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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

ADMINISTRATIVE & PUBLIC LAW:
IMPARTIALITY – THE CORNERSTONE OF ANY FAIR AND JUST LEGAL SYSTEM

The Constitutional Court 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 has held that the right of recusal is designed to ensure that a person before a court should have a fair trial, and this right it entrenched in our Constitution.

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This principle was again tested in the case of *Basson v Hugo & Others* [2018] ZASCA 1, where, the Supreme Court of Appeal (SCA) considered whether the applicant was obliged to exhaust an internal remedy contemplated in (2)(c) of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) prior to instituting judicial review proceedings in circumstances where the decision-maker was alleged to be biased or reasonably suspected of bias.

The court a quo concluded that the review application was premature as Dr Basson had a duty to exhaust an internal remedy before approaching the court to review and set aside the impugned decision.

In summary, the Health Professions Council of South Africa launched a complaint against Dr Wouter Basson (Dr Basson) that related to his participation in chemical and biological warfare research during his employment with the South African Defence Force in the 1980s.

In 2007 Dr Basson was charged with unprofessional conduct before a professional conduct committee (Committee). In 2013 the Committee found that Dr Basson had breached established ethical rules of the medical profession and found him guilty of unprofessional conduct. At the hearing in January 2015, Dr Basson's counsel asked the Committee whether the two of the members (Respondents) were members of any of the organisations that had endorsed the petitions calling for his removal from the Register of Medical Practitioners. The Committee noted the request and ruled that the hearing proceed, without furnishing the information requested. Upon seeking an adjournment to consider his position, which was granted, on resumption of the proceedings, Dr Basson's counsel requested an adjournment till the next morning to take instructions to approach the high court for an order compelling the Committee to furnish the information. The request was refused and Dr Basson and his legal team excused themselves from the disciplinary inquiry.

Dr Basson approached the high court urgently and obtained an order prohibiting the Committee 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 March 2015, upon being provided with the information, he applied to the Committee for the recusal of the Respondents. Upon approaching the court, *a quo* to review and set aside the impugned decision, the application was dismissed and Dr Basson was directed to exhaust his internal remedy of appeal before an ad hoc appeal committee in terms of the Health Professions Act, No 56 of 1974 (Act), should he wish to do so.

The court *a quo* concluded that the review application was premature as Dr Basson had a duty to exhaust an internal remedy before approaching the court to review and set aside the impugned decision. It found that he had not complied with that duty; that he failed to show exceptional circumstances in terms of s7(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.

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The SCA concluded that, there were exceptional circumstances which mandated judicial intervention in the interests of justice, and which exempted Dr Basson from his obligation to exhaust the remedy under the Act.

In Dr Basson's appeal to the SCA, he argued that a penalty imposed by the Committee would be done so by the very same people he wished to have recused, making it a case of exceptional circumstances because "the Committee lacked competence from the outset".

Having considered the circumstances articulated by the court *a quo* as to why an appeal committee would be empowered to consider the merits of the recusal application, the SCA held that the reasoning of the court *a quo* presupposed that the impugned decision was merely voidable, and would then be rendered invalid as a result of a subsequent decision by the Committee or an appeal committee. The SCA held that in cases where a presiding officer should have recused himself, the proceedings which take place after the dismissal of an application for recusal are regarded as never having occurred at all. Dr Basson argued that the Committee had no jurisdiction at all because an actual or reasonable apprehension of bias, presented an issue of elementary justice.

That established, the SCA held that once it is found that that the Respondents should have recused themselves, the proceedings before the Committee would be a nullity. It held further that an appeal under s10(3) of the Act will not remedy the lack of jurisdiction since it is not possible to appeal against a nullity. Therefore, the nullity of the proceedings at the first stage means that any appellate proceedings will also be void. The significance of exceptional circumstances in this case, and the basis for Dr Basson's claim in the SCA, is that the law requires individuals to exhaust any available internal remedies unless they can justify why there are exceptional circumstances to exempt them from this duty. In determining whether such exceptional circumstances existed, the SCA highlighted how the relevant factors to consider are whether the internal remedy is effective, available and adequate.

Since impartiality is the 'cornerstone of any fair and just legal system', the SCA echoed the Constitutional Court's finding that '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. The SCA therefore concluded that, in consideration of these prevailing factors, there were exceptional circumstances which mandated judicial intervention in the interests of justice, and which exempted Dr Basson from his obligation to exhaust the remedy under the Act.

This case illustrates how 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.

Corné Lewis and Yana van Leeve

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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