THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 968/16

In the matter between:

DR WOUTER BASSON **APPELLANT**

and

PROF J F M HUGO **FIRST RESPONDENT**

PROF R E MHLANGA **SECOND RESPONDENT**

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA **THIRD RESPONDENT**

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

Coram: Shongwe AP, Seriti and Swain JJA and Mokgohloa and Schippers AJJA

Heard: 24 November 2017

Delivered: 17 January 2018

Summary: Promotion of Administrative Justice Act 3 of 2000, s 7(2) – failure to exhaust internal remedy prior to instituting judicial review proceedings – whether this is an appropriate case to grant exemption in terms of s 7(2)*(c)* where administrator alleged to be biased or reasonably suspected of bias – court finding that internal remedy ineffective and inadequate.

ORDER

On appeal from: The Gauteng Division, Pretoria (Unterhalter AJ sitting as court of first instance):

1 The appeal is upheld and the order of the court a quo is set aside.

2 The third respondent is ordered to pay the costs of the proceedings before the court a quo and the costs of appeal, such costs to include the costs of two counsel.

3 The case is remitted to the Gauteng Division of the High Court, Pretoria, to decide the review application.

JUDGMENT

Shongwe AP (Seriti JA and Mokgohloa and Schippers AJJA concurring)

[1] The issue in this appeal is 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 impugned decision).

[2] The matter arises from a disciplinary inquiry which the Council launched against the appellant, Dr Wouter Basson, under the Health Professions Act 56 of 1974 (the Act). The appellant is a cardiologist practising in the Western Cape. In 2007 he was charged with unprofessional conduct before a professional

conduct committee (the Committee) constituted in terms of 15(2)(*f*) of the Act, comprising Professor J F M Hugo as Chairperson, Professor R E Mhlanga and the late Judge Eloff, then retired. 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.

[3] In December 2013 the Committee found that the appellant had breached established ethical rules of the medical profession and he was found guilty of unprofessional conduct on four of the charges brought against him. In January 2015 the pro forma prosecutor called Mr Martin Heywood, a director of a law clinic, as a witness in aggravation of sanction. Mr Heywood submitted two petitions for the removal of the appellant's name from the Register of Medical Practitioners (the register), by registered health professionals and organisations working in the fields of human rights and law. One of these petitions was supported by various organisations, including the South African Medical Association (SAMA) and the Rural Doctors Association of South Africa (RUDASA).

[4] At the hearing in January 2015 the appellant's counsel asked the Committee whether the first and second respondents were members of any of the organisations that had endorsed the petitions calling for his removal from the register. The Committee noted the request and ruled that the hearing proceed, without furnishing the information requested. The appellant's counsel then asked the Committee for an adjournment to consider his position, which was granted. On resumption of the proceedings, the appellant's counsel requested an adjournment till the next morning to take instructions to approach the high court for an order compelling the respondents to furnish the information. That request was refused and the appellant and his counsel excused themselves from the disciplinary inquiry.

[5] The Committee proceeded forthwith to hear evidence by Professor Marc Blockman, the Chair of the Human Research Ethics Committee at the University of Cape Town, in aggravation of the penalty to be imposed. Professor Blockman expressed the opinion that despite having been found guilty of unprofessional conduct, the appellant had shown no accountability, no responsibility and was a disgrace to the profession. He then referred to a petition signed by various health professionals who called on the Council to remove the appellant's name from the register.

[6] In the interim, the appellant approached the high court urgently and obtained an order prohibiting the respondents from proceeding with the disciplinary inquiry, pending the finalisation of an application compelling them to furnish information relating to their membership of the organisations that supported the petition for his removal from the register. In an explanatory affidavit in that application, Professor Hugo confirmed that he is a member of SAMA and was associated with RUDASA, and that he did not have any interaction with RUDASA for three years prior to January 2015. He stated that he did not participate in the processes that led to the relevant petitions; and that Professor Mhlanga advised him that he is not a member of any of the organisations in question.

[7] In March 2015 the appellant applied to the Committee for the recusal of Professors Hugo and Mhlanga, on the grounds that Professor Hugo has an interest in the subject matter of the inquiry; and actual or a reasonable apprehension of bias on the part of both these members of the Committee. The application for recusal was refused by the Committee. The appellant then approached the court a quo to review and set aside the impugned decision.

[8] 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 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 an internal remedy before approaching the court to review and set aside the impugned decision. It found that the appellant had not complied with such duty; that he failed to show exceptional circumstances in terms of s 7(2)*(c)* of PAJA; and that it was not in the interests of justice to exempt him from the obligation to exhaust an internal remedy. That remedy, the court a quo held, is an appeal to an ad hoc appeal committee established under s 10(2) of the Act, which in terms of s 10(3), has the power to vary, confirm or set aside a finding of the Committee, or to refer the matter back to the Committee with such instructions as it may deem fit.

[9] Before us the appellant contended that in terms of s 42(1A) of the Act, a penalty imposed by a committee remains effective until the appeal is finalised. This situation, so the appellant argued, is prejudicial to him, in that such penalty would cause irreparable harm to his practice. He further argued that the sanction would be imposed by the same persons he wanted to have recused. The appellant conceded that courts are ordinarily opposed to hearing appeals and reviews piecemeal, but argued that this was a case where the court a quo should have exercised its discretion and found exceptional circumstances, and thus have exempted him from the duty to exhaust the internal remedy.

[10] On the other hand, the third respondent contended that the court a quo was correct in finding that before applying for judicial review by a high court, the appellant had to exhaust the internal remedy as envisaged in s 10(3) of the Act, read together with 8(1) of the Regulations relating to the conduct of inquiries into alleged unprofessional conduct (GN 765, *GG* 22584, 24 August

2001), which sets out the procedure for appeals from the Committee to an appeal committee. The third respondent further contended that the appeal committee would be seized with the whole record of the proceedings of the Committee as the appellant brought a substantive application for the recusal of the first and second respondents; therefore the appeal committee would have to consider the appeal as a normal appeal. It was also contended that the appeal committee has the power not only to set aside the findings of the committee, but also the proceedings as a whole. The respondent asked this court to find that the appellant is not entitled to exhaust his internal appeal remedy for the recusal of Professors Hugo and Mhlanga, until the entire case has been completed and the Committee has imposed sanction.

[11] The starting point in determining whether the appellant was obliged to exhaust the internal remedy in s 10(3) of the Act, is s 7(2) of PAJA. It reads:

'*(a)* Subject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph *(c)*, a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph *(a)* has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interests of justice.'

[12] It is settled that the impugned decision constitutes administrative action as defined in PAJA (*SA Veterinary Council & another v Veterinary Defence Force Association* [2003] ZASCA 27; 2003 (4) SA 546 (SCA) para 34). Therefore, an internal remedy must be exhausted prior to judicial review, unless the appellant can show exceptional circumstances to exempt him from this

requirement (*Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as* amicus curiae*)* [2009] ZASCA 23; 2010 (4) SA 327 (CC) para 34; *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15). What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue (*Koyabe* supra para 39). Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be 'objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and our law'; and available if it can be pursued 'without any obstruction, whether systemic or arising from unwarranted administrative conduct' (*Koyabe* supra para 44). An internal remedy is adequate if it is capable of redressing the complaint (*Koyabe* supra paras 42, 43 and 45).

[13] Section 10 of the Act provides in material part as follows:

'(2) The council shall establish *ad hoc* appeal committees, each consisting of, as chairperson, a person with knowledge of the law with at least 10 years' relevant experience, not more than two registered persons drawn from the profession of the registered person in respect of whose conduct a professional conduct committee of a professional board had held an inquiry, and a member of the council appointed to represent the community.

(3) An appeal committee referred to in subsection (2) shall have the power to vary, confirm or set aside a finding of a professional conduct committee established in terms of section 15(5)*(f)* or to refer the matter back to the professional conduct committee with such instructions as it may deem fit.'

[14] Regulation 8 sets out the appeal procedure. The relevant provisions read:

'(1) The accused or pro forma complainant may appeal to the appeal committee against the finding and/or penalty of the professional conduct committee to the appeal committee.

(2) The appellant shall inform the registrar by notice within three weeks from the date of the professional conduct committee's decision of his or her intention to appeal against the finding and/or penalty.

(3) The registrar shall provide the appellant with a copy of a transcript of the proceedings at the inquiry within one month from the date on which the registrar received a written notice of appeal.

(4) The appellant shall file six copies of his or her papers setting out the grounds for appeal and containing heads of argument with the registrar within one month from the date on which he or she received a copy of the transcript referred to in subregulation (3).

(5) The appeal shall only be heard on the papers referred to in subregulation (4).'

[15] Section 20 of the Act provides for an appeal to a high court. It reads:

'(1) 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.'

[16] The court a quo 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.

[17] 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, in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) at 8J-9B, this court rejected the notion that a refusal by a judge (in this case an administrator) to recuse himself from proceedings in respect of which he is reasonably suspected of bias, renders that decision voidable; and held that the consequence of a failure to recuse renders the proceedings a nullity. Hefer JA observed:

'The effect of a refusal to do so is clear. Unlike the seemingly controversial status in English administrative law of the decisions of biased officials (cf Craig *Administrative Law* 3rd ed at 467-8; Wade 'Unlawful Administrative Action: Void or Voidable' (1968) 84 *LQR* 95), firm and authoritative views have been expressed in South Africa regarding the effect on judicial proceedings of a Judge's refusal to withdraw from the matter from which he should have recused himself. Without spelling out its actual effect, Centlivres CJ observed in *R v Milne and Erleigh (6)* (*supra* at 6 *in fin*) that a biased Judge who continues to try a matter after refusing an application for his recusal thereby "commits … an irregularity in the proceedings every minute he remains on the bench during the trial of the accused." '

[18] Hefer JA went on to say (at 9C) that the judgment in *Council of Review, South African Defence Force, & others v Mönnig & others* 1992 (3) SA 482 (A) is more explicit. 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 (*Mönnig* supra at 495A-D). In the instant case, the appellant's complaint was not that the finding of the Committee is an irregularity committed by an otherwise competent tribunal. Instead, his complaint was that the Committee lacked competence from the outset, because of actual or a reasonable apprehension of bias on the part of two of its members. Stated differently, the appellant alleged that by virtue of its composition, the Committee could not exercise jurisdiction over him. So, this is not a case where

the Committee wrongly acted within its jurisdiction: the appellant alleged that it had no jurisdiction from the start. The issue is one of elementary justice.

[19] Therefore, should it be found that Professors Hugo and Mhlanga ought to have recused themselves, the proceedings before the Committee would be a nullity (*Moch* supra at 9G). 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 (*Moch* supra at 9J-10A).

[20] In addition, the appellant is entitled to fairness at every stage of the disciplinary proceedings. As this court said in *Slagment (Pty) Ltd v Building Construction and Allied Workers's Union & others* [1994] ZASA 108; 1995 (1) SA 742 (A) at 756:

'The question whether it is possible for an appellate tribunal to correct an administrative decision which is impeachable on the grounds of unfairness, is discussed by Baxter, Administrative Law, at 588-9. The learned author states that in the first place, a complainant is entitled to fairness at all stages of the decision-making process, and he quotes from the judgment of Megarry J in the English case of *Leary v National Union of Vehicle Builders* [1971] Ch 34 at 49:

"If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?" '

[21] Further, 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 (compare *Nichol* supra paras 20-22). 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) 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 subregulation (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 (*Tikly & others v Johannes NO & others* 1963 (2) SA 588 (T) at 591F-591A), and thus inadequate. Professor Hoexter (Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 388) puts it thus:

'With a narrow appeal, however, the appellate body is confined to the record, which means that the "taint" of the unfairness is inevitably carried forward to the appellate hearing.'

[22] For these reasons alone, 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 (*Nichol* supra para 16). The internal remedy is ineffective and inadequate: it does not offer a prospect of success and cannot redress the appellant's complaint.

[23] The internal remedy in s 10(3) of the Act is moreover ineffective and inadequate, because it cannot be implemented in accordance with the relevant principles and values of administrative justice of the Constitution (*Koyabe* supra para 44). In *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 9; 1999 (4) SA 147 (CC) para 28), the Constitutional Court, affirming *Mönnig* (supra at 491E-F), held that the recusal right is designed to ensure that a person accused before a court should have a fair trial; that the right to a fair trial in criminal proceedings has now been entrenched in s 35(3) of the Constitution; and that s 34, which guarantees the right to have a dispute decided 'in a fair public hearing before a court or,

where appropriate, another independent and impartial tribunal or forum', applies to other proceedings.

[24] The Act and s 10(3) in particular, must be construed in a way that gives effect to the spirit, purport and objects of the Bill of Rights (s 39(2) of the Constitution), one of which is s 34 of the Constitution. The common law, which is 'law' within the meaning of s 8(1) of the Constitution, is also subject to s 34 and in terms of s 39(2) must be developed in accordance with its provisions (*Sarfu* supra para 28).

[25] As was held in *Sarfu* (supra para 48), an impartial Judge (or other presiding officer) is a fundamental prerequisite for a fair trial and a presiding officer should not hesitate to recuse herself or himself where a litigant has reasonable grounds to apprehend that the presiding officer, for whatever reason, was not or will not be impartial. Impartiality, the Constitutional Court has said, 'is the keystone of a civilised system of adjudication'; and an absolute requirement in every judicial proceeding and proceedings before other tribunals (see also *South African Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC) para 13). The reason is that:

'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals. . . . Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes' (*Sarfu* supra para 35; *Saccawu* supra para 13).

[26] The rule against bias is thus firmly anchored to public confidence in the legal system, and extends to non-judicial decision-makers such as tribunals.

And the rule reflects the fundamental principle of our Constitution that courts and tribunals must not only be independent and impartial, but must be seen to be such; and the requirement of impartiality is also implicit, if not explicit in s 34 of the Constitution (*Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) paras 28 and 31).

[27] The determination of what constitutes 'exceptional circumstances' within the meaning of s 7(2)*(c)* of PAJA, is necessarily informed by the nature of the complaint for which judicial relief is sought (*Koyabe* supra para 39). In the present case the complaint is actual or a reasonable apprehension of bias, raised directly and promptly at first instance, ie before the Committee. The rule against bias is entrenched in the Constitution, which places a high premium on the substantive enjoyment of rights (*Koyabe* supra para 44). Section 38 of the Constitution gives the appellant the right to approach a competent court if a right in the Bill of Rights (s 34) has been infringed or threatened, and the court may grant appropriate relief. In ruling against the appellant, the Committee has set out its position and there is a proper record of the proceedings before it. If the relevant members of the Committee should have recused themselves, the proceedings before it would be null and void; and any appeal to an appeal committee would suffer the same fate. The pursuit of an internal remedy would therefore be futile.

[28] These factors, in my view, constitute exceptional circumstances which render judicial intervention in the interests of justice, and which exempt the appellant from the obligation to exhaust the remedy under s 10(3) of the Act.

[29] In the result, I make the following order:

1 The appeal is upheld and the order of the court a quo is set aside.

2 The third respondent is ordered to pay the costs of the proceedings before the court a quo and the costs of appeal, such costs to include the costs of two counsel.

3 The case is remitted to the Gauteng Division of the High Court, Pretoria, to decide the review application.

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J B Z Shongwe
Acting President of the Supreme Court of Appeal

Swain JA:

[30] I have had the benefit of reading the judgment of my colleague Shongwe AP and agree with the outcome of the appeal and the order granted. I however reach the same conclusion by a route which in certain important respects differs from that of my colleague.

[31] The issues raised by the third respondent before the court a quo, which are relevant to the determination of the appeal, were as follows;

(a) The appellant was required to exhaust the internal remedy of appeal under the Health Professions Act 56 of 1974, (the Act) before approaching the court a quo.

(b) There were no exceptional circumstances that permitted the appellant to have recourse to the court a quo, before exhausting this internal remedy.

[32] The preliminary point taken by the third respondent, concerning the duty to exhaust any internal remedy is found in the provisions of ss 7 (2)*(*a*) and (*c*)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which provide as follows;

'(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

[33] The court a quo defined the central issue for determination as whether the appellant, 'may appeal the refusal by the committee to uphold his application for the recusal of Professors Hugo and Mhlanga to an ad hoc appeal committee established in terms of section 10 (2) of the Act?'

[34] Section 10(3) of the Act makes provision for the powers of an appeal committee established in terms of s 10 (2), in the following terms;

'(3) A disciplinary appeal committee referred to in subsection (2) shall have the power to vary, confirm or set aside a finding of a disciplinary committee established in terms of subsection (1) or to refer the matter back to the disciplinary committee with such instructions as it may deem fit.'

[35] In dealing with the issue as to whether the appeal to the appeal committee constituted an effective internal remedy for the purposes of the PAJA, the court a quo noted that the power given to the appeal committee to vary, confirm or set aside a finding, or to refer the matter back to the professional conduct committee, was a formulation of the powers of an appellate administrative body found in many statutes. The formulation however did not resolve perennial questions of statutory interpretation, namely whether the appellate body enjoyed review powers as well as an appellate jurisdiction.

[36] In addition, the court a quo noted that the issue was whether the appellate body entertained appeals in the wide sense, or whether the appeal was an ordinary appeal limited to the evidence and the record upon which the original decision was rendered. The court a quo remarked that these matters often occasioned considerable difficulty where, as here, the legislature had not expressly stated the scope of appellate jurisdiction.

[37] The court a quo however concluded that such interpretational intricacies could be avoided in the present case. It reasoned that even if it was assumed in favour of the appellant that the committee did not enjoy review powers and no appeal jurisdiction in the wide sense, that did not mean that the appeal committee did not enjoy a jurisdiction to consider an appeal in respect of the committee's decision, to dismiss the appellant's recusal application. This was because the application was made formally, with the result that the facts and law relied upon in support of the application, served before the committee. The committee was therefore entitled to consider the merits of the recusal application and conclude that it should be refused. If the committee had erred and should have upheld the application for refusal, then the appeal committee enjoyed the power to set aside this finding of the committee.

[38] According to the court a quo this was not a case in which there were irregularities that did not appear from the record. The recusal application was argued before the committee, considered by it and a decision rendered on the merits. On this basis the correctness of the committee's finding on the recusal application could be considered by the appeal committee. No power of review was required to do so because the question was not whether the committee's finding was lawful, but whether it was correct. In addition the appeal committee did not need to decide the recusal application de novo in order to decide whether the finding of the committee was correct. No wider appeal was implicated in order to determine the merits of the recusal finding.

[39] The court a quo accordingly decided that the appellant was afforded a meaningful right of appeal under the Act, to have the correctness of the recusal finding considered. The appellant therefore enjoyed an internal remedy of appeal under the Act and had a duty to exhaust this remedy in terms of the PAJA, unless exempted from doing so.

[40] For reasons which will become apparent, the court a quo erred in classifying the claim of bias as an issue which was amenable to an appellate jurisdiction by the appeal committee. To reduce the enquiry to whether the decision by the committee in refusing the application for recusal was right or wrong, ignores the juridical nature of a claim of bias as well as the legal effect upon the proceedings of the committee, if the claim is upheld.

[41] The rule against bias is foundational to the fundamental principle of the Constitution that courts, as well as tribunals and forums, must not only be

independent and impartial, but must be seen to be so. The constitutional imperative of a fair public hearing is negated by the presence of bias, or a reasonable apprehension of bias, on the part of a judicial or presiding officer. The vital importance of this constitutional principle was described in *Bernert v ABSA Bank Ltd* 2011(3) SA 92 (CC) paras 28 and 31 in the following terms;

'It is, by now, axiomatic that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, the judicial officer is either actually biased or there exists a reasonable apprehension that the judicial officer might be biased, acts in a manner that is inconsistent with the Constitution…The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial…

…And the requirement of impartiality is also implicit, if not explicit, in s 34 of the Constitution which guarantees the right to have disputes decided "in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum…"'

The appellant accordingly possesses a constitutional right to an independent and impartial hearing before the committee, whose conduct assessed objectively should not exhibit a reasonable apprehension of bias, towards the appellant.

[42] In the pre-constitutional era this Court in *Council of Review, South African Defence Force & others v Mönnig* 1992 (3) SA 482 (A) at 491 stated that;

'The recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial. Generally speaking such rules, which are part of our common law, must be observed unless the Legislature has by competent legislation, either expressly or by clear implication, otherwise decreed'.

The legal effect upon proceedings, of a finding of bias on the part of the presiding officer, was described at page 495 in the following terms;

'What must be remembered is that in the present case we are concerned with the proceedings of what is in substance a court of law. It is a court which admittedly is composed of laymen, but one which in all other respects has the characteristics of a court of law and which enjoys a wide criminal jurisdiction. And, as I have already observed, the propriety of its proceedings should be judged by the normal standards pertaining to a court of law. If, as I have held, the court martial should have recused itself, it means that the trial which it conducted after the application for recusal had been dismissed should never have taken place at all. What occurred was a nullity. It was not, as in many of the cases quoted to us, an irregularity or series of irregularities committed by an otherwise competent tribunal. It was a tribunal that lacked competence from the start. The irregularity committed by proceeding with the trial was fundamental and irreparable. Accordingly, there was no basis upon which the council of review could validate what had gone before. *The only way the council of review could have cured the proceedings before the court martial would have been to set them aside*.' (Emphasis added)

The fundamental right to a fair and impartial hearing is accordingly guaranteed, because a denial of the right results in the invalidity of the hearing and an order setting aside the proceedings. Consequently, if it is subsequently found that the first and second respondents should have recused themselves, the hearing before the committee will be a nullity and the proceedings will have to be set aside.

[43] It is against this background that the provisions of ss 7(2*)(*a*) and (*c*)* of the PAJA must be applied. A requirement that the administrative remedy be available, effective and adequate was enunciated in *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA (CC) 327 paras 44 and 45 in the following terms;

'In a constitutional democracy like ours, where the substantive enjoyment of rights has a high premium, it is important that any existing administrative remedy be an effective one. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. An internal remedy must also be readily available and it must be possible to pursue without any obstruction, whether systemic or arising from unwarranted administrative conduct. *Factors*

such as these will be taken into account when a court determines whether exceptional circumstances exist, making it in the interests of justice to intervene.'

Thus, as the international jurisprudence illustrates, *judicial enforcement of the duty to exhaust internal remedies, in giving content to the "exceptional circumstances" exemption, must consider the availability, effectiveness and adequacy of the existing internal remedies.*' (Emphasis added)

It is therefore apparent that the enquiry whether an internal remedy is available, effective and adequate, and the enquiry whether exceptional circumstances are present justifying exemption from the duty to exhaust an internal remedy in the interest of justice, are not disparate enquiries.

[44] That the presence of exceptional circumstances may be established by the absence of an effective and adequate internal remedy, is illustrated by the decision of this court in *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 18, where the following was stated;

'As "exceptional circumstances" which might justify an exemption in terms of s 7 (2) *(c)* would exist where the available internal remedy would not be able to provide the applicant with effective redress for his or her complaint…'

[45] The meaning of the term 'exceptional circumstances' was described in *Nichol* para16, as follows;

'Counsel for the registrar and the FSB submitted that, while there is no definition of "exceptional circumstances" in PAJA, these must be circumstances that are out of the ordinary and that render it inappropriate for the court to require the s 7(2)(c) applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the courts rather than resort to the applicable internal remedy. I agree with this contention. In the words of Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex Parte Swati*[1]:

[1] [1986] 1 All ER 717 (CA) at 724 *a-b.*

"By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided."'

In other words, where an internal remedy in the form of an appeal procedure does not provide the applicant with effective and adequate redress for the complaint, exceptional circumstances will be present which will justify exemption from the obligation to exhaust this internal remedy in the interest of justice.

[46] The enquiry is whether the court a quo correctly concluded that the power of the appeal committee, in terms of s 10 (3) of the Act 'to vary, confirm or aside a finding' of the committee, provided an available, effective and adequate remedy to protect the appellant's constitutional right to a fair and impartial hearing, before the committee. Implicit in the finding by the court a quo that the appellant enjoys an effective right of appeal to the appeal committee, to challenge the refusal by the first and second respondents to recuse themselves, is that the appellant must at this stage submit himself to the jurisdiction of the committee for the imposition of a penalty, which may include erasure or suspension from his medical practice, before exercising his right of appeal to the appeal committee.

[47] In *Kayobe*, the Constitutional Court at footnote 41 in dealing with possible exceptions to the duty to exhaust an internal remedy, referred to the decision of Justice Blackmun in *McCarthy v Madigan* 503 US 140 (1992) at 144-148, in the following terms;

'Justice Blackmun further recognized exceptions to the exhaustion requirement, where the interests of the individual in obtaining judicial intervention outweigh the institutional interest in exhaustion: (a) where it may prejudice subsequent court action (for example, an

unreasonable or indefinite time frame for administrative action); (b) where there is doubt whether the agency can grant effective relief; and (c) where the administrative body is biased or has predetermined the issue.'

These exceptions may also be regarded as examples of the absence of an effective and adequate internal remedy for the particular complaint.

[48] With regard to the first exception, Justice Blackmun also said the following at 147;

'Even where the administrative decision-making schedule is otherwise reasonable and definite, a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim.'

This is consonant with what was stated in *Nichol*, namely that the circumstances must require the immediate intervention of the courts, rather than resort to the applicable internal remedy.

[49] The court a quo dealt with the issue of whether the appellant would suffer irreparable harm, if the penalty imposed by the committee was one of erasure or suspension from his medical practice, in the context of whether the appellant had established the presence of exceptional circumstances. The issue is however of equal relevance in determining whether the right of appeal to the appeal committee, is an effective and adequate internal remedy.

[50] The date upon which a 'decision' by the committee or appeal committee takes effect, is dealt with in ss10 (4) and (5) of the Act;

'(4) A decision of a disciplinary committee, unless appealed against, shall be of force and effect from the date determined by the disciplinary committee.

(5) Where a matter has been considered by a disciplinary appeal committee the decision of the disciplinary appeal committee, unless appealed against, shall be of force and effect from the date determined by the disciplinary appeal committee.'

The lodging of an appeal therefore precludes the exercise of a discretion by the committee or the appeal committee, as the case may be, to determine the date when a 'decision' will be of force and effect. This is consistent with the common law rule that generally the execution of a judgement is automatically suspended upon the noting of an appeal[2]. However, in the absence of an appeal, a committee or an appeal committee is entitled to determine the date from which the 'decision' will be of force and effect.

[51] Section 42 (1A) of the Act however provides that;

'(1A) If an appeal is lodged against a penalty or erasure or suspension from practice, such penalty shall remain effective until the appeal is heard.'

Lodging an appeal against a penalty therefore has no effect upon the operation of the penalty which remains effective pending the outcome of the appeal.

[52] A clear distinction is drawn in these sections between the consequences which follow upon an appeal being lodged against the imposition of a penalty, or erasure or suspension from practice (hereafter referred to as a 'penalty'), and an appeal being lodged against a 'decision'. If an appeal is lodged against the decision as well as the penalty imposed, the operation of the decision will be suspended, but not the operation of the penalty. The justification for this distinction must be to protect the public from the conduct of the medical practitioner concerned pending the outcome of any appeal, particularly where the penalty is one of erasure or suspension from the Register of Medical Practitioners.

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[2] *Reid & another v Godart & another* 1938 AD 511 at 513.

[53] The court a quo however erroneously concluded that although s 42 (1 A) of the Act provided that a penalty would remain effective until an appeal was finalised, this provision did not determine the date from which the penalty would take effect. It found that ss 10(4) and (5) of the Act permitted a committee, or appeal committee, to determine the date when its 'decision', which included its decision as to the penalty to be imposed, would be of force and effect. This interpretation disregards the clear distinction drawn between a 'decision' and a 'penalty' in the Act and renders superfluous the stipulation in s 42(1A) that the penalty 'shall remain effective until the appeal is heard.'

[54] The court a quo therefore erred in deciding that the date when a penalty would take effect remained within the discretionary power of the committee or appeal committee and that any harm the appellant would suffer would be mitigated if he was able to persuade the committee or the appeal committee, as the case may be, that the penalty should not commence until his appeals or review were determined. In addition, I disagree with the view of the court a quo that a 'formidable hurdle' to finding that exceptional circumstances were present, was that the statutory scheme under the Act, strikes a balance between rights of appeal and the need to protect the public from a medical practitioner found guilty of serious misconduct. The court a quo noted that although this might work harshly upon a professional person who may suffer a penalty destructive of his professional life, and yet be vindicated on appeal, that was what the legislature had determined and no constitutional challenge to this regime had been brought.

[55] This reasoning however loses sight of the real issue, which is whether the appellant may suffer irreparable harm if he is unable to secure immediate

judicial consideration of his claim of bias, on the part of the committee. That the legislature may have intended in the normal course of events, harsh consequences for a professional person pending the outcome of an appeal, cannot justify denial of the immediate consideration of the appellant's claim of bias.

[56] I agree with the submission made on behalf of the appellant, that in addition, any decision to impose a penalty of erasure or suspension will be taken by persons who it might subsequently be determined, should have recused themselves. The appellant will therefore suffer the exercise of drastic powers by persons, whose decisions may ultimately be found to be a nullity, after a hearing that should never have taken place. For these reasons, the immediate judicial consideration of the appellant's claim for review would be justified. The right of appeal to the appeal committee does not constitute an adequate and effective internal remedy in this regard.

[57] The second exception to the duty to exhaust an internal remedy referred to in *Koyabe*, is where there is doubt whether the administrative agency can grant effective relief. In this regard Justice Blackmun added the following at 147-148;

'For example, an agency, as a preliminary matter, may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute… Alternatively, an agency may be competent to adjudicate the issue presented, but still lack authority to grant the type of relief requested.'

Although couched in the context of an exception to the duty to exhaust an internal remedy, a lack of authority on the part of the administrative agency to

grant the type of relief requested, would also constitute evidence of the absence of an effective and adequate internal remedy.

[58] The power the appeal committee possesses in terms of s 10 (3) of the Act to, 'vary, confirm or set aside a finding of a professional conduct committee… or to refer the matter back to the professional conduct committee with such instructions as it may deem fit,' would entitle it to set aside the 'finding' by the committee that its members were not obliged to recuse themselves from the hearing. However, this would not include the power to set aside the proceedings before the committee, because the power of the appeal committee is restricted to the variation, confirmation or setting aside of a 'finding' of the committee.

[59] In *Mönnig* it was made clear that the irregularity in the proceedings, being the failure of the court martial to recuse itself, could only be cured by setting the proceedings aside. This is necessary because a finding of bias permeates and invalidates every aspect of the proceedings and not simply their outcome. I therefore disagree with the submission of counsel for the third respondent that if the appeal committee upheld the claim of bias, it could legitimize the proceedings simply by setting aside the finding of guilt.

[60] There is a further basis upon which the appeal committee would be unable to grant the necessary relief. The decision taken by the committee as to the guilt of the appellant constitutes administrative action within the meaning of s 33 of the Constitution, read with item 23 (2)(*b*) of Schedule 6 to the Constitution, in accordance with the decision in *SA Veterinary Council & another v Veterinary Defence Force Association* 2003 (4) SA 546 (SCA) para 34. In terms of the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town*

& others 2004 (6) SA 222 para 26, until this decision of the committee 'is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.' Even if it is assumed that the appeal committee possesses a review jurisdiction to vary, confirm or set aside the committee's finding of guilt, this would not include the power to set aside the proceedings.

[61] The appellant is therefore able to distinguish his case from the type of case for which the appeal procedure was provided. This procedure does not provide the appellant with effective redress for his complaint. Put differently, the appeal committee is not competent to adjudicate the issue of bias because it lacks the necessary authority to grant the type of relief requested, namely setting aside the proceedings on the ground that they are a nullity.

[62] The third exception from the duty to exhaust internal remedies referred to in *Koyabe*, is bias on the part of the administrative body. The vital importance of an absence of bias in determining whether an internal remedy is effective, was referred to in *Koyabe* para 44, as follows;

'A remedy will be effective *if it is objectively implemented*, taking into account the relevant principles and values of administrative justice present in the Constitution and our law.' (Emphasis added)

In the present case the allegation of bias, or the reasonable apprehension of bias, lies against the members of the committee and not the appeal committee, for it is the members of the committee who must still impose an appropriate penalty.

[63] To summarize, the internal remedy of an appeal to the appeal committee does not provide an available, effective and adequate remedy to protect the

appellant's constitutional right to a fair and impartial hearing before the committee, on the following grounds. The appellant may suffer irreparable harm if he is unable to secure immediate judicial consideration of his claim of bias on the part of the committee. In addition, the appeal committee is not competent to adjudicate the issue of bias because it lacks the necessary authority to grant the type of relief requested, namely setting aside the proceedings on the ground that they are a nullity. Finally, the internal remedy cannot be effective or adequate if it will not be objectively implemented without bias, or the reasonable apprehension of bias.

[64] Because these grounds also justify a finding that the appellant should be exempted from the obligation to exhaust the internal remedy of an appeal because of the presence of exceptional circumstances, it becomes unnecessary to consider the reasons why the court a quo concluded that no exceptional circumstances were present.

[65] The allegation of bias, or the reasonable apprehension of bias by the appellant on the part of the committee, has to be assessed in accordance with the appropriate standard of proof to be applied by a court in deciding whether to grant, or refuse leave to apply for judicial review. This was described in *R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 All ER 717 at 723, by Sir John Donaldson MR in the following terms;

'Even if the matter had stopped there, I would have been minded to refuse leave to apply on the grounds that an applicant must show more than that it is not impossible that grounds for judicial review exist. To say that he must show a prima facie case that such grounds do in fact exist may be putting it too high, but he must at least show that it is a real, as opposed to a theoretical, possibility. In other words, he must have an arguable case.'

[66] In my view, the appellant has demonstrated an arguable case for leave to be granted to apply for judicial review, to consider the committee's decision to refuse the appellant's application for recusal.

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K G B Swain

Judge of Appeal

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