



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)**

REPORTABLE

CASE NO: 965/2023

In the matter between:

CHRISTINA FRANSINA JOHANNA ELS

Applicant

and

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

First Respondent

**THE REGISTRAR: HEALTH PROFESSIONS COUNCIL
OF SOUTH AFRICA**

Second Respondent

**THE PROFESSIONAL CONDUCT COMMITTEE
(PROFESSIONAL BOARD OF PSYCHOLOGY)**

Third Respondent

PULE VICEROY HILLARY MAOKA N.O.
(In his capacity as Pro Forma Complainant)

Fourth Respondent

Bench: P.A.L. Gamble

Heard: 5 March 2024

Delivered: 25 April 2024

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Thursday 25 April 2024.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. The applicant is a counselling psychologist in private practice in George who is in the process of being disciplined by the first respondent (HPCSA), the statutory professional body with which she is registered to practice. It is alleged that the applicant engaged in what is termed, in the language of the profession of psychologists, “multiple relationships”. The substance of the complaint is that while the applicant was acting as a court appointed facilitator in a Childrens’ Court enquiry in Cape Town, she offered professional therapeutic services to certain of the parties involved in that matter. Such conduct is regarded by the HPCSA as unprofessional in that is alleged to be a breach of the so-called Professional Board for Psychology Rules of Conduct Pertaining to the Profession of Psychology (the Psychology Rules).

2. A complaint was lodged relating to the applicant's alleged breach of the Psychology Rules as aforesaid in December 2013. On 9 December 2015 the HSPCA’s “Committee of Preliminary Enquiry” found that the applicant had acted unprofessionally as alleged and imposed certain admission of guilt fines which she declined to pay.

3. In the result, the applicant was formally charged with unprofessional conduct on 30 March 2016 and was required to appear before the third respondent (the Conduct Committee) where oral evidence would be adduced. The enquiry was set to begin on 3 October 2016 but did not proceed as planned for reasons which are not clear but are in any event not relevant at this stage.

4. I pause to point out that the powers and duties of such a conduct committee are governed by s42 of the Health Professions Act, 56 of 1974 (HPA) and any regulations in relation thereto issued under s61(h) of the HPA. Further, a finding of guilty before the Conduct Committee might have serious consequences and could, in terms of s42(1)(c) of the HPA, result in the applicant's name being removed from the register of practitioners.

PRIOR LEGAL PROCEEDINGS

5. In May 2022 the applicant approached this Division urgently for an order for a permanent stay of the inquiry. In a detailed judgment Binns-Ward J dismissed the application with costs¹. The history of the matter is set out in detail by His Lordship and will not be repeated herein.

6. For present purposes it suffices to say that, after expert evidence had been led before the Conduct Committee from 26 – 28 October 2021, the applicant had approached the Conduct Committee on 14 April 2022 (and shortly before the postponed date for resumption of the enquiry on 9 May 2022) for a permanent stay of the proceedings. When this application was refused, the applicant sought urgent relief before Binns-Ward J.

7. When that application failed, the enquiry was set down to continue from 21 – 25 November 2022. I should mention that the Conduct Committee comprises 5 members and a pro forma prosecutor who hail from the length and breadth of the land. For convenience, and essentially to accommodate the applicant, the inquiry was held in George but, given the composition of the committee, this presented logistical challenges. The applicant was represented by a local attorney having earlier terminated the brief of her erstwhile counsel from Cape Town.

8. The November 2022 hearing did not get off the ground due to the alleged illness of the applicant's attorney. It also did not continue as planned from 30

¹ Els v Health Professionals Council of SA and others [2022] ZAWCHC 106 (30 May 2022)

January – 3 February 2023, once again due to the alleged sudden illness of the attorney. But the application did run as planned on 8 – 12 May 2023 and 31 July – 4 August 2023. The next sitting of the Conduct Committee was scheduled (by agreement) for 3 – 7 September 2023. However, it was once again brought to a grinding halt mid-way through the sitting on 5 September 2023 when the applicant approached the erstwhile duty judge on Circuit (Wille J) on only a couple of hours' notice to the Conduct Committee for urgent relief interdicting the continuation of the inquiry while the applicant sought to pursue an internal appeal against the Conduct Committee's ruling on the admissibility of documentary evidence.

9. Wille J granted the applicant temporary relief (styled an “interim-interim order”) while the respondents were afforded an opportunity to file opposing papers. To that end the urgent application was postponed to 20 November 2023 for argument before Erasmus J, who was to be the duty judge presiding over the Circuit at that time. In the interim the HSPCA launched an urgent application for reconsideration of the order of Wille J which was heard by Dolamo J (the erstwhile duty judge on Circuit) on 29 September 2023. His Lordship refused the reconsideration application on 6 October 2023.

10. When the matter came before Erasmus J on 20 November 2023 it was crowded out and on 1 December 2023 it was further postponed until 5 March 2023 when the matter was heard by this Court sitting on Circuit. All the while the “interim-interim order” granted by Wille J remained in place and the inquiry was stalled, as was the applicant's design.

RELIEF SOUGHT

11. The initial notice of motion which served before Wille J sought an order interdicting the enquiry from proceeding further pending the outcome of an internal appeal which the applicant wished to lodge against the finding of the Conduct Committee in relation to the inadmissibility of certain documentary evidence to which I shall refer shortly. I shall refer to the wording of the original application more fully hereunder. After the proceedings were halted by Wille J, the applicant sought to

appeal the Conduct Committee's ruling on the inadmissibility of the evidence by lodging an internal appeal with the second respondent (the Registrar) on 25 September 2023.

12. The right to such an internal appeal is founded in regulations which govern the conduct of inquiries into alleged unprofessional conduct, to which further reference will be made hereunder. It is necessary to point out that a practitioner who is aggrieved by a decision of, inter alia, a disciplinary appeal committee, has an automatic right of appeal to the High Court in terms of s20 of the HPA² which appeal is dealt with by this court as if it were a civil appeal from a magistrates' court. The HPA thus contemplates that the prosecution of an internal appeal is a pre-requisite to a s20 appeal. This case, however, does not involve such an appeal and is only concerned with the applicant's demand to exercise her alleged right to an internal appeal at this stage.

13. The relevant document filed by the applicant in purporting to exercise her alleged right to an internal appeal (the Notice of Appeal) is entitled -

"Notice of Appeal in terms of Regulation 11 of the Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the Health Professions Act, 1974 dated 6 February 2009."

It proclaims the applicant's intention to appeal to the Appeal Committee

"against the findings and interlocutory rulings of the Third Respondent made on 1 August 2023 and 4 September 2023 respectively."

14. I shall recite the grounds of appeal set out in the Notice of Appeal in full as they provide the necessary background to this application.

² **20. Right to appeal**

(1) any person who is aggrieved by any decision of the Council, a professional body or a disciplinary appeal committee, may appeal to the appropriate High Court against such decision.

“TAKE FURTHER NOTICE THAT the findings and interlocutory rulings appeal against as well as the grounds for appeal are the following:

1. The Third Respondent erred in finding on 1 August 2023 that the transcript of the proceedings of the Children’s Court of Cape Town, case number 14/1/4-252/2011 and 6 December 2013 to 8 of December 2014 is irrelevant to the complaints lodged against the Applicant.

2. The Third Respondent erred in making an interlocutory ruling on 4 September 2023 that the Applicant may not refer to the transcript of the proceedings of the Children’s Court of Cape Town, case number 14/1/4-252/2011 of 6 December 2023 (sic) to 8 December 2014 during the examination of witnesses.

3. The Third Respondent erred in making an interlocutory ruling on 4 September 2023 that photographs received into evidence by the Children’s Court of Cape Town, case number 14/1/4-252/2011 on 8 December 2013 and to which a witness called by the Fourth Respondent testified, should not be admitted into evidence in the proceedings before the Third Respondent.

4. The Third Respondent ought to have found that:

4.1 The transcript of the proceedings of the Children’s Court of Cape Town, case number 14/1/4-252/2011 of 6 December 2013 to 8 December 2014 is relevant and material to the complaints lodged against the Applicant, can prove or disprove points of fact in issue and establish the reliability of certain witnesses called by the Fourth Respondent.

4.2 The transcript of the proceedings in the Children’s Court of Cape Town, case number 14/1/4-252/2011 of 6 December 2013 to 8 December 2014 should be admitted into evidence in terms of Regulation 9(19)(a) of the 2009 Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the Health Professions Act, 1974 because it is rationally related to the complaints lodged against the Applicant.

4.3 The Applicant may refer to the transcript of the proceedings of the Children's Court of Cape Town, case number 14/1/4-252/2011 of 6 December 2023 (sic) to 8 December 2014 during the examination of witnesses.

4.4 Photographs received into evidence by the Children's Court of Cape Town, case number 14/1/4-252/2011 on 8 December 2013 and to which a witness called by the Fourth Respondent testified, are relevant insofar as the witness testified to the relevant photographs and should be admitted into evidence."

15. After receipt of the Notice of Appeal, the Registrar wrote to the Applicant's attorney on 26 September 2023.

"1....

2. It is trite law that a statutory body such as the HPCSA may not act other than in accordance with the powers accorded to (sic) by a statute or regulation.

3. The Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct (*'the Professional Regulations'*) under the Health Professions Act were promulgated by the Minister of Health on 6 February 2009. The Minister subsequently amended the Professional Regulations on 31 January 2020 and again on 23 June 2023. The latest amendment to the Professional Regulations entered into force on 23 June 2023. On 25 September 2023, you attempted to appeal a decision taken by the Professional Conduct Committee on 1 August 2023 and 4 September 2023, that is, after regulation 11 of the Professional Regulations had been amended. This is notwithstanding that as from 23 June 2023, regulation 11(1) of the Procedural Regulations provides that:

'The respondent or the pro forma complainant may, after imposition of a penalty on the respondent after the discharge of the respondent, appeal to the appeal committee against the findings or penalty of the professional conduct committee or both such finding and such penalty. (Emphasis added)'

5. Given that an appeal is not ripe at this stage of the process, I am unable (sic) entertain your internal appeal application nor refer it to the HPCSA internal appeals committee.

6. Your client will have the opportunity to bring an internal appeal application once the inquiry is completed and after a penalty has been imposed and the matter has been concluded in the event that she is found guilty by Professional Conduct Committee.”

16. The applicant did not act immediately: it was only some 6 weeks after receipt of this letter that she gave notice on 6 November 2024 of her intention to amend her notice of motion to read as follows.

“1. That the matter may be heard as one of urgency and that the usual time periods, notice and service in terms of the Rules of Court be dispensed with;

2. That the respondents be interdicted from proceeding with the inquiry into the alleged unprofessional conduct of Ms.CFJ Els (set down to continue on Tuesday 5 September 2023 (sic) at 10h00) under their reference/case number PS 003-1550/754301/523-8510 pending:

2.1 the outcome of a review application to be instituted by the applicant against the second respondent’s decision on 26 September 2023 *“Given that an appeal is not ripe at this stage of the process, I am unable (sic) entertain your internal appeal application nor refer it to the HPCSA internal appeals committee”*; and

2.2 the outcome of an appeal to an Appeal Committee of the First Respondent –

2.2.1 against the finding of the Third Respondent that the transcript of the proceedings of Children’s Court for Cape Town under case number 14/1/4/252/2011 from 6 December 2013 to 8 December 2014 not be allowed into evidence in the inquiry into the alleged unprofessional conduct of Ms CFJ Els under the respondent’s case number 14/1/4/252/2011.

2.2.2 against the finding of the Third Respondent that the witness currently testifying before the Third Respondent in the inquiry into the alleged unprofessional conduct of Ms. CFJ Els under the respondents’ case number PS 0031550/754301/5238510 may not be cross-examined with reference to the transcript of the proceedings of the Children’s Court for Cape Town under case number 14/1/4/252/2011 from 6 December 2013 to 8 December 2014.

3. That the applicant (Ms. Els) be granted a period of 21 (twenty-one) days to institute a review application against the second respondent's decision as set out in paragraph 2.1 above.
4. That the interdict in terms of paragraph 2 above shall continue to operate until the institution and final determination of the review application and by the Appeal Committee of the appeal.
5. Should the applicant failed to institute the review within the period of 21 days, the interdict in terms of paragraph 2 shall lapse.
6. Such further and/or alternative relief as the Court may grant the Applicant.
7. That such respondents as may oppose this application be ordered to pay the costs of the application."

It appears that there was no opposition to the intended amendment.

17. The Notice of Motion as amended differs from the original to the extent that it introduces an additional procedural step in the litigation process by the addition of the relief now sought in prayer 2.1. This was presumably added to the notice of motion after consideration of the contents of the aforementioned letter of the Registrar informing the applicant that "*an appeal is not ripe at this stage of the process.*"

18. Shorn of the repetitive verbiage in the amended Notice of Motion, what the applicant seeks to do at this stage in the middle of her part-heard disciplinary enquiry is to –

18.1. Firstly, launch a review within 21 days of this Court's interim order to procure the setting aside of the alleged "decision" of the Registrar of 26 September 2024 as noted above;

18.2. Then, if the review is successful, the applicant hopes to persuade the reviewing court to remit the matter back to the Registrar with directions that a duly constituted Appeal Committee consider the applicant's appeal against the

Conduct Committee's refusal to permit the Children's Court record to be admitted into evidence and for witnesses to be cross-examined thereon (the admissibility point);

18.3. The applicant will then seek to argue the admissibility point before the Appeal Committee and, if successful, to return to the disciplinary enquiry and request that it proceed on the basis of the admissibility point having been resolved in her favour.

STALINGRAD?

19. The obvious questions that spring to mind are, firstly, how long will these proposed steps take, secondly to what end they are sought to be taken and thirdly, at what cost? The answer to the third question is self-evident – at great cost to both parties, in circumstances where the HPSCA's costs are likely to be paid out of public coffers, if not in whole, then certainly in part.

20. The first and second points are more complicated and require a gaze into the proverbial judicial crystal ball. If things run according to the applicant's plan, it is conceivable, given the current state of the Circuit Court's roll that the review contemplated under prayer 2.1 of the amended notice of motion may take anything between 12 and 18 months, if not longer to conclude.

21. If things do not go according to the applicant's intended design in that review, is it unreasonable to presume that she will attempt to appeal the refusal to review the Registrar's "decision" further up the litigation line, perhaps first to a Full Bench and then later to the Supreme Court of Appeal and possibly even the Constitutional Court? I believe that is not beyond the realms of speculation.

22. But there are other scenario's too. Say, for instance, the applicant is able to persuade the reviewing court to send the matter back to the Appeal Committee and she is unable to persuade that body to overrule the admissibility point,

is it too remote to speculate that such a decision of the Appeal Committee will then be reviewed all the way up the litigation line too? I believe not either.

23. My conclusions in relation to these potential steps are based on the fact that the applicant has already demonstrated unequivocally in the litigation before Binns-Ward J, that she harbours a firm belief that the disciplinary proceedings against her should be brought to an immediate halt, and permanently so. I bear in mind also that that earlier urgent application was only launched after the proceedings had commenced before the Conduct Committee – *in medias res* as it has been termed.

24. Lastly, although the Conduct Committee declined to permit the admission of the record in the Children’s Court as early as 1 August 2023, the applicant waited another month before launching the application before Wille J, effectively with no meaningful notice to the respondents. She thus waited until the very last minute, abused the requirements of urgency and has now held up the enquiry for more than 6 months.

25. Having failed to stop the inquiry before Binns-Ward J, the applicant has now seized upon a further alleged procedural misstep to stall the disciplinary proceedings. In my view, the procedure adopted by the applicant is yet another page in what has become known as “The Stalingrad Playbook”, where litigants in criminal matters, all the while proclaiming their earnest wish to bring the matter to a speedy conclusion so as to procure their acquittal, put up one procedural hurdle after another to kibosh that very intention.

26. The Stalingrad approach was given detailed consideration, yet again, in the more recent decision of the Supreme Court of Appeal in Zuma³, where Ponnann JA had the following to say.

“[6] As long ago as May 2007, Mr. Zuma’s then counsel intimated, in response to a query from Hugo J, that he was following a ‘Stalingrad’ strategy’ in the conduct of Mr. Zuma’s

³ Zuma v Downer and another 2024 (2) SA 356 (SCA)

defence to the criminal charges that the latter faced. As explained by Wallis JA in Moyo v Minister of Justice and Constitutional Development and Others:

‘The term “Stalingrad defence” has become a term of art in the armoury of criminal defence lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the Constitution provides do not take place. I need hardly add that this is of particular benefit to those who are well-resourced and able to secure the services of the best lawyers.’

The high court recorded in the main judgment that *‘[t]he application [by the respondents to set aside the private prosecution] is directed at ensuring that there is an end to the abuse of an unlawful private prosecution and an end hopefully to the “Stalingrad” strategy’*.

[7] A key plank of this appeal is that no other court had been as ready to accept the characterisation ‘Stalingrad’, as was the high court in this matter. That is not entirely accurate. In Democratic Alliance v President of the Republic of South Africa, three judges of the Gauteng Division of the High Court, Pretoria found that Mr. Zuma had adopted a *‘Stalingrad defence strategy’*, which had *‘cost the state, and hence the taxpayer, thus far a total amount of between R16 788 781.14 and R32 million’*. Meyer J (Ledwaba DJP and Kubushi J concurring) observed that the law reports are indeed replete with judgments dealing with Mr. Zuma’s criminal prosecution. The court noted that Mr. Zuma had ultimately been unsuccessful in every one of the challenges, almost always with an adverse costs order.

[8] In 2017, Navsa ADP commenced a judgment of this Court with a reference to TS Eliot’s *‘recurrent end of the unending’*. He proceeded to refer to what Harms JA said some eight years earlier in National Director of Public Prosecutions v Zuma:

‘The litigation between the NDPP and Mr. Zuma has a long and troubled history and the law reports are replete with judgments dealing with the matter. It is accordingly unnecessary to say much by way of introduction and a brief summary will suffice.’

This abbreviated history illustrates that on any reckoning, the scale of litigation, which is likely unprecedented in the South African courts, justifiably attracts the epithet ‘Stalingrad’.” (Internal references otherwise omitted)

27. While the disciplinary inquiry which the applicant faces is not a criminal trial, it bears a strong resemblance thereto, both in form and substance. The rules applicable thereto track our criminal procedures in the lower courts quite closely and the ultimate end is to procure the applicant's guilt on charges of unprofessional conduct with a concomitant sanction in the event of a finding of guilt. In the circumstances, I believe that it is fair to apply the Stalingrad epithet in this matter too.

28. In my view, and for the reasons which follow, the applicant is not bona fide in her desire to lodge an internal appeal and in accordance with the legal principles set forth hereunder, a civil court would thus be reluctant to permit such a delaying tactic to be advanced. I might add that the time might not be far off that the courts visit legal practitioners who facilitate such stratagems with personal costs orders.

JUDICIAL INTERVENTION IN MEDIAS RES

29. During argument counsel for the applicant was asked whether he was familiar with the approach advocated by the Appellate Division in Wahlhaus⁴ and the many cases which have followed it. He confirmed that he was, but sought to distinguish the instant case from the principle that flows from Wahlhaus for reasons which I will set out below.

30. In Wahlhaus Ogilvie Thompson JA summarized the approach in which superior courts have expressed reluctance to become embroiled in unconcluded proceedings in lower courts as follows.

"If, as the appellants contend, the magistrate erred in dismissing their exception and objection to the charge, his error was that, in the performance of his statutory functions, he gave a wrong decision. The normal remedy against a wrong decision of that kind is to appeal after conviction. The practical effect of entertaining appellants' petition would be to bring the magistrate's decision under appeal at the present, unconcluded, stage of the criminal

⁴ Wahlhaus and others v Additional Magistrate, Johannesburg and another 1959(3) SA 113 (A) at 119D-120A

proceedings against them in the magistrate's court. No statutory provision exists directly sanctioning such a course. Sec 103(1) of the Magistrates' Courts Act (32 of 1944) – in contrast with secs. 103(2) and 104 conferring rights of appeal upon the Attorney-General – only confers a right of appeal on accused who is '*convicted of any offence by the judgment of any magistrate's court.*' Nor, even if the preliminary point decided against the accused by a magistrate be fundamental to the accused's guilt, will a Superior Court ordinarily interfere – whether by way of appeal or by way of review – before a conviction has taken place in the inferior court. (See *Lawrence v A.R.M. of Johannesburg*, 1908 T.S. 525, and *Ginsberg v Additional Magistrate of Cape Town*, 1933 C.P.D.357). In the former of these two cases Innes, C.J. said at p. 526:

'This is really an appeal from the magistrate's decision upon the objection, and we are not prepared to entertain appeals piecemeal. If the magistrate finds the appellant guilty, then let him appeal, and we shall decide the whole matter.'

It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief – by way of review, interdict or *mandamus* – against the decision of a magistrate's court given before conviction. (See *Ellis v Visser and another*, 1956 (2) SA 117 (W) and *R v Marais*, 1959 (1) SA 98 (T), where most of the decisions are collated). This, however, is a power which is to be sparingly exercised; for each case must depend on its own circumstances. The learning authors of *Gardiner and Lansdowne* (6th ed. vol 1 p750) state:

'While a Superior Court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the uninterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in the rare cases where grave injustice might otherwise result or where justice might not by other means be attained... In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure on the continuity of proceedings in the court below and the fact that redress by means of review or appeal will ordinarily be available.'

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts."

31. Recently, in Jiyana⁵, I had occasion to remark (Fortuin J, concurring) as follows.

“[15] The principle thus enunciated in Wahlhaus is still good law and has not been supplanted by our constitutional jurisprudence. On the contrary, it has been endorsed by our highest courts. In Moyo the Supreme Court of Appeal deprecated what has since been dubbed “*the Stalingrad*” defence designed to unnecessarily delay criminal prosecutions, and referred expressly to the judgment of the late then Acting Chief Justice in Thint.

“[161] Under the present Constitution similar preliminary litigation in a criminal case was considered by Langa ACJ... [in Thint] and he said the courts –

‘should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s35 (5) [of the Constitution]. Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The court’s doors should never be completely closed to litigants... If, for instance, a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to engage in preliminary litigation to enforce his or her fundamental rights. But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s35 (5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interests of all concerned.’ “

16. The issue was further discussed as follows in Motata.

“12. It has been stressed that underlying the reluctance of the courts to interfere in uninterminated proceedings in the lower court is the undesirability of hearing appeals or

⁵ Jiyana v Regional Court Magistrate (Commercial Crimes Court 7, Bellville) and another [2023] ZAWCHC 236 (6 September 2023)

reviews piecemeal. See S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and another 1999 (2) SACR 13 (C) at 22e-f; Nourse v Van Heerden NO and others 1999 (2) SACR 198 (W) at 207d-e; and S v Western Areas Ltd and others [2005 (1) SACR 441 (SCA)] where, in para 25, Howie P stated:

‘Long experience has taught that in general it is in the interests of justice that an appeal await the completion of the case whether civil or criminal. Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time on issues which may not have arisen had the process of been left to run its ordinary course.’” (Emphasis added; all internal references otherwise omitted)

32. In the circumstances, a superior court will only intervene in uncompleted proceedings in a lower court (or other similar tribunal) in exceptional cases. What such circumstances are will be determined from case to case. That approach was endorsed by the Labour Appeal Court (LAC), a court which in my respectful view would ordinarily be concerned with the consideration of the lawfulness and fairness of a disciplinary matter such as that *in casu*. It said the following in Booyesen⁶.

“[54] To answer the question that was before the court a quo, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. [25] The list is not exhaustive.”

The case cited in footnote 25 in para [54] of this judgment is Wahlhaus.

33. The Labour Court came to a similar conclusion in Magoda⁷, relying on earlier authority from the old LAC established under the 1956 Labour Relations Act.

⁶ Booyesen v Minister of Safety and Security (2011) 32 ILJ 112 (LAC)

⁷ Magoda v Director-General of Rural Development and Land Reform and another [2017] BLLR 1267

“[12] In the further alternative, even if a legality review is available to the applicant under section 158(1)(h) despite the existence of an alternative remedy under the LRA, in order to succeed with an application for interim relief at this stage, she would have to establish exceptional circumstances for a review *in medias res*. This was explained as follows by the old LAC in Zondi:⁸

“There is no universal or absolute test governing the question when a court will interfere in uncompleted proceedings, but one thing is clear from the cases and that is that a court will only interfere in medias res in exceptional circumstances, or when there is very good reason to do so. In ordinary circumstances the time to take any proceedings on appeal or review is at the termination thereof. The reasons for this attitude are equally clear. To permit interference in unterminated proceedings delays the continuation and completion of such proceedings. If such termination were to be readily permitted the proceedings might be interrupted at various times, and to deal with reviews or appeals piecemeal is clearly not practicable. In any event, the irregularity, even if it is allowed to stand, will not necessarily affect the result which might otherwise have followed. The tribunal concerned might for example in any event come to a conclusion favourable to the party otherwise affected by the irregularity. Even if the irregularity does in the end lead to a conclusion adverse to the person affected thereby, the time to put it right, as I have already said, is at the termination of proceedings.”

34. Lastly, there is the recent Full Bench decision in this Division in Public Protector⁹. In that matter Parliament was in the process of conducting an inquiry under s194 of the Constitution, 1996 into the fitness of the Public Protector to hold office. Having unsuccessfully applied for the recusal of the chair of the inquiry and after failing to persuade the chair to subpoena certain witnesses, the Public Protector turned to the court for intervention. The court refused to come to her assistance and endorsed the Wahlhaus approach.

(LC) at [12]

⁸ Zondi and others v President, Industrial Court and others (1991) 12 ILJ 1295 (LAC) at 1300

⁹ Public Protector of South Africa v Chairperson: Section 194 (1) Committee and others [2023] 2 All SA 818 (WCC)

[40] It is only 'in rare cases where grave injustice might otherwise result or where justice might not by other means be attained' that a court will entertain a review before the conclusion of proceedings. Such judicial intervention in medias res has been said to be warranted only where there is a gross irregularity in the proceedings and in a rare case because the perpetrators perpetuating the irregularities are those that have been entrusted with safeguarding constitutional rights.

[41] Courts will 'hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available'. This is so because in the absence of exceptional circumstances reviews should ordinarily be brought at the end of proceedings in order not to threaten the effectiveness of all tribunals and courts by opening 'sluice-gates that could render the functioning of the courts and the innumerable administrative tribunals throughout the land untenable'. To find differently not only risks wasting judicial resources and increasing legal costs but 'would result in the piecemeal review' of proceedings and a fragmentation and delay in proceedings which may not have arisen had the process been left to run to completion." (Internal references omitted)

EXCEPTIONAL CIRCUMSTANCES?

35. Counsel for the applicant did not rely on any exceptional circumstances which warranted the intervention of this Court because he steadfastly maintained that the case falls outside the ambit of Wahlhaus and the cases which have followed it. The contention advanced on behalf of the applicant is that she has an internal right to appeal the interlocutory ruling by the Conduct Committee on the inadmissibility of the evidence, a right which she claims is sourced in Regulation 11 of the regulations governing such a disciplinary enquiry.¹⁰

36. It is accepted that, if the applicant does not enjoy the right to an internal appeal at this stage, the application falls foul of the Wahlhaus approach and that she

¹⁰ Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the Health Professions Act, 1974, No R.102 published in the Government Gazette of 6 February 2009 (the 2009 Regs)

cannot succeed in the present application. This then requires the Court to examine the import of the regulations to see whether they say what the applicant claims.

THE RIGHT TO AN INTERNAL APPEAL UNDER THE REGULATIONS

37. Under Reg 11 of the 2009 Regs, a party's right to an appeal was described as follows.

"Appeal

11. (1) The respondent or the *pro forma* complainant may appeal to the appeal committee against the findings or penalty of the professional conduct committee or both such finding and such penalty."

This means that both the practitioner and the *pro forma* prosecutor have a right of appeal in respect of both the finding of the conduct committee and any sanction imposed.

38. On 23 June 2023 various aspects of the 2009 Regs were revised in terms of GN 53 of the Government Gazette of 23 June 2023. These will be referred to as "the 2023 Regs" in which the revised internal appeal procedure is set forth as follows.

"11. Appeal

(1) The respondent or the *pro forma* complainant may, after the imposition of a penalty on the respondent or after the discharge of the respondent, appeal to the appeal committee against the findings or penalty of the professional conduct committee or both such finding and such penalty."

39. While preserving the right of internal appeal to both parties, the essential difference between the appeal provision in the 2009 Regs and the 2023 Regs appears to address a practical problem which had arisen. It appears from the papers filed herein that, whereas, previously under the 2009 Regs, a practitioner found guilty

of misconduct might have sought to lodge an appeal after “conviction” and before “sentence” (to conveniently use the language of the criminal courts), since June 2023 the entire process must have been brought to finality, with a finding of unprofessional conduct on the part of the practitioner having been made and the appropriate sanction having been imposed by the Conduct Committee, before she is entitled to invoke her right to an internal appeal.

40. This change in the regulations, which fortuitously came about in the midst of the Conduct Committee’s proceedings herein, engendered some debate between the parties as to which set of regulations in relation to the applicant’s right of internal appeal was applicable. In the view that I take of the matter, it is unnecessary to resolve that debate at this stage. I shall assume, without deciding, that the contention by the applicant’s counsel is correct: that her right of internal appeal is sourced in the 2009 Regs and that she might be entitled to exercise that right before the sanction is imposed. On that interpretation, the applicant would be entitled to a further internal appeal in the event of a sanction being imposed and thereafter to an appeal to the High Court under s20. I should mention that the applicant’s counsel accepted that if the 2023 Regs applied his client was not entitled to relief.

41. Counsel for the applicant submitted that, upon a proper interpretation of the Reg 11(1) of the 2009 Regs, the applicant was entitled to exercise her right to an internal appeal against the Conduct Committee’s interlocutory ruling on the admissibility of the Children’s Court evidence at this stage. I consider that submission to be erroneous and wrong in law for the reasons that follow.

42. Firstly, if the 2009 Reg 11(1) is considered purely in its contextual setting, it is apparent that the drafter of the regulations intended to afford a practitioner an internal right of appeal against a finding of either professional misconduct or the sanction imposed in consequence of such finding, or both, after the conclusion of the entire proceedings against her and before she exercised her right to appeal to the High Court under s20.

43. However, it appears that over the years a practice had arisen which the HPCSA wanted to stop. That practice was a tendency for some practitioners to seek to appeal their “convictions” (i.e. a finding of unprofessional conduct) before the relevant conduct committee imposed a sanction on them. And then, once they had been “sentenced” (or sanctioned as the Regs say) to appeal that determination in a further proceeding.

44. During argument counsel for the respondents picked up on this point and referred the Court to Annexure PM 12 to the answering affidavit, being a memorandum which provides the rationale for certain of the amendments contained in the 2023 Regs. The document is introduced as follows in the answering affidavit.

“67. Whereas the Conduct Regulations previously allowed appeals to be lodged prior to the imposition of a sentence, given that this resulted in inordinate delays, after extensive discussions with in the HPCSA, on 26 June 2020, the HPCSA recommended to the Minister of Health that Regulation 11 be amended to only allow for a single appeal, namely after both finding and sanction has been imposed. In the explanatory memorandum which accompanied the proposed amendment of the Conduct Regulations, the HPCSA advised the Minister that the amendment of Regulation 11 was required.”

45. The relevant passage in the annexed explanatory memorandum is to the following effect.

“The regulations are further amended in order to provide for appeal against the decision of the professional conduct committee only after the imposition of a penalty provided for in the Act. There has (sic) been instances where respondents have demanded to appeal the decision of the professional conduct committee immediately after conviction and prior to sentencing and thus bring about piecemeal (sic) prosecution and consideration of complaints with inordinate delays in the finalization of complaints.”

46. It seems to be that what the Minister had in mind, when amending Reg 11, was the streamlining of proceedings before a conduct committee to ensure that there were no unnecessary delays. For this reason, the possibility of exercising the right of an internal appeal after conviction and before sentence was expressly

precluded to make way for one single internal appeal process only to be pursued after the sanction had been imposed.

NATURE OF INTERNAL APPEAL

47. In my view it is significant to note that both the 2009 and 2023 versions of Reg 11 deal with an internal appeal against a “finding”, as opposed to an interlocutory ruling made by a conduct committee. Over the years the courts have considered what decisions of lower courts were capable of appeal. To that end, a clear distinction was drawn between an interlocutory ruling, for example, on the admissibility of evidence (which was not appealable) and a final determination of the *lis* between the parties (which is perforce appealable).

48. A useful starting point is Dickinson¹¹, a case in which a party to an application in the erstwhile Natal Provincial Division to have an arbitration award made an order of court sought to appeal a ruling by the judge on an interlocutory matter relating to the admissibility of certain documentary evidence during the course an opposed motion. Innes CJ opined as follows.

“But every decision or ruling of the court during the progress of a suit does not amount to an order. That term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but the Court must be duly asked to grant some definite and distinct relief, before its decision upon the matter can properly be called an order. A trial Court is sometimes called upon to decide questions which come up during the progress of the case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin: the Court decides it, and the hearing proceeds. But that decision, though it may be of considerable practical importance, is not an order from which an appeal could under any circumstance lie, apart from the final decision on the merits. So also in a case like the present. The parties differed as to what portion of the evidence (which was all in Court) could properly be referred to in support of the applicant’s contention that the [arbitration] award was bad. The Court gave its ruling on the point. But that was not an order

¹¹ Dickinson and another v Fisher’s Executors 1914 AD 424 at 427-8

in the legal sense; it decided no definite application for relief, for none had been made; it was a mere direction to the parties with regard to the lines upon which their contention upon the merits should proceed. To treat such a ruling as an order against which, with the leave of the Court an appeal would lie, would lead to remarkable results. It would be open to a dissatisfied party to apply during the progress of an action for leave to appeal against any decision as to the admissibility of evidence which happens to be given against him. And there might be more than one such decision in the course of a single hearing. If every such ruling were an independent order, subject to appeal upon leave being obtained, the party concerned would, as of course, apply for such leave, in order to retain unquestioned his right to challenge the ruling, so as to support his final appeal against a possible adverse decision on the merits. The Court would on the above assumption have the discretion to refuse leave, but there would be doubtless many cases in which permission would not be withheld. And these subsidiary appeals, besides being expensive and inconvenient, might prove to be useless because the Court might in the result find upon the merits of a party who is challenging its interim ruling. If, however, the word order be taken in the legal sense already suggested, none of these difficulties and inconveniences present themselves.”

49. This *dictum* in Dickinson has been followed in numerous cases over the past century. More recently, in Mkize¹², Ponnar JA dealt extensively with the distinction between orders which are capable of appeal and mere interlocutory rulings in the course of a matter, which are not.

50. While it is correct that Dickinson related to a case involving an order of court rather than a finding by a disciplinary tribunal, I believe that the only sensible contextual meaning to be given to the word “finding” in Reg 11 is in relation to the ultimate finding that the Conduct Committee is required to make viz. whether Ms. Els is guilty of professional misconduct or not. In the Concise Oxford English Dictionary (10th ed. revised) “*finding*” is defined as “*a conclusion reached as a result of an inquiry, investigation, or trial.*” And, in my view, it is only when that final conclusion has been reached either way, that Ms. Els (or the fourth respondent as the case may be) will enjoy the right to an internal appeal.

¹² ABSA Bank Ltd v Mkize 2014 (5) SA 16 (SCA) at [59] *et seq*

51. Against this background, I am of the considered view that it was not contemplated, through the proclamation of Reg 11, that a practitioner facing a disciplinary hearing would be entitled to appeal an interlocutory ruling relating to, for instance, the inadmissibility of evidence, the granting of a postponement, or a refusal to permit her to call a particular witness *in medias res*. Such an interpretation ignores the procedural distinction between an interlocutory ruling on a disputed point during a hearing and a definitive finding of unprofessional conduct (or acquittal) at the end of the enquiry after consideration of all the evidence.

52. Additionally, it flies in the face of the established approach in Wahlhaus and the other cases referred to earlier. To permit a practitioner to challenge each and every ruling made by a conduct committee along the way through the mechanism of an internal appeal remedy would lead to a chaotic and disintegrated disciplinary process, thereby precluding a speedy determination of the complaint, which is the ultimate goal of such a process. It is for this reason that the courts have repeatedly cautioned against a piecemeal approach to appeals in matters such as this. In my view, the passage cited above from the LAC decision in Zondi is directly on point.

53. Notwithstanding the clear wording of the 2009 Regs that it is only a finding of unprofessional conduct which was capable of internal appeal, counsel for the applicant persisted with the argument that the use of the word “finding” in the erstwhile Reg 11(1) included an interlocutory ruling on the admissibility of evidence. This submission seeks to advance the relief originally sought by Ms. Els’ in her original notice of appeal

“against the findings and interlocutory rulings of the Third Respondent made on 1 August 2023 and 4 September 2023 respectively”

54. The submission flies in the face of the plethora of decided cases which do not sanction such an approach. Those cases have been set out above and in

conclusion I refer to Savoi¹³ where the Full Court observed as follows in regard to an attempt to pre-empt the admissibility of documentary evidence in a criminal trial.

“[58] Lastly, the applicants submit that they intend to prevent the criminal trial from being heard, hence the application to have their trial permanently stayed. What is evident from this interlocutory application is that they want the court hearing the application for the permanent stay to decide on the admissibility of documents not yet presented to the trial court. In my view, it will lead to a piecemeal trial process. I echo the sound advice of the Constitutional Court in Savoi v NDPP where the court emphasised that it is pre-eminently the duty of the trial court to decide on the admissibility of evidence, including deciding on whether the admission of evidence of a particular type would render the trial unfair. The applicants will indeed be able to challenge evidence illegally obtained during the criminal trial. If there had been any abuse of obtaining evidence then the trial court would be the best forum to decide on allegations of abuse.”

Once again the crux of the decision was the avoidance of piecemeal litigation.

55. At the conclusion of argument, the Court inquired of counsel for the applicant whether there were any decided cases which supported his argument that Reg 11(1) of the 2009 Regs sanctioned an appeal *in medias res* against an interlocutory ruling such as that made by the Conduct Committee. Counsel was unaware of any such decisions but requested an opportunity to file a supplementary note in that regard in the event that his research proved fruitful. The Court afforded counsel the right to file such a note by 22 March 2024, the last day of the Circuit sitting.

56. Counsel did not adhere to that direction but chose rather to file a set of supplementary heads of argument on 25 March 2024. Those heads did not refer to any authority in support of his interpretation of the ambit of the 2009 Regs, but sought to introduce further arguments and referred to additional evidence. Counsel for the respondent objected to this tactic. In my view, it was improper of counsel to submit such submissions without the consent of his opponent or the sanction of the Court.

¹³ Savoi and others v National Prosecuting Authority and another 2021 (2) SACR 278 (KZP) at [58]

The supplementary heads of argument were therefore not considered in the finalisation of this judgment. In conclusion, the absence of any authorities tending to support counsel's interpretation of the 2009 Regs confirms this Court's interpretation thereof.

REQUISITES FOR INTERIM INTERDICTIONARY RELIEF

57. As I understand it, the Wahlhaus approach is not founded on a party's failure to satisfy the test for an interim interdict. Rather, it is based on a superior court's refusal to engage with a matter until the proceedings below have terminated: it is essentially a refusal by the superior court to permit its jurisdiction to be engaged *in medias res*. To the extent that submissions were made by counsel on the basis of the requisites for an interim interdict being met or not, I shall briefly deal therewith.

58. The requisites for interim interdictory relief are trite. These are -

- (i) a prima facie right (which may be open to some doubt);
- (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (iii) a balance of convenience in favour of the granting of the interim relief; and
- (iv) the absence of any other satisfactory remedy.¹⁴

59. In my considered view, the applicant fails at each of these hurdles. She has not established that she has a right to an internal appeal against the Conduct Committee's interlocutory ruling. Secondly, she has not established an apprehension of irreparable harm if the application is dismissed. Thirdly, the balance of convenience is manifestly in favour of the proceedings being brought to finality as soon as possible.

¹⁴ Setlogelo v Setlogelo 1914 AD 221 at 227; Erasmus Superior Court Practice, 2nd ed. Vol 2 at D6-16C *et seq*

Fourthly, the applicant has at least two other remedies in the event that she is ultimately found guilty of professional misconduct – (i) an internal appeal under the Regs (whether 2009 or 2023) and (ii) an appeal to the High Court under s20 of the HPA.

60. Finally, if I am wrong as to the existence of a prima facie right of internal appeal at this stage, I consider that this is a matter where the well-known *dictum* of Holmes JA in Olympic Passenger¹⁵ is in point. After citing the *ratio in* Setlegolo the Learned Judge said the following.

“It thus appears that where the applicant’s right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant’s prospects of ultimate success may range all the way from strong to weak. The expression ‘prima facie established though open to some doubt’ seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon consideration of all the facts. Usually, this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less the need for such balance to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.”

61. I have found that the applicant’s prima facie right has not been established. But if I am wrong on that score, I consider that her prospects of success on review are so weak that they are substantially outweighed by the balance of convenience and prejudice to the respondents.

¹⁵ Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D&CLD) at 383C

CONCLUSION

62. For all of these reasons, I am of the view that the applicant has failed to make out a case for intervention by this Court in the disciplinary inquiry and the application must thus be dismissed.

COSTS

53. The respondents asked that costs follow the result and that if the application was unsuccessful, the applicant should be ordered to pay punitive costs. Counsel for the applicant accepted that costs should follow the result. I have expressed my concerns about the applicant's bona fides in pursuing this application. However, while that may afford a basis for a punitive costs order, in my view, the applicant's conduct in this matter can be described as vexatious in the sense in which that term was described in Alluvial Creek¹⁶

"An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and the most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case."

¹⁶In re Alluvial Creek Ltd 1929 CPD 532 at 535, followed in, inter alia, Camps Bay Ratepayers' and Residents' Association and another v Harrison and another 2011 (4) SA 42 (CC) at 76 and Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) at [27]

ORDER OF COURT

Accordingly, it is ordered that the application be dismissed with costs on the scale as between attorney and client, such costs to include the costs of the appearances before Wille J on 5 September 2023 and Erasmus J on 20 November and 1 December 2023.

GAMBLE, J

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