been proved.

[16] It appears from the transcript of the inquiry that when he was originally informed of the allegations made against him, Dr Krawitz had made an affidavit, as had Ms Chilton, and these had been sent to the council before the charge sheet was drawn up and the summons issued.

[17] In the judgment delivered at the end of the inquiry the second appellant referred to the following dictum by Van Dijkhorst J in *Prokureursorde van Transvaal v Kleynhans* 1995(1) SA 839(T) at 853 G-H:

'Uit die aard van die dissiplinêre verrigtinge vloei voort dat van 'n respondent verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die Hof te plaas sodat 'n korrekte en regverdige beoordeling van die geval kan plaasvind. Blote breë ontkennings, ontwykings en obstruktionisme hoort nie tuis by dissiplinêre verrigtinge nie.'

[18] The second appellant said his interpretation of this passage differed from that argued by Dr Krawitz's attorney.

He proceeded:

'the crux of what was said by the judge is that in disciplinary actions it is expected of the respondent to go along with the rules, give the necessary information.

... [I]t is expected from a respondent to co-operate and assist the court so that all relevant facts [are] placed before you. Meaning that if there is specific knowledge into a specific matter it is expected of that respondent to play along and give that information.

Dr Krawitz is the only one that can submit certain facts. Obviously then in this matter the only one that does have the knowledge of the real facts regarding time and the timeous assistance is Dr Krawitz. He elected not to testify.

His statement that was handed in with the bundle does not have the necessary evidential value because the contents of that statement [were] never proved to be correct. Dr Krawitz himself never testified regarding that matter nor was there any cross-examination to test the correctness thereof.

His failure to co-operate and to assist into his behaviour when and at what time he rendered any assistance to [the dog] he leaves the Tribunal with no option but to find that he failed to render the necessary veterinary assistance timeously.

What happened to the animal after it was admitted into the hospital until such time that it died, the only one with that knowledge, if the necessary assistance was given or not and if it was timeously or not, is Dr Krawitz. [His] failure to testify leaves the tribunal with the only inference from that, due to his failure to testify that Dr Krawitz failed to render the timeous veterinary assistance to [the dog], the property of Mr Potgieter and Ms Kruger.

Therefore you are found GUILTY AS CHARGED.'

[19] Subsequently the second appellant supplemented the judgment given during the inquiry. He pointed out that the finding as reflected on the record should be corrected to reflect that Dr Krawitz was found guilty as charged on the main allegation. It is thus clear that Dr Krawitz was found guilty of acting unprofessionally, improperly or disgracefully in failing to render the necessary timeous veterinary assistance to the complainant's dog after it had been admitted to his clinic.

(It is noteworthy that the tribunal does not appear to have applied its mind to the question whether the conduct of which it found Dr Krawitz guilty was unprofessional or improper or disgraceful. These adjectives are used disjunctively in section 33(1) of the Act and it is incumbent, on a disciplinary tribunal functioning under the section, one would think, to specify which adjective was appropriate. The point was not taken by the respondent and need not be considered further in this case.)

[20] In his supplementary reasons the second appellant proceeded to deal with certain criticisms of the finding which were contained in a draft affidavit prepared for Dr Krawitz's signature and which was sent to the first appellant.

[21] In paragraph 8 of the draft affidavit the following appears:

'I was advised that as no *prima facie* case had been made against me, I need not tender evidence to the Tribunal which decision was conveyed to the Tribunal members.'

[22] The second appellant responded to this paragraph as follows:

'This inquiry is not a criminal case and to speak of "no *prima facie* case had been made against me" is not correct. It is an inquiry into transgressions and it is expected of both sides involved to place the relevant facts before the Tribunal for evaluation for the purpose of making a finding from it.'

[23] Later in the supplementary reasons, the second appellant said:

'... [W]hen the patient was admitted to the clinic it was still alive. Dr Krawitz was aware that the dog was admitted. Ms Kruger was later informed telephonically by Dr Krawitz that the dog died.

A patient does not just die from nothing. Dr Krawitz was the only one that was in a position to tell the tribunal if the necessary timeous treatment was given to the patient and notwithstanding that, the animal still died. The cause of death of the patient is something that occurred later. The patient was admitted at 11.00. Dr Krawitz informed Ms Kruger at 16.00 that the animal died, five hours [elapsed] from the time that the patient was admitted and it was therefore of great importance to know what happened during that period of time. Dr Krawitz is the only one able to answer that and therefore it is expected of him to co-operate and to assist that all relevant facts are placed before the tribunal. He elected not to do so. The evidence tendered, therefore, [proved] that Dr Krawitz failed to render the necessary timeous veterinary assistance to [the dog] . . .'

[24] After quoting a number of decisions on disciplinary proceedings, the second appellant said:

'If the respondent is of the opinion that evidence against him is weak or inconclusive he may remove any doubt by denying it under oath which will result in giving him the benefit of such doubt at the end of the hearing. The rules of natural justice [need] to be adhered to, which means that, in disciplinary hearings, both sides must be viewed fully.'

[25] Roux J held that there was no evidence to support the conviction and that the finding of the tribunal had accordingly to be set aside: reference was made in this regard to *Mpemvu and Others v Nqasala* (1909) 26 SC 531, *SA Medical and Dental Council v McLoughlin* 1948(2) SA 355 (A) at 393 and *SA Medical and Dental Council v Lipron* 1949(3) SA 277 (A) at 283. He proceeded to distinguish the *dictum* in *Prokureursorde van Transvaal v Kleynhans, supra,* upon which the second appellant had relied, holding that it was not authority for the proposition that where there are no facts proven to support a finding of guilt 'silence fills the gaps'.

In regard to the *locus standi* of the respondent, Roux J held that section 38(e)[1] of the Constitution provided for the procedure adopted in this case.

[26] It is convenient at this stage to set out sections of the Constitution that are relevant.

[27] Section 38 of the Constitution, in so far as it is relevant, is in the following terms:

[1] The judgment refers to section 38(3) but this is clearly a misprint.

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

. . .

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

. . . and

(e) an association acting in the interest of its members.'

[28] Section 33(1) and (3) of the Constitution, in so far as they are relevant, read as follows:

'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(3) National legislation must be enacted to give effect to these rights . . .'

[29] Item 23(2)(b) of Schedule 6 of the Constitution, in so far as it is relevant, reads as follows:

'Until the legislation envisaged in [section] 33(3) of the new Constitution is enacted

. . .

(b) section 33(1) . . . must be regarded to read as follows:

"Every person has the right to

. . .

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened . . ."'

(The facts giving rise to this case arose before the legislation envisaged in section 33(3) of the Constitution, viz the Promotion of Administrative Justice Act 3 of 2000, was enacted with the result that item 23(2)(b) of Schedule 6 applies.)

[30] In arguing the appeal before us Mr *Stoop* contended that a *prima facie* case had been established against Dr Krawitz on the main count. Referring *inter alia* to the decisions of this Court in *Union Government (Minister of Railways) v Sykes* 1913 AD 156 and *Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd and Another,* 1996(3) SA 966 (A) he submitted that because the answers to the questions as to whether he treated the dog and if he did so, when treatment was given, were peculiarly within the knowledge of Dr Krawitz, less evidence than otherwise would suffice to establish a *prima facie* case. Further, that sufficient evidence had, in the circumstances, been led. The *prima facie* case thus established, he contended, became conclusive when Dr Krawitz closed his case without testifying.

[31] He also relied on the principle approved by this Court in *Galante v Dickinson* 1950(2) SA 460(A) at 465, viz that a court is entitled, in the absence of evidence from the defendant, to select out of two possible alternative explanations as to what happened, that explanation which favours

the plaintiff, rather than that which favours the defendant, where the matter in question is unquestionably within the knowledge of the defendant.

He submitted that two alternatives presented themselves to the tribunal after the close of Dr Krawitz's case: (1) that Dr Krawitz did not only conduct a post-mortem examination on the dog but also rendered the necessary timeous assistance to the dog; or (2) that he only conducted a post-mortem examination and failed to render the necessary timeous assistance so that in, the circumstances, the tribunal was entitled to regard the second alternative as proven, given Dr Krawitz's failure to testify.

[32] Mr *Stoop* did not contend that if there had been no *prima facie* case against Dr Krawitz the tribunal would have been entitled to regard his silence as filling the gap notwithstanding that the facts may have lain peculiarly within his knowledge.

[33] He also argued that because Dr Krawitz's legal representative did not at any stage put to any of the witnesses that his client did render the necessary timeous assistance, this amounted to a tacit admission on the part of Dr Krawitz that he did not render such assistance.

[34] On the *locus standi* point Mr *Stoop* conceded that the decision taken by the tribunal constituted administrative action within the meaning of section 33 of the Constitution, read with item 23(2)(b) of Schedule 6 of the

Constitution. It follows from this concession, with which I agree, that Dr Krawitz had the right to procedurally fair administrative action by the tribunal, as his right to continue to practise as a veterinarian was affected or threatened as a result of the proceedings and that the requirement in the first part of section 38 of the Constitution is accordingly satisfied. Mr *Stoop* contended, however, that the court *a quo* erred in holding that section 38(e) was satisfied. This paragraph, it will be recalled, gives *locus standi,* where the enforcement of rights entrenched in the Bill of Rights is concerned, to 'an association, acting in the interest of its members'. Mr *Stoop* argued that it was significant that section 38(e) spoke of 'the interest of its *members*.' He said that the plural was not a coincidence and that, on the facts of this case, none of the respondent's members other than Dr Krawitz have an interest in the outcome of these proceedings. It followed, so he contended, that the respondent did not have the necessary *locus standi* to bring the proceedings for review of the tribunal's finding.

[35] I turn to consider whether a reviewable irregularity took place. It is clear from the authorities that if a disciplinary tribunal has applied the wrong criterion in making a finding of guilt the application of such criterion constitutes a reviewable irregularity, which can only be ignored if it is clear that if the correct criterion had been applied the finding would have been the

same: see, eg, *Hira and Another v Booysen and Another* 1992(4) SA 69(A) at 95 C-F.

[36] It appears from both the judgment given when the finding was made and the supplementary reasons furnished subsequently that the tribunal adopted the wrong approach when it considered the evidence at the end of the proceedings. It did not approach the matter in the manner outlined by Mr *Stoop.*

[37] I say this because in my view the tribunal did not consider whether there was a *prima facie* case (which became conclusive when it was not answered). It is plain both from the tribunal's reliance on the second appellant's interpretation of the decision in *Prokureursorde van Transvaal v Kleynhans, supra,* and its statement that Dr Krawitz's failure to co-operate and assist left it with no option but to find him guilty, together with the statement in the supplementary reasons that it was not correct to speak of a *prima facie* case not having been established against Dr Krawitz, that it approached the matter on a totally erroneous basis and, as Roux J correctly found, that it found Dr Krawitz guilty simply because he failed to testify, without considering whether a *prima facie* case had been made out.

[38] The second appellant's interpretation of the *Kleynhans* decision is also clearly wrong. The passage relied on by the *pro forma* complainant in

argument before the tribunal does not mean that an onus is placed on a respondent in disciplinary proceedings to prove his or her innocence or that a failure to testify in answer to a charge, even where no *prima facie* case is made out, will leave the tribunal with no option other than to find the respondent guilty and no such approach was adopted by the court which heard the *Kleynhans* case. All that was said was that disciplinary proceedings are *sui generis* (and not to be conducted as if they were a criminal case (see *Cirota and Another v Law Society, Transvaal* 1979(1) SA 172(A) at 187 G, one of the cases cited by Van Dijkhorst J in *Kleynhans's* case) nor ordinary civil proceedings (*Cirota, supra,* at 187 H)). It was also said that because these were disciplinary proceedings it was expected of the respondent to co-operate and that obstructionism was not appropriate.

[39] The *dictum* in any event does not apply to the facts of this case. Dr Krawitz, it will be recalled, did not indulge in tactical denials or obstructionism: on the contrary he provided the first appellant with a written explanation in the form of an affidavit when notified in terms of section 31(5) of the Act of the matter to be inquired into. It is not suggested that that affidavit (which was not put before us) consisted simply of denials and a refusal to provide information.

[40] In view of the fact that it is clear that the tribunal adopted an erroneous approach to the matter the proceedings can only be saved if it is clear that despite the irregularity Dr Krawitz was not prejudiced because the finding would have been the same if the correct approach had been applied: *cf Le Roux and Another v Grigg-Spall* 1946 AD 244 at 254.

[41] In my view, unless Mr *Stoop's* contention that Dr Krawitz's attorney tacitly admitted that his client did not give timeous and necessary treatment to the dog (by failing to put to the witnesses who testified at the inquiry that Dr Krawitz denied the allegations against him on this point) is correct, it is not possible to say what the tribunal's decision would have been on the point.

[42] The contention was based on the summary appearing in Phipson, *Evidence,* 7 ed, 460 of remarks made by the House of Lords in *Browne v Dunn* (1894) 6 R 67, quoted with approval by Davis AJA (with whom Watermeyer CJ, Greenberg JA and Schreiner JA concurred) in *R v M* 1946 AD 1023 at 1028 and subsequently approved by the Constitutional Court in *President of the RSA v SA Rugby Football Union* 2000 (1) SA 1 (CC) at 37 B-C. As far as is material the passage reads:

'As a rule a party should put to each of his opponent's witnesses in turn so much of his own case *as concerns that particular witness . . .'* (My emphasis.)

[43] As none of the witnesses who testified at the inquiry knew anything about the treatment (if any) given by Dr Krawitz and no witness testified directly on the point it was neither appropriate nor necessary for Dr Krawitz's legal representative to put his denial to them and there can be no question of any tacit admission having been made by him in this regard.

[44] I am accordingly satisfied that the tribunal's finding against Dr Krawitz was vitiated by a reviewable irregularity.

[45] The next question to be considered is whether the respondent had the necessary *locus standi* to institute review proceedings to have that finding set aside.

[46] I do not agree with Mr *Stoop's* contention that in bringing the application for the setting aside of the tribunal's finding against Dr Krawitz the respondent was acting only in the interest of one of its members, Dr Krawitz, and not that of the others as well. As long as the finding stood, even if it was not binding on future tribunals on some form of *stare decisis* doctrine, there was at least a danger that future tribunals, especially those presided over by the second appellant, would adopt the same attitude and find other members of respondent guilty, without considering whether a *prima facie* case had been established against them, simply because they failed to testify. In the circumstances one can readily understand why the

respondent was of the opinion, as stated in the affidavit of Dr Carser, the chairman of the respondent, that the manner in which the first and second appellants conducted the inquiry and the manner in which Dr Krawitz was found guilty were matters of importance to all members of the respondent. It follows that the respondent did have *locus standi* in terms of section 38(e) of the Constitution to institute the present proceedings.

[47] The following order is made:

The appeal is dismissed with costs.

Concur
Marais JA
Schutz JA
Mthiyane JA
Heher AJA

.....
IG FARLAM
JUDGE OF APPEAL

MARAIS JA:

[1] I concur in the judgment of Farlam JA. I do so *dubitans* in so far as the finding that the respondent had *locus standi* to challenge the outcome of disciplinary proceedings is concerned. If its interest is, as it is said to be, the correction of the reasoning employed by the committee so that the members of the association, should they have the misfortune to be charged with unprofessional conduct, will not in future suffer from the same erroneous reasoning and thus be subjected to unfair administrative action, and if that is a sufficient interest to entitle it to seek relief in terms of s 38 (e) of the Constitution, it would have *locus standi* to approach the court for a declaratory order. But *non constat* that it would necessarily have *locus standi* to review the outcome of a disciplinary enquiry involving a third party (whether or not that party was a member) in order to protect the interests of its members generally.

[2] The *locus standi* of the respondent cannot depend upon whether or not the subject of the enquiry approves or disapproves of the challenge to the outcome of the enquiry. It either has *locus standi* or it does not. That is a mixed question of law and fact. Allowing outsiders to challenge, because there is a Bill of Rights principle which was not honoured, the outcome of proceedings the result of which is acceptable to the subject of the proceedings and which he or she does not wish to challenge or have disturbed, is fraught with potential problems.

[3] No doubt there may be infractions which are so grave that the new constitutional order will require the interests of the subject of the enquiry to be subordinated to the interests of the public in having strict adherence to the values enshrined in the Bill of Rights. To take an extreme example: A whipping is ordered by a disciplinary tribunal. The person disciplined prefers that fate to a more serious disciplinary action which it is open to the

tribunal to take. It may well be that even outsiders who have no connection with the person concerned will have *locus standi* to attempt to prevent the whipping from being carried out. But I doubt whether the same would apply to any infraction whatsoever of a right contained in the Bill of Rights no matter how little prejudice, if any, has been caused by it.

[4] Had it not been for the fact that the Promotion of Administrative Justice Act 3 of 2000 has now been enacted and brought into operation, I would have felt obliged to come to a firm conclusion on the issue as the question would have continued to arise in the future and brave souls who might have wished to attempt to persuade this court to revisit the issue might have wanted to know what the detailed reasons for the misgivings are. But the present answer to the question is ephemeral as the provisions of the Promotion of Administrative Justice Act will henceforth have to be taken into account as well in answering such questions and we have obviously not

been addressed on the proper interpretation of the provisions of that Act. I shall therefore not say more than I have said.

R M MARAIS
JUDGE OF APPEAL

HEHER AJA) CONCUR